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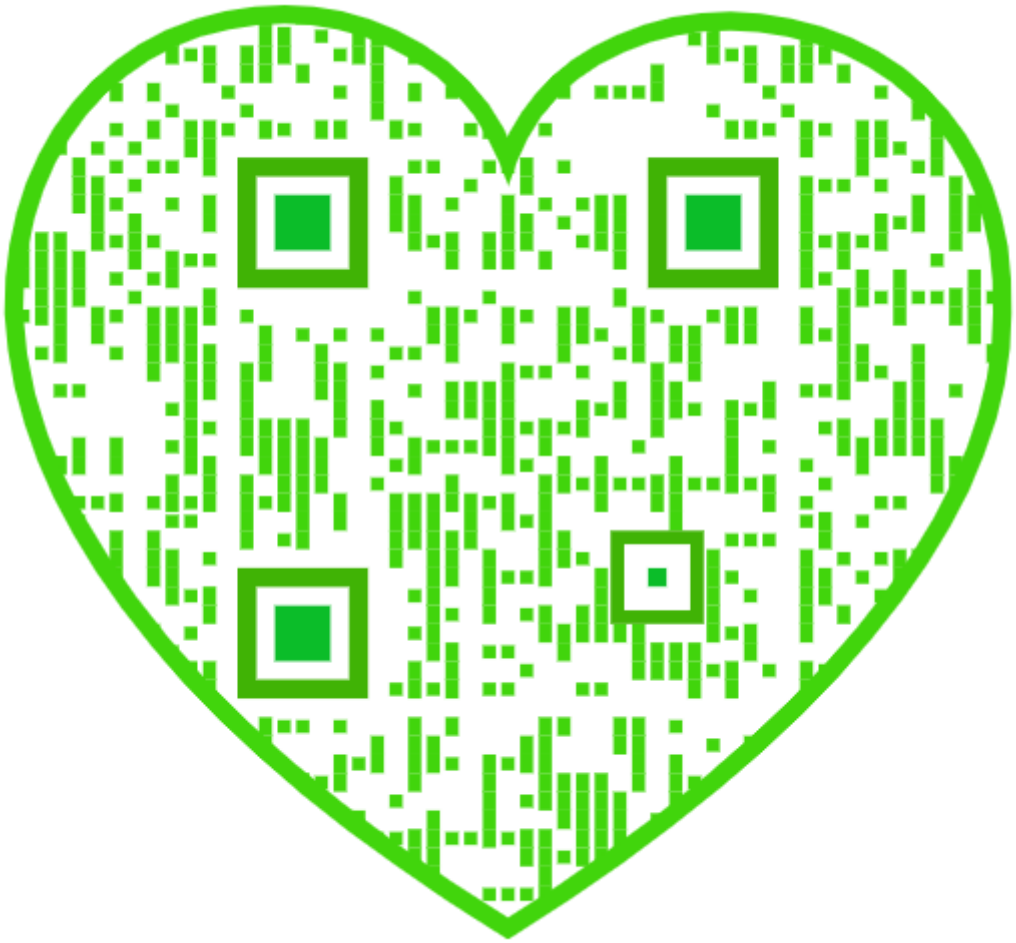

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I. DEFINITION AND GENERAL NATURE.

A. Definition. The term assignment, as ordinarily used, signifies the transfer, between living parties,[1] of all kinds of property, real, personal, and mixed, whether in possession or action,[2] and whether made by delivery, indorsement,

1. **Between living persons.**— Assignments cannot, properly, be said to be made by a dead man. Hight *v.* Sackett, 34 N. Y. 447, 451 [*citing* Tomlin L. Dict.].

2. **It is most frequently used in referring** to a class of acts by which the right or title to something of value is transferred to another before the object of the transfer has be-

transfer in writing, or by parol,[3] and includes as well the instrument by which the transfer is made as the transfer itself.[4] The common-law definition of an assignment is the transferring and setting over to another of some right, title, and interest in things in which a third party, not a party to the assignment, has a concern and interest;[5] and, in a more technical sense, it is applied to a transfer of a term of years.[6]

B. At Common Law. By the rules of the common law, property not in possession was incapable of transfer, and, therefore, choses in action were not assignable.[7]

come property in possession. Cross *v.* Sacramento Sav. Bank, 66 Cal. 462, 6 Pac. 94.

As to subject-matter of assignments see *infra*, II. *Compare* also *infra*, I, B, C, D.

3. It is more comprehensive than the terms "indorse," "negotiate," or like words, applied to commercial paper. Bump *v.* Van Orsdale, 11 Barb. (N. Y.) 634; Hicks *v.* Wirth, 10 How. Pr. (N. Y.) 555.

As to mode and sufficiency of assignments see *infra*, III.

4. Includes instrument of transfer.— Anderson L. Dict.; Bouvier L. Dict.; and the following cases:

Arkansas.— Edison *v.* Frazier, 9 Ark. 219.

Illinois.— Ball *v.* Chadwick, 46 Ill. 28.

Iowa.— Schee *v.* La Grange, 78 Iowa 101, 42 N. W. 616.

Minnesota.— Banning *v.* Sibley, 3 Minn. 389.

New Jersey.— Hutchings *v.* Low, 13 N. J. L. 246.

New York.— Jagoe *v.* Alleyn, 16 Barb. (N. Y.) 580; Potter *v.* Bushnell, 10 How. Pr. (N. Y.) 94.

United States.— Philadelphia Seventh Nat. Bank *v.* Shenandoah Iron Co., 35 Fed. 436.

Compare Franklin *v.* Kelley, 2 Nebr. 79, wherein it was held that the words "assignment" and "transfer" were inapt to describe a deed of conveyance of the fee simple, under 2 U. S. Stat. at L. p. 456, § 12.

Appointment and setting over right to another.— Garretsie *v.* Van Ness, 2 N. J. L. 17, 2 Am. Dec. 333.

Corporate rights stand on same footing, as to their assignability, with rights of individuals. Grocers' Nat. Bank *v.* Clark, 48 Barb. (N. Y.) 26. See also Turk *v.* Cook, 63 Ga. 681; Holmes *v.* Evans, 129 N. Y. 140, 29 N. E. 233, 41 N. Y. St. 365; Griffey *v.* New York Cent. Ins. Co., 100 N. Y. 417, 3 N. E. 309, 53 Am. Rep. 202; Thacker *v.* Henderson, 63 Barb. (N. Y.) 271; Harlowe *v.* Hudgins, 84 Tex. 107, 19 S. W. 364, 31 Am. St. Rep. 21; Griffith *v.* Burlingame, 18 Wash. 429, 51 Pac. 1059; Glasford *v.* Baker, 1 Wash. Terr. 224.

Includes all personal chattels not in possession. Colonial Bank *v.* Whinney, 11 App. Cas. 426, 56 L. J. Ch. 43, 55 L. T. Rep. N. S. 362, 3 Morrill 207, 34 Wkly. Rep. 705.

When applied to written instruments implies written assignments, unless otherwise qualified. Enloe *v.* Reike, 56 Ala. 500; Hardie *v.* Mills, 20 Ark. 153; Andrews *v.* Brown, 1 Iowa 154. But see Hutchings *v.* Low, 13 N. J. L. 246.

As to necessity of written assignment see *infra*, III, C, 3, b.

5. Cowles *v.* Rickets, 1 Iowa 582; Brown *v.* Crookston, etc., Assoc., 34 Minn. 545, 26 N. W. 907 [*citing* Bouvier L. Dict.]. See also *infra*, I, B.

6. Ball *v.* Chadwick, 46 Ill. 28; 2 Bl. Comm. 326.

Distinguished from "lease."—An assignment is, properly, a transfer or making over to another of the right one has in any estate; and it differs from a lease only in this: that by a lease one grants an interest less than his own, reserving to himself a reversion; in assignments he parts with the whole property. Passaic, etc., Bridge Proprietors *v.* State, 21 N. J. L. 384 [*citing* 2 Bl. Comm. 317, 326]. But *compare* Potts *v.* Trenton Water Power Co., 9 N. J. Eq. 592, as to the effect of an assignment of a lease itself. See also LANDLORD AND TENANT.

7. 2 Bl. Comm. 291; and the following cases:

Alabama.— McNutt *v.* King, 59 Ala. 597; Johnson *v.* Martin, 54 Ala. 271.

Connecticut.— Brush *v.* Curtis, 4 Conn. 312.

Delaware.—Porter *v.* Morris, 2 Harr. (Del.) 509.

Illinois.— Chicago, etc., R. Co. *v.* Maher, 91 Ill. 312; Hale *v.* Andrews, 75 Ill. 252; Kennedy *v.* Kennedy, 66 Ill. 190; Safford *v.* Miller, 59 Ill. 205; McKinney *v.* Alvis, 14 Ill. 33.

Indiana.— Moore *v.* Ireland, 1 Ind. 531.

Iowa.— The doctrine of the common law — that choses in action are not assignable — does not obtain in Iowa. Watson *v.* Hunkins, 13 Iowa 547.

Kentucky.— Trimble *v.* Ford, 5 Dana (Ky.) 517; Jarman *v.* Howard, 3 A. K. Marsh. (Ky.) 383.

Maryland.— Tradesmen's Nat. Bank *v.* Green, 57 Md. 602.

Massachusetts.— Coulter *v.* Haynes, 146 Mass. 458, 16 N. E. 19; Moore *v.* Spiegel, 143 Mass. 413, 9 N. E. 827; Tucker *v.* Tucker, 119 Mass. 79; Connor *v.* Parker, 114 Mass. 331; Foss *v.* Lowell Five Cents Sav. Bank, 111 Mass. 285; Moore *v.* Coughlin, 4 Allen (Mass.) 335; Foss *v.* Nutting, 14 Gray (Mass.) 484; Sigourney *v.* Severy, 4 Cush. (Mass.) 176; Hodges *v.* Holland, 19 Pick. (Mass.) 43; Armsby *v.* Farnam, 16 Pick. (Mass.) 318; Coolidge *v.* Ruggles, 15 Mass. 387; Skinner *v.* Somes, 14 Mass. 107; Cutts *v.* Perkins, 12 Mass. 206; Orr *v.* Amory, 11 Mass. 25.

Minnesota.— Spencer *v.* Woodbury, 1 Minn. 105.

New Hampshire.—Edson *v.* Fuller, 22 N. H. 183.

New Jersey.— Morrow *v.* Vernon Tp., 35 N. J. L .490; Sergeant *v.* Stryker, 16 N. J. L.

To this common-law rule, however, there were recognized several well-established exceptions.[8]

C. In Equity. While the transfer of mere litigious rights is not recognized by courts of equity any more than by courts of law, equity has always recognized assignments of choses in action, possibilities, expectancies, things not *in esse*, and mere contingencies, if made for a valuable consideration, and looked upon the assigneee as the true owner of the chose.[9]

464, 32 Am. Dec. 404; Garrison *v.* Sandford, 12 N. J. L. 261; Lacey *v.* Collins, 5 N. J. L. 575; Reed *v.* Bainbridge, 4 N. J. L. 406; Smock *v.* Taylor, 1 N. J. L. 206.

New York.— Mann *v.* Herkimer County Mut. Ins. Co., 4 Hill (N. Y.) 187; Jessel *v.* Williamsburgh Ins. Co., 3 Hill (N. Y.) 88; Demarest *v.* Willard, 8 Cow. (N. Y.) 206; Greenby *v.* Wilcocks, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379.

South Carolina.— Sims *v.* Radcliffe, 3 Rich. (S. C.) 287; Ware *v.* Key, 2 McCord (S. C.) 373.

Texas.— The doctrine of the common law — that choses in action are not assignable — is said not to prevail in Texas. Winn *v.* Ft. Worth, etc., R. Co., 12 Tex. Civ. App. 198, 33 S. W. 593.

Vermont.— Read *v.* Young, 1 D. Chipm. (Vt.) 244.

West Virginia.— Hogue *v.* Bierne, 4 W. Va. 658.

Wisconsin.— Pillsbury *v.* Mitchell, 5 Wis. 17.

England.— Master *v.* Miller, 4 T. R. 320.

Canada.— Eakins *v.* Gawley, 33 U. C. Q. B. 178; Sterling *v.* McEwan, 18 U. C. Q. B. 466.

As to the subject-matter of assignments see *infra*, II.

The reason for this rule is stated to have been that, otherwise, pretended titles might be granted to great men, whereby justice might be trodden down and the weak oppressed. 2 Bl. Comm. 290.

Extent of the common-law rule.— The rule was so strictly construed as to apply to the assignment of choses in action, although the original promise was expressed to be made with the promisee and his assigns (Jessel *v.* Williamsburgh Ins. Co., 3 Hill (N. Y.) 88; Crouch *v.* Credit Foncier, L. R. 8 Q. B. 374, 42 L. J. Q. B. 183, 29 L. T. Rep. N. S. 259, 21 Wkly. Rep. 946), and so as not to permit any one but the original obligee of a bond to enforce liability thereon against the maker, although the bond was made payable to bearer (Crouch *v.* Credit Foncier, L. R. 8 Q. B. 374, 42 L. J. Q. B. 183, 29 L. T. Rep. N. S. 259, 21 Wkly. Rep. 946; and see *infra*, VIII, A), the rule being so far relaxed, however, as to permit the maker to discharge his liability by payment to the bearer (Crouch *v.* Credit Foncier, L. R. 8 Q. B. 374, 42 L. J. Q. B. 183, 29 L. T. Rep. N. S. 259, 21 Wkly. Rep. 946).

8. As to subject-matter of assignments, generally, see *infra*, II.

Assignments of annuities were permitted. See ANNUITIES, II, B [2 Cyc. 460]; and Davis *v.* Marlborough, 1 Swanst. 74.

Bills of exchange, including checks, were recognized by the courts as negotiable, by the general custom of merchants; but promissory notes were not included in the exception. Blanckenhagen *v.* Blundell, 2 B. & Ald. 417; Kenne *v.* Beard, 8 C. B. N. S. 372, 6 Jur. N. S. 1248, 29 L. J. C. P. 287, 2 L. T. Rep. N. S. 240, 8 Wkly. Rep. 469, 98 E. C. L. 372; Clerke *v.* Martin, 2 Ld. Raym. 757; Brown *v.* Harraden, 4 T. R. 148. See also, generally, BILLS AND NOTES.

Assignments made by and to the king were recognized. Lambert *v.* Taylor, 4 B. & C. 138, 6 D. & R. 188, 3 L. J. K. B. O. S. 160, 10 E. C. L. 515.

Assignments to or by the United States, or any state, were recognized. U. S. *v.* Buford, 3 Pet. (U. S.) 12, 7 L. ed. 585; U. S. *v.* White, 2 Hill (N. Y.) 59, 37 Am. Dec. 374.

The rule was held to have no application to foreign contracts which, if assignable where made, were recognized as assignable, so as to pass the right to sue in the courts of England. Goodwin *v.* Robarts, 1 App. Cas. 476, 45 L. J. Exch. 748, 35 L. T. Rep. N. S. 179, 24 Wkly. Rep. 987; Gorgier *v.* Mieville, 3 B. & C. 45, 2 L. J. K. B. O. S. 206, 27 Rev. Rep. 290, 10 E. C. L. 30; Rumball *v.* Metropolitan Bank, 2 Q. B. D. 194, 46 L. J. Q. B. 346, 36 L. T. Rep. N. S. 240, 25 Wkly. Rep. 366. But see Fine Art Soc. *v.* Union Bank, 17 Q. B. D. 705, 51 J. P. 69, 56 L. J. Q. B. 70, 55 L. T. Rep. N. S. 536, 35 Wkly. Rep. 114.

9. *Arkansas.*— Caldwell *v.* Meshew, 44 Ark. 564.

Connecticut.— Gregory *v.* Savage, 32 Conn. 250.

Illinois.— Carlyle *v.* Carlyle Water, etc., Co., 140 Ill. 445, 29 N. E. 556.

Indiana.— McKernan *v.* Mayhew, 21 Ind. 291; White *v.* Wiley, 14 Ind. 496.

Kentucky.— Owsley *v.* Owsley, 78 Ky. 257; Miller *v.* Malony, 3 B. Mon. (Ky.) 105.

Maine.— Skowhegan First Nat. Bank *v.* Maxfield, 83 Me. 576, 22 Atl. 479.

Maryland.— Whiting *v.* Independent Mut. Ins. Co., 15 Md. 297.

Massachusetts.— Currier *v.* Howard. 14 Gray (Mass.) 511; Eastmann *v.* Wright, 6 Pick. (Mass.) 316; Ensign *v.* Kellogg, 4 Pick. (Mass.) 1; Dunn *v.* Snell, 15 Mass. 481; Parker *v.* Grout, 11 Mass. 157, note *a*; Quiner *v.* Marblehead Social Ins. Co., 10 Mass. 476; Dix *v.* Cobb, 4 Mass. 508.

Mississippi.—Byars *v.* Griffin, 31 Miss. 603; Grand Gulf Bank *v.* Wood, 12 Sm. & M. (Miss.) 482.

Missouri.— Dobyns *v.* McGovern, 15 Mo. 662.

D. Under Statutes. In England statutes have been passed, from time to time, affecting the assignability of various choses in action.[10] In most of the states of the Union, the doctrine that choses in action are not assignable at law has been greatly modified by statute.[11] In quite a number of the states these

New York.— Wheeler *v.* Wheeler, 9 Cow. (N. Y.) 34.

North Carolina.— York *v.* Landis, 65 N. C. 535; Hoppiss *v.* Eskridge, 37 N. C. 54.

South Carolina.— Fraser *v.* Charleston, 11 S. C. 486.

Vermont.— Stiles *v.* Farrar, 18 Vt. 444.

West Virginia.— Hogue *v.* Bierne, 4 W. Va. 658.

United States.— Peugh *v.* Porter, 112 U. S. 737, 5 S. Ct. 361, 28 L. ed. 859; Welch *v.* Mandeville, 1 Wheat. (U. S.) 233, 4 L. ed. 79.

England.— Nelthorpe *v.* Holgate, 1 Coll. 217, 8 Jur. 551; Munn *v.* East India Co., Finch 299; Addison *v.* Cox, L. R. 8 Ch. 76, 42 L. J. Ch. 291, 28 L. T. Rep. N. S. 45, 21 Wkly. Rep. 180; Row *v.* Dawson, 1 Ves. 331.

Canada.— Ham *v.* Ham, 6 U. C. C. P. 37; Foote *v.* Matthews, 4 Grant Ch. (U. C.) 366.

As to subject-matter of assignments, generally, see *infra*, II.

As to equitable assignments see *infra*, III, C, 3, g.

Assignee must show some obstacle to proceeding at law. Ross *v.* Munro, 6 Grant Ch. (U. C.) 431. See also *infra*, VIII, A, 2.

The validity of these assignments in equity was recognized by the common-law courts for many purposes. Thus, the assignment of a chose in action was considered as a sufficient consideration to support a promise upon which an action at law could be based.

Illinois.— Carlyle *v.* Carlyle Water, etc., Co., 140 Ill. 445, 29 N. E. 556.

Maine.— Vose *v.* Treat, 58 Me. 378; Page *v.* Danforth, 53 Me. 174; Farnum *v.* Virgin, 52 Me. 576; McLellan *v.* Walker, 26 Me. 114; Lang *v.* Fiske, 11 Me. 385; Hatch *v.* Spearin, 11 Me. 354.

Massachusetts.— Burrows *v.* Glover, 106 Mass. 324; Grant *v.* Wood, 12 Gray (Mass.) 220; Mowry *v.* Todd, 12 Mass. 281; Crocker *v.* Whitney, 10 Mass. 316.

Vermont.— Chaffee *v.* Rutland R. Co., 55 Vt. 110; Simonds *v.* Pierce, 51 Vt. 467; Smilie *v.* Stevens, 41 Vt. 321; Goss *v.* Barker, 22 Vt. 520; Hodges *v.* Eastman, 12 Vt. 358; Bucklin *v.* Ward, 7 Vt. 195; Moar *v.* Wright, 1 Vt. 57.

United States.— Tiernan *v.* Jackson, 5 Pet. (U. S.) 580, 8 L. ed. 234; Mandeville *v.* Welch, 5 Wheat. (U. S.) 277, 5 L. ed. 87.

England.— Winch *v.* Keeley, 1 T. R. 619.

10. **Administrator's bonds.**— 20 & 21 Vict. c. 77.

Assurance policies.— 30 & 31 Vict. c. 144.

Bail bonds.— 4 Anne, c. 16.

Bills of lading.— 18 & 19 Vict. c. 111.

Choses in action of bankrupts.— 32 & 33 Vict. c. 71.

Companies' bonds.— 28 & 29 Vict. c. 78.

Marine assurance.— 31 & 32 Vict. c. 86.

Promissory notes.— 7 Anne, c. 25; 3 & 4 Anne, c. 9.

Replevin bonds.— 2 Geo. II, c. 19.

Transferable debentures.— McKean *v.* Jones, 19 Can. Supreme Ct. 489; Wellington County Municipal Council *v.* Wilmot Tp. Municipality, 17 U. C. Q. B. 82; 36 & 37 Vict. c. 35.

The Common-Law Procedure Act was passed in 1884, which permitted pleadings on equitable grounds. By this act, assignments of debts might be pleaded in answer to legal rights, and courts of law protected assignees by not permitting collusive releases or payments to the assignor to be pleaded. Legh *v.* Legh, 1 B. & P. 447.

The Judicature Act made a radical change in England. It provided that any absolute assignment by writing, under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and shall be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the rights of the assignee if this act had not been passed) to pass or transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, without the concurrence of the debtor; provided, always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor, or any one claiming under him, or of any other opposing or conflicting claim to such debt or chose in action, he shall be entitled, if he thinks fit to call upon the several persons making claim thereto, to interplead concerning the same; or he may, if he think fit, pay the same into the high court of justice, under and in conformity with the provisions of the acts for the relief of trustees. 36 & 37 Vict. c. 66, § 25, subd. 6; Exchange Bank *v.* Stinson, 32 U. C. C. P. 158; Wellington *v.* Chard, 22 U. C. C. P. 518; Blair *v.* Ellis, 34 U. C. Q. B. 466. Applies to cause accruing before the passing of the statute. Wallace *v.* Gilchrist, 24 U. C. C. P. 40. Not applicable where deed of assignment shows assignee was not to have right to sue. Hostrawser *v.* Robinson, 23 U. C. C. P. 350. Where assignment is absolute in form, action should be brought in name of assignee, although assignor reserved right to part of money to be collected. Ward *v.* Hughes, 8 Ont. 138. *Compare* also, generally, *infra*, VIII, A, B. As to what is sufficient notice to debtor see Grant *v.* Cameron, 18 Can. Supreme Ct. 716.

11. *Alabama.*— Brown *v.* Chambers, 12 Ala. 697 (all contracts in writing for the payment of money or property, or performance of any duty of whatever nature); Withers *v.* Greene,

statutes which modify the common-law rule as to the assignability of choses in

9 How. (U. S.) 213, 13 L. ed. 109 (sealed instrument for payment of money, construing Alabama statute). But a mere request or authority in writing to an attorney to pay money out of a particular fund which he has collected (Waters *v.* Carleton, 4 Port. (Ala.) 205), or a written instrument directing certain attorneys to pay to one an amount certain and interest, "the demand I have against the estate of David Yarbrough, deceased" (West *v.* Foreman, 21 Ala. 400, 402), is not within the statute authorizing the assignee to sue upon the instrument in his own name.

Arkansas.— St. Louis, etc., R. Co. *v.* Camden Bank, 47 Ark. 541, 1 S. W. 704 (certificate of indebtedness of a railroad company, properly executed); Lafferty *v.* Rutherford, 5 Ark. 649 (bonds, bills, notes, agreements, or contracts in writing for the payment of money or property); Small *v.* Strong, 2 Ark. 198; Gamblin *v.* Walker, 1 Ark. 220 (bonds, bills, notes, agreements, or contracts in writing for the payment of money or property). But memoranda of accounts given by foremen to laborers, not to be paid, but merely intended for the information of superior officers on which to audit accounts of the laborers, are not written instruments which may be assigned. St. Louis, etc., R. Co. *v.* Camden Bank, 47 Ark. 541, 1 S. W. 704. See also Gwinn *v.* Roberts, 3 Ark. 72, holding that an order for a certain amount in merchandise is not assignable.

California.— La Rue *v.* Groezinger, 84 Cal. 281, 24 Pac. 42, 18 Am. St. Rep. 179 (a right arising out of an obligation); Gray *v.* Garrison, 9 Cal. 325 (a promise by deed to pay A a sum certain in consideration of A's withdrawing his defense to a suit); Ryan *v.* Maddux, 6 Cal. 247 (contracts for the payment of money or personal property).

Colorado.— The acknowledgment, on the part of an employer, that wages are due and will be paid the next regular pay-day is assignable. Rio Grande Extension Co. *v.* Coby, 7 Colo. 299, 3 Pac. 481.

Connecticut.— Hoyt *v.* Ketcham, 54 Conn. 60, 5 Atl. 606; Bixby *v.* Parsons, 49 Conn. 483, 44 Am. Rep. 246.

Delaware.— Porter *v.* Morris, 2 Harr. (Del.) 509.

Georgia.— Bewick Lumber Co. *v.* Hall, 94 Ga. 539, 21 S. E. 154; Daniels *v.* Meinhard, 53 Ga. 359 (chose in action arising out of contract); Cochran *v.* Strong, 44 Ga. 636; Wilkinson *v.* Cheatham, 43 Ga. 258 (commissioners' certificates, of damages to property caused by removal of county-seat, issued to property-owners); Walton *v.* Bethune, 37 Ga. 319.

Illinois.— Potter *v.* Gronbeck, 117 Ill. 404, 7 N. E. 586 (guaranty for payment of rent); Reeve *v.* Smith, 113 Ill. 47; Kingsbury *v.* Wall, 68 Ill. 311 (instrument in writing for payment of money or articles of personal property); Weston *v.* Myers, 33 Ill. 424. But a guaranty for the performance of the covenants of a lease is not assignable. Potter *v.* Gronbeck, 117 Ill. 404, 7 N. E. 586. A cause of action on a verbal contract is not assignable so as to pass the right of action to the assignee. Chicago, etc., R. Co. *v.* Maher, 91 Ill. 312. A deed of trust is a mere chose in action, and is assignable neither by statute or at common law. Kleeman *v.* Frisbie, 63 Ill. 482. The instrument, however, in order to be assignable, must show on its face that it comes within the statute. Potter *v.* Gronbeck, 117 Ill. 404, 7 N. E. 586.

Indiana.— Broyles *v.* Madison County, 83 Ind. 599; Brownlee *v.* Madison County, 81 Ind. 186; Overstreet *v.* Freeman, 12 Ind. 390; Patterson *v.* Crawford, 12 Ind. 241; Strong *v.* Clem, 12 Ind. 37; Spangler *v.* McDaniel, 3 Ind. 275; Harden *v.* Wolf, 2 Ind. 31; Mountjoy *v.* Adair, Smith (Ind.) 96; Nichols *v.* Woodruff, 8 Blackf. (Ind.) 493. The receipt of a justice of the peace for claims which he took for collection is not assignable. White *v.* Wiley, 14 Ind. 496. The following instrument in writing under seal held assignable: For value received, I assign to B all my interest in a judgment in my favor against C & D for five hundred dollars; and, if the judgment cannot be collected, I bind myself to pay B the amount of it. Jones *v.* Burtch, 5 Blackf. (Ind.) 372.

Iowa.— Knadler *v.* Sharp, 36 Iowa 232; Weire *v.* Davenport, 11 Iowa 49, 77 Am. Dec. 132; Howey *v.* Willtrout, 10 Iowa 105; Farwell *v.* Tyler, 5 Iowa 535; Creighton *v.* Gordon, Morr. (Iowa) 41. Instruments in writing by which the maker promises to pay or deliver any property or do any labor, or acknowledges any money, or labor, or property to be due, are assignable by indorsement thereon, or by other writing. Rappleye *v.* Racine Seeder Co., 79 Iowa 220, 44 N. W. 363, 7 L. R. A. 139; Sales *v.* Kier, 50 Iowa 699; Dubuque First Nat. Bank *v.* Carpenter, 41 Iowa 518; Moorman *v.* Collier, 32 Iowa 138. A receipt for lumber to be sold on commission is not assignable, so as to vest the legal interest in the assignee. Bissell *v.* Fales, Morr. (Iowa) 491. Under Iowa Code, § 2086, providing that "when, by the terms of an instrument, its assignment is prohibited, an assignment of it shall nevertheless be valid," a commutation mileage ticket is not such an instrument as to be capable of assignment, contrary to a condition expressed therein. Way *v.* Chicago, etc., R. Co., 64 Iowa 48, 19 N. W. 828, 52 Am. Rep. 431.

Kansas.— Krapp *v.* Eldridge, 33 Kan. 106, 5 Pac. 372.

Kentucky.— Triplett *v.* Vandegrift, 8 B. Mon. (Ky.) 420; Sirlott *v.* Tandy, 3 Dana (Ky.) 142 (agreement to pay sum in promissory notes); Boyd *v.* Rumsey, 5 J. J. Marsh. (Ky.) 42; Craig *v.* Miller, 3 Bibb (Ky.) 440 (contracts containing reciprocal covenants); Bowman *v.* Frowman, 2 Bibb (Ky.) 233 (contracts containing reciprocal covenants); Conn *v.* Jones, Hard. (Ky.) 8 (bonds, bills, or

action have been construed to mean that all assignments formerly recognized in

promissory notes, whether for payment of money or of property). But a contract to pay a stipulated sum for the rent of a house and to make certain improvements (Hicks *v.* Doty, 4 Bush (Ky.) 420, a sealed instrument providing for repayment of money partly in personal services (Marcum *v.* Hereford, 8 Dana (Ky.) 1; Halbert *v.* Deering, 2 Litt. (Ky.) 290, or a note or bond part of which is to be discharged in personal services (Henry *v.* Hughes, 1 J. J. Marsh. (Ky.) 453) is not assignable. Writings are assignable only when every stipulation therein contained is of an assignable nature. White *v.* Buck, 7 B. Mon. (Ky.) 546; Wickliffe *v.* Clay, 1 Dana (Ky.) 585.

Louisiana.— Non-negotiable notes may be assigned. Kilgour *v.* Ratcliff, 2 Mart. N. S. (La.) 292; Sedwell *v.* Moore, 10 Mart. (La.) 117.

Maryland.— Hewell *v.* Coulbourn, 54 Md. 59; Cox *v.* Hill, 6 Md. 274; New York L. Ins. Co. *v.* Flack, 3 Md. 341, 56 Am. Dec. 742; Crawford *v.* Brooke, 4 Gill (Md.) 213; Kent *v.* Somervell, 7 Gill & J. (Md.) 265.

Michigan.— Felt *v.* Reynold's Rotary Fruit Evaporating Co., 52 Mich. 602, 18 N. W. 378 (bonds, notes, or other choses in action not assignable under existing laws); Chicago, etc., R. Co. *v.* Sturgis, 44 Mich. 538, 7 N. W. 213 (claims for labor and material furnished a railroad); Bannister *v.* Rouse, 44 Mich. 428, 6 N. W. 870 (promise in writing to pay for goods, which promise contains a provision leaving it optional with the payee to retain the goods if they are not paid for by a day certain). Actions for torts, if they survive to the personal representative, are assignable. Finn *v.* Corbitt, 36 Mich. 318; Grant *v.* Smith, 26 Mich. 201; Brady *v.* Whitney, 24 Mich. 154. See also Roger Williams Ins. Co. *v.* Carrington, 43 Mich. 252, 5 N. W. 303.

Minnesota.— Kimball *v.* Bryant, 25 Minn. 496, choses in action in the nature of property may be assigned.

Mississippi.— Chicago, etc., R. Co. *v.* Packwood, 59 Miss. 280 (claim for negligently killing stock); Shields *v.* Taylor, 25 Miss. 13 (an order directing drawee to pay money to payee). The character of an obligation may be shown by evidence *aliunde*, so as to bring it within the statute. Hunt *v.* Shackleford, 55 Miss. 94.

Missouri.— Sauter *v.* Leveridge, 103 Mo. 615, 14 S. W. 981 (debt evidenced by note, although note is lost); Sumrall *v.* Sun Mut. Ins. Co., 40 Mo. 27 (claim of subscriber to guarantee fund of insurance company for interest already due and to become due); Long *v.* Constant, 19 Mo. 320, 61 Am. Dec. 559 (debt evidenced by note, although note is lost); Smith *v.* Schibel, 19 Mo. 140. One in whose favor an order is drawn may sue for the debt in his own name. Walker *v.* Mauro, 18 Mo. 564. See Allen *v.* Kennedy, 91 Mo. 324, 2 S. W. 142; Jones *v.* Hurst, 67 Mo. 568; State Nat. Bank *v.* Robidoux, 57 Mo. 446; Wooden *v.* Butler, 10 Mo. 716; Chauvin *v.* Labarge, 1 Mo. 556.

Nebraska.— Mills *v.* Murry, 1 Nebr. 327.

Nevada.— Peck *v.* Dodds, 10 Nev. 204.

New Hampshire.— Debt due upon a contingency may be assigned with mortgage given to secure it. Bancroft *v.* Marshall, 16 N. H. 244.

New Jersey.—Allaire *v.* Howell Works Co., 14 N. J. L. 21. Assignee of choses in action, except they be agreements for the payment of money, cannot maintain an action thereon in his own name. Ruckman *v.* Outwater, 28 N. J. L. 571.

New York.— Crooke *v.* Kings County, 97 N. Y. 421; Moore *v.* Littel, 41 N. Y. 66; Prindle *v.* Caruthers, 15 N. Y. 425; Purple *v.* Hudson River R. Co., 4 Duer (N. Y.) 74; Peterson *v.* Chemical Bank, 29 How. Pr. (N. Y.) 240; Pond *v.* Bergh, 10 Paige (N. Y.) 140; Lawrence *v.* Bayard, 7 Paige (N. Y.) 70.

North Carolina.—Woodcock *v.* Bostic, 118 N. C. 822, 24 S. E. 362; Wilkinson *v.* Wright, 1 N. C. 422.

Ohio.—Allen *v.* Miller, 11 Ohio St. 374.

Oregon.—Assignee of demands may sue thereon in his own name. Falconio *v.* Larsen, 31 Oreg. 137, 48 Pac. 703, 37 L. R. A. 254; Gregoire *v.* Rourke, 28 Oreg. 275, 42 Pac. 996; Dawson *v.* Pogue, 18 Oreg. 94, 22 Pac. 637, 6 L. R. A. 176.

Pennsylvania.— A note to be paid in the office-notes of a bank is not assignable. Irvine *v.* Lowry, 14 Pet. (U. S.) 293, 10 L. ed. 462, construing Pennsylvania statute.

South Carolina.— Burkett *v.* Moses, 11 Rich. (S. C.) 432; Peay *v.* Pickett, 1 Nott & M. (S. C.) 254. Whenever an obligation is drawn to one and his assigns, it is assignable. Hale *v.* Schults, 3 McCord (S. C.) 218. A due-bill payable in paper medium is not assignable under the statute making choses in action, payable in money, assignable. Sollee *v.* Meugy, 1 Bailey (S. C.) 620; Lange *v.* Kohne, 1 McCord (S. C.) 115.

Tennessee.— Smith *v.* Hubbard, 85 Tenn. 306, 2 S. W. 569; Bailey *v.* Rawley, 1 Swan (Tenn.) 294.

Texas.—Time-checks are assignable. Texas, etc., R. Co. *v.* Allen, 1 Tex. App. Civ. Cas. § 570; Texas, etc., R. Co. *v.* McMullen, 1 Tex. App. Civ. Cas. § 160. Probated accounts against estate of deceased are assignable. McDonough *v.* Tutt, 31 Tex. 199.

Virginia.— Porter *v.* Young, 85 Va. 49, 6 S. E. 803; Iaege *v.* Bossieux, 15 Gratt. (Va.) 83, 76 Am. Dec. 189; Stewart *v.* Anderson, 6 Cranch (U. S.) 203, 3 L. ed. 199; Lewis *v.* Harwood, 6 Cranch (U. S.) 82, 3 L. ed. 160, these last two cases construing Virginia statute.

West Virginia.—An assignee of a note or draft does not acquire the legal title to a debt, but an equitable right, which, by virtue of the statute, he may assert at law in his own name, or in that of the original payee, for his

equity are equally valid at law, so as to permit the assignee thereof to sue thereon in his own name.[12]

II. SUBJECT-MATTER.[13]

A. In General. To make an assignment valid at law, the thing which is the subject of it must have an existence, actual or potential, at the time of such assignment; but courts of equity will support assignments of contingent interests and expectations, and of things which rest in mere possibility only. An assignment of a future interest, though in the form of a conveyance, operates, in equity, by way of present contract merely, to take effect and attach to the thing assigned as soon as it comes into *esse*, and to be regarded before that time only as an agreement to convey, and after that time as a conveyance.[14] But a mere possibility or

own benefit. Clarke *v.* Hogeman, 13 W. Va. 718.

Wisconsin.—Chapman *v.* Plummer, 36 Wis. 262; McArthur *v.* Green Bay, etc., Canal Co., 34 Wis. 139.

As to subject-matter of assignments, generally, see *infra*, II.

As to right of assignee to sue in his own name see *infra*, VIII, A.

12. Validating all assignments recognized in equity.— *Kansas.*— McCrum *v.* Corby, 11 Kan. 464, all choses in action, except for tort, assignable.

Michigan.— Cook *v.* Bell, 18 Mich. 387.

Missouri.— Kuhn *v.* Schwarz, 33 Mo. App. 610; Boyer *v.* Hamilton, 21 Mo. App. 520.

New York.— Hooker *v.* Eagle Bank, 30 N. Y. 83, 86 Am. Dec. 351.

Wisconsin.— Chapman *v.* Plummer, 36 Wis. 262.

See also *infra*, VIII, A.

13. For particular property or rights assignable see cross-references, *supra*, pp. 5, 6; and also *infra*, II, B.

14. Necessity of existence of subject-matter.— *Alabama.*— Hurst *v.* Bell, 72 Ala. 336.

California.— Matter of Garcelon, 104 Cal. 570, 38 Pac. 414, 43 Am. St. Rep. 134, 32 L. R. A. 595; Hassie *v.* God Is With Us Congregation, 35 Cal. 378; Bibend *v.* Liverpool, etc., F., etc., Ins. Co., 30 Cal. 78.

Colorado.— Chamberlin *v.* Gilman, 10 Colo. 94, 14 Pac. 107; Patton *v.* Coen, etc., Carriage Mfg. Co., 3 Colo. 265.

Illinois.— Savage *v.* Gregg, 150 Ill. 161, 37 N. E. 312; Crum *v.* Sawyer, 132 Ill. 443, 24 N. E. 956; Simpson *v.* Simpson, 114 Ill. 603, 4 N. E. 137, 7 N. E. 287; Kershaw *v.* Kershaw, 102 Ill. 307; Bishop *v.* Davenport, 58 Ill. 105; Parsons *v.* Ely, 45 Ill. 232.

Indiana.— McClure *v.* Raben, 125 Ind. 139, 25 N. E. 179, 9 L. R. A. 477, 133 Ind. 507, 33 N. E. 275, 36 Am. St. Rep. 558.

Iowa.— Dunham *v.* Bentley, 103 Iowa 136, 72 N. W. 437; Taylor *v.* Galland, 3 Greene (Iowa) 17.

Kansas.— Clendening *v.* Wyatt, 54 Kan. 523, 38 Pac. 792, 33 L. R. A. 278.

Kentucky.— Bohon *v.* Bohon, 78 Ky. 408; McBee *v.* Myers, 4 Bush (Ky.) 356.

Louisiana.— Grayson *v.* Sanford, 12 La. Ann. 646.

Maine.— Knevals *v.* Blauvelt, 82 Me. 458, 19 Atl. 818; Griffith *v.* Douglass, 73 Me. 532, 40 Am. Rep. 395; Hamlin *v.* Jerrard, 72 Me. 62; Morrill *v.* Noyes, 56 Me. 458, 96 Am. Dec. 486; Curtis *v.* Curtis, 40 Me. 24, 63 Am. Dec. 651. Not as a conveyance, but as a contract. Edwards *v.* Peterson, 80 Me. 367, 14 Atl. 936, 6 Am. St. Rep. 207.

Maryland.— Not as a common-law conveyance, but as an equitable agreement to assign or appoint. Cooke *v.* Husbands, 11 Md. 492.

Massachusetts.— Low *v.* Pew, 108 Mass. 347, 11 Am. Rep. 357; Macomber *v.* Parker, 14 Pick. (Mass.) 497; Crocker *v.* Whitney, 10 Mass. 316; Boynton *v.* Hubbard, 7 Mass. 112. The interest of one having, by will, a right to participate at a future day, provided he lives so long, in the distribution of property of the deceased, is assignable. Wainwright *v.* Sawyer, 150 Mass. 168, 22 N. E. 885.

Missouri.— Brown *v.* Fulkerson, 125 Mo. 400, 28 S. W. 632; Sikemeier *v.* Galvin, 124 Mo. 367, 27 S. W. 551; Godman *v.* Simmons, 113 Mo. 122, 20 S. W. 972; Page *v.* Gardner, 20 Mo. 507; Schubert *v.* Herzberg, 65 Mo. App. 578; Johnson County *v.* Bryson, 27 Mo. App. 341.

New Hampshire.—Hall *v.* Chaffee, 14 N. H. 215.

New Jersey.—Looker *v.* Peckwell, 38 N. J. L. 253; Woodward *v.* Woodward, 16 N. J. Eq. 83; Smithurst *v.* Edmunds, 14 N. J. Eq. 408.

New York.— Chester *v.* Jumel, 125 N. Y. 237, 26 N. E. 297, 35 N. Y. St. 4; Fairbanks *v.* Sargent, 117 N. Y. 320, 22 N. E. 1039, 27 N. Y. St. 411, 6 L. R. A. 475; Williams *v.* Ingersoll, 89 N. Y. 508; Ham *v.* Van Orden, 84 N. Y. 257; Devlin *v.* New York, 63 N. Y. 8; Miller *v.* Emans, 19 N. Y. 384; Field *v.* New York, 6 N. Y. 179, 57 Am. Dec. 435; Stover *v.* Eyeleshimer, 3 Keyes (N. Y.) 620. Under the New York statutes expectant estates are descendible, devisable, and alienable in the same manner as estates in possession. Griffin *v.* Shepard, 124 N. Y. 70, 26 N. E. 339, 35 N. Y. St. 210; Crooke v. Kings County, 97 N. Y. 421; Freeborn v. Wagner, 4 Keyes (N. Y.) 27.

North Carolina.— McNeeley *v.* Hart, 32 N. C. 63, 51 Am. Dec. 377. Not as a grant, but as a contract entitling assignee to spe-

expectancy, not coupled with any interest in, or growing out of, property, cannot be the subject of a valid assignment,[15] nor can a mere litigious right be

cific performance as soon as assignor has acquired power to perform. McDonald *v.* McDonald, 58 N. C. 211, 75 Am. Dec. 434.

Ohio.— Hart *v.* Gregg, 32 Ohio St. 502; Gilpin *v.* Williams, 25 Ohio St. 283; Needles *v.* Needles, 7 Ohio St. 432, 70 Am. Dec. 85.

Pennsylvania.— Lennig's Estate, 182 Pa. St. 485, 38 Atl. 466, 61 Am. St. Rep. 725, 38 L. R. A. 378; Patterson *v.* Caldwell, 124 Pa. St. 455, 17 Atl. 18, 10 Am. St. Rep. 598; Ruple *v.* Bindley, 91 Pa. St. 296; East Lewisburg Lumber, etc., Co. *v.* Marsh, 91 Pa. St. 96; Philadelphia *v.* Lockhardt, 73 Pa. St. 211; Bittenbender *v.* Sunbury, etc., R. Co., 40 Pa. St. 269; Patten *v.* Wilson, 34 Pa. St. 299; *In re* Serrill, 16 Phila. (Pa.) 409, 15 Wkly. Notes Cas. (Pa.) 470.

Rhode Island.— D'Wolf *v.* Gardiner, 9 R. I. 145. Not as a conveyance, but as an executory contract. Bailey *v.* Hoppin, 12 R. I. 560.

South Carolina.— Not as conveyance, but in equity. Allston *v.* State Bank, 2 Hill Eq. (S. C.) 235. See Forrest *v.* Warrington, 2 Desauss. (S. C.) 254.

South Dakota.—Sykes *v.* Canton First Nat. Bank, 2 S. D. 242, 49 N. W. 1058.

Tennessee.— Steelle *v.* Frierson, 85 Tenn. 430, 3 S. W. 649.

Texas.— Hale *v.* Hollon, 14 Tex. Civ. App. 96, 35 S. W. 843, 36 S. W. 288 [*affirmed* in 90 Tex. 427, 39 S. W. 287, 59 Am. St. Rep. 819, 36 L. R. A. 75]; Graham *v.* Henry, 17 Tex. 164; Nimmo *v.* Davis, 7 Tex. 26.

Vermont.— Batchelder *v.* Jenness, 59 Vt. 104, 7 Atl. 279; Burke *v.* Whitcomb, 13 Vt. 421.

West Virginia.— Schmertz *v.* Hammond, 47 W. Va. 527, 35 S. E. 945.

United States.— Peugh *v.* Porter, 112 U. S. 737, 5 S. Ct. 361, 28 L. ed. 859; Hunter *v.* U. S., 5 Pet. (U. S.) 173, 8 L. ed. 86. Right to use invention before patent obtained, see Hendrie *v.* Sayles, 98 U. S. 546, 25 L. ed. 176; Hammond *v.* Mason, etc., Organ Co., 92 U. S. 724, 23 L. ed. 767; Mitchell *v.* Winslow, 2 Story (U. S.) 630, 17 Fed. Cas. No. 9,673.

England.— Musprat *v.* Gordon, 1 Anstr. 34, 3 Rev. Rep. 541; Bates *v.* Dandy, 2 Atk. 207; Grey *v.* Kentish, 1 Atk. 280; Lindsay *v.* Gibbs, 22 Beav. 522, 2 Jur. N. S. 1039, 4 Wkly. Rep. 788; Rodick *v.* Gandell, 12 Beav. 325, 1 De G. M. & G. 763, 13 Jur. 1087, 19 L. J. Ch. 113, 50 Eng. Ch. 591, 15 Eng. L. & Eq. 22; Hinde *v.* Blake, 2 Beav. 234, 9 L. J. Ch. 346; *In re* Clarke, 36 Ch. D. 348; *Ex p.* Kelsall, 1 De G. 352; *In re* Beattie, 1 De G. 352; Whitworth *v.* Gaugain, 3 Hare 416, 25 Eng. Ch. 416; Langton *v.* Horton, 1 Hare 549, 6 Jur. 910, 11 L. J. Ch. 299, 23 Eng. Ch. 549; Holroyd *v.* Marshall, 10 H. L. Cas. 191, 9 Jur. N. S. 213, 33 L. J. Ch. 193, 7 L. T. Rep. N. S. 172, 11 Wkly. Rep. 171, 11 Eng. Reprint 999; Grantham *v.* Hawley, Hobart 132; Printing, etc., Co. *v.* Sampson, L. R. 19 Eq. 462, 44 L. J. Ch. 705, 32 L. T. Rep. N. S. 354, 23 Wkly. Rep. 463; Townshend *v.* Windham, 2 Ves. 1; Robinson *v.* Bavasor, 3 Viner Abr. 155; Stuart *v.* Tucker, 2 W. Bl. 1137.

Canada.— Greet *v.* Citizens Ins. Co., 5 Ont. App. 596, 27 Grant Ch. (U. C.) 121; Ham *v.* Ham, 6 U. C. C. P. 37; Buntin *v.* Georgen, 19 Grant Ch. (U. C.) 167.

As to particular rights and interests assignable see *infra*, II, B.

As to assignment of possibilities and expectancies, generally, see *infra*, II, B, 2.

15. Mere expectancy not coupled with any interest.— *Alabama.*— Expected accounts, to be earned in the future by the practice of medicine, are not assignable. Skipper *v.* Stokes, 42 Ala. 255, 94 Am. Dec. 646. But see, *contra*, Stewart *v.* Kirkland, 19 Ala. 162.

Illinois.— Cassem *v.* Kennedy, 147 Ill. 660, 35 N. E. 738. An order drawn on another and accepted by him for the payment of a certain sum in goods, payable on condition that payee shall have in his hands, ready to be delivered to the drawer, a deed from the payee and wife to certain property described, and making the delivery of the goods and the deed simultaneous acts, is not assignable either at common law or under the statute, as the contingency upon which the payment was to be made might never happen. Kingsbury *v.* Wall, 68 Ill. 311.

Massachusetts.— Mulhall *v.* Quinn, 1 Gray (Mass.) 105, 61 Am. Dec. 414. Assignment of fish thereafter to be caught in the sea does not pass title to the fish when caught. Low *v.* Pew, 108 Mass. 347, 11 Am. Rep. 357; Usher *v.* D'Wolfe, 13 Mass. 290.

New Hampshire.— Hall *v.* Cushman, 16 N. H. 462.

New York.— Decker *v.* Saltsman, 1 Hun (N. Y.) 421; Edwards *v.* Varick, 5 Den. (N. Y.) 664; Jackson *v.* Waldron, 13 Wend. (N. Y.) 178; Pelletreau *v.* Jackson, 11 Wend. (N. Y.) 110.

Ohio.—Jeffers *v.* Lampson, 10 Ohio St. 101.

Pennsylvania.— Lehigh Valley R. Co. *v.* Woodring, 116 Pa. St. 513, 9 Atl. 58.

Rhode Island.— D'Wolf *v.* Gardiner, 9 R. I. 145.

West Virginia.— Expected proceeds of a fair to be held in future by a society are not assignable. Huling *v.* Cabell, 9 W. Va. 522, 27 Am. Rep. 562. See also Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

United States.— Though the assignment of a mere right to file a bill for a fraud committed upon the assignor is void, a conveyance of property is not void, although the grantee may be compelled to bring a suit to enforce his right to the property conveyed. Traer *v.* Clews, 115 U. S. 528, 6 S. Ct. 155, 29 L. ed. 467.

England.— *In re* Davis, 22 Q. B. D. 193, 37 Wkly. Rep. 203; Rex *v.* Lords Com'rs of Treasury, 4 A. & E. 976, 31 E. C. L. 424; Cooper *v.* Reilly, 1 Russ. & M. 560, 5 Eng. Ch. 560, 2 Sim. 560, 2 Eng. Ch. 560; Prosser *v.* Ed-

assigned;[16] but, if the assignee has an interest in the thing assigned independent of the assignor, and a fraudulent act lies in the way of the attainment of the assignee's independent right, he may acquire the assignor's right to sue to remove the obstacle, and a court of equity will entertain the suit.[17]

B. Particular Rights and Interests—1. Real Estate. Any estate or interest in lands may be assigned;[18] and this is so whether the estate be legal or equitable,[19] vested or contingent.[20] Mere personal licenses to use land are, however, not assignable.[21] But grants, or reservations in deeds, of the right of enter-

monds, 1 Y. & C. Exch. 481. Order for payment of alimony not assignable. *In re* Robinson, 27 Ch. D. 160, 53 L. J. Ch. 986, 33 Wkly. Rep. 17.

Canada.— Sutherland *v.* Webster, 21 Ont. App. 228; Brown *v.* Johnston, 12 Ont. App. 190.

See also *infra*, II, B, 2.

16. Mere right to file a bill in equity for fraud committed on assignor is not assignable.

Georgia.— Marshall *v.* Means, 12 Ga. 61, 56 Am. Dec. 444.

Illinois.— Illinois Land, etc., Co. *v.* Speyer, 138 Ill. 137, 27 N. E. 931; Norton *v.* Tuttle, 60 Ill. 130.

Michigan.— Brush *v.* Sweet, 38 Mich. 574.

Missouri.— Haseltine *v.* Smith, 154 Mo. 404, 55 S. W. 633; Wilson *v.* St. Louis, etc., R. Co., 120 Mo. 45, 25 S. W. 527, 759; Smith *v.* Harris, 43 Mo. 557; Jones *v.* Babcock, 15 Mo. App. 149.

New York.— McMahon *v.* Allen, 35 N. Y. 403; Boughton *v.* Smith, 26 Barb. (N. Y.) 635.

Tennessee.— Morrison *v.* Deaderick, 10 Humphr. (Tenn.) 341.

England.—Upton *v.* Bassett, Cro. Eliz. 455; Prosser *v.* Edmonds, 1 Y. & C. Exch. 481.

But the rule applies only to cases where the assignment does not carry anything which has, of itself, a legal existence and value, independent of right to sue for fraud. It does not apply to a case where the right to sue for the fraud is merely incidental to a subsisting substantial property, which has been assigned, and which right is, of itself, intrinsically susceptible of legal enforcement. Emmons *v.* Barton, 109 Cal. 662, 42 Pac. 303; Connecticut Mut. L. Ins. Co. *v.* Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656; Smith *v.* Harris, 43 Mo. 557.

17. Haseltine *v.* Smith, 154 Mo. 404, 55 S. W. 633; Smith *v.* Harris, 43 Mo. 557.

18. Any interest may be assigned.— *Alabama.*— Real estate in possession of another may be sold, unless the person in possession is openly and notoriously asserting title hostile to that of the vendor. Hinton *v.* Nelms, 13 Ala. 222.

Colorado.— Hunt *v.* Hayt, 10 Colo. 278, 15 Pac. 410.

Illinois.— Barling *v.* Peters, 131 Ill. 78, 21 N. E. 809.

Indiana.— Strong *v.* Clem, 12 Ind. 37.

Missouri.— Melton *v.* Smith, 65 Mo. 315.

New Hampshire.— Tenancy at will cannot be assigned. Whittemore *v.* Gibbs, 24 N. H. 484.

New Jersey.— The right to a specific performance of a contract to purchase land is a proper subject for assignment. Grigg *v.* Landis, 21 N. J. Eq. 494.

New York.— Sanders *v.* Soutter, 136 N. Y. 97, 32 N. E. 638, 49 N. Y. St. 63. See also Sheridan *v.* House, 4 Abb. Dec. (N. Y.) 218.

Pennsylvania.— Lessee having five-years' lease may assign remaining four years before expiration of first year. Williams *v.* Downing, 18 Pa. St. 60.

Canada.— Ward *v.* Archer, 24 Ont. 650.

See 4 Cent. Dig. tit. "Assignments," § 7.

19. Immaterial whether interest is legal or equitable.— *Georgia.*— Thursby *v.* Myers, 57 Ga. 155.

Illinois.— Barling *v.* Peters, 131 Ill. 78, 21 N. E. 809; Carr *v.* Waugh, 28 Ill. 418.

New York.— Demarest *v.* Willard, 8 Cow. (N. Y.) 206.

North Carolina.— Watson *v.* Smith, 110 N. C. 6, 14 S. E. 640, 28 Am. St. Rep. 665; Bodenhamer *v.* Welch, 89 N. C. 78.

England.— Stanley *v.* White, 14 East 332, 12 Rev. Rep. 544; Hobson *v.* Mellond, 2 M. & Rob. 342.

20. Immaterial whether interest is vested or contingent.— *Illinois.*— Ridgeway *v.* Underwood, 67 Ill. 419.

Massachusetts.— Butterfield *v.* Reed, 160 Mass. 361, 35 N. E. 1128; Gardner *v.* Hooper, 3 Gray (Mass.) 398; Winslow *v.* Goodwin, 7 Metc. (Mass.) 363; Blanchard *v.* Brooks, 12 Pick. (Mass.) 47.

Missouri.— Unless the contingency depends on the existence of a particular person at a particular time. White *v.* McPheeters, 75 Mo. 286; De Lassus *v.* Gatewood, 71 Mo. 371.

New Jersey.— Takes effect, not as a conveyance, but by estoppel. Den *v.* Demarest, 21 N. J. L. 525.

North Carolina.— Watson *v.* Smith, 110 N. C. 6, 14 S. E. 640, 28 Am. St. Rep. 665.

Ohio.— Jeffers *v.* Lampson, 10 Ohio St. 101.

Rhode Island.— D'Wolf *v.* Gardiner, 9 R. I. 145.

England.— Hobson *v.* Trevor, 10 Mod. 307, 2 P. Wms. 191; Beckley *v.* Newland, 2 P. Wms. 182; Wethered *v.* Wethered, 2 Sim. 183, 29 Rev. Rep. 77, 2 Eng. Ch. 183.

21. Personal license not assignable.—Wadsworth *v.* Smith, 11 Me. 278, 26 Am. Dec. 525; Wilder *v.* Wheeler, 60 N. H. 351; Pearson *v.* Hartman, 100 Pa. St. 84; Troy Iron, etc., Factory *v.* Corning, 14 How. (U. S.) 193, 14

ing the land and taking therefrom the products of the soil, or the mineral underlying it, confer not merely personal licenses, but such interests in the land as are capable of assignment.[22]

2. Possibilities and Expectancies. Whether the mere naked possibility or expectancy of an heir apparent or heir presumptive can be made the subject of assignment or release has been the subject of controversy; but it is now settled law that such assignment or releases, if made *bona fide* and for an adequate consideration, will be enforced in equity after the death of the ancestor.[23] The gen-

L. ed. 383. Same rule applied to personalty see Marston *v.* Carter, 12 N. H. 159.

22. Grants and reservations in deeds.— *Connecticut.*— Gaston *v.* Plum, 14 Conn. 344. See Smith *v.* Moodus Water Power Co., 35 Conn. 392.

Massachusetts.— Amidon *v.* Harris, 113 Mass. 59; Hankey *v.* Clark, 110 Mass. 262; Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 290; Munn *v.* Stone, 4 Cush. (Mass.) 146. Especially where reservation is to heirs and assigns. Goodrich *v.* Burbank, 12 Allen (Mass.) 459, 90 Am. Dec. 161.

New York.— Sears *v.* Conover, 4 Abb. Dec. (N. Y.) 179, 3 Keyes (N. Y.) 113.

South Carolina.—McBee *v.* Loftus, 1 Strobh. Eq. (S. C.) 90.

Vermont.— May assign interest in growing crop. Aiken *v.* Smith, 21 Vt. 172.

England.— A tenant may assign his interest in crops to be grown in future years of his term. Petch *v.* Tutin, 15 L. J. Exch. 280, 15 M. & W. 110.

23. Expectancy of heir apparent or presumptive.— *California.*— In spite of the statute, which provides that a "mere possibility, such as the expectancy of an heir-apparent, is not to be deemed an interest of any kind," and that "a mere possibility, not coupled with an interest, cannot be transferred," it is held that an heir apparent can make a transfer of his expectancy which will be upheld by a court of equity, the statute being held to be merely declaratory of the rule of the common law, and not affecting rights in equity. Matter of Garcelon, 104 Cal. 570, 584, 38 Pac. 414, 43 Am. St. Rep. 134, 32 L. R. A. 595.

Illinois.— Glover *v.* Condell, 163 Ill. 566, 45 N. E. 173, 35 L. R. A. 360; Crum *v.* Sawyer, 132 Ill. 443, 24 N. E. 956; Simpson *v.* Simpson, 114 Ill. 603, 4 N. E. 137, 7 N. E. 287; Kershaw *v.* Kershaw, 102 Ill. 307; Bishop *v.* Davenport, 58 Ill. 105; Parsons *v.* Ely, 45 Ill. 232; Shephard *v.* Clark, 38 Ill. App. 66.

Indiana.— McClure *v.* Raben, 125 Ind. 139, 25 N. E. 179, 9 L. R. A. 477.

Kansas.— Clendening *v.* Wyatt, 54 Kan. 523, 38 Pac. 792. 33 L. R. A. 278.

Kentucky.— McBee *v.* Myers, 4 Bush (Ky.) 356; Lee *v.* Lee, 2 Duv. (Ky.) 134. But such an assignment will not operate against the heirs of the assignor, against whom there is no covenant of warranty in the assignment. Bohon *v.* Bohon, 78 Ky. 408.

Louisiana.— La. Civ. Code, art. 2623, provides: "When a man sells his right to a succession, without particularly specifying the objects of which it consists, he only warrants his right as an heir," and article 2624 provides: "A right is said to be litigious whenever there exists a suit or contestation on the same." Under these articles it was decided that a child of a decedent could assign his interest in the estate of the decedent, when no dispute existed as to the fact that he had such an interest. Grayson *v.* Sanford, 12 La. Ann. 646.

Maine.— Curtis *v.* Curtis, 40 Me. 24, 63 Am. Dec. 651.

Massachusetts.— Jenkins *v.* Stetson, 9 Allen (Mass.) 128; Trull *v.* Eastman, 3 Metc. (Mass.) 121, 37 Am. Dec. 126; Fitch *v.* Fitch, 8 Pick. (Mass.) 480; Kenney *v.* Tucker, 8 Mass. 142.

New Hampshire.— Peterborough Sav. Bank *v.* Hartshorn, 67 N. H. 156, 33 Atl. 729.

New Jersey.— Bacon *v.* Bonham, 27 N. J. Eq. 209. Such agreements, when they refer to lands, are within the statute of frauds. Brands *v.* De Witt, 44 N. J. Eq. 545, 10 Atl. 181, 14 Atl. 894, 6 Am. St. Rep. 909. Release in following form: "Received of Daniel Havens, the sum of six hundred dollars in full, in lieu of dowry," given by son to father, held to debar son from participation in estate of father. Havens *v.* Thompson, 26 N. J. Eq. 383.

New York.—Stover *v.* Eycleshimer, 3 Keyes (N. Y.) 620; Varick *v.* Edwards, Hoffm. (N. Y.) 382. Under the New York statutes "expectant estates are descendible, devisable, and alienable in the same manner as estate in possession." Griffin *v.* Shepard, 124 N. Y. 70, 26 N. E. 339, 35 N. Y. St. 210. See also Van Ness *v.* Day, 7 Alb. L. J. 172; Wilson *v.* Wilson, 20 How. Pr. (N. Y.) 41.

North Carolina.— Mastin *v.* Marlow, 65 N. C. 695; McDonald *v.* McDonald, 58 N. C. 211, 75 Am. Dec. 434. *Compare* Watson *v.* Smith, 110 N. C. 6, 14 S. E. 640, 28 Am. St. Rep. 665.

Ohio.— Cannot be released at common law. Gilpin *v.* Williams, 25 Ohio St. 283; Needles *v.* Needles, 7 Ohio St. 432, 70 Am. Dec. 85. And does not operate by way of estoppel as against title thereafter acquired by the assignor, unless expressly warranted against in the instrument of assignment. Hart *v.* Gregg, 32 Ohio St. 502.

Pennsylvania.—Caulfield *v.* Van Brunt, 173 Pa. St. 428, 34 Atl. 230; Kuhn's Estate, 163 Pa. St. 438, 30 Atl. 215; Fritz's Estate, 160 Pa. St. 156, 28 Atl. 642; Power's Appeal, 63 Pa. St. 443; Bayler *v.* Com., 40 Pa. St. 37, 80 Am. Dec. 551; *In re* Wilson, 2 Pa. St. 325. See also Woodward's Estate, 1 Chester Co. Ct. (Pa.) 417.

Tennessee.— Cannot, as against creditors,

eral rule is that, to make the assignment valid, it must have been made with the consent of the ancestor.[24]

3. RIGHTS OF ENTRY. Rights of entry, reserved for breach of condition subsequent, are confined to grantors and their heirs, and are not assignable.[25]

4. ACCOUNTS. While an open account is assignable in equity, so as to vest the beneficial interest in the assignee thereof, it is not, in the absence of statutory provisions authorizing its assignment, assignable so as to authorize the assignee to maintain an action thereon in his own name.[26] The statutes of many of the

be conveyed for love and affection. Read *v.* Mosby, 87 Tenn. 759, 11 S. W. 940, 5 L. R. A. 122; Fitzgerald *v.* Vestal, 4 Sneed (Tenn.) 257.

Texas.— Hale *v.* Hollon, 90 Tex. 427, 39 S. W. 287, 59 Am. St. Rep. 819, 36 L. R. A. 75 [*affirming* 14 Tex. Civ. App. 96, 35 S. W. 843, 36 S. W. 288].

Wisconsin.— And, by the code, an assignment, valid as an equitable assignment, is equally valid as an assignment at law. Chapman *v.* Plummer, 36 Wis. 262.

United States.— Hinkle *v.* Wanzer, 17 How. (U. S.) 353, 15 L. ed. 173.

England.— Hinde *v.* Blake, 2 Beav. 234, 9 L. J. Ch. 346; Carleton *v.* Leighton, 3 Meriv. 667; Hobson *v.* Trevor, 10 Mod. 307, 2 P. Wms. 191; Wethered *v.* Wethered, 2 Sim. 183, 29 Rev. Rep. 77, 2 Eng. Ch. 183; Smith *v.* Baker, 1 Y. & C. Ch. 223, 20 Eng. Ch. 223.

See 4 Cent. Dig. tit. "Assignments," § 12.

24. Consent of ancestor.— McClure *v.* Raben, 125 Ind. 139, 25 N. E. 179, 9 L. R. A. 477, 133 Ind. 507, 33 N. E. 275; McCall *v.* Hampton, 98 Ky. 166, 17 Ky. L. Rep. 713, 32 S. W. 406, 56 Am. St. Rep. 335, 33 L. R. A. 266; Alves *v.* Schlesinger, 81 Ky. 290 (verbal assent, it has been said, will not be sufficient); Lowry *v.* Spear, 7 Bush (Ky.) 451; Beard *v.* Griggs, 1 J. J. Marsh. (Ky.) 22; Davis *v.* Hayden, 9 Mass. 514; Boynton *v.* Hubbard, 7 Mass. 112. *Contra,* Steele *v.* Frierson, 85 Tenn. 430, 3 S. W. 649. It has been said that it is not necessary to procure the consent of an insane ancestor to such an assignment. Hale *v.* Hollon, 14 Tex. Civ. App. 96, 35 S. W. 843, 36 S. W. 288 [*affirmed* in 90 Tex. 427, 39 S. W. 287, 59 Am. St. Rep. 819, 36 L. R. A. 75]; Fuller *v.* Parmenter, (Vt. 1900) 47 Atl. 1079.

25. *Connecticut.*— Warner *v.* Bennett, 31 Conn. 468. But are assignable under the statute. Hoyt *v.* Ketcham, 54 Conn. 60, 5 Atl. 606.

Maine.— Hooper *v.* Cummings, 45 Me. 359; Bangor *v.* Warren, 34 Me. 324, 56 Am. Dec. 657.

Maryland.— Gwynn *v.* Jones, 2 Gill & J. (Md.) 173.

Massachusetts.— Rice *v.* Boston, etc., R. Corp., 12 Allen (Mass.) 141; Trask *v.* Wheeler, 7 Allen (Mass.) 109; Rice *v.* Stone, 1 Allen (Mass.) 566; Guild *v.* Richards, 16 Gray (Mass.) 309. Rule is the same as to right of entry reserved in a conveyance by the state. Thompson *v.* Bright, 1 Cush. (Mass.) 420.

Minnesota.— Said to be not assignable before breach. Ohio Iron Co. *v.* Auburn Iron Co., 64 Minn. 404, 67 N. W. 221.

New York.— Towle *v.* Remsen, 70 N. Y. 303; Nicoll *v.* New York, etc., R. Co., 12 N. Y. 121; Main *v.* Green, 32 Barb. (N. Y.) 448.

England.— 4 Cruise Dig. 113; 2 Cruise Dig. 4; 1 Spence Eq. 153.

Contra.— Possibility of reversion devisable by statute. Cornelius *v.* Ivins, 26 N. J. L. 376; Southard *v.* Central R. Co., 26 N. J. L. 13. An assignment of a contract for the sale of chattels, by the terms of which title is to remain in the vendor in order to secure the purchase-price, carries with it the right of property, together with the right of possession for condition broken, whether the default be prior or subsequent to the assignment. Landigan *v.* Mayer, 32 Oreg. 245, 51 Pac. 649, 67 Am. St. Rep. 521. Grantor reserving right of reversion for breach of condition subsequent has assignable interest before condition broken. McKissick *v.* Pickle, 16 Pa. St. 140.

26. Assignable in equity.—*Arkansas.*— Anderson *v.* Lewis, 10 Ark. 304.

Connecticut.— Until notice of the assignment of a book-debt is given to the debtor, he remains the debtor of the assignor. Woodbridge *v.* Perkins, 3 Day (Conn.) 364.

Indiana.— Newman *v.* Vickery, 1 Ind. 470.

Kansas.— May be made by mere delivery, and without notification to debtor, so as to protect assignee from subsequent garnishment. Clark *v.* Wies, 34 Kan. 553, 9 Pac. 281.

Massachusetts.— Moore *v.* Coughlin, 4 Allen (Mass.) 335. Must be notice to debtor before garnishment, so as to prefer to garnishment of book-account. Dix *v.* Cobb, 4 Mass. 508.

Mississippi.— Account may be assigned by parol, so as to vest equitable title in assignee. Pass *v.* McRea, 36 Miss. 143.

Missouri.— Kingsley *v.* Missouri Fire Co., 14 Mo. 465.

New Jersey.— Norris *v.* Douglass, 5 N. J. L. 960; Wright *v.* Williamson, 3 N. J. L. 520; Mulford *v.* French, 3 N. J. L. 54.

Pennsylvania.— Guthrie *v.* White, 1 Dall. (Pa.) 268, 1 L. ed. 131.

South Carolina.— Brown *v.* Thompson, 2 McCord (S. C.) 476; Brown *v.* Rees, 3 Brev. (S. C.) 191.

Tennessee.— Mt. Olivet Cemetery Co. *v.* Shubert, 2 Head (Tenn.) 116.

Texas.— See, *contra,* Mims *v.* Swartz, 37 Tex. 13; Smalley *v.* Taylor, 33 Tex. 668; Devine *v.* Martin, 15 Tex. 25. These three suits were cases in equity. And see, as to assign-

states contain provisions which have been construed to permit the assignment of accounts, so that the assignee may sue thereon in his own name.[27] Where there are mutual accounts, a particular item of credit in one of them cannot be assigned before balance struck, so as to enable the assignee thereof to sue the debtor.[28]

5. Future Earnings and Anticipated Profits — a. Under Existing Contract. Future earnings or salary of a private individual,[29] and anticipated prof-

ments of choses in action in Texas, *supra*, note 11, p. 9.

Vermont.—A book-account may be assigned orally, so as to vest the equitable title in the assignee. Spafford *v.* Page, 15 Vt. 490.

See 4 Cent. Dig. tit. "Assignments," § 18.

An unliquidated balance of account is a proper subject of assignment. Bartlett *v.* Pearson, 29 Me. 9; Westcott *v.* Potter, 40 Vt. 271. *Contra*, as to unliquidated partnership balance. Whittle *v.* Skinner, 23 Vt. 531.

27. Statutory provisions.— *California.*— Ryan *v.* Maddux, 6 Cal. 247.

Indiana.— Overstreet *v.* Freeman, 12 Ind. 390.

Iowa.— Knadler *v.* Sharp, 36 Iowa 232.

Kansas.— Krapp *v.* Eldridge, 33 Kan. 106, 5 Pac. 72.

Maryland.— Crawford *v.* Brooke, 4 Gill (Md.) 213.

Michigan.— Chicago, etc., R. Co. *v.* Sturgis, 44 Mich. 538, 7 N. W. 213.

Mississippi.— Beck *v.* Rosser, 68 Miss. 72, 8 So. 259.

Missouri.— Kuhn *v.* Schwartz, 33 Mo. App. 610.

New York.—Hooker *v.* Eagle Bank, 30 N. Y. 83, 86 Am. Dec. 351.

Ohio.— Allen *v.* Miller, 11 Ohio St. 374.

Pennsylvania.— Nonantum Worsted Co. *v.* Webb, 124 Pa. St. 125, 16 Atl. 632.

28. Mutual accounts.—Nonantum Worsted Co. *v.* Webb, 124 Pa. St. 125, 16 Atl. 632.

29. Wages.— *Alabama.*— Wellborn *v.* Buck, 114 Ala. 277, 21 So. 786.

Colorado.— Denver, etc., R. Co. *v.* Smeeton, 2 Colo. App. 126, 29 Pac. 815.

Connecticut.— Augur *v.* New York Belting, etc., Co., 39 Conn. 536. W went into the employ of a company under an arrangement by which he was to commence working for them whenever they had work for him, of which they were to give him notice, but nothing was agreed as to the length of time that he should continue in their employment. Before commencing work he assigned to A, by an order on the company, all money to become due to him while in their employ. This order being accepted by the company and put on record as required by the statute, was held good, as against garnishment of the company by one of W's creditors, as to all wages earned up to the time of such garnishment. Harrop *v.* Landers, etc., Co., 45 Conn. 561.

Iowa.— Metcalf *v.* Kincaid, 87 Iowa 443, 54 N. W. 867, 43 Am. St. Rep. 391.

Kentucky.— Manly *v.* Bitzer, 91 Ky. 596, 13 Ky. L. Rep. 166, 16 S. W. 464, 34 Am. St. Rep. 242; Boone *v.* Connelly, 12 Ky. L. Rep. 190.

Maine.— Haynes *v.* Thompson, 80 Me. 125, 13 Atl. 276; Wade *v.* Bessey, 76 Me. 413; Emerson *v.* European, etc., R. Co., 67 Me. 387, 24 Am. Rep. 39; Farrar *v.* Smith, 64 Me. 74.

Massachusetts.— Murphy *v.* Murphy, 121 Mass. 167; St. Johns *v.* Charles, 105 Mass. 262; Macomber *v.* Doane, 2 Allen (Mass.) 541; Wallace *v.* Walter Heywood Chair Co., 16 Gray (Mass.) 209; Emery *v.* Lawrence, 8 Cush. (Mass.) 151; Weed *v.* Jewett, 2 Metc. (Mass.) 608, 37 Am. Dec. 115; Gardner *v.* Hoeg, 18 Pick. (Mass.) 168; Cutts *v.* Perkins, 12 Mass. 206. Although wages have been increased during period. Boylen *v.* Leonard, 2 Allen (Mass.) 407; Brackett *v.* Blake, 7 Metc. (Mass.) 335, 41 Am. Dec. 442. But an assignment of wages in future, to be earned in employ of A, does not give assignee any right to have assignor continue in A's employ; and an agreement made between the assignor and a third party, by which agreement the assignor goes out of the employ of A and enters into the employ of the third party, although the third party uses the assignor to do A's work in the same capacity in which the assignor formerly worked for A, and although third party receives from A for such work the same compensation formerly paid to the assignor by A, and pays assignor the same wages, does not violate any right of the assignee. Lightbody *v.* Smith, 125 Mass. 51. In Tripp *v.* Brownell, 12 Cush. (Mass.) 376, it was said that, where such assignment was made upon consideration, part of which had been paid to the assignor, the assignment was irrevocable, although never accepted by the employer.

Minnesota.— Bates *v.* B. B. Richards Lumber Co., 56 Minn. 14, 57 N. W. 218. Assignment of wages to become due, without limit as to time or amount and without acceptance by employer, is void as to attaching creditors. Steinbach *v.* Brant, 79 Minn. 383, 82 N. W. 651, 79 Am. St. Rep. 494.

Missouri.— Price *v.* Morningstar Min. Co., 83 Mo. App. 470; Hax *v.* Acme Cement, etc., Co., 82 Mo. App. 447.

New Hampshire.— Provencher *v.* Brooks, 64 N. H. 479, 13 Atl. 641; McCormick *v.* Towns, 64 N. H. 278, 9 Atl. 97; Allen *v.* Pickett, 61 N. H. 641. Future earnings of minor son, under contract, may be assigned by father. Kent *v.* Watson, 46 N. H. 148. As against garnishing creditor, if debtor is duly notified. Conway *v.* Cutting, 51 N. H. 407.

New Jersey.— Bleakley *v.* Nelson, 56 N. J. Eq. 674, 39 Atl. 912.

Oregon.— Stott *v.* Franey, 20 Oreg. 410, 26 Pac. 271, 23 Am. St. Rep. 132.

its[30] under existing agreements, may be assigned, although the contract under which the work is being done may be indefinite as to time of employment and the amount to be paid for the work.

b. In Anticipation of Future Contract. But, in order that there may be an assignment of future earnings, it is essential that the expectation of such earnings shall be based upon an existing contract of employment; as without such contract there cannot be any valid assignment, either in law or equity, of wages and salary to be earned in future, for the reason that, under such circumstances, future earnings constitute a mere possibility not coupled with an interest.[31]

Pennsylvania.— Berresford *v.* Susquehanna Coal Co., 24 Pa. Co. Ct. 557.

Rhode Island.— Dolan *v.* Hughes, 20 R. I. 513, 40 Atl. 344, 40 L. R. A. 735. As against garnishing creditor, if debtor is duly notified. Tiernay *v.* McGarity, 14 R. I. 231.

Tennessee.— Smith *v.* Hubbard, 85 Tenn. 306, 2 S. W. 569.

Vermont.— Thayer *v.* Kelley, 28 Vt. 19, 65 Am. Dec. 220.

United States.— But see Spain *v.* Hamilton, 1 Wall. (U. S.) 604.

See 4 Cent. Dig. tit. "Assignments," § 19.

Although the workman works by the piece and his wages per month vary, future wages, to be earned under existing contract, are capable of being assigned. Twiss *v.* Cheever, 2 Allen (Mass.) 40; Hartley *v.* Tapley, 2 Gray (Mass.) 565; Kane *v.* Clough, 36 Mich. 436, 24 Am. Rep. 599.

Assignment of future wages, if upon valuable consideration, and accepted by employer, is valid against garnishing creditors. Allen *v.* Pickett, 61 N. H. 641. See Harrop *v.* Landers, etc., Co., 45 Conn. 561; Taylor *v.* Lynch, 5 Gray (Mass.) 49; Weed *v.* Jewett, 2 Metc. (Mass.) 608, 37 Am. Dec. 115. Even if entire consideration for assignment has not been paid prior to garnishment. Lannan *v.* Smith, 7 Gray (Mass.) 150. But is not valid if made to defeat creditors, although made openly and upon good consideration. Gragg *v.* Martin, 12 Allen (Mass.) 498, 90 Am. Dec. 164.

The lay or share in the profits of a voyage which a seaman in a whaling vessel receives, according to custom, in lieu of wages, is assignable before the commencement of the voyage. Osborne *v.* Jordan, 3 Gray (Mass.) 277; Parkhurst *v.* Dickerson, 21 Pick. (Mass.) 307; Gardner *v.* Hoeg, 18 Pick. (Mass.) 168.

30. Anticipated profits.— *Connecticut.*— Whole of contract price may be assigned, although only a part of the same has been earned. Hawley *v.* Bristol, 39 Conn. 26.

Maine.— Morrill *v.* Noyes, 56 Me. 458, 96 Am. Dec. 486. A contract between an insurance company and its agent, by which the latter is entitled to receive commissions on renewed premiums, to accrue annually for a given period in future, is assignable by the agent. Knevals *v.* Blauvelt, 82 Me. 458, 19 Atl. 818.

Massachusetts.— Darling *v.* Andrews, 9 Allen (Mass.) 106.

Missouri.— Leahy *v.* Dugdale, 27 Mo. 437. If a contract provides for payment of contract price in instalments, of which eighty-five per cent. is payable monthly and fifteen per cent. is to be retained and paid over ninety days after completion of the contract, each demand is separate and may be separately assigned. Adler *v.* Kansas City, etc., R. Co., 92 Mo. 242, 4 S. W. 917.

Nebraska.— Perkins *v.* Butler County, 44 Nebr. 110, 62 N. W. 308.

New Hampshire.— Garland *v.* Harrington, 51 N. H. 409.

New York.— Cooper *v.* Douglass, 44 Barb. (N. Y.) 409.

Pennsylvania.— Bittenbender *v.* Sunbury, etc., R. Co., 40 Pa. St. 269.

Utah.— The assignment, by a building contractor, of money to become due him under contract as building progressed is valid in equity. Board of Education *v.* Salt Lake Pressed Brick Co., 13 Utah 211, 44 Pac. 709.

England.— Drew *v.* Josolyne, 18 Q. B. D. 590, 56 L. J. Q. B. 490, 57 L. T. Rep. N. S. 5, 35 Wkly. Rep. 570; *Ex p.* Moss, 14 Q. B. D. 310; Buck *v.* Robson, 3 Q. B. D. 686, 48 L. J. Q. B. 250, 39 L. T. Rep. N. S. 325, 26 Wkly. Rep. 804; Southwell *v.* Scotter, 44 J. P. 376, 49 L. J. Exch. 356; Knill *v.* Prowse, 35 Wkly. Rep. 163.

31. *Alabama.*—Not good as against attaching creditors of the assignor. Skipper *v.* Stokes, 42 Ala. 255, 94 Am. Dec. 646; Purcell *v.* Mather, 35 Ala. 570, 76 Am. Dec. 307. *Contra,* Stewart *v.* Kirkland, 19 Ala. 162.

Connecticut.— Where order is given to a firm by an employee for wages to accrue to him in future, and the order is accepted by the employer, and, subsequently, the firm changes by withdrawal of one of the members thereof and the substitution of another member, the order will not operate as an assignment of wages to accrue from the new firm. Adams *v.* Willimantic Linen Co., 45 Conn. 320.

Maine.— But such assignment may be made valid by ratification of it after the money has been earned. Farnsworth *v.* Jackson, 32 Me. 419. An assignment, made by a person in the employ of a company, of wages thereafter to accrue to him from his employment with that company, within a limited time in the future, was held, as between the parties and no rights of creditors of the assignor intervening, to be a valid assignment of wages accruing to assignor within that time under a reëmployment by that company, he having been discharged the day after the assignment was made. Edwards *v.* Peterson, 80 Me. 367, 14 Atl. 936, 6 Am. St. Rep. 207.

Massachusetts.— Eagan *v.* Luby, 133 Mass.

6. Salaries or Fees of Public Officers — a. Unearned Salaries or Fees. The assignment, by certain classes of public servants, of their unearned salaries or fees of office has been forbidden by statute in England [32] and by act of congress in the United States.[33] But, even in the absence of statute, the great weight of authority, both in England and in the United States, is to the effect that an assignment by a public officer of the unearned salary or fees of his office is void as against public policy.[34] The doctrine has been extended so as to forbid the

543; Herbert *v.* Bronson, 125 Mass. 475; Lightbody *v.* Smith, 125 Mass. 51; Twiss *v.* Cheever, 2 Allen (Mass.) 40; Mulhall *v.* Quinn, 1 Gray (Mass.) 105, 61 Am. Dec. 414.

Michigan.— See Neumann *v.* Calumet, etc., Min. Co., 57 Mich. 97, 23 N. W. 600.

New York.— Field *v.* New York, 6 N. Y. 179, 57 Am. Dec. 179; Cooper *v.* Douglass, 44 Barb. (N. Y.) 409.

Ohio.— Tolman *v.* Hyndman Steel Roofing Co., 9 Ohio Dec. 501, 6 Ohio N. P. 467.

Pennsylvania.— Lehigh Valley R. Co. *v.* Woodring, 116 Pa. St. 513, 9 Atl. 58; Jermyn *v.* Moffitt, 75 Pa. St. 399. Will not carry wages of new employment, though employment be by successor concern. Trumbower *v.* Ivey, 2 Pa. Co. Ct. 470.

Rhode Island.— O'Keefe *v.* Allen, 20 R. I. 414, 39 Atl. 752, 78 Am. St. Rep. 884; Kennedy *v.* Tiernay, 14 R. I. 528.

See 4 Cent. Dig. tit. "Assignments," § 21.

Unearned book-accounts are assignable so as to transfer accounts thereafter earned by assignor in another business. Tailby *v.* Official Receiver, 13 App. Cas. 523, 58 L. J. Q. B. 75, 60 L. T. Rep. N. S. 162, 37 Wkly. Rep. 513 [*overruling In re* D'Espineuil, 20 Ch. D. 758; Belden *v.* Read, 3 H. & C. 955, 11 Jur. N. S. 547, 34 L. J. Exch. 212, 13 L. T. Rep. N. S. 66, 13 Wkly. Rep. 867].

32. English statutes.— Assignment of seaman's wages void. 1 Geo. II, c. 14, § 7. So as to half-pay officers in the army. Stone *v.* Lidderdale, 2 Anstr. 533, 3 Rev. Rep. 622.

See also Army and Navy, II, J, 1, h [3 Cyc. 829]; and Seamen.

33. Federal statutes.— Trimble *v.* Ford, 5 Dana (Ky.) 517; Brooks *v.* Cooper, 50 N. J. Eq. 761, 26 Atl. 978, 35 Am. St. Rep. 793, 21 L. R. A. 617; Schwenk *v.* Wyckoff, 46 N. J. Eq. 560, 20 Atl. 259, 19 Am. St. Rep. 438, 9 L. R. A. 221; Billings *v.* O'Brien, 45 How. Pr. (N. Y.) 392; Elwyn's Appeal, 67 Pa. St. 367.

34. In the absence of statute.— *Alabama.* — Schloss *v.* Hewlett, 81 Ala. 266, 1 So. 263; Robertson *v.* Robinson, 65 Ala. 610, 39 Am. Rep. 17; Payne *v.* Mobile, 4 Ala. 333, 37 Am. Rep. 744.

California.— Bangs *v.* Dunn, 66 Cal. 72, 4 Pac. 963.

Illinois.— Good as to unearned salary of a school-teacher. Johnson *v.* Pace, 78 Ill. 143.

Indiana.— Ellis *v.* State, 4 Ind. 1.

Kentucky.— Holt *v.* Thurman, (Ky. 1901) 63 S. W. 280; Dickinson *v.* Johnson, 22 Ky. L. Rep. 1686, 61 S. W. 267; Field *v.* Chipley, 79 Ky. 260, 42 Am. Rep. 215; Trimble *v.* Ford, 5 Dana (Ky.) 517; Jones *v.* Com., 2 Litt. (Ky.) 357. But it has been held that a jailer (Webb *v.* McCauley, 4 Bush. (Ky.) 8), or a policeman elected for a term of four years, whose compensation is a fixed sum per day, payable monthly (Manly *v.* Bitzer, 91 Ky. 596, 13 Ky. L. Rep. 166, 16 S. W. 464, 34 Am. St. Rep. 242), may assign his fees or wages payable in the future.

Massachusetts.— But see Brackett *v.* Blake, 7 Metc. (Mass.) 335, 41 Am. Dec. 442, holding that a city officer, who is chosen for a year, subject to be removed from office at any time, at the will of the mayor and aldermen, and whose salary is payable quarterly, may legally make an assignment of a quarter's salary before the quarter expires.

Missouri.— State *v.* Williamson, 118 Mo. 146, 23 S. W. 1054, 40 Am. St. Rep. 358, 21 L. R. A. 827; Beal *v.* McVicker, 8 Mo. App. 202.

New Hampshire.— *Contra,* Conway *v.* Cutting, 51 N. H. 407.

New Jersey.— Wayne Tp. *v.* Cahill, 49 N. J. L. 144, 6 Atl. 621.

New York.— Bowery Nat. Bank *v.* Wilson, 122 N. Y. 478, 25 N. E. 855, 34 N. Y. St. 43, 19 Am. St. Rep. 507, 9 L. R. A. 706; Bliss *v.* Lawrence, 58 N. Y. 442, 17 Am. Rep. 273; August *v.* Crane, 28 Misc. (N. Y.) 549, 59 N. Y. Suppl. 583; Billings *v.* O'Brien, 45 How. Pr. (N. Y.) 392; Currie *v.* Hart, 2 Sandf. Ch. (N. Y.) 353. But see People *v.* Dayton, 50 How. Pr. (N. Y.) 143, where it was said that the fees of a justice of the peace, earned and unearned, are capable of assignment, distinguishing unearned fees from unearned salary. August *v.* Crane, 28 Misc. (N. Y.) 549, 59 N. Y. Suppl. 583. *Contra,* People *v.* Dayton, 50 How. Pr. (N. Y.) 143.

Pennsylvania.— Elwyn's Appeal, 67 Pa. St. 367.

South Carolina.—*Compare* Buttz *v.* Charleston, 17 S. C. 585. But see Ciples *v.* Blair, Rice Eq. (S. C.) 60, holding that costs due clerk of a court are assignable in equity.

South Dakota.— State *v.* Barnes, 10 S. D. 306, 73 N. W. 80.

Texas.—El Paso Nat. Bank *v.* Fink, 86 Tex. 303, 24 S. W. 256, 40 Am. St. Rep. 833. And representation that salary is earned will not give validity to an assignment of the salary of a public officer, when, as a matter of fact, the salary has not been earned at the time when the assignment is made. State Nat. Bank *v.* Fink, (Tex. Civ. App. 1894) 24 S. W. 937.

West Virginia.— Stevenson *v.* Kyle, 42 W. Va. 229, 24 S. E. 886, 57 Am. St. Rep. 854.

Wisconsin.— *Contra,* State *v.* Hastings, 15 Wis. 75.

United States.— Shannon *v.* Bruner, 36 Fed. 147.

England.— *In re* Mirams, [1891] 1 Q. B.

assignment, by private trustees, of expected fees to be earned by the performance of duties of the trust, when such duties and the compensation therefor are prescribed by statute.[35]

b. Earned Salaries and Fees. But, when the services are performed and the salary or fees earned, public policy does not prohibit their assignment.[36]

7. Contracts — a. General Rule — (1) *Private Contracts.*[37] As to assignability of private contracts, it may be stated as a general rule that rights arising out of agreements or contracts between private individuals may be assigned,[38] in the

564, 60 L. J. Q. B. 397, 64 L. T. Rep. N. S. 117, 8 Morrell 59, 39 Wkly. Rep. 464; Stone *v.* Lidderdale, 2 Anstr. 533, 3 Rev. Rep. 622; Palmer *v.* Bate, 2 B. & B. 673, 6 Moore C. P. 28, 23 Rev. Rep. 525; Arbuckle *v.* Cowtan, 3 B. & P. 321; Hill *v.* Paul, 8 Cl. & F. 295, 8 Eng. Reprint 116; Barwick *v.* Reade, 1 H. Bl. 627, 2 Rev. Rep. 608; Lidderdale *v.* Montrose, 4 T. R. 248, 2 Rev. Rep. 375; Flarty *v.* Odlum, 3 T. R. 681, 1 Rev. Rep. 791. But the office must be public, and it is not enough that the due discharge of the duties of the office should be for the public benefit in a secondary or remote sense. Cooper *v.* Reilly, 1 Russ. & M. 560, 5 Eng. Ch. 560, 2 Sim. 560, 2 Eng. Ch. 560. Annuity conferred on one by the crown for past services may be assigned. Davis *v.* Marlborough, 1 Swanst. 74. See *supra*, note 8. A pension conferred on one in the employ of the government, upon the abolition of his office, upon condition that he shall hold himself in readiness to serve in any similar capacity when requested by the government so to do, is not assignable. Wells *v.* Forster, 5 Jur. 464, 10 L. J. Exch. 216, 8 M. & W. 148. See also Pensions. An assignment of all offices and fees that the assignor may thereafter acquire held valid, it being construed to mean an assignment of offices that might legally be assigned. Harrington *v.* Kloprogge, 2 B. & B. 678, 2 Chit. 475, 4 Dougl. 5, 6 Moore 38 note, 23 Rev. Rep. 539 note, 18 E. C. L. 744.

See 4 Cent. Dig. tit. "Assignments," § 23.

The reason for this rule has been well stated: "It is easy to see how great abuses would follow if such transfers were permitted. Not only would there exist a constant temptation to anticipate future earnings under the stress of present financial pressure, at usurious rates of discount, but when completed, one of the strongest incentives to industrious exertion — the expectation of pecuniary reward in the near future — would be gone." Schloss *v.* Hewlett, 81 Ala. 266, 270, 1 So. 263.

35. Unearned fees of trustees.— *In re* King, 110 Mich. 203, 68 N. W. 154; Matter of Worthington, 141 N. Y. 9, 11, 35 N. E. 929, 56 N. Y. St. 561, 23 L. R. A. 97, wherein it was said: "There is no fundamental distinction in this respect between public and private trusts, where the statute fixes the compensation and prescribes that it shall not become due and payable until the services have been rendered, or at stated periods during the term of service. It is well settled that a public officer cannot, during his official term, and before his salary or fees become due and payable, make valid assignments of such salary, or fees. . . . The same considerations forbid the recognition of an assignment by an executor of his commissions in advance of the time prescribed by law for their adjustment and payment. When the hope of compensation is gone, a strong incentive to diligence and zeal is wanting, and the temptation to be content with a lax or perfunctory administration of the trust becomes more persuasive."

36. Birkbeck *v.* Stafford, 14 Abb. Pr. (N. Y.) 285, 23 How. Pr. (N. Y.) 236; Thompson *v.* Cullers, (Tex. Civ. App. 1896) 35 S. W. 412.

37. For particular contracts assignable see also *supra*, cross-references, p. 5.

38. As a rule assignable.—*California.*—Doll *v.* Anderson, 27 Cal. 248.

Georgia.—Swanson *v.* Kirby, 98 Ga. 586, 26 S. E. 71.

Illinois.— Carr *v.* Waugh, 28 Ill. 418; Pacey *v.* Troxel, 68 Ill. App. 367; Brassel *v.* Troxel, 68 Ill. App. 131.

Indiana.— Blair *v.* Hamilton, 48 Ind. 32.

Kansas.— Missouri Valley L. Ins. Co. *v.* Kelso, 16 Kan. 481; Missouri Pac. R. Co. *v.* Phelps, (Kan. App. 1900) 61 Pac. 672.

Kentucky.— McKee *v.* Hoover, 1 T. B. Mon. (Ky.) 32.

Massachusetts.— Haskell *v.* Blair, 3 Cush. (Mass.) 534.

Minnesota.— Blakeley *v.* Le Duc, 22 Minn. 476.

Mississippi.— Byars *v.* Griffin, 31 Miss. 603.

Missouri.— Early *v.* Reed, 60 Mo. 528; Leahy *v.* Dugdale, 27 Mo. 437; Empire Paving, etc., Co. *v.* Prather, 58 Mo. App. 487; Peabody *v.* Warner, 16 Mo. App. 556.

Nebraska.— Daugherty *v.* Gouff, 23 Nebr. 105, 36 N. W. 351.

New Jersey.— Howe *v.* Smeeth, etc., Co., (N. J. 1900) 48 Atl. 24.

New York.— Evansville Nat. Bank *v.* Kaufmann, 93 N. Y. 273, 45 Am. Rep. 204; Van Santen *v.* Standard Oil Co., 81 N. Y. 171; Devlin *v.* New York, 63 N. Y. 8; Bordwell *v.* Collie, 45 N. Y. 494; Fulton F. Ins. Co. *v.* Baldwin, 37 N. Y. 648; McBride *v.* Farmers' Bank, 26 N. Y. 450; *In re* Daly, 58 N. Y. App. Div. 49, 68 N. Y. Suppl. 596; Sears *v.* Conover, 3 Keyes (N. Y.) 113; Hand *v.* Brooks, 21 N. Y. App. Div. 489, 47 N. Y. Suppl. 583; Van Dyke *v.* Gardner, 22 Misc. (N. Y.) 113, 49 N. Y. Suppl. 328; Rochester Lantern Co. *v.* Stiles, etc., Press Co., 16 N. Y. Suppl. 781,

absence of any provision or stipulation in the agreement or contract to the contrary,[39]

40 N. Y. St. 851; Peckham *v.* Smith, 9 How. Pr. (N. Y.) 436.

Ohio.— Stoutenberg *v.* Freese, 2 Ohio Dec. 463.

Oregon.— Mitchell *v.* Taylor, 27 Oreg. 377, 41 Pac. 119.

South Carolina.— But see Breen *v.* Ingram, 1 Bay (S. C.) 173.

Tennessee.— Smith *v.* Hubbard, 85 Tenn. 306, 2 S. W. 569.

Texas.— Peevy *v.* Hurt, 32 Tex. 146. But see Holliman *v.* Rogers, 6 Tex. 91.

United States.— Delaware County *v.* Diebold Safe, etc., Co., 133 U. S. 473, 10 S. Ct. 399, 33 L. ed. 674.

See 4 Cent. Dig. tit. "Assignments," § 24 *et seq.*; and *supra*, I, D.

A claim for money overpaid in discharge of an obligation is assignable. Lawyers' Surety Co. *v.* Reinach, 25 Misc. (N. Y.) 150, 54 N. Y. Suppl. 205; First Presb. Soc. *v.* Ayer, 25 Wkly. Dig. (N. Y.) 402; Lawler *v.* Jennings, 18 Utah 35, 55 Pac. 60.

Agreement to pay railroad, its successors and assigns, certain sum after the railroad is constructed between certain points is assignable. Wilks *v.* Georgia Pac. R. Co., 79 Ala. 180; Smith *v.* Hollett, 34 Ind. 519; Michigan Midland, etc., R. Co. *v.* Bacon, 33 Mich. 466; Stevens *v.* Corbitt, 33 Mich. 458.

Agreement to sell and deliver goods for fixed price in cash is assignable. Sears *v.* Conover, 3 Keyes (N. Y.) 113; Tyler *v.* Barrows, 6 Rob. (N. Y.) 104; Arkansas Valley Smelting Co. *v.* Belden Min. Co., 127 U. S. 379, 8 S. Ct. 1308, 32 L. ed. 246. Contract to sell piano, to be selected by party wishing to buy, is assignable by proposed purchaser. Groot *v.* Story, 41 Vt. 533. Contract by which A agrees to sell and B to buy all grapes to be grown from certain vines for a period of ten years is assignable. La Rue *v.* Groezinger, 84 Cal. 281, 24 Pac. 42, 8 Am. St. Rep. 179. But see Worden *v.* Chicago, etc., R. Co., 82 Iowa 735, 48 N. W. 71. One who has agreed to deliver to another in future certain trees not then grown, for a price certain per tree, can, in equity, assign the contract so as to give his assignee the right to perform the same and to look to the other contracting party for the payment of the purchase-money. Parsons *v.* Woodward, 22 N. J. L. 196. But see Van Rensselaer *v.* Aikin, 44 N. Y. 126, where it was decided that a promise to pay to a person named certain subscriptions, to be expended in repairing the road in front of another's house, cannot be assigned by him so as to authorize the assignee to do the work and collect the subscriptions.

An assignment of all one's interest in goods in charge of a common carrier passes the right of action against the carrier for non-delivery under the contract. Waldron *v.* Willard, 17 N. Y. 466. See Boston Ice Co. *v.* Potter, 123 Mass. 28, 25 Am. Rep. 9; Schmaling *v.* Thomlinson, 1 Marsh. 500, 6 Taunt. 147, 1 E. C. L. 549.

A right to receive goods from another may be assigned. Larson *v.* Cook, 85 Wis. 564, 55 N. W. 703.

Contract by one for drilling an oil-well on lands of another, under circumstances showing that many men would be required to do the work, is assignable by the contractor. Galey *v.* Mellon, 172 Pa. St. 443, 33 Atl. 560.

Contracts in partial restraint of trade may be assigned. California Steam Nav. Co. *v.* Wright, 6 Cal. 258, 65 Am. Dec. 511; Hedge *v.* Lowe, 47 Iowa 137; Up River Ice Co. *v.* Denler, 114 Mich. 296, 72 N. W. 157, 68 Am. St. Rep. 480; Francisco *v.* Smith, 143 N. Y. 488, 38 N. E. 980, 62 N. Y. St. 803; Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. St. Rep. 464; Greite *v.* Henricks, 71 Hun (N. Y.) 7, 24 N. Y. Suppl. 545, 53 N. Y. St. 851; Barber Asphalt Paving Co. *v.* Brand, 7 N. Y. Suppl. 744, 27 N. Y. St. 883. See, *contra*, Hillman *v.* Shannahan, 4 Oreg. 163, 18 Am. Rep. 281.

Contract of a railroad company that, in consideration of the building of certain furnaces upon its right of way, it would transport ore and metal to and from such furnaces at a given rate for the term of ten years, when required to do so by the other contracting party, is, upon the completion of the furnaces, assignable by the other contracting party. Himrod Furnace Co. *v.* Cleveland, etc., R. Co., 22 Ohio St. 451.

Contract to convey to A at any time within five months, on his request in writing, certain lands, part cash, deferred payments in one and two years, covenants and agreements to extend to heirs, personal representatives, and assigns of respective parties, is not personal and may be assigned. Rice *v.* Gibbs, 33 Nebr. 460, 50 N. W. 436.

Money due under contract partly performed may be assigned. Rodgers *v.* Torrent, 111 Mich. 680, 70 N. W. 335; Alden *v.* George W. Frank Imp. Co., 57 Nebr. 67, 77 N. W. 369; Anniston Nat. Bank *v.* Durham School Committee, 121 N. C. 107, 28 S. E. 134; Parsons *v.* Baltimore Bldg., etc., Assoc., 44 W. Va. 335, 29 S. E. 999, 67 Am. St. Rep. 769.

39. Parties may stipulate that contract shall not be assignable.— Tabler *v.* Sheffield Land, etc., Co., 79 Ala. 377, 58 Am. Rep. 593; Deffenbaugh *v.* Foster, 40 Ind. 382; Andrew *v.* Meyerdirck, 87 Md. 511, 40 Atl. 173; Omaha *v.* Standard Oil Co., 55 Nebr. 337, 75 N. W. 859. But *compare* Board Trustees School Dist. No. 1 *v.* Whalen, 17 Mont. 1, 41 Pac. 849; and see, *contra*, Manchester *v.* Kendall, 103 N. Y. 638. Provision against assignability may be waived by conduct of parties. Grigg *v.* Landis, 21 N. J. Eq. 494; Brewster *v.* Hornellsville, 35 N. Y. App. Div. 161, 54 N. Y. Suppl. 904. Does not prevent equitable assignment as to third parties. Hackett *v.* Campbell, 10 N. Y. App. Div. 523, 42 N. Y. Suppl. 47; *In re* Turcan, 40 Ch. D. 5, 58 L. J. Ch. 101, 59 L. T. Rep. N. S. 712, 37 Wkly. Rep. 70.

or unless there exists a prohibitory statute forbidding the assignment of such rights.[40]

(II) *Public Contracts.* The same rule is applicable to public contracts as to private contracts, except as modified by statute.[41]

b. Exceptions — (I) *Contractual Rights Coupled With Liabilities.* If the rights arising out of the contract are coupled with a liability thereunder, they cannot be assigned.[42]

(II) *Contracts Involving Relations of Personal Confidence.* Contracts involving the relation of personal confidence, and such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided, are not transferable.[43]

40. Prohibited by statute.—Way *v.* Chicago, etc., R. Co., 64 Iowa 48, 19 N. W. 828, 52 Am. Rep. 431; Roger Williams Ins. Co. *v.* Carrington, 43 Mich. 252, 5 N. W. 303.

41. There is nothing in the nature of contracts for public work that forbids their assignment by the contractor. Most laws governing the letting of public contracts provide that the work must be let to the lowest responsible bidder, and the personality of the bidder does not enter into the consideration, it being usually provided that the work shall be done according to a certain plan and subject to the approval of a designated officer.

California.— Anderson *v.* De Urioste, 96 Cal. 404, 31 Pac. 266; Taylor *v.* Palmer, 31 Cal. 240; Cochran *v.* Collins, 29 Cal. 129.

Illinois.— Carlyle *v.* Carlyle Water, etc., Co., 140 Ill. 445, 29 N. E. 556.

Massachusetts.— But see, *contra*, Pike *v.* Waltham, 168 Mass. 581, 47 N. E. 437.

Missouri.— St. Louis *v.* Clemens, 42 Mo. 69.

New York.—Devlin *v.* New York, 63 N. Y. 8.

Ohio.— Corry *v.* Gaynor, 22 Ohio St. 584; Ernst *v.* Kunkle, 5 Ohio St. 520.

Pennsylvania.— Philadelphia *v.* Lockhardt, 73 Pa. St. 211.

South Carolina.— Columbia Water Power Co. *v.* Columbia, 5 S. C. 225.

South Dakota.—Carter *v.* State, 8 S. D. 153, 65 N. W. 422.

See 4 Cent. Dig. tit. "Assignments," § 26.

But as to contracts to which the United States is a party see U. S. Rev. Stat. (1878), §§ 3477, 3737; Flint, etc., R. Co. *v.* U. S., 112 U. S. 762, 5 S. Ct. 368, 28 L. ed. 862; U. S. *v.* Gillis, 95 U. S. 407, 24 L. ed. 503.

42. Parsons *v.* Woodward, 22 N. J. L. 196; Arkansas Valley Smelting Co. *v.* Belden Min. Co., 127 U. S. 379, 8 S. Ct. 1308, 32 L. ed. 246; Winchester *v.* Davis Pyrites Co., 67 Fed. 45, 28 U. S. App. 353, 14 C. C. A. 300; British Waggon Co. *v.* Lea, 5 Q. B. D. 149, 44 J. P. 440, 49 L. J. Q. B. 321, 42 L. T. Rep. N. S. 437, 28 Wkly. Rep. 349; Robson *v.* Drummond, 2 B. & Ad. 303, 9 L. J. K. B. O. S. 187, 22 E. C. L. 132.

But assignee of a bond with reciprocal covenants may maintain an action against the obligor upon showing that the undertaking of the latter has become absolute by the performance of the conditions by the obligee. Brown *v.* Chambers, 12 Ala. 697.

43. Contracts involving personal skill and confidence are not assignable.

California.—Contract between attorney and client. Taylor *v.* Black Diamond Coal Min. Co., 86 Cal. 589, 25 Pac. 51.

Indiana.— Contract for sale of machine, with warranty thereof, is not assignable by seller. Sprankle *v.* Trulove, 22 Ind. App. 577, 54 N. E. 461.

Iowa.—Contract for sale of goods on credit, and the exclusive handling of the same. Schoonover *v.* Osborne, 108 Iowa 453, 79 N. W. 263; Rappleye *v.* Racine Seeder Co., 79 Iowa 220, 44 N. W. 363, 7 L. R. A. 139.

Louisiana.—Contract to take one as a partner. Grayson *v.* Whatley, 15 La. Ann. 525; Taylor *v.* Penny, 5 La. Ann. 7.

Massachusetts.— Pike *v.* Waltham, 168 Mass. 581, 47 N. E. 437.

Michigan.— Marquette *v.* Wilkinson, 119 Mich. 413, 78 N. W. 474, 43 L. R. A. 840; Edison *v.* Babka, 111 Mich. 235, 69 N. W. 499. Contract to work land on shares. Litka *v.* Wilcox, 39 Mich. 94.

Missouri.— Prather *v.* McEvoy, 8 Mo. 661; Bothick *v.* Purdy, 3 Mo. 82; Butts *v.* McMurry, 74 Mo. App. 526; Boykin *v.* Campbell, 9 Mo. App. 495.

Nebraska.— Zetterlund *v.* Texas Land, etc., Co., 55 Nebr. 355, 75 N. W. 860.

New York.— Daly *v.* Stetson, 118 N. Y. 269, 23 N. E. 369, 28 N. Y. St. 827; Friedlander *v.* New York Plate Glass Ins. Co., 38 N. Y. App. Div. 146, 56 N. Y. Suppl. 583; Jessel *v.* Williamsburg Ins. Co., 3 Hill (N. Y.) 88; Hayes *v.* Willio, 4 Daly (N. Y.) 259; Martin *v.* Platt, 5 N. Y. St. 284; Nixon *v.* Zuricaldy, 2 Misc. (N. Y.) 541, 24 N. Y. Suppl. 121 [*affirmed* in 4 Misc. (N. Y.) 615, 24 N. Y. Suppl. 1150].

South Dakota.— Carter *v.* State, 8 S. D. 153, 65 N. W. 422.

Texas.— Hudson *v.* Farris, 30 Tex. 574.

United States.— Horst *v.* Roehm, 84 Fed. 565.

England.— Between author and publisher. Griffith *v.* Tower Pub. Co., [1897] 1 Ch. 21, 66 L. J. Ch. 12, 75 L. T. Rep. N. S. 330, 45 Wkly. Rep. 73. Involving skill on part of manufacturer. Dr. Jaeger's Sanitary Woollen Co. *v.* Walker, 77 L. T. Rep. N. S. 180.

An instrument which gives to a person an option to buy land, upon the performance of certain conditions, which he may or may not perform, as he may elect, may not be assignable by such person before he has acquired any right of property under it by performing

(III) *Contracts For Personal Services.* Contracts for personal services are not assignable.[44]

8. Torts — a. In General. In distinguishing between rights, growing out of tortious acts, that are assignable and such as are not assignable, the test most generally applied is that if the right of action arising from the act is in its nature such that it will, upon the death of the party aggrieved, survive to his personal representatives, it is assignable, and that if it will not thus survive it is not assignable.[45]

the conditions, but it is assignable in equity after that time. Perkins *v.* Hadsell, 50 Ill. 216.

Contracts for support and maintenance are not assignable. Thus, a contract for the maintenance of the poor of a county (Burger *v.* Rice, 3 Ind. 125), contract of son for support of his parents during their lifetime (Clinton *v.* Fly, 10 Me. 292), or a contract to support parents (Clinton *v.* Fly, 10 Me. 292; Rollins *v.* Riley, 44 N. H. 9; Bethlehem *v.* Annis, 40 N. H. 34, 77 Am. Dec. 700; Eastman *v.* Batchelder, 36 N. H. 141, 72 Am. Dec. 295; Flanders *v.* Lamphear, 9 N. H. 201) is not assignable. Duty to take care of brother and maintain him in sickness and in health not assignable. Balch *v.* Smith, 12 N. H. 437.

See 4 Cent. Dig. tit. "Assignments," § 29.

County commissioners' court contracted with a person to subdivide school lands into tracts of one hundred and sixty acres, after personal inspection by the contractor, who was to divide them, according to quality, into first, second, and third-class lands, and, after surveying them, to make a sworn report. It was held that the contract involved a personal trust and was not assignable. Palo Pinto County *v.* Gano, 60 Tex. 249.

Payments due and to become due to a contractor under contract requiring personal skill may be assigned by him. Sharp *v.* Edgar, 3 Sandf. (N. Y.) 379.

Where a city water company contracted, by its franchise, to supply the station of a city's electric plant with water at a specific monthly rental, the fact that the company agreed that the rental should be paid at the end of the month did not destroy the assignability of the contract on the ground that a special confidence was placed in the city, if it does not appear that the city's lessee, seeking to enforce the contract, relied on such stipulation or refused to pay the rent in advance. Jenkins *v.* Columbia Land, etc., Co., 13 Wash. 502, 43 Pac. 328.

Where a contract personal in its nature is made with a firm it cannot be assigned to one member thereof by the other. D. C. Hardy Implement Co. *v.* South Bend Iron Works, 129 Mo. 222, 31 S. W. 599.

Where a railroad agreed to take a certain amount of coal from a certain vein of a certain coal company, an assignee of the property of the coal company and of the contract to take coal could not compel the railroad company to take the coal. La Rue *v.* Groezinger, 84 Cal. 281, 24 Pac. 42, 18 Am. St. Rep. 179.

44. *California.*— Fitch *v.* Brockmon, 3 Cal. 348.

Illinois.— Sloan *v.* Williams, 138 Ill. 43, 27 N. E. 531, 12 L. R. A. 496.

Kentucky.—Davenport *v.* Gentry, 9 B. Mon. (Ky.) 427; Henry *v.* Hughes, 1 J. J. Marsh. (Ky.) 453; Force *v.* Thomason, 2 Litt. (Ky.) 166. *Compare* Hazel *v.* McCloskey, 6 Ky. L. Rep. 736.

Missouri.—Redheffer *v.* Leathe, 15 Mo. App. 12.

Nebraska.—Hilton *v.* Crooker, 30 Nebr. 707, 47 N. W. 3.

Ohio.— Chapin *v.* Longworth, 31 Ohio St. 421.

United States.— Bancroft *v.* Scribner, 72 Fed. 988, 44 U. S. App. 480, 21 C. C. A. 352.

But this rule does not apply to involuntary servitudes, paupers, criminals, etc. Wilson *v.* Church, 1 Pick. (Mass.) 23; Horner *v.* Wood, 23 N. Y. 350.

45. Survivorship as test of assignability.— *Iowa.*— Taylor *v.* Galland, 3 Greene (Iowa) 17.

Kansas.— Stewart *v.* Balderston, 10 Kan. 131; Noble *v.* Hunter, 2 Kan. App. 538, 43 Pac. 994.

Michigan.— Stebbins *v.* Dean, 82 Mich. 385, 46 N. W. 778; Finn *v.* Corbitt, 36 Mich. 318.

Minnesota.— Tuttle *v.* Howe, 14 Minn. 145, 100 Am. Dec. 205.

Mississippi.— Fink *v.* Henderson, 74 Miss. 8, 19 So. 892.

Missouri.— Chouteau *v.* Boughton, 100 Mo. 406, 13 S. W. 877; McPherson First Nat. Bank *v.* George R. Barse Live Stock Commission Co., 61 Mo. App. 143; State *v.* Heckart, 49 Mo. App. 280.

New York.— Zabriskie *v.* Smith, 13 N. Y. 322, 64 Am. Dec. 551; Graves *v.* Spier, 58 Barb. (N. Y.) 349; Grocers Nat. Bank *v.* Clark, 48 Barb. (N. Y.) 26; Dininny *v.* Fay, 38 Barb. (N. Y.) 18; Gould *v.* Gould, 36 Barb. (N. Y.) 270; Foy *v.* Troy, etc., R. Co., 24 Barb. (N. Y.) 382; Butler *v.* New York, etc., R. Co., 22 Barb. (N. Y.) 110; Rutherford *v.* Aiken, 3 Thomps. & C. (N. Y.) 60; Purple *v.* Hudson River R. Co., 4 Duer (N. Y.) 74; Freeman *v.* Newton, 3 E. D. Smith, (N. Y.) 246; Lamphere *v.* Hall, 26 How. Pr. (N. Y.) 509.

Pennsylvania.— North *v.* Turner, 9 Serg. & R. (Pa.) 244.

Texas.— Stewart *v.* Houston, etc., R. Co., 62 Tex. 246; Galveston, etc., R. Co. *v.* Freeman, 57 Tex. 156.

Washington.— Slauson *v.* Schwabacher, 4 Wash. 783, 31 Pac. 329, 31 Am. St. Rep. 948.

b. Personal Torts. A right of action for a personal tort — such as slander, breach of promise of marriage, assault and battery, false imprisonment, malicious prosecution, and kindred wrongs — is not assignable either at law or in equity.[46]

c. Torts to Property. But a right of action for a tortious act occasioning injury to property — such as trespasses, the conversion of personal property, or actions on the case for negligence resulting in the damage or destruction of property — are assignable.[47]

Wisconsin.— Lebmann *v.* Farwell, 95 Wis. 185, 70 N. W. 170, 60 Am. St. Rep. 111, 37 L. R. A. 333; Day *v.* Vinson, 78 Wis. 198, 47 N. W. 269, 10 L. R. A. 205; Gates *v.* Northern Pac. R. Co., 64 Wis. 64, 24 N. W. 494; Webber *v.* Quaw, 46 Wis. 118, 49 N. W. 830; McArthur *v.* Green Bay, etc., Canal Co., 34 Wis. 139.

United States.— Comegys *v.* Vasse, 1 Pet. (U. S.) 193, 7 L. ed. 108.

See 4 Cent. Dig. tit. "Assignments," §§ 39, 42 *et seq.*; and ABATEMENT AND REVIVAL, III, A, 3, b, (II) [1 Cyc. 49].

46. In this class of cases the damages are said to consist entirely of personal suffering, mental or corporeal, and must be recovered, if at all, by the person injured.

California.— Archer *v.* Freeman, 124 Cal. 528, 57 Pac. 474; Lawrence *v.* Martin, 22 Cal. 173; Oliver *v.* Walsh, 6 Cal. 456.

Georgia.— Central R., etc., Co. *v.* Brunswick, etc., R. Co., 87 Ga. 386, 13 S. E. 520.

Illinois.— North Chicago St. R. Co. *v.* Ackley, 171 Ill. 100, 49 N. E. 22, 44 L. R. A. 177; Chicago, etc., R. Co. *v.* Maher, 91 Ill. 312; Chicago General R. Co. *v.* Capek, 82 Ill. App. 168.

Iowa.— Unliquidated claims for personal injuries may be assigned. Hawley *v.* Chicago, etc., R. Co., 71 Iowa 717, 29 N. W. 787; Vimont *v.* Chicago, etc., R. Co., 64 Iowa 513, 17 N. W. 31, 21 N. W. 9; Clews *v.* Traer, 57 Iowa 459, 10 N. W. 838; Gray *v.* McCallister, 50 Iowa 497; Weire *v.* Davenport, 11 Iowa 49, 77 Am. Dec. 132. But see Crook *v.* Gruell, 82 Iowa 736, 47 N. W. 1081.

Kansas.— Atchison, etc., R. Co. *v.* Chenoweth, 4 Kan. App. 810, 49 Pac. 155.

Kentucky.— Com. *v.* Fuqua, 3 Litt. (Ky.) 41.

Maine.— Averill *v.* Longfellow, 66 Me. 237; McGlinchy *v.* Hall, 58 Me. 152.

Massachusetts.— Linton *v.* Hurley, 104 Mass. 353; Rice *v.* Stone, 1 Allen (Mass.) 566.

Minnesota.— Hunt *v.* Conrad, 47 Minn. 557, 50 N. W. 614, 14 L. R. A. 512.

Missouri.—Renfro *v.* Prior, 24 Mo. App. 402.

New Hampshire.— Jordan *v.* Gillen, 44 N. H. 65.

New York.— Pulver *v.* Harris, 52 N. Y. 73; Hyslop *v.* Randall, 4 Duer (N. Y.) 660; Hodgman *v.* Western R. Corp., 7 How. Pr. (N. Y.) 492; People *v.* Tioga Common Pleas, 19 Wend. (N. Y.) 73; Hudson *v.* Plets, 11 Paige (N. Y.) 180. But see Birch *v.* Metropolitan El. R. Co., 15 Daly (N. Y.) 453, 8 N. Y. Suppl. 325.

Ohio.— Grant *v.* Ludlow, 8 Ohio St. 1.

Pennsylvania.— Sommer *v.* Wilt, 4 Serg. & R. (Pa.) 19; Yonkers *v.* Pennsylvania R. Co., 18 Lanc. L. Rev. 84.

South Carolina.— Miller *v.* Newell, 20 S. C. 123, 47 Am. Rep. 833.

Texas.—Stewart *v.* Houston, etc., R. Co., 62 Tex. 246.

Virginia.— Dillard *v.* Collins, 25 Gratt. (Va.) 343.

Washington.— Slauson *v.* Schwabacher, 4 Wash. 783, 31 Pac. 329, 31 Am. St. Rep. 948.

Wisconsin.— John V. Farwell Co. *v.* Wolf, 96 Wis. 10, 70 N. W. 289, 71 N. W. 109, 65 Am. St. Rep. 22, 37 L. R. A. 138; St. Joseph Mfg. Co. *v.* Miller, 69 Wis. 389, 34 N. W. 235; Kusterer *v.* Beaver Dam, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725. But see Murray *v.* Buell, 76 Wis. 657, 45 N. W. 667, 20 Am. St. Rep. 92.

United States.— Comegys *v.* Vasse, 1 Pet. (U. S.) 193, 7 L. ed. 108. And no change was made in this rule by the statute providing that suits by assignees could not be prosecuted in the courts of the United States unless the assignors of the causes of action sued on could have prosecuted such suits. Northern Ins. Co. *v.* St. Louis, etc., R. Co., 5 McCrary (U. S.) 126, 15 Fed. 840; Ware *v.* Brown, 2 Bond (U. S.) 267, 29 Fed. Cas. No. 17,170.

England.— Chamberlain *v.* Williamson, 2 M. & S. 408, 15 Rev. Rep. 295.

See 4 Cent. Dig. tit. "Assignments," § 42.

Claim for damages for reading false hour in summons not assignable. Lamphere *v.* Hall, 26 How. Pr. (N. Y.) 509.

Under Wisconsin statutes, actions for assault and battery, for false imprisonment, and other wrongs to the person survive. Yet it has been held that cause of action arising out of a conspiracy to drive defendant out of business is not assignable. Murray *v.* Buell, 76 Wis. 657, 45 N. W. 667, 20 Am. St. Rep. 92.

47. *California.*— Lehmann *v.* Schmidt, 87 Cal. 15, 25 Pac. 161.

Connecticut.— Claim for wilfully and maliciously mutilating property assignable. Whitaker *v.* Gavit, 18 Conn. 522.

Illinois.— But see, *contra,* Chicago, etc., R. Co. *v.* Maher, 91 Ill. 312.

Iowa.— Torts affecting rights *in re* and *ad rem* are assignable. Taylor *v.* Galland, 3 Greene (Iowa) 17. A right of action for negligently killing stock may be assigned. Everett *v.* Central Iowa R. Co., 73 Iowa 442, 35 N. W. 609.

Kansas.— Claim for moneys tortiously obtained may be assigned. Whitford *v.* Lynch,

d. Rights of Action For Fraud or Deceit. Actions for deceit or growing out of frauds which do not properly fall in either of the classes just mentioned have, in some jurisdictions, been said to be assignable, while in others the contrary rule has been laid down.[48]

e. Verdicts and Judgments in Actions For Torts. In some jurisdictions it is

10 Kan. 180; Stewart *v.* Balderston, 10 Kan. 131.

Michigan.— Finn *v.* Corbitt, 36 Mich. 318.

Mississippi.— Claim for negligent killing of a horse is assignable. Chicago, etc., R. Co. *v.* Packwood, 59 Miss. 280.

Missouri.— Snyder *v.* Wabash, etc., R. Co., 86 Mo. 613. Although the code declares that it shall not be deemed to authorize the assignment of things in action not arising out of contract. Doering *v.* Kenamore, 86 Mo. 588 [*overruling* Wallen *v.* St. Louis, etc., R. Co., 74 Mo. 521].

New Hampshire.— Jordan *v.* Gillen, 44 N. H. 424.

New York.—Hyde *v.* Tuffts, 45 N. Y. Super. Ct. 56; Fried *v.* New York Cent. R. Co., 1 Sheld. (N. Y.) 1, 25 How. Pr. (N. Y.) 285. *Compare* Gillet *v.* Fairchild, 4 Den. (N. Y.) 80.

Oregon.— Dahms *v.* Sears, 13 Oreg. 47, 11 Pac. 891.

Tennessee.— East Tennessee, etc., R. Co. *v.* Henderson, 1 Lea (Tenn.) 1.

Texas.— Gulf, etc., R. Co. *v.* Jones, 3 Tex. App. Civ. Cas. § 14.

United States.— Davis *v.* St. Louis, etc., R. Co., 25 Fed. 786.

See 4 Cent. Dig. tit. "Assignments," § 44.

A claim for the conversion of personal property may be assigned, either by assigning the claim or by assigning the property converted.

Alabama.— See, *contra*, Foster *v.* Goree, 5 Ala. 424; Dunklin *v.* Wilkins, 5 Ala. 199; Goodwyn *v.* Lloyd, 8 Port. (Ala.) 237.

California.— Lazard *v.* Wheeler, 22 Cal. 139.

Kentucky.— But see, *contra*, Young *v.* Ferguson, 1 Litt. (Ky.) 298; Stogdell *v.* Fugate, 2 A. K. Marsh. (Ky.) 136.

Maryland.— Leighton *v.* Preston, 9 Gill (Md.) 201.

Michigan.— Smith *v.* Thompson, 94 Mich. 381, 51 N. W. 168; Finn *v.* Corbitt, 36 Mich. 318; Grant *v.* Smith, 26 Mich. 201; Brady *v.* Whitney, 24 Mich. 154; Final *v.* Backus, 18 Mich. 218.

Missouri.— Smith *v.* Kennett, 18 Mo. 154; Dickson *v.* Merchants Elevator Co., 44 Mo. App. 498; Hamlin *v.* Carruthers, 19 Mo. App. 567; Goodger *v.* Finn, 10 Mo. App. 226.

Mississippi.— Davis *v.* Herndon, 39 Miss. 484.

New York.— Richtemeyer *v.* Remsen, 38 N. Y. 206; McKee *v.* Judd, 12 N. Y. 622, 64 Am. Dec. 515; Hall *v.* Robinson, 2 N. Y. 293; Hawk *v.* Thorn, 54 Barb. (N. Y.) 164; Hoy *v.* Smith, 49 Barb. (N. Y.) 360; Genet *v.* Howland, 45 Barb. (N. Y.) 560; Gould *v.* Gould, 36 Barb. (N. Y.) 270; Marvin *v.* Inglis, 39 How. Pr. (N. Y.) 329; Hassell *v.* Borden, 1 Hilt. (N. Y.) 128. An assignment of right of action for conversion carries right of action for prior conversion and negligent loss of property. Whitney *v.* Slauson, 30 Barb. (N. Y.) 276.

North Carolina.— Robertson *v.* Stuart, 2 N. C. 182.

Wisconsin.— McArthur *v.* Green Bay, etc., Canal Co., 34 Wis. 139; Tyson *v.* McGuineas, 25 Wis. 656.

United States.— Tome *v.* Dubois, 6 Wall. (U. S.) 548, 18 L. ed. 943.

See 4 Cent. Dig. tit. "Assignments," § 45.

Right of action against a common carrier to recover the value of property intrusted to him is assignable, and the assignee may sue in his own name. Merrill *v.* Grinnell, 30 N. Y. 594. A right of action against a carrier for injury to goods while the same are in transit is assignable. Norfolk, etc., R. Co. *v.* Read, 87 Va. 185, 12 S. E. 395. To the same effect see Watson *v.* Hoosac Tunnel Line Co., 14 Mo. App. 585; Smith *v.* New York, etc., R. Co., 28 Barb. (N. Y.) 605, 16 How. Pr. (N. Y.) 277; Thurman *v.* Wells, 18 Barb. (N. Y.) 500; Hudson *v.* Kansas Pac. R. Co., 9 Fed. 879.

Right of action for wrongful destruction of property by fire not assignable; so held in Kansas. Kansas Midland R. Co. *v.* Brehm, 54 Kan. 751, 39 Pac. 690; Atchison, etc., R. Co. *v.* Kansas Farmers' Ins. Co., 7 Kan. App. 447, 53 Pac. 607.

Right of action for trespass to land is assignable. More *v.* Massini, 32 Cal. 590; Gates *v.* Comstock, 107 Mich. 546, 65 N. W. 544; Grant *v.* Smith, 26 Mich. 201; Chouteau *v.* Boughton, 100 Mo. 406, 13 S. W. 877. But see, *contra*, Allen *v.* Macon, etc., R. Co., 107 Ga. 838, 33 S. E. 696.

48. May be assigned.—Metropolitan L. Ins. Co. *v.* Fuller, 61 Conn. 252, 23 Atl. 193, 29 Am. St. Rep. 196; Dean *v.* Chandler, 44 Mo. App. 338; Moore *v.* McKinstry, 37 Hun (N. Y.) 194; Graves *v.* Spier, 58 Barb. (N. Y.) 349; Johnston *v.* Bennett, 5 Ahb. Pr. N. S. (N. Y.) 331. But see, *contra*, Zabriskie *v.* Smith, 13 N. Y. 322, 64 Am. Dec. 551; Collins *v.* Suau, 7 Rob. (N. Y.) 623; Hyslop *v.* Randall, 11 How. Pr. (N. Y.) 97. See also cases cited *supra*, notes 16, 17, p. 14.

May not be assigned.— Smith *v.* Thompson, 94 Mich. 381, 54 N. W. 168; Chase *v.* Boughton, 93 Mich. 285, 54 N. W. 44; Lewis *v.* Rice, 61 Mich. 97, 27 N. W. 867; Dayton *v.* Fargo, 45 Mich. 153, 7 N. W. 758; Dickinson *v.* Seaver, 44 Mich. 624, 7 N. W. 182; Morris *v.* Morris, 5 Mich. 171; Killen *v.* Barnes, 106 Wis. 546, 82 N. W. 536; John V. Farwell Co. *v.* Wolf, (Wis. 1897) 70 N. W. 289; Milwaukee, etc., R. Co. *v.* Milwaukee, etc., R. Co., 20 Wis. 165, 88 Am. Dec. 735. See also cases cited *supra*, notes 16, 17, p. 14.

held that, although a right of action for personal torts cannot be assigned, a verdict or judgment to be rendered for such a tort may be assigned.[49]

9. Statutory Rights. There is nothing peculiar to rights conferred upon one by statute that in itself forbids the assignment of such rights. As to such rights, it may be said that the assignability or non-assignability of them depends in each case upon the language of the statute conferring the rights. If the statute forbids the assignment of the right conferred by it, or if the legislative intent, as shown by the act, is to confer a right strictly personal to the person upon whom it is conferred, then such right is not assignable. In the absence of such express or implied prohibition, the assignability or non-assignability of rights conferred by statute is to be governed by the principles governing the assignability or non-assignability of choses in action in general. Statutory rights giving compensation for property loss suffered are, generally, said to be assignable, whereas rights to recover penalties and rights given by statute for the redress of personal wrongs are not assignable.[50]

49. Noble *v.* Hunter, 2 Kan. App. 538, 43 Pac. 994; Kent *v.* Chapel, (Minn. 1897) 70 N. W. 2; Coughlin *v.* New York, etc., R. Co., 71 N. Y. 443, 27 Am. Rep. 75; Zogbaum *v.* Parker, 55 N. Y. 120; Ely *v.* Cooke, 28 N. Y. 365; Rooney *v.* Second Ave. R. Co., 18 N. Y. 368; Mackey *v.* Mackey, 43 Barb. (N. Y.) 58; Nash *v.* Hamilton, 3 Abb. Pr. (N. Y.) 35; Countryman *v.* Boyer, 3 How. Pr. (N. Y.) 386 [but see Brooks *v.* Hanford, 15 Abb. Pr. (N. Y.) 342]; Ladd *v.* Ferguson, 9 Oreg. 180 (holding that such a verdict may be assigned to an attorney); Yonkers *v.* Pennsylvania R. Co., 18 Lanc. L. Rev. 84.

But see, contra, that verdicts for personal torts are not assignable.

California.— Lawrence *v.* Martin, 22 Cal. 173.

Georgia.— Gamble *v.* Central R., etc., Co., 80 Ga. 595, 7 S. E. 315, 12 Am. St. Rep. 276.

Maine.— McGlinchy *v.* Hall, 58 Me. 152.

Massachusetts.— Rice *v.* Stone, 1 Allen (Mass.) 566.

Minnesota.—Hunt *v.* Conrad, 47 Minn. 557, 50 N. W. 614, 14 L. R. A. 512.

South Carolina.— Not assignable except in the interests of justice. Duncan *v.* Bloomstock, 2 McCord (S. C.) 318, 13 Am. Dec. 728.

Before it is rendered, judgment may be assigned. North Chicago St. R. Co. *v.* Ackley, 171 Ill. 100, 49 N. E. 222, 44 L. R. A. 177; Weire *v.* Davenport, 11 Iowa 49, 77 Am. Dec. 132; Patten *v.* Wilson, 34 Pa. St. 299.

While appeal is pending, judgment cannot be assigned. Miller *v.* Newell, 20 S. C. 123, 47 Am. Rep. 833.

What operates as equitable assignment.— An agreement, at the beginning of an action, between attorney and client, that the attorney is to have a certain percentage of the amount recovered in lieu of his fees, operates as an equitable assignment of a judgment thereafter to be obtained in that action, and such an assignment will be preferred to the claim of a creditor who attaches or garnishes the defendant after such an agreement has been made. Schubert *v.* Herzberg, 65 Mo. App. 578.

50. Statutory rights assignable.— *California.*—Claim for damages by a laborer against the owner for not taking a bond from a contractor for a building. Gibbs *v.* Tally, 133 Cal. 373, 63 Pac. 168.

Indiana.— Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320; Louisville, etc., R. Co. *v.* Goodbar, 88 Ind. 213.

Iowa.— Garretson *v.* Ferrall, 78 Iowa 166, 42 N. W. 637, 6 L. R. A. 377. Claim for moneys paid for intoxicating liquors under a statute giving the right to recover such moneys on demand. Sellers *v.* Arie, 99 Iowa 515, 68 N. W. 814.

Kentucky.— Com. *v.* Fuqua, 3 Litt. (Ky.) 41; Jones *v.* Com., 2 Litt. (Ky.) 357; May *v.* Johnston, 2 Bibb (Ky.) 220. Right to reclaim usurious interest paid. Breckenridge *v.* Churchill, 3 J. J. Marsh. (Ky.) 11.

Massachusetts.— Right to reclaim usurious interest paid. Gray *v.* Bennett, 3 Metc. (Mass.) 522.

Minnesota.— Howe *v.* Freidheim, 27 Minn. 294, 7 N. W. 143.

Mississippi.—Laborers and mechanics' liens. Kerr *v.* Moore, 54 Miss. 286. Landlords and laborers' liens. Newman *v.* Greenville Bank, 66 Miss. 323, 5 So. 753. Right given by statute to apply, within a certain time, to set aside a decree of a court against a non-resident upon certain showing being made. Fink *v.* Henderson, 74 Miss. 8, 19 So. 892.

New York.— Quin *v.* Moore, 15 N. Y. 432; Jackson *v.* Daggett, 24 Hun (N. Y.) 204; Dininny *v.* Fay, 38 Barb. (N. Y.) 18; Moses *v.* Waterbury Button Co., 37 N. Y. Super. Ct. 393; Zeltner *v.* Irwin, 21 Misc. (N. Y.) 13, 46 N. Y. Suppl. 852. Cause of action, against directors of a corporation, to charge them, under a statute, with the debt of the corporation. Bonnell *v.* Wheeler, 1 Hun (N. Y.) 332. Claim for services under statute which provides that railroads shall station signalmen at crossings and that, in the absence of their so doing, men shall be stationed there by the county at the expense of the railroad companies. Stoothoff *v.* Long Island R. Co., 32 Hun (N. Y.) 437. Claim, under the Civil

10. Partial Assignments. Partial assignments of such choses in action as are assignable can be so made as to entitle the assignee to the rights of a co-owner against the assignor.[51] In England and under some of the decisions of the American courts an order given by a creditor to his debtor to pay a third party so much money out of a specific fund or debt is a valid assignment of so much of the fund or debt.[52] But the weight of authority in the United States seems to be that such

Damage Act, for the loss of means of support caused by intoxicating liquors can be assigned to a member of the family; but *quære* as to strangers. Ludwig *v.* Glaessel, 34 Hun (N. Y.) 312. Claim for money lost at gaming. Meech *v.* Stoner, 19 N. Y. 26; McDougall *v.* Walling, 48 Barb. (N. Y.) 364; Weyburn *v.* White, 22 Barb. (N. Y.) 82; Hendrickson *v.* Beers, 6 Bosw. (N. Y.) 639. Right to reclaim usurious interest. Wheelock *v.* Lee, 64 N. Y. 242.

South Dakota.— Right of a purchaser at an illegal tax-sale to have his money refunded, with twelve per cent. interest. Erickson *v.* Brookings County, 3 S. D. 434, 53 N. W. 857, 18 L. R. A. 347.

Tennessee.— Right to reclaim usurious interest paid. Spicer *v.* Jarrett, 2 Baxt. (Tenn.) 454.

Vermont.— See Middlebury Bank *v.* Edgerton, 30 Vt. 182.

Washington.— Gilmore *v.* Westerman, 13 Wash. 390, 43 Pac. 345.

Wisconsin.— Knowles *v.* Frawley, 84 Wis. 119, 54 N. W. 107. Right of a laborer in employ of a corporation to enforce payment of wages from a stockholder. Day *v.* Vinson, 78 Wis. 198, 47 N. W. 269, 10 L. R. A. 205.

United States.— *Compare* Fitzgerald *v.* Weidenbeck, 76 Fed. 695.

See 4 Cent. Dig. tit. "Assignments," § 48.

Statutory rights not assignable.— Claim for usurious interest paid to a national bank. Lloyd *v.* Russell First Nat. Bank, 5 Kan. App. 512, 47 Pac. 575. Right, given by statute to parents, to recover damages against one who sells intoxicating drinks to their minor son. McGee *v.* McCann, 69 Me. 79. Penalty, under a statute, to prevent extortion by railroad companies. McBratney *v.* Rome, etc., R. Co., 17 Hun (N. Y.) 385. Claim for damages for death by wrongful act. Texas, etc., R. Co. *v.* Schowalter, 3 Tex. App. Civ. Cas. § 69. See also Mumford *v.* Wright, 12 Colo. App. 214, 55 Pac. 744.

51. *Iowa.*— Conover *v.* Earl, 26 Iowa 167.

Maine.— National Exch. Bank *v.* McLoon, 73 Me. 498, 40 Am. Rep. 388.

Massachusetts.— James *v.* Newton, 142 Mass. 366, 8 N. E. 122, 56 Am. Rep. 692.

Minnesota.— Canty *v.* Latterner, 31 Minn. 239, 17 N. W. 385.

Mississippi.—Whitney *v.* Cowan, 55 Miss. 626; Moody *v.* Kyle, 34 Miss. 506.

Missouri.— St. Louis Fourth Nat. Bank *v.* Noonan, 88 Mo. 372; Johnson County *v.* Bryson, 27 Mo. App. 341.

Nebraska.— Daugherty *v.* Gouff, 23 Nebr. 105, 36 N. W. 351.

New York.— See King *v.* King, 68 N. Y. Suppl. 1089.

Tennessee.— Hicks *v.* Smith, 4 Lea (Tenn.) 459.

Texas.—Harris County *v.* Campbell, 68 Tex. 22, 3 S. W. 243, 2 Am. St. Rep. 467; Olive *v.* San Antonio Builders' Supply Co., (Tex. Civ. App. 1894) 27 S. W. 789.

Vermont.— Burditt *v.* Porter, 63 Vt. 296, 21 Atl. 955, 25 Am. St. Rep. 763.

England.— Rodick *v.* Gandell, 12 Beav. 325, 1 De G. M. & G. 763, 13 Jur. 1087, 19 L. J. Ch. 113, 50 Eng. Ch. 591, 15 Eng. L. & Eq. 22; Burn *v.* Carvalho, 9 L. J. Ch. 65, 4 Myl. & C. 690, 18 Eng. Ch. 690, 7 Sim. 109, 8 Eng. Ch. 109; Row *v.* Dawson, 1 Ves. 331; Yeates *v.* Groves, 1 Ves. Jr. 280.

52. If the order is upon a valuable consideration, it cannot be revoked by the creditor, and binds the creditor's assignee in bankruptcy. As soon as the assignee gives notice to the debtor, it binds the funds in the hands of the debtor, and he cannot pay the debt to the former creditor without first satisfying the assignee. There is no need for any express acceptance of the order by the holder of the fund; he need not attorn to the assignee or enter into any contract to hold the fund for him in order to give validity to the assignment.

Illinois.— Warren *v.* First Nat. Bank, 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746 [*affirming* 50 Ill. App. 193].

Iowa.— McWilliams *v.* Webb, 32 Iowa 577; Cochran *v.* Glover, Morr. (Iowa) 151.

Mississippi.— Hutchinson *v.* Simon, 57 Miss. 628.

Nebraska.— Code *v.* Carlton, 18 Nebr. 328, 25 N. W. 353.

New Jersey.— Lanigan *v.* Bradley, etc., Co., 50 N. J. Eq. 201, 24 Atl. 505; Bayonne *v.* Harlem Bank, 48 N. J. Eq. 646, 25 Atl. 20; Kirtland *v.* Moore, 40 N. J. Eq. 106, 2 Atl. 269.

New York.— Chambers *v.* Lancaster, 160 N. Y. 342, 54 N. E. 707 [*affirming* 3 App. Div. 215, 38 N. Y. Suppl. 253]; Lauer *v.* Dunn, 115 N. Y. 405, 22 N. E. 270, 26 N. Y. St. 412; Brill *v.* Tuttle, 81 N. Y. 454, 37 Am. Rep. 515; People *v.* New York, 77 N. Y. 45; Parker *v.* Syracuse, 31 N. Y. 376; Field *v.* New York, 6 N. Y. 179, 57 Am. Dec. 435; Hall *v.* Buffalo, 1 Keyes (N. Y.) 193.

Texas.— Campbell *v.* Hilldebrandt, (Tex. 1887) 3 S. W. 243; Collins, etc., Co. *v.* U. S. Insurance Co., 7 Tex. Civ. App. 579, 27 S. W. 147.

Virginia.— Shenandoah Valley R. Co. *v.* Miller, 80 Va. 821; Anderson *v.* De Soer, 6 Gratt. (Va.) 363; Brooks *v.* Hatch, 6 Leigh (Va.) 534.

Washington.— Seattle *v.* Liberman, 9 Wash. 276, 37 Pac. 433.

assignments, unless made with the consent of the party liable on account of the chose, are not binding upon him, and he may discharge the liability by settlement with the assignor the same as if no assignment had been made.[53] Courts of equity, however, have always recognized partial assignments of choses in action

West Virginia.— Stevenson *v.* Kyle, 42 W. Va. 229, 24 S. E. 886, 57 Am. St. Rep. 854; Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555. *Compare* St. Lawrence, etc., Mfg. Co. *v.* Price, (W. Va. 1901) 38 S. E. 526.

England.— Bell *v.* London, etc., R. Co., 15 Beav. 548; Burn *v.* Carvalho, 9 L. J. Ch. 65, 4 Myl. & C. 690, 18 Eng. Ch. 690, 7 Sim. 109, 8 Eng. Ch. 109; Yeates *v.* Groves, 1 Ves. Jr. 280. If debtor pays assignor he can be compelled to pay assignee over again. Jones *v.* Farrell, 1 De G. & J. 208, 3 Jur. N. S. 751, 58 Eng. Ch. 162.

Canada.— Farquhar *v.* Toronto, 12 Grant Ch. (U. C.) 186.

53. The reason for this rule is that it would not be just to the debtor to allow the creditor to split his claims so as to require the debtor to deal with a number of creditors instead of with one. It would impose on the debtor the risk of ascertaining the relative shares and rights of the substituted parties.

Alabama.— Kansas City, etc., R. Co. *v.* Robertson, 109 Ala. 296, 19 So. 432.

California.— Thomas *v.* Rock Island Gold, etc., Min. Co., 54 Cal. 578; Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423; Marziou *v.* Pioche, 8 Cal. 522.

Colorado.— French *v.* Deane, 19 Colo. 504, 36 Pac. 609, 24 L. R. A. 387; Smedden *v.* Doerffler, 5 Colo. App. 477, 39 Pac. 68. But see Central Nat. Bank *v.* Spratten, 7 Colo. App. 430, 43 Pac. 1048.

Illinois.— Potter *v.* Gronbeck, 117 Ill. 404, 7 N. E. 586; Chicago, etc., R. Co. *v.* Nichols, 57 Ill. 464; Crosby *v.* Loop, 14 Ill. 330; Miller *v.* Bledsoe, 2 Ill. 530, 32 Am. Dec. 37; But see Warren *v.* Columbus First Nat. Bank, 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746.

Iowa.— Lamb *v.* Council Bluffs Ins. Co., 70 Iowa 238, 30 N. W. 497.

Kansas.— German F. Ins. Co. *v.* Bullene, 51 Kan. 764, 33 Pac. 467.

Kentucky.—Weinstock *v.* Bellwood, 12 Bush (Ky.) 139; Galliopolis Bank *v.* Trimble, 6 B. Mon. (Ky.) 599.

Louisiana.— Garrett *v.* Morgan, 11 Rob. (La.) 447; Le Blanc *v.* East Baton Rouge Parish, 10 Rob. (La.) 25; Cantrelle *v.* Le Goaster, 3 Rob. (La.) 432; Miller *v.* Brigot, 8 La. 533; Kelso *v.* Beaman, 6 La. 87; Russell *v.* Ferguson, 7 Mart. N. S. (La.) 519; King *v.* Havard, 5 Mart. N. S. (La.) 193.

Maine.— Getchell *v.* Maney, 69 Me. 442.

Maryland.— Harris *v.* Baltimore, 73 Md. 22, 17 Atl. 1046, 20 Atl. 111, 985, 25 Am. St. Rep. 565, 8 L. R. A. 677; Sheppard *v.* State, 3 Gill (Md.) 289; Gibson *v.* Finley, 4 Md. Ch. 75.

Massachusetts.— Kingsbury *v.* Burrill, 151 Mass. 199, 24 N. E. 36; Papineau *v.* Naumkeag Steam Cotton Co., 126 Mass. 372; Tripp *v.* Brownell, 12 Cush. (Mass.) 376; Palmer *v.* Merrill, 6 Cush. (Mass.) 282, 52 Am. Dec. 782; Gibson *v.* Cooke, 20 Pick. (Mass.) 15, 32 Am. Dec. 194.

Michigan.— Milroy *v.* The Spurr Mountain Iron Min. Co., 43 Mich. 231, 5 N. W. 287; Flint, etc., R. Co. *v.* Dewey, 14 Mich. 477.

Minnesota.— Schilling *v.* Mullen, 55 Minn. 122, 56 N. W. 586, 43 Am. St. Rep. 475; Dean *v.* St. Paul, etc., R. Co., 53 Minn. 504, 55 N. W. 628.

Missouri.— McLeod *v.* Snyder, 110 Mo. 298, 19 S. W. 494; St. Louis Fourth Nat. Bank *v.* Noonan, 88 Mo. 372; Dickinson *v.* Coates, 79 Mo. 250, 49 Am. Rep. 228; Loomis *v.* Robinson, 76 Mo. 488; Beardslee *v.* Morgner, 73 Mo. 22; Burnett *v.* Crandall, 63 Mo. 410; Love *v.* Fairfield, 13 Mo. 300, 53 Am. Dec. 148; Kiddoo *v.* Ames, 73 Mo. App. 667; Leonard *v.* Missouri, etc., R. Co., 68 Mo. App. 48; Dowell *v.* Vandalia Banking Assoc., 62 Mo. App. 482; Missouri Pac. R. Co. *v.* Wright, 38 Mo. App. 141; Rice *v.* Dudley, 34 Mo. App. 383; Johnson County *v.* Bryson, 27 Mo. App. 341.

New Jersey.— Otis *v.* Adams, 56 N. J. L. 38, 67 Atl. 1092.

Ohio.— Stanbery *v.* Smythe, 13 Ohio St. 495.

Oregon.— McDaniel *v.* Maxwell, 21 Oreg. 202, 27 Pac. 952, 28 Am. St. Rep. 740.

Pennsylvania.—Philadelphia Appeals, 86 Pa. St. 179; Jermyn *v.* Moffitt, 75 Pa. St. 399; Ingraham *v.* Hall, 11 Serg. & R. (Pa.) 78; Sturdevant *v.* Roberts, 5 Kulp (Pa.) 99. But see Grove's Appeal, 103 Pa. St. 562; Caldwell *v.* Hartupee, 70 Pa. St. 74; Miller *v.* Insurance Co., 5 Phila. (Pa.) 12, 19 Leg. Int. (Pa.) 38; Fairgrieves *v.* Lehigh Nav. Co., 2 Phila. (Pa.) 182, 13 Leg. Int. (Pa.) 356.

South Carolina.— Hughes *v.* Kiddell, 2 Bay (S. C.) 324; Lowndes *v.* Ladson, Rich. Eq. Cas. (S. C.) 315.

Tennessee.— Hicks *v.* Smith, 4 Lea (Tenn.) 459; Gardner *v.* Smith, 5 Heisk. (Tenn.) 256.

Vermont.— Burditt *v.* Porter, 63 Vt. 296, 21 Atl. 955, 25 Am. St. Rep. 763; Angus *v.* Robinson, 59 Vt. 585, 8 Atl. 497, 59 Am. Rep. 758; Carter *v.* Nichols, 58 Vt. 553, 5 Atl. 197.

Wisconsin.— Skobis *v.* Ferge, 102 Wis. 122, 78 N. W. 426.

United States.— Kendall *v.* U. S., 7 Wall. (U. S.) 113, 19 L. ed. 85. See Christmas *v.* Gaines, 14 Wall. (U. S.) 69, 20 L. ed. 762.

See 4 Cent. Dig. tit. "Assignments," § 55.

An assignment of a claim for fraud in the hands of a receiver is not made a partial assignment by reason of the fact that the receiver holds the fund subject to costs. Garniss *v.* San Francisco Super. Ct., 88 Cal. 413, 26 Pac. 351.

for many purposes, and will protect the assignees of such choses whenever they can do so without working a hardship upon the debtor.[54]

III. MODE AND SUFFICIENCY.

A. Parties to the Assignment. An assignment being a contract, there must, of course, be two parties — one, called the assignor, giving, and the other, called the assignee, taking, the assignment.[55]

B. Necessary Elements of Assignment — 1. ACCEPTANCE BY ASSIGNEE. It may be stated as a general proposition that, in order to render an assignment effective, it must be communicated to the assignee, and his acceptance or assent thereto be given.[56]

54. In equity the interests of all parties can be determined in a single suit. The debtor can bring the entire fund into court, and runs no risk of its improper distribution. If he is not at fault costs may be awarded in his favor.

California.— Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423.

Illinois.—Warren *v.* Columbus First Nat. Bank, 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746; Phillips *v.* Edsall, 127 Ill. 535, 20 N. E. 801; Pomeroy *v.* Manhattan L. Ins. Co., 40 Ill. 398; National Safe, etc., Co. *v.* People, 50 Ill. App. 336.

Indiana.— Lapping *v.* Duffy, 47 Ind. 51; Groves *v.* Euby, 24 Ind. 418; Wood *v.* Wallace, 24 Ind. 226.

Iowa.— Des Moines County *v.* Hinkley, 62 Iowa 637, 17 N. W. 915.

Maine.— Horne *v.* Stevens, 79 Me. 262, 9 Atl. 616; National Exch. Bank *v.* McLoon, 73 Me. 498, 40 Am. Rep. 388.

Massachusetts.— Richardson *v.* White, 167 Mass. 58, 44 N. E. 1072; James *v.* Newton, 142 Mass. 366, 8 N. E. 122, 56 Am. Rep. 692.

Minnesota.— Schilling *v.* Mullen, 55 Minn. 122, 56 N. W. 586, 43 Am. St. Rep. 475; Dean *v.* St. Paul, etc., R. Co., 53 Minn. 504, 55 N. W. 628.

New Jersey.— Brown *v.* Dunn, 50 N. J. L. 111, 11 Atl. 149; Lannigan *v.* Bradley, etc., Co., 50 N. J. Eq. 201, 24 Atl. 505.

New York.— Field *v.* New York, 6 N. Y. 179, 57 Am. Dec. 435; Jones *v.* New York, 47 N. Y. Super. Ct. 242; Danvers *v.* Lugar, 30 Misc. (N. Y.) 98, 61 N. Y. Suppl. 778; Cook *v.* Genesee Mut. Ins. Co., 8 How. Pr. (N. Y.) 514.

North Carolina.— Etheridge *v.* Vernoy, 74 N. C. 800.

Oregon.— McDaniel *v.* Maxwell, 21 Oreg. 202, 27 Pac. 952, 28 Am. St. Rep. 740.

Pennsylvania.— Geist's Appeal, 104 Pa. St. 351; Hancock's Appeal, 34 Pa. St. 155.

South Dakota.— Sykes *v.* Canton First Nat. Bank, 2 S. D. 242, 49 N. W. 1058.

Tennessee.— Gardner *v.* Smith, 5 Heisk. (Tenn.) 256.

55. Mowry *v.* Wood, 12 Wis. 413; Galloway *v.* Finley, 12 Pet. (U. S.) 264, 9 L. ed. 1079.

As to parties to contracts, generally, see CONTRACTS.

As to parties to particular contracts see HUSBAND AND WIFE; INFANTS; INSANE PERSONS; PARTNERSHIP; PRINCIPAL AND AGENT, and like titles.

A government officer received from another officer funds for the use of the government, and gave his written receipt and promise to account therefor. The receipt and promise were assigned to the government under authority of an act of congress. It was held that the government could maintain an action based on the assignment. U. S. *v.* Buford, 3 Pet. (U. S.) 12, 7 L. ed. 585.

56. *Kansas.*— Brockmeyer *v.* Washington Nat. Bank, 40 Kan. 744, 21 Pac. 300.

Louisiana.— Relf *v.* Boro, 17 La. Ann. 258.

Maine.— Mitchell *v.* Allen, 10 Me. 450.

Mississippi.— Hart *v.* Forbes, 60 Miss. 745.

Missouri.— Nicholson *v.* Walker, 25 Mo. App. 368.

New York.— Kelly *v.* Roberts, 40 N. Y. 432.

Tennessee.—Dews *v.* Olwill, 3 Baxt. (Tenn.) 432.

Canada.— Muir *v.* Waddell, 14 Grant Ch. (U. C.) 488.

As to acceptance, generally, see CONTRACTS.

Acceptance need not be by the assignee himself, but may be by his agent.—And where the assignor is the agent of the assignee, he may, on behalf of the assignee, accept the assignment of a chose in action from himself. Randolph Bank *v.* Armstrong, 11 Iowa 515; Tompkins *v.* Wheeler, 16 Pet. (U. S.) 106, 10 L. ed. 903. See, generally, PRINCIPAL AND AGENT.

Presumption and burden of proof.— Where an assignment is directly to a party having a beneficial interest under it, the presumption is that he accepts it, and affirmative proof of acceptance is not required; but the party impeaching it must disprove acceptance. Van Buskirk *v.* Warren, 4 Abb. Dec. (N. Y.) 457; Moir *v.* Brown, 14 Barb. (N. Y.) 39; Townson *v.* Tickell, 3 B. & Ald. 31, 22 Rev. Rep. 291, 5 E. C. L. 28. It has been held that, not only in a case of general assignment for the benefit of creditors, but in the case of special assignments, the assent of the beneficiary will be presumed unless his dissent be expressed. Randolph Bank *v.* Armstrong, 11 Iowa 515. See also Brooks *v.* Marbury, 11 Wheat. (U. S.) 78, 6 L. ed. 423.

2. Delivery of Subject-Matter.[57] In order to complete an assignment there should be a delivery of the thing assigned.[58] In regard to personal property — that is, choses in possession — it has been held that while, as between the parties, delivery of actual possession thereof is not necessary to the passing of the property therein,[59] it may be necessary in order to bind creditors of, and *bona fide* purchasers from, the assignor.[60] But, where the actual possession is impossible of delivery, it is sufficient, even as against creditors and purchasers, if there is a symbolical delivery, or if the assignee takes actual possession within a reasonable time after it is possible for him so to do.[61]

3. Consideration[62] **— a. Necessity of.** Like other personal property, a chose in action may be the subject of a gift;[63] but, in order that the assignment may take

57. As to delivery, generally, see Contracts.

58. **Delivery necessary.**—Marshall *v.* Morehouse, 14 La. Ann. 689; White *v.* Kilgore, 77 Me. 571, 1 Atl. 739; Leonard *v.* Kebler, 50 Ohio St. 444, 34 N. E. 659 [*affirming* 3 Ohio Cir. Ct. 600]; Shattler *v.* Taft, 4 Cinc. L. Bul. 419, 7 Ohio Dec. (Reprint) 631; Ruth *v.* Loos, 1 Leg. Chron. (Pa.) 166; Whittle *v.* Skinner, 23 Vt. 531. *Compare* Gregory *v.* Dozier, 51 N. C. 4.

As long as anything remains to be done by the assignor, and there has been no actual delivery of the thing assigned, no title will pass to the assignee. Whittle *v.* Skinner, 23 Vt. 531. *Compare* Piper's Estate, 11 Phila. (Pa.) 141, 33 Leg. Int. (Pa.) 228, 2 Wkly. Notes Cas. (Pa.) 711. Where, though a bond and mortgage were delivered, the parties intended that there should be a written assignment, the mere manual delivery of the bond and mortgage did not operate as an assignment thereof. Strause *v.* Josephthal, 77 N. Y. 622.

The delivery of a copy of a book-account has been held a sufficient delivery. But this would not exclude other methods of assigning the account. Porter *v.* Bullard, 26 Me. 448; Robbins *v.* Bacon, 3 Me. 346; Akin *v.* Meeker, 78 Hun (N. Y.) 387, 29 N. Y. Suppl. 132, 60 N. Y. St. 697. *Contra*, see Cornwell *v.* Baldwin's Bank, 12 N. Y. App. Div. 227, 43 N. Y. Suppl. 771.

Where the assignment is by writing, the delivery thereof is a sufficient delivery of the chose in action. Planters, etc., Ins. Co. *v.* Tunstall, 72 Ala. 142; Tatum *v.* Ballard, 94 Va. 370, 26 S. E. 871.

59. **Actual delivery not necessary when.**—Parks *v.* Hall, 2 Pick. (Mass.) 206; Harris *v.* D'Wolf, 4 Pet. (U. S.) 147, 7 L. ed. 811; Wheeler *v.* Sumner, 4 Mason (U. S.) 183, 29 Fed. Cas. No. 17,501.

Constructive delivery to pass beneficial interest.—In the assignment of choses in action, while there must be some sort of a delivery (Marshall *v.* Morehouse, 14 La. Ann. 689; White *v.* Kilgore, 77 Me. 571, 1 Atl. 739; Whittle *v.* Skinner, 23 Vt. 531), it need not be an actual delivery in order to pass the beneficial interest, but it may be constructive (McGee *v.* Riddlesbarger, 39 Mo. 365; Motz *v.* Stowe, 83 N. C. 434; Spring *v.* South Carolina Ins. Co., 8 Wheat. (U. S.) 268, 5 L. ed. 614), even as against the creditors of the assignor (Fisher *v.* Bradford, 7 Me. 28; Richardson *v.* Lincoln, 5 Metc. (Mass.) 201; Hedge *v.* Drew, 12 Pick. (Mass.) 141, 22 Am. Dec. 416; Howe *v.* Ould, 28 Gratt. (Va.) 1; Hutchison *v.* Rust, 2 Gratt. (Va.) 394; Lysaght *v.* Bryant, 9 C. B. 46, 19 L. J. C. P. 160, 67 E. C. L. 46).

What constitutes constructive delivery.—Any act of the assignor indicating that he relinquishes to the assignee the control over the chose in action will amount to a constructive delivery thereof.

Maine.—White *v.* Kilgore, 77 Me. 571, 1 Atl. 739.

Massachusetts.— Richardson *v.* White, 167 Mass. 58, 44 N. E. 1072; Stearns *v.* Quincy Mut. F. Ins. Co., 124 Mass. 61, 26 Am. Rep. 647; Providence County Bank *v.* Benson, 24 Pick. (Mass.) 204.

New Hampshire.— Brewer *v.* Franklin Mills, 42 N. H. 292.

New York.—Williams *v.* Ingersoll, 89 N. Y. 508.

North Carolina.— Motz *v.* Stowe, 83 N. C. 434; Winberry *v.* Koonce, 83 N. C. 351.

Pennsylvania.— See Lightner's Appeal, 82 Pa. St. 301.

Virginia.— Tatum *v.* Ballard, 94 Va. 370, 26 S. E. 871; Howe *v.* Ould, 28 Gratt. (Va.) 1; Daniels *v.* Conrad, 4 Leigh (Va.) 401.

60. Marshall *v.* Morehouse, 14 La. Ann. 689. See Wells *v.* Briscoe, 3 Gill (Md.) 406.

61. **Actual possession impossible of delivery.**— Porter *v.* Bullard, 26 Me. 448; Harris *v.* D'Wolf, 4 Pet. (U. S.) 147, 7 L. ed. 811; Wheeler *v.* Sumner, 4 Mason (U. S.) 183. Where the officers of a corporation agreed to loan to it their notes on condition that it should deliver certain securities to trustees to secure the notes, and the officers gave their notes, and the company assigned to the trustees certain notes, which assignment could not take effect owing to the securities being already pledged, but, some time later, the debt for which the securities were pledged was discharged and the securities were then transferred to the trustees, it was held that the assignment to the trustees took effect as of the date of the assignment to them, free from equities arising before the delivery of the securities to them. Nelson *v.* Edwards, 40 Barb. (N. Y.) 279.

62. As to consideration, generally, see Contracts.

63. **Operating as a gift.**—Pawling *v.* Speed, Litt. Sel. Cas. (Ky.) 77, 12 Am. Dec. 269;

effect as a gift as between the parties thereto, it must be fully executed.[64] Except in the case of gifts, a valuable consideration is, of course, necessary to support the assignment as between the assignor and the assignee,[65] and as between the assignee and creditors of the assignor.[66]

b. Sufficiency. As to what is a sufficient consideration to support an assignment, it may be said that the sufficiency of the consideration is to be governed by the rules applicable to other cases of contract.[67] The securing of a preëxisting debt furnishes a valuable consideration for an assignment.[68] Assignments under seal *prima facie* import a consideration.[69] But such presumption is not a strong one and is easily overcome by evidence to the contrary.[70]

c. Who May Question. As to the obligee in the chose, the rule is sometimes broadly stated to be that the subject of consideration, or want thereof, is not open to him, his obligation being to pay, and it being immaterial to him whether the party to whom he is compelled to pay gave value for the obligation or not, the only interest of the obligee being that he shall be required to pay his debt to but one person.[71] But the better doctrine seems to be to confine the rule to assign-

Kimball *v.* Leland, 110 Mass. 325; Briscoe *v.* Eckley, 35 Mich. 112. See also, generally, GIFTS.

64. Must be fully executed.—Burke *v.* Steel, 40 Ga. 217; Pace *v.* Pace, 73 N. C. 119; Mathis *v.* Hammond, 9 Rich. Eq. (S. C.) 137. See also, generally, GIFTS.

65. As between assignor and assignee.— *California.*— Mayer *v.* Child, 47 Cal. 142.

Maine.— Waterman *v.* Merrow, 94 Me. 237, 47 Atl. 157.

New Jersey.—Andrews *v.* Rue, 34 N. J. L. 402.

New York.— Tallman *v.* Hoey, 89 N. Y. 537; Risley *v.* Smith, 39 N. Y. Super. Ct. 137.

North Carolina.— Pace *v.* Pace, 73 N. C. 119.

Pennsylvania.— Dale *v.* Land Co., 3 Phila. (Pa.) 328, 16 Leg. Int. (Pa.) 21.

66. As between assignee and assignor's creditors.— Haynes *v.* Thompson, 80 Me. 125, 13 Atl. 276; Perkins *v.* Parker, 1 Mass. 117; Hyatt *v.* Prentzell, 20 Leg. Int. (Pa.) 133.

67. Follows rules applicable to other contracts.— *Illinois.*— D'Wolf *v.* Pratt, 42 Ill. 198.

Indiana.—A promise by one that he will pay to another the amount of a note, unless a court of competent jurisdiction decides that he cannot set the note off against an assignee of a claim of the maker of the note against him, is a good consideration for the assignment of the note to him. Wolf *v.* Smith, 14 Ind. 360.

Kentucky.— Williamson *v.* Yager, 91 Ky. 282, 14 Ky. L. Rep. 273, 15 S. W. 660, 34 Am. St. Rep. 184.

Maryland.— Whitridge *v.* Barry, 42 Md. 140.

New York.— St. Mark's Church *v.* Teed, 120 N. Y. 583, 24 N. E. 1014 [*affirming* 44 Hun (N. Y.) 349]; Hanes *v.* Sackett, 67 N. Y. Suppl. 843.

North Carolina.— An agreement to support assignor, without any further circumstances showing for what period of time and in what manner, is too indefinite to furnish the consideration for an assignment. Pace *v.* Pace, 73 N. C. 119.

Ohio.— Windhorst *v.* Wilhelms, 1 Ohio Cir. Dec. 17, 1 Ohio Cir. Ct. 28, 13 Cinc. L. Bul. 361.

Wisconsin.—Ingram *v.* Osborn, 70 Wis. 184, 35 N. W. 304.

See 4 Cent. Dig. tit. "Assignments," § 113.

68. Securing preëxisting debt.— *Alabama.* — Jones *v.* Lowery Banking Co., 104 Ala. 252, 16 So. 75.

Iowa.— Moore *v.* Lowrey, 25 Iowa 336, 95 Am. Dec. 790.

Maine.— Hardy *v.* Colby, 42 Me. 381.

Massachusetts.— Putnam *v.* Story, 132 Mass. 205.

Michigan.— Shafford *v.* Detroit Sav. Bank, (Mich. 1900) 84 N. W. 624.

New York.— Seymour *v.* Wilson, 19 N. Y. 417; Stover *v.* Eycleshimer, 3 Keyes (N. Y.) 620; English *v.* Lee, 63 Hun (N. Y.) 572, 18 N. Y. Suppl. 576; Risley *v.* Smith, 39 N. Y. Super. Ct. 137. *Contra,* Rupp *v.* Blanchard, 34 Barb. (N. Y.) 627.

Vermont.— Blin *v.* Pierce, 20 Vt. 25.

See 4 Cent. Dig. tit. "Assignments," § 114.

69. Presumption as to instrument under seal.— Hancock's Appeal, 34 Pa. St. 155; Mutual Protective Ins. Co. *v.* Hamilton, 5 Sneed (Tenn.) 268. See CONTRACTS.

70. Presumption may be rebutted.—Twitchell *v.* McMurtrie, 77 Pa. St. 383. See CONTRACTS.

After a lapse of fifty years, an assignment under which claim has been asserted for many years will be presumed to be genuine. Consideration cannot he expected to be clearly shown after lapse of such length of time. Lewis *v.* Baird, 3 McLean (U. S.) 56, 15 Fed. Cas. No. 8,316.

But a written assignment does not import valuable consideration. Wood *v.* Duval, 9 Leigh (Va.) 6. But see Thomas *v.* Sturges, 32 Miss. 261.

71. Obligee in the chose.— Guy *v.* Craighead, 6 N. Y. App. Div. 463, 39 N. Y. Suppl. 688; Merrick *v.* Brainard, 38 Barb. (N. Y.) 574; Richardson *v.* Mead, 27 Barb. (N. Y.)

ments recognized, either at common law or under statutes, as carrying the legal title to the chose assigned;[72] and to require proof of consideration in cases of assignments that are recognized only in courts of equity, which courts recognize the assignee in this class of cases solely because he is a purchaser for value.[73]

4. Notice to Debtor — a. Necessity. As between assignor and assignee it is not necessary to the validity of an assignment that the debtor be notified thereof;[74] and, as between successive assignees of the same chose from the same person, the assignee prior in time will be prior in right, although he has failed to

178; Mills *v.* Fox, 4 E. D. Smith (N. Y.) 220; Beach *v.* Raymond, 2 E. D. Smith (N. Y.) 496; Norton *v.* McCarthy, 10 Misc. (N. Y.) 222, 30 N. Y. Suppl. 1057; Burtnett *v.* Gwynne, 2 Abb. Pr. (N. Y.) 79; Texas, etc., R. Co. *v.* Davis, 93 Tex. 562, 54 S. W. 381, 55 S. W. 562.

72. The better doctrine.—*Colorado.*—Marks *v.* Anderson, 1 Colo. App. 1, 27 Pac. 168.

Florida.— Sammis *v.* Wightman, 31 Fla. 70, 12 So. 536.

Illinois.— Beach *v.* Derby, 19 Ill. 617.

Indiana.— Pugh *v.* Miller, 126 Ind. 189, 25 N. E. 1040; Morrison *v.* Ross, 113 Ind. 186, 14 N. E. 479; Hardin *v.* Helton, 50 Ind. 319; Tibbetts *v.* Thatcher, 14 Ind. 86.

Iowa.— Gere *v.* Council Bluffs Ins. Co., 67 Iowa 272, 23 N. W. 137, 25 N. W. 159; Whittaker *v.* Johnson County, 10 Iowa 161.

Massachusetts.— Ensign *v.* Kellogg, 4 Pick. (Mass.) 1.

Nebraska.— Barnett *v.* Ellis, 34 Nebr. 539, 52 N. W. 368.

New York.—Deach *v.* Perry, 6 N. Y. Suppl. 940, 25 N. Y. St. 891; Cunningham *v.* Freeborn, 11 Wend. (N. Y.) 240. Where statute requires that suit shall be brought in name of real party in interest it is competent to show that the assignment was on secret trust for the assignor. Butler *v.* Niles, 26 How. Pr. (N. Y.) 61.

United States.— Stanley *v.* Albany County, 21 Blatchf. (U. S.) 249, 15 Fed. 483.

England.— Harding *v.* Harding, 17 Q. B. D. 442, 55 L. J. Q. B. 462, 34 Wkly. Rep. 775; Walker *v.* Bradford Old Bank, 12 Q. B. D. 511, 53 L. J. Q. B. 280, 32 Wkly. Rep. 645; Lee *v.* Magrath, 10 L. R. Ir. 313.

See 4 Cent. Dig. tit. "Assignments," § 112.

Where the debtor has recognized the assignment and has promised to pay the assignee, the latter need not show any consideration. Norris *v.* Hall, 18 Me. 332.

73. *Alabama.*— Hall *v.* Alexander, 9 Ala. 219.

California.— Matter of Webb, 49 Cal. 541.

Connecticut.— Under statute, assignee cannot maintain action in his own name unless assignment is *bona fide* made to him. Bixby *v.* Parsons, 49 Conn. 483, 44 Am. Rep. 246.

Kansas.—Bartholomew *v.* Salina First Nat. Bank, 57 Kan. 594, 47 Pac. 519.

Maine.— Haynes *v.* Thompson, 80 Me. 125, 13 Atl. 276; Dunning *v.* Sayward, 1 Me. 366.

Massachusetts.—Perkins *v.* Parker, 1 Mass. 117.

Minnesota.—Lamprey *v.* Lamprey, 29 Minn. 151, 12 N. W. 514.

New York.—People's Bank *v.* St. Anthony's Roman Catholic Church, 109 N. Y. 512, 17 N. E. 408, 16 N. Y. St. 856; Wilbur *v.* Warren, 104 N. Y. 192, 10 N. E. 263; Moffatt *v.* Bailey, 22 N. Y. App. Div. 632, 47 N. Y. Suppl. 983; Shaw *v.* Tonns, 20 N. Y. App. Div. 39, 46 N. Y. Suppl. 545; Nelson *v.* Edwards, 40 Barb. (N. Y.) 279; Rupp *v.* Blanchard, 34 Barb. (N. Y.) 627; Risley *v.* Smith, 39 N. Y. Super. Ct. 137.

North Carolina.— Pace *v.* Pace, 73 N. C. 119; Cannaday *v.* Shepard, 55 N. C. 224.

Pennsylvania.— Lennig's Estate, 182 Pa. St. 485, 38 Atl. 466, 61 Am. St. Rep. 725, 38 L. R. A. 378; Kennedy *v.* Ware, 1 Pa. St. 445, 44 Am. Dec. 145.

Tennessee.— Spring City Bank *v.* Rhea County, (Tenn. Ch. 1900) 59 S. W. 442.

Wisconsin.— Smith *v.* Wood, 12 Wis. 382.

England.— *In re* Richardson, 30 Ch. D. 396.

See 4 Cent. Dig. tit. "Assignments," § 112.

Creditors of the debtor cannot question the want of consideration. Beach *v.* Derby, 19 Ill. 617.

Original assignor of a note cannot question the consideration for an assignment by the purchaser of the note who has elected to rescind the purchase on the ground of fraud and has assigned the claim to a resident of another county in order that suit might be brought in that county. Hicks *v.* Steel, (Mich. 1901) 85 N. W. 1121.

74. As between assignor and assignee.— *Colorado.*— Jackson *v.* Hamm, 14 Colo. 58, 23 Pac. 88.

Connecticut.— Bishop *v.* Holcomb, 10 Conn. 444.

Massachusetts.— Allyn *v.* Allyn, 154 Mass. 570, 28 N. E. 779.

New Hampshire.— Marsh *v.* Garney, 69 N. H. 236, 45 Atl. 745.

New Jersey.— Board of Education *v.* Duparquet, 50 N. J. Eq. 234, 24 Atl. 922.

New York.—Crosby *v.* Kropf, 33 N. Y. App. Div. 446, 54 N. Y. Suppl. 76. See Fortunato *v.* Patten, 5 Misc. (N. Y.) 234, 25 N. Y. Suppl. 333 [*reversed* in 147 N. Y. 277, 41 N. E. 572].

Ohio.— Adae *v.* Moses, 7 Ohio Dec. (Reprint) 419, 2 Cinc. L. Bul. 338.

Tennessee.— Smith *v.* Hubbard, 85 Tenn. 306, 2 S. W. 569.

England.— Beavan *v.* Oxford, 6 De G. M. & G. 507, 2 Jur. N. S. 121, 25 L. J. Ch. 299, 4 Wkly. Rep. 275, 55 Eng. Ch. 395.

See 4 Cent. Dig. tit. "Assignments," § 116.

Nor as between assignee and those claiming under him as next of kin is such notice necessary. Kimball *v.* Leland, 110 Mass. 325.

give notice of the assignment to the debtor, and a subsequent assignee has given such notice.[75] The assignment will also be complete as against creditors of the assignor garnishing the chose after assignment and before notice of the assignment to the debtor, provided that notice of the assignment be given to the debtor in time to permit him to disclose the assignment in his answer to the garnishee process.[76] But, until notice of the assignment is given to the

The assignee may sue debtor, without first giving him notice of the assignment. Cunningham *v.* Norton, (Cal. 1895) 40 Pac. 491.

75. As between successive assignees.— White *v.* Wiley, 14 Ind. 496; Freund *v.* Importers, etc., Nat. Bank, 76 N. Y. 352; Greentree *v.* Rosenstock, 61 N. Y. 583. But see Muir *v.* Schenck, 3 Hill (N. Y.) 228, 38 Am. Dec. 633; Inglis *v.* Inglis, 2 Dall. (Pa.) 45, 1 L. ed. 282. *Contra*, Merchants', etc., Bank *v.* Hewitt, 3 Iowa 93, 66 Am. Dec. 49; Brice *v.* Bannister, 3 Q. B. D. 569, 47 L. J. Q. B. 722, 38 L. T. Rep. N. S. 739, 26 Wkly. Rep. 670; Johnstone *v.* Cox, 16 Ch. D. 571; Meux *v.* Bell, 1 Hare 73, 6 Jur. 123, 11 L. J. Ch. 77, 23 Eng. Ch. 73; Loveridge *v.* Cooper, 2 L. J. Ch. O. S. 75, 3 Russ. 31, 27 Rev. Rep. 1, 3 Eng. Ch. 31; Dearle *v.* Hall, 2 L. J. Ch. O. S. 62, 3 Russ. 1, 27 Rev. Rep. 1, 3 Eng. Ch. 1; Foster *v.* Blackstone, 1 Myl. & K. 297, 2 L. J. Ch. 84, 7 Eng. Ch. 297. But see Davies *v.* Austen, 1 Ves. Jr. 247.

76. As against assignor's creditors.— *Alabama.*— Jones *v.* Lowery Banking Co., 104 Ala. 252, 16 So. 75.

Delaware.— Dawson *v.* Jones, 2 Houst. (Del.) 412.

Georgia.— Whitten *v.* Little, 2 Ga. Dec. 99.

Illinois.— Savage *v.* Gregg, 150 Ill. 161, 37 N. E. 312 [*affirming* 51 Ill. App. 281]; Dressor *v.* McCord, 96 Ill. 389; Hodson *v.* McConnel, 12 Ill. 170; Woodward *v.* Brooks, 18 Ill. App. 150.

Iowa.— Smith *v.* Clarke, 9 Iowa 241; Walters *v.* Washington Ins. Co., 1 Iowa 404, 63 Am. Dec. 451.

Kentucky.— Stockton *v.* Hall, Hard. (Ky.) 160.

Maine.— Littlefield *v.* Smith, 17 Me. 327.

Maryland.— Brady *v.* State, 26 Md. 290.

Massachusetts.— Thayer *v.* Daniels, 113 Mass. 129; Gardner *v.* Hoeg, 18 Pick. (Mass.) 168; Dix *v.* Cobb, 4 Mass. 508; Wakefield *v.* Martin, 3 Mass. 558. But see Warren *v.* Copelin, 4 Metc. (Mass.) 594.

Minnesota.— Lewis *v.* Bush, 30 Minn. 244, 15 N. W. 113.

New Hampshire.— Ricker *v.* Cross, 5 N. H. 570, 22 Am. Dec. 480.

New Jersey.— Bradley *v.* Berns, 51 N. J. Eq. 437, 26 Atl. 908.

New York.— Bush *v.* Lathrop, 22 N. Y. 535.

Pennsylvania.—Stevens *v.* Stevens, 1 Ashm. (Pa.) 190.

Rhode Island.—Abbott *v.* Davidson, 18 R. I. 91, 25 Atl. 839; Lee *v.* Robinson, 15 R. I. 369, 5 Atl. 290; Tiernay *v.* McGarity, 14 R. I. 231; Northam *v.* Cartright, 10 R. I. 19.

Tennessee.— Gayoso Sav. Inst. *v.* Fellows, 6 Coldw. (Tenn.) 467.

Virginia.— Wilson *v.* Davisson, 5 Munf. (Va.) 178; Tazewell *v.* Barrett, 4 Hen. & M. (Va.) 259.

Washington.— Bellingham Bay Boom Co. *v.* Brisbois, 14 Wash. 173, 44 Pac. 153.

West Virginia.—Tingle *v.* Fisher, 20 W. Va. 497; Valley Bank *v.* Gettinger, 3 W. Va. 309.

England.— Badeley *v.* Consolidated Bank, 38 Ch. D. 238, 57 L. J. Ch. 468, 59 L. T. Rep. N. S. 419, 36 Wkly. Rep. 745; Scott *v.* Hastings, 4 Kay & J. 633, 5 Jur. N. S. 450, 6 Wkly. Rep. 862; Pickering *v.* Ilfracombe R. Co., L. R. 3 C. P. 235, 37 L. J. C. P. 118, 17 L. T. Rep. N. S. 650, 16 Wkly. Rep. 458.

But see, *contra*, the following cases:

Connecticut.—Foster *v.* Mix, 20 Conn. 395; Vanbuskirk *v.* Hartford F. Ins. Co., 14 Conn. 141, 36 Am. Dec. 473; Bishop *v.* Holcomb, 10 Conn. 444; Judah *v.* Judd, 5 Day (Conn.) 534; Woodbridge *v.* Perkins, 3 Day (Conn.) 364.

Illinois.—Moore *v.* Gravelot, 3 Ill. App. 442.

Louisiana.— Newman *v.* Irwin, 43 La. Ann. 1114, 10 So. 181; Risley's Succession, 11 Rob. (La.) 298; Copley *v.* Dowell, 1 Rob. (La.) 26; Cox *v.* White, 2 La. 422; Styles *v.* McNeil, 6 Mart. N. S. (La.) 296; Thomas *v.* Callihan, 5 Mart. N. S. (La.) 180; Carlin *v.* Dumartrait, 5 Mart. N. S. (La.) 20; Bainbridge *v.* Clay, 4 Mart. N. S. (La.) 56; Badnal *v.* Moore, 9 Mart. (La.) 403.

Maine.— McAllister *v.* Brooks, 22 Me. 80, 38 Am. Dec. 282.

Massachusetts.— Wood *v.* Partridge, 11 Mass. 488; Foster *v.* Sinkler, 4 Mass. 450; Comstock *v.* Farnum, 2 Mass. 96.

Missouri.— Murdoch *v.* Finney, 21 Mo. 138.

New York.— Bishop *v.* Garcia, 14 Abb. Pr. N. S. (N. Y.) 69.

Tennessee.— Flickey *v.* Loney, 4 Baxt. (Tenn.) 169; Clodfelter *v.* Cox, 1 Sneed (Tenn.) 330, 60 Am. Dec. 157; Hobson *v.* Stevenson, 1 Tenn. Ch. 203.

Vermont.— Nichols *v.* Hooper, 61 Vt. 295, 17 Atl. 134; Seward *v.* Garlin, 33 Vt. 583; Williams *v.* Shepherd, 33 Vt. 164; Webster *v.* Moranville, 30 Vt. 701; Ward *v.* Morrison, 25 Vt. 593; Peck *v.* Walton, 25 Vt. 33.

See 4 Cent. Dig. tit. "Assignments," § 116.

A judgment, rendered against the debtor of the assignor, upon garnishment at the instance of a creditor of the assignor, was set aside, before any part of the judgment had been paid, at the suit of an assignee, whose assignment antedated the garnishment but who had not given notice thereof. It was there said that a party making an absolute assignment of a chose in action parts with all his interest in the same, and a subsequent attaching creditor or assignee can acquire no interest therein; that if the debtor pays the assignor without notice of the assignment,

debtor, it will not bind him so as to deprive him of equities arising between the date of the assignment and the date when he received notice thereof.[77] As to such equities, the assignment takes effect from the time the debtor receives notice and not from the time of the assignment.[78] After the debtor has received notice of the assignment the chose becomes fixed in his hands, within the limitations hereafter stated,[79] and he cannot discharge the liability by payment to any party other than the assignee, or in any way change the rights of the assignee as they stood at the time of the notice,[80] except that he may avail himself of a set-off against the assignor arising thereafter out of the same contract or transaction which gave rise to the debt assigned.[81]

b. By Whom and To Whom Given. The notice must be given by the assignee, or by his procurement,[82] to the debtor or the latter's duly authorized agent.[83] But,

the latter will be held to have received the same as trustee for the assignee, and even a judgment obtained against the debtor as garnishee, before payment thereof, will not defeat the rights of the assignee — at least where the facts proved in the action to set aside the judgment disclose superior equities in the assignee. MacDonald *v.* Kneeland, 5 Minn. 352.

77. As against the debtor.— *Connecticut.*— Adams *v.* Leavans, 20 Conn. 73; Woodbridge *v.* Perkins, 3 Day (Conn.) 364.

Louisiana.— Bach *v.* Twogood, 18 La. 414.

Maryland.— Robinson *v.* Marshall, 11 Md. 251.

Mississippi.— Shields *v.* Taylor, 25 Miss. 13.

Missouri.— Richards *v.* Griggs, 16 Mo. 416, 57 Am. Dec. 240.

New York.— Heermans *v.* Ellsworth, 64 N. Y. 159; Crosby *v.* Kropf, 33 N. Y. App. Div. 446, 54 N. Y. Suppl. 76.

Ohio.— Gardner *v.* National City Bank, 39 Ohio St. 600.

Pennsylvania.— Com. *v.* Sides, 176 Pa. St. 616, 35 Atl. 136; Inglis *v.* Inglis, 2 Dall. (Pa.) 45, 1 L. ed. 282.

Tennessee.— Hobson *v.* Stevenson, 1 Tenn. Ch. 203.

Vermont.— Loomis *v.* Loomis, 26 Vt. 198.

Virginia.— Stebbins *v.* Bruce, 80 Va. 389.

West Virginia.— Cox *v.* Wayt, 26 W. Va. 807.

Wyoming.— Stebbins *v.* Union Pac. R. Co., 2 Wyo. 71.

Canada.— Maple Leaf Rubber Co. *v.* Brodie, 18 Quebec Super. Ct. 352.

But see, *contra*, Morgan *v.* Lowe, 5 Cal. 325, 63 Am. Dec. 132; *dicta* in Kennedy *v.* Parke, 17 N. J. Eq. 415.

See 4 Cent. Dig. tit. "Assignments," § 116.

Notice to one partner is a notice to the firm. Fitch *v.* Stamps, 6 How. (Miss.) 487.

78. As to debtor assignment takes effect when.— Merchants', etc., Bank *v.* Hewitt, 3 Iowa 93, 66 Am. Dec. 49; Callanan *v.* Edwards, 32 N. Y. 483; Clement *v.* Philadelphia, 137 Pa. St. 328, 20 Atl. 1000, 21 Am. St. Rep. 876; Miller *v.* Kreiter, 76 Pa. St. 78; Walker *v.* Bradford Old Bank, 12 Q. B. D. 511, 53 L. J. Q. B. 280, 32 Wkly. Rep. 645; Williams *v.* Sorrell, 4 Ves. Jr. 389. See also Zuccarello *v.* Randolph, (Tenn. Ch. 1899) 58 S. W. 453.

79. See cases cited *infra*, note 66, p. 55.

80. Must pay assignee.—*Louisiana.*—Ramsay *v.* Littlejohn, 7 Mart. N. S. (La.) 654.

Minnesota.— Schilling *v.* Mullen, 55 Minn. 122, 56 N. W. 586, 43 Am. St. Rep. 475.

New York.— Jones *v.* New York, 90 N. Y. 387; Callanan *v.* Edwards, 32 N. Y. 483; Richardson *v.* Ainsworth, 20 How. Pr. (N. Y.) 521.

Texas.— Rollison *v.* Hope, 18 Tex. 446.

England.— Walker *v.* Bradford Old Bank, 12 Q. B. D. 511, 53 L. J. Q. B. 280, 32 Wkly. Rep. 645; Legh *v.* Legh, 1 B. & P. 447; *In re* Asphaltic Wood Pavement Co., 30 Ch. D. 216, 54 L. J. Ch. 460, 53 L. T. Rep. N. S. 65, 33 Wkly. Rep. 513; Webb *v.* Smith, 30 Ch. D. 192, 53 L. T. Rep. N. S. 737; *In re* Milan Tramways Co., 22 Ch. D. 122, 25 Ch. D. 587, 50 L. T. Rep. N. S. 545, 32 Wkly. Rep. 631; Roxburghe *v.* Cox, 17 Ch. D. 520, 50 L. J. Ch. 772, 45 L. T. Rep. N. S. 225, 30 Wkly. Rep. 74; Watson *v.* Mid Wales R. Co., L. R. 2 C. P. 593, 36 L. J. C. P. 285, 17 L. T. Rep. N. S. 94, 15 Wkly. Rep. 1107.

Canada.— Dennison *v.* Knox, 24 U. C. Q. B. 119.

81. Set-off against assignor.— Callanan *v.* Edwards, 32 N. Y. 483; Newfoundland *v.* Newfoundland R. Co., 13 App. Cas. 199, 57 L. J. P. C. 35, 58 L. T. Rep. N. S. 285; Bergman *v.* Macmillan, 17 Ch. D. 423, 44 L. T. Rep. N. S. 794, 29 Wkly. Rep. 890.

82. By assignee.— Holt *v.* Babcock, 63 Vt. 634, 22 Atl. 459; Barron *v.* Porter, 44 Vt. 587; Brickett *v.* Nichols, 30 Vt. 743; Webster *v.* Moranville, 30 Vt. 701; Peck *v.* Walton, 25 Vt. 33.

83. To debtor or debtor's agent.— Anniston Nat. Bank *v.* Durham School Committee, 118 N. C. 383, 24 S. E. 792; Weed Sewing Mach. Co. *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

As against garnishing creditor, notice to one trustee, if debt is in hands of two trustees, is sufficient. Foster *v.* Mix, 20 Conn. 395.

Notice given to person in charge of debtor's store is sufficient as against garnishing creditors. May *v.* Hill, 14 Mont. 338, 36 Pac. 877.

Where assignor places assignee in possession of evidence of indebtedness, a notice, by the assignor to the agent of the board of pub-

in case of the death of the debtor, the notice of assignment may be given to his personal representatives.[84]

c. Form and Sufficiency. The notice need not be in any particular form.[85] It is not necessary to exhibit to the debtor either the original or a copy of a written assignment, notice that such assignment is claimed to exist being sufficient.[86] A notice must be sufficiently definite to enable the debtor to identify the subject-matter of the assignment.[87] It has been said that the notice must be direct and positive,[88] and that it is not sufficient that the debtor is notified of facts that would put a reasonable man on inquiry.[89] The legality of a notice is not affected by the fact that it is served on Sunday.[90] What constitutes a sufficient notice is, usually, a question of fact, but when it depends merely on the construction of writings it becomes a question of law.[91]

5. Consent and Acceptance of Debtor. To a valid transfer or assignment of a thing or chose in action of a kind assignable, no consent to or acceptance of the assignment by the debtor is required,[92] except, perhaps in partial assignments, as

lic works, not to pay the money to the assignee, but to pay it to him, will not be sufficient, although in writing, to bind the public treasury to the payment to him of the money, the money having been paid out on the report of the agent of the government, although the request not to pay was among the papers delivered by the agent to his successor. Laughlin *v.* District of Columbia, 116 U. S. 485, 6 S. Ct. 472, 29 L. ed. 701.

Where the public is the debtor, notice is properly given to officials without whose consent money cannot be paid out. Harlem Bank *v.* Bayonne, 48 N. J. Eq. 246, 21 Atl. 478 [*affirmed in* 48 N. J. Eq. 646, 25 Atl. 20]; Burditt *v.* Porter, 63 Vt. 296, 21 Atl. 955, 25 Am. St. Rep. 763; Thayer v. Lyman, 35 Vt. 646.

Not necessary to notify sureties, if principal debtor is notified, as against garnishment. Seward *v.* Garlin, 33 Vt. 583.

84. To debtor's personal representatives.— Seward *v.* Garlin, 33 Vt. 583; Brown *v.* Millington, 25 Vt. 242; Walker *v.* Bradford Old Bank, 12 Q. B. D. 511, 53 L. J. Q. B. 280, 32 Wkly. Rep. 645.

85. No particular form necessary.— *Iowa.* — Manning *v.* Mathews, 70 Iowa 503, 30 N. W. 749.

Louisiana.— St. Mary's Bank *v.* Morton, 12 Rob. (La.) 407; Flint *v.* Franklin, 9 Rob. (La.) 207; Delassize's Succession, 8 Rob. (La.) 259; Gillett *v.* Landis, 17 La. 470; Reeves *v.* Burton, 6 Mart. N. S. (La.) 283; Touro *v.* Cushing, 1 Mart. N. S. (La.) 425.

Maine.— Jewett *v.* Dockray, 34 Me. 45; Robbins *v.* Bacon, 3 Me. 346.

Vermont.— Dale *v.* Kimpton, 46 Vt. 76.

England.—Under the Judicature Act notice must be in writing and may be given either by indorsement of the assignment on the original obligation and forwarding it to the debtor, or by separate writing. Read *v.* Brown, 22 Q. B. D. 128, 58 L. J. Q. B. 120, 60 L. T. Rep. N. S. 250, 37 Wkly. Rep. 131; Harding *v.* Harding, 17 Q. B. D. 442, 55 L. J. Q. B. 462, 34 Wkly. Rep. 775; Buck *v.* Robson, 3 Q. B. D. 686, 48 L. J. Q. B. 250, 39 L. T. Rep. N. S. 325, 26 Wkly. Rep. 804; Brice *v.* Bannister, 3 Q. B. D. 569, 47 L. J. Q. B. 722, 38 L. T. Rep. N. S. 739, 26 Wkly. Rep. 670; Lett *v.* Morris, 1 L. J. Ch. 17, 4 Sim. 607, 6 Eng. Ch. 607; *Ex p.* South, 3 Swanst. 392. But notice of equitable assignment may be verbal. *Ex p.* Agra Bank, L. R. 3 Ch. 555, 37 L. J. Bankr. 23, 18 L. T. Rep. N. S. 866, 16 Wkly. Rep. 879.

86. Need not exhibit written assignment. — National Fertilizer Co. *v.* Thomason, 109 Ala. 173, 19 So. 415; Touro *v.* Cushing, 1 Mart. N. S. (La.) 425; Davenport *v.* Woodbridge, 8 Me. 17. At least if evidence of assignment be not demanded. Bean *v.* Simpson, 16 Me. 49.

87. Notice must be definite.— Plympton *v.* Preston, 4 La. Ann. 356; McAllister *v.* Brooks, 22 Me. 80, 38 Am. Dec. 282.

88. Notice must be direct and positive.— *Connecticut.*— Merely putting letter in mail, without showing delivery, not sufficient. Judah *v.* Judd, 5 Day (Conn.) 534.

Louisiana.—Registry not sufficient. Thomas *v.* Callihan, 5 Mart. N. S. (La.) 180. Where debtor has promised to pay assignee notice will be presumed. Gray *v.* Trafton, 12 Mart. (La.) 102.

New York.— Meghan *v.* Mills, 9 Johns. (N. Y.) 64.

Tennessee.— Hobson *v.* Stevenson, 1 Tenn. Ch. 203.

Vermont.— Cahoon *v.* Morgan, 38 Vt. 234.

89. Ellis *v.* Amason, 17 N. C. 273. *Contra,* Adkins *v.* Ferguson, 11 Ky. L. Rep. 95; Wilkins *v.* Batterman, 4 Barb. (N. Y.) 47.

90. Served on Sunday.— Crozier *v.* Shants, 43 Vt. 478.

91. Sufficiency, when question of law and when question of fact.— Reuton *v.* Monnier, 77 Cal. 449, 19 Pac. 820; Whitman *v.* Winchester Repeating Arms Co., 55 Conn. 247, 10 Atl. 571; Crouch *v.* Mullen, 141 N. Y. 495, 36 N. E. 394, 57 N. Y. St. 585.

92. Debtor's consent and acceptance not necessary.— *Illinois.*— Savage *v.* Gregg, 150 Ill. 161, 37 N. E. 312.

Indiana.—Lassiter *v.* Jackman, 88 Ind. 118.

Kansas.— Krapp *v.* Eldridge, 33 Kan. 106, 5 Pac. 372.

Kentucky.— Newby *v.* Hill, 2 Metc. (Ky.) 530; Varnon *v.* Chestnut, 8 Ky. L. Rep. 428.

heretofore stated.[93] But, where the parties to the contract under which the right arises have stipulated that neither the contract nor any right thereunder shall be assignable without the consent of the other party, such consent must be obtained before the attempted assignment will be given effect.[94]

6. Promise of Debtor to Pay. Under the rules of the common law, no action could be brought against the debtor, by the assignee of a debt in his own name, unless there was a promise by the debtor to him to pay him the debt.[95] Since the assignment of a chose in action for a valuable consideration gives the assignee an equitable right to receive payment of the debt from the debtor, and imposes on the latter an obligation, in equity, to pay the debt to the assignee, this right and obligation constitute a sufficient consideration to support a promise of the debtor to pay the debt to the assignee, on which promise the latter can base an action in his own name at law;[96] and, where the debtor makes such a promise, it has been

Maryland.— Crawford *v.* Brooke, 4 Gill (Md.) 213.

Michigan.— Roger Williams Ins. Co. *v.* Carrington, 43 Mich. 252, 5 N. W. 303.

Montana.— Oppenheimer *v.* Butte First Nat. Bank, 20 Mont. 192, 50 Pac. 419.

Nevada.— Smith *v.* Mayberry, 13 Nev. 427.

New Hampshire.— Brown *v.* Mansur, 64 N. H. 39, 5 Atl. 768; Garland *v.* Harrington, 51 N. H. 409.

New York.— See Manchester *v.* Kendall, 51 N. Y. Super. Ct. 460 [*affirmed* in 103 N. Y. 638, 8 N. E. 653].

South Carolina.— McGahan *v.* Lockett, 54 S. C. 364, 32 S. E. 429, 71 Am. St. Rep. 796.

Texas.— Ross *v.* Smith, 19 Tex. 171, 70 Am. Dec. 327; Beaumont Lumber Co. *v.* Moore, (Tex. Civ. App. 1897) 41 S. W. 180; Scheuber *v.* Simmons, 2 Tex. Civ. App. 672, 22 S. W. 72.

See 4 Cent. Dig. tit. "Assignments," § 121.

Contra, under New Hampshire statute.— To be valid as against attaching creditors of an assignor his assignment of future wages must be accepted in writing by the employer and filed with the town-clerk. Berlin Mills Co. *v.* Poole, 62 N. H. 439. See also O'Neil *v.* Dunn, 63 N. H. 393. Even though the statute provides for acceptance across the face of the assignment, an acceptance indorsed across the back thereof will be sufficient. Lewis *v.* Lougee, 63 N. H. 287. Such assignment is good between the parties without an acceptance. Garland *v.* Harrington, 51 N. H. 409; Conway *v.* Cutting, 51 N. H. 407.

93. See *supra,* note 53, p. 28; and *infra,* note 56, p. 55. See also *In re* Trimble, 23 Pittsb. Leg. J. (Pa.) 89; Burck *v.* Taylor, 152 U. S. 634, 14 S. Ct. 696, 38 L. ed. 578.

94. Fortunato *v.* Patten, 5 Misc. (N. Y.) 234, 25 N. Y. Suppl. 333 [*reversed* in 147 N. Y. 277, 41 N. E. 572]; and cases cited *supra,* note 39, p. 21.

95. At common law.— *Massachusetts.*— Borrowscale *v.* Bosworth, 99 Mass. 378.

Michigan.— Tefft *v.* McNoah, 9 Mich. 201.

New York.— Dubois *v.* Doubleday, 9 Wend. (N. Y.) 317.

Pennsylvania.— Fahnestock *v.* Schoyer, 9 Watts (Pa.) 102.

Tennessee.— Smith *v.* Cottrel, 8 Baxt. (Tenn.) 62; Mt. Olivet Cemetery Co. *v.* Shubert, 2 Head (Tenn.) 116.

Texas.— Ross *v.* Smith, 19 Tex. 171, 70 Am. Dec. 327.

United States.— Tiernan *v.* Jackson, 5 Pet. (U. S.) 580, 8 L. ed. 234.

England.— Williams *v.* Everett, 14 East 582, 13 Rev. Rep. 315; Grant *v.* Austen, 5 Price 58, 17 Rev. Rep. 540.

96. Consideration for promise to pay.— *Maine.*— Page *v.* Danforth, 53 Me. 174; Norris *v.* Hall, 18 Me. 332; Smith *v.* Berry, 18 Me. 122; Lang *v.* Fiske, 11 Me. 385.

Maryland.— Gordon *v.* Downey, 1 Gill (Md.) 41; Lamar *v.* Manro, 10 Gill & J. (Md.) 50; Barger *v.* Collins, 7 Harr. & J. (Md.) 213; Allstan *v.* Contee, 4 Harr. & J. (Md.) 351; Onion *v.* Paul, 1 Harr. & J. (Md.) 114.

Massachusetts.— Burrows *v.* Glover, 106 Mass. 324; Fogg *v.* Middlesex Mut. F. Ins. Co., 10 Cush. (Mass.) 337; Kingsley *v.* New England Mut. F. Ins. Co., 8 Cush. (Mass.) 393; Barrett *v.* Union Mut. F. Ins. Co., 7 Cush. (Mass.) 175; Barney *v.* Coffin, 3 Pick. (Mass.) 115; Mowry *v.* Todd, 12 Mass. 281; Crocker *v.* Whitney, 10 Mass. 316.

Michigan.— See Tefft *v.* McNoah, 9 Mich. 201.

Mississippi.— See Swisher *v.* Fitch, 1 Sm. & M. (Miss.) 541.

New Hampshire.— Boyd *v.* Webster, 58 N. H. 336; Pierce *v.* Nashua F. Ins. Co., 50 N. H. 297, 9 Am. Rep. 235; Thompson *v.* Emery, 27 N. H. 269; Morse *v.* Bellows, 7 N. H. 549, 28 Am. Dec. 372; Currier *v.* Hodgdon, 3 N. H. 82.

New York.— Jessel *v.* Williamsburgh Ins. Co., 3 Hill (N. Y.) 88; Dubois *v.* Doubleday, 9 Wend. (N. Y.) 317; De Forest *v.* Frary, 6 Cow. (N. Y.) 151; Compton *v.* Jones, 4 Cow. (N. Y.) 13.

Pennsylvania.— De Barry *v.* Withers, 44 Pa. St. 356; Withers *v.* De Barry, 5 Phila. (Pa.) 7, 19 Leg. Int. (Pa.) 37; Sellers *v.* Cooper, 3 Leg. & Ins. Rep. 61.

Rhode Island.— Clarke *v.* Thompson, 2 R. I. 146.

South Carolina.— Matheson *v.* Crain, 1 McCord (S. C.) 219.

Tennessee.—Mt. Olivet Cemetery Co. *v.* Shubert, 2 Head (Tenn.) 116.

held to constitute a waiver of all right of set-off against the assignor, existing at the time or subsequently arising.[97] The action in such case is not on the original obligation of the debtor, but on his promise, made to the assignee.[98] It has been held, in some cases, that the promise must be an express one on the part of the debtor.[99]

C. Mode of Assignment — 1. In General. In the absence of some statutory provision on the subject, prescribing the mode of assignment,[1] and in the absence of restrictions placed by the parties themselves on the manner of assignment, no particular mode or form is necessary to effect a valid assignment.[2] The assignment

Texas.— Rollison *v.* Hope, 18 Tex. 446.

Vermont.— Simonds *v.* Pierce, 51 Vt. 467; Allis *v.* Jewell, 36 Vt. 547; Bucklin *v.* Ward, 7 Vt. 195; Moar *v.* Wright, 1 Vt. 57.

Virginia.— Cleaton *v.* Chambliss, 6 Rand. (Va.) 86.

West Virginia.— Bentley *v.* Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. 584.

United States.— Tiernan *v.* Jackson, 5 Pet. (U. S.) 580, 8 L. ed. 234.

England.— Wilson *v.* Coupland, 5 B. & Ald. 228, 7 E. C. L. 131; Williams *v.* Everett, 14 East 582, 13 Rev. Rep. 315; Surtees *v.* Hubbard, 4 Esp. 203; Israel *v.* Douglas, 1 H. Bl. 239; Fenner *v.* Meares, 2 W. Bl. 1269.

But see, *contra*, Kendrick *v.* Glover, 1 Ga. Dec. 63; Jarman *v.* Howard, 3 A. K. Marsh. (Ky.) 383.

See 4 Cent. Dig. tit. "Assignments," § 122.

97. Waiver of set-off against assignor.— King *v.* Fowler, 16 Mass. 397; Thompson *v.* Emery, 27 N. H. 269; Wiggin *v.* Damrell, 4 N. H. 69.

98. Action is on the promise.— Bentley *v.* Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. 584.

99. Express promise.— Jarman *v.* Howard, 3 A. K. Marsh. (Ky.) 383; Cole *v.* Bodfish, 17 Me. 310; Dubois *v.* Doubleday, 9 Wend. (N. Y.) 317.

But see, *contra*, the following cases:

Illinois.— Carlyle *v.* Carlyle Water, etc., Co., 140 Ill. 445, 29 N. E. 556.

Louisiana.— Mourton *v.* Robertson, 3 La. 439.

Maryland.— Barger *v.* Collins, 7 Harr. & J. (Md.) 213.

Massachusetts.— Armsby *v.* Farnam, 16 Pick. (Mass.) 318.

England.— Peacock *v.* Harris, 10 East 104, 10 Rev. Rep. 231; Surtees *v.* Hubbard, 4 Esp. 203.

1. *Georgia.*—Certificates of damage to property, such damage being caused by the removal of a county-seat under an act of the general assembly, issued to the property-owners damaged, are by them assignable by indorsement thereon so as to vest the title thereto in the assignee. Wilkinson *v.* Cheatham, 43 Ga. 258.

Iowa.— Instruments in writing by which the maker promises to pay or deliver any property or do any labor, or acknowledges any money, or labor, or property to be due, are assignable by indorsement thereon or by other writing, and assignee has a right of action thereon in his own name. Rappleye *v.* Racine Seeder Co., 79 Iowa 220, 44 N. W. 363, 7 L. R. A. 139; Dubuque First Nat. Bank *v.* Carpenter, 41 Iowa 518; Moorman *v.* Collier, 32 Iowa 138.

Maryland.— Under the Maryland act of 1829, c. 51, *bona fide* transferee by assignment, in writing, of chose in action for the payment of money may maintain an action at law in his own name against the debtor. Kent *v.* Somervell, 7 Gill & J. (Md.) 265.

Michigan.—McDonald *v.* Preston Nat. Bank, 111 Mich. 649, 70 N. W. 143.

Missouri.— Horner *v.* Missouri Pac. R. Co., 70 Mo. App. 285.

Texas.— Texas, etc., R. Co. *v.* Vaughan, 16 Tex. Civ. App. 403, 40 S. W. 1065.

United States.— Hobbs *v.* McLean, 117 U. S. 567, 6 S. Ct. 870, 29 L. ed. 940; U. S. *v.* Ferguson, 78 Fed. 103, 45 U. S. App. 457, 24 C. C. A. 1. But see U. S. Rev. Stat. (1878), § 3477, construed in Spofford *v.* Kirk, 97 U. S. 484, 24 L. ed. 1032, wherein it was said that the statute means that the assignments not complying with the statute are not absolutely null and void, but voidable, at the option of the government or its officers, and that, where the government has recognized an assignment, the parties cannot claim that it is invalid. See also Freedman's Sav., etc., Co. *v.* Shepherd, 127 U. S. 494, 8 S. Ct. 1250, 32 L. ed. 163; Bailey *v.* U. S., 109 U. S. 432, 3 S. Ct. 272, 27 L. ed. 988; Goodman *v.* Niblack, 102 U. S. 556, 26 L. ed. 229. This statute does not cover assignments by operation of law. Erwin *v.* U. S., 97 U. S. 392, 24 L. ed. 1065.

See 4 Cent. Dig. tit. "Assignments," § 61.

Where one disposes of property, reserving the right to dispose of certain interests therein by will, he cannot dispose of those interests by deed. Mahon *v.* Smith, 60 How. Pr. (N. Y.) 385.

2. Gorringe *v.* Irwell India Rubber, etc., Works, 34 Ch. D. 128, 56 L. J. Ch. 85, 55 L. T. Rep. N. S. 572, 35 Wkly. Rep. 86; Percival *v.* Dunn, 29 Ch. D. 128, 54 L. J. Ch. 570, 52 L. T. Rep. N. S. 320; *In re* Irving, 7 Ch. D. 419, 47 L. J. Bankr. 38, 37 L. T. Rep. N. S. 507, 26 Wkly. Rep. 376; Diplock *v.* Hammond, 5 De G. M. & G. 320, 23 L. J. Ch. 550, 2 Smale & G. 141, 2 Wkly. Rep. 500, 54 Eng. Ch. 254; Rodick *v.* Gandell, 12 Beav. 325, 1 De G. M. & G. 763, 13 Jur. 1087, 19 L. J. Ch. 113, 50 Eng. Ch. 591, 15 Eng. L. & Eq. 22; McGowan *v.* Smith, 26 L. J. Ch. 8, 8 Wkly. Rep. 690; Robertson *v.* Grant, 3 Ch. Chamb. (U. C.) 331. "I hereby authorize you to pay," held sufficient. Lett *v.* Morris, 1 L. J. Ch. 17, 4 Sim. 607, 6 Eng. Ch. 607.

need not be in writing,[3] and if in writing may be in the form of an agreement or order,[4]

3. Need not be in writing.— *Alabama.*— Lowery *v.* Peterson, 75 Ala. 109.

California.—Wiggins *v.* McDonald, 18 Cal. 126.

Colorado.— Perkins *v.* Peterson, 2 Colo. App. 242, 29 Pac. 1135.

Illinois.— Mason *v.* Chicago Title, etc., Guarantee Co., 77 Ill. App. 19.

Indiana.— Ross *v.* Schneider, 30 Ind. 423; Slaughter *v.* Foust, 4 Blackf. (Ind.) 379.

Iowa.— Tone *v.* Shankland, 110 Iowa 525, 81 N. W. 789; Seymour *v.* Aultman, 109 Iowa 297, 80 N. W. 401; Preston *v.* Peterson, 107 Iowa 244, 77 N. W. 864; Hoffman *v.* Smith, 94 Iowa 495, 63 N. W. 182; Foster *v.* Trenary, 65 Iowa 620, 22 N. W. 898; Howe *v.* Jones, 57 Iowa 130, 8 N. W. 451, 10 N. W. 299; Green *v.* Marble, 37 Iowa 95; Switzer *v.* Smith, 35 Iowa 269; Barthol *v.* Blakin, 34 Iowa 452; McWilliams *v.* Webb, 32 Iowa 577; Moore *v.* Lowrey, 25 Iowa 336, 95 Am. Dec. 790; Conyngham *v.* Smith, 16 Iowa 471; White *v.* Tucker, 9 Iowa 100.

Kansas.— Clark *v.* Wiss, 34 Kan. 553, 9 Pac. 281; McCubbin *v.* Atchison, 12 Kan. 166.

Kentucky.— Newby *v.* Hill, 2 Metc. (Ky.) 530.

Louisiana.— Edwards *v.* Daley, 14 La. Ann. 384; Delassize's Succession, 8 Rob. (La.) 259.

Maine.— White *v.* Kilgore, 77 Me. 571, 1 Atl. 739; Sprague *v.* Frankfort, 60 Me. 253; Simpson *v.* Bibber, 59 Me. 196; Garnsey *v.* Gardner, 49 Me. 167; Porter *v.* Bullard, 26 Me. 448.

Maryland.— Spiker *v.* Nydegger, 30 Md. 315; Crane *v.* Gough, 4 Md. 316; Baden *v.* State, 1 Gill (Md.) 165; Mitchell *v.* Mitchell, 1 Gill (Md.) 66; Onion *v.* Paul, 1 Harr. & J. (Md.) 114.

Massachusetts.— Macomber *v.* Doane, 2 Allen (Mass.) 541; Currier *v.* Howard, 14 Gray (Mass.) 511; Grover *v.* Grover, 24 Pick. (Mass.) 261, 35 Am. Dec. 319; Dunn *v.* Snell, 15 Mass. 481; Jones *v.* Witter, 13 Mass. 304; Quinear *v.* Marblehead Social Ins. Co., 10 Mass. 476; Crocker *v.* Whitney, 10 Mass. 316.

Michigan.— Donovan *v.* Halsey Fire Engine Co., 58 Mich. 38, 24 N. W. 819; Draper *v.* Fletcher, 26 Mich. 154.

Minnesota.—Hurley *v.* Bendel, 67 Minn. 41, 69 N. W. 477.

Mississippi.— Pass *v.* McRea, 36 Miss. 143.

Missouri.— Boyle *v.* Clark, 63 Mo. App. 473; Johnson County *v.* Bryson, 27 Mo. App. 341.

Montana.— Oppenheimer *v.* Butte First Nat. Bank, 20 Mont. 192, 50 Pac. 419.

New Hampshire.— Gage *v.* Dow, 59 N. H. 383; Jordan *v.* Gillen, 44 N. H. 424; Brewer *v.* Franklin Mills, 42 N. H. 292; Thompson *v.* Emery, 27 N. H. 269.

New Jersey.—Hutchings *v.* Low, 13 N. J. L. 246; Lanigan *v.* Bradley, etc., Co., 50 N. J. Eq. 201, 24 Atl. 505.

New York.—Williams *v.* Ingersoll, 89 N. Y. 508; Truax *v.* Slater, 86 N. Y. 630; Greene *v.* The Republic F. Ins. Co., 84 N. Y. 572; Risley *v.* Phenix Bank, 83 N. Y. 318, 38 Am. Rep. 421; Fryer *v.* Rockefeller, 63 N. Y. 268; Thurber *v.* Chambers, 60 N. Y. 29; Hooker *v.* Eagle Bank, 30 N. Y. 83, 86 Am. Dec. 351; Clegg *v.* New York Newspaper Union, 72 Hun (N. Y.) 395, 25 N. Y. Suppl. 565, 55 N. Y. St. 464; York *v.* Conde, 61 Hun (N. Y.) 26, 15 N. Y. Suppl. 380, 39 N. Y. St. 945; Risley *v.* Phœnix Bank, 11 Hun (N. Y.) 484; Doremus *v.* Williams, 4 Hun (N. Y.) 458; Kessel *v.* Albetis, 56 Barb. (N. Y.) 362; Gould *v.* Ellery, 39 Barb. (N. Y.) 163; Rupp *v.* Blanchard, 34 Barb. (N. Y.) 627; Hoyt *v.* Story, 3 Barb. (N. Y.) 262; Sexton *v.* Fleet, 2 Hilt. (N. Y.) 477; Waldron *v.* Baker, 4 E. D. Smith (N. Y.) 440; Hastings *v.* McKinley, 1 E. D. Smith (N. Y.) 273; Epstein *v.* U. S. Fidelity etc., Co., 29 Misc. (N. Y.) 295, 60 N. Y. Suppl. 527; Riker *v.* Curtis, 17 Misc. (N. Y.) 134, 39 N. Y. Suppl. 340; Ford *v.* Stuart, 19 Johns. (N. Y.) 342; Briggs *v.* Dorr, 19 Johns. (N. Y.) 95.

North Carolina.—Ponton *v.* Griffin, 72 N. C. 362.

North Dakota.— Roberts *v.* Fargo First Nat. Bank, 8 N. D. 474, 79 N. W. 993.

Pennsylvania.— Craft *v.* Webster, 4 Rawle (Pa.) 242.

South Carolina.— Miller *v.* Newell, 20 S. C. 123, 47 Am. Rep. 833; Howell *v.* Bulkley, 1 Nott & M. (S. C.) 249; Perryclear *v.* Jacobs, Riley Eq. (S. C.) 47.

Tennessee.— Cleveland *v.* Martin, 2 Head (Tenn.) 128; Graham *v.* McCampbell, Meigs (Tenn.) 52, 33 Am. Dec. 126.

Texas.— Clark *v.* Gillespie, 70 Tex. 513, 8 S. W. 121; Ross *v.* Smith, 19 Tex. 171, 70 Am. Dec. 327; Rollison *v.* Hope, 18 Tex. 446.

Vermont.— Hutchins *v.* Watts, 35 Vt. 360.

West Virginia.— Wilt *v.* Huffman, 46 W. Va. 473, 33 S. E. 279; Kenneweg *v.* Schilansky, 45 W. Va. 521, 31 S. E. 949; Bentley *v.* Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. 584; Scraggs *v.* Hill, 37 W. Va. 706, 17 S. E. 185.

Wisconsin.—Arpin *v.* Burch, 68 Wis. 619, 32 N. W. 681.

United States.— Farmers', etc., Bank *v.* Kansas City Pub. Co., 3 Dill. (U. S.) 287, 8 Fed. Cas. No. 4,652.

England.— Heath *v.* Hall, 2 Rose 271, 4 Taunt. 326, 13 Rev. Rep. 610.

See 4 Cent. Dig. tit. "Assignments," § 67 *et seq.*; and *infra*, III, C, 3.

An inchoate invention, or an interest therein, may be assigned by parol. Jones *v.* Reynolds, 120 N. Y. 213, 24 N. E. 279, 30 N. Y. St. 881. And an equitable interest may be assigned in a perfected invention without being in writing, although U. S. Rev. Stat. (1878), § 4898, provides for assignments of patents to be in writing to be good at law. Burr *v.* De la Vergne, 102 N. Y. 415, 7 N. E. 366. See also PATENTS.

4. In form of agreement or order.— Gray *v.* Trafton, 12 Mart. (La.) 702; Sherman *v.*

or in the form of any other instrument which the parties themselves may use for the purpose.[5]

2. Agreements to Assign. But a mere agreement to assign a debt or chose in action at some future time will not operate as an assignment thereof so as to vest any present interest in the assignee;[6] nor will a mere suggestion to the debtor or holder, leaving him free to exercise his discretion in whatever way he thinks best, operate as an assignment.[7]

3. Particular Modes — a. Under Statute. As heretofore stated,[8] in most of the states of the United States and also in England[9] statutes have been enacted authorizing the assignment of choses in action at law, so as to permit the assignee to sue in his own name on the right assigned. In some states statutes exist authorizing actions to be brought in the name of the real party in interest, under which the assignee of a chose in action is classed by the courts;[10] and, in some of the states, it has been held that an assignment sufficient in equity is equally effective in law.[11] In other states, assignments of choses in action are expressly authorized, and assignees authorized to sue thereon in their own names. In some states only assignments in writing are valid at law.[12] Where a statute provides a

Elder, 24 N. Y. 381; Hall *v.* Robinson, 2 N. Y. 293; Waldron *v.* Willard, 17 N. Y. 466; Switzer *v.* Noffsinger, 82 Va. 518.

5. Moore *v.* Lowrey, 25 Iowa 336, 95 Am. Dec. 790.

The resolution of a board of directors making specific appropriation of a claim then in the hands of an attorney for collection has been held to be a mere declaration of intention and not an assignment. Guthrie's Appeal, 92 Pa. St. 269. But see Griffith *v.* Burlingame, 18 Wash. 429, 51 Pac. 1059.

6. Will not operate as an assignment.— *Massachusetts.*— Stearns *v.* Quincy Mut. F. Ins. Co., 124 Mass. 61, 26 Am. Rep. 647; Palmer *v.* Merrill, 6 Cush. (Mass.) 282, 52 Am. Dec. 782; Moody *v.* Wright, 13 Metc. (Mass.) 17, 46 Am. Dec. 706; Walker *v.* Russell, 17 Pick. (Mass.) 280; Foster *v.* Lowell, 4 Mass. 308.

Missouri.— State *v.* Lindsay, 73 Mo. App. 473.

New York.— Arents *v.* Long Island R. Co., 36 N. Y. App. Div. 379, 55 N. Y. Suppl. 401.

Pennsylvania.— Wylie's Appeal, 92 Pa. St. 196.

Virginia.— Evans *v.* Rice, 96 Va. 50, 30 S. E. 463.

West Virginia.— Beard *v.* Arbuckle, 19 W. Va. 135; Neely *v.* Jones, 16 W. Va. 625, 37 Am. Rep. 794.

An agreement to transfer warrants, to be issued in future, in payment of services under a mail contract with the United States, was held to be executory and not to vest in the promisee any interest in the warrants, after they were issued, until assigned. Benford *v.* Sanner, 40 Pa. St. 9, 80 Am. Dec. 545.

Equitable assignment.— Where a stranger to a judgment paid it to the judgment creditor, who agreed to assign the judgment to him, it was held that the transaction operated as an equitable assignment of the judgment to the stranger. Crumlish *v.* Central Imp. Co., 38 W. Va. 390, 18 S. E. 456, 45 Am. St. Rep. 872, 23 L. R. A. 120. See also Bamberger *v.* Oshinsky, 21 Misc. (N. Y.) 716, 48 N. Y. Suppl. 139; Commercial Bank *v.* Rufe, 92 Fed. 789. In Sims *v.* Sims, 2 Hill Eq. (S. C.) 61, it was held that a stipulation of heirs that they would relinquish and quitclaim any interest which they had in a certain fund, and authorizing the administrator to pay the assignee, operated as an equitable assignment of the fund, as equity would regard as done that which ought to be done.

7. Watson *v.* Wellington, 8 L. J. Ch. O. S. 159, 1 Russ. & M. 602, 5 Eng. Ch. 602.

8. See *supra*, I, D.

9. Under the Judicature Act, assignment must be in writing, and express notice thereof must be given in writing. Read *v.* Brown, 22 Q. B. D. 128, 58 L. J. Q. B. 120, 60 L. T. Rep. N. S. 250, 37 Wkly. Rep. 131. See also Wiesener *v.* Rackow, 76 L. T. Rep. N. S. 448.

10. In the United States.— *California.*— Lucas *v.* Pico, 55 Cal. 126; Wiggins *v.* McDonald, 18 Cal. 126.

Indiana.— Bartholomew County *v.* Jameson, 86 Ind. 154; Treadway *v.* Cobb, 18 Ind. 36; Mewherter *v.* Price, 11 Ind. 199.

Iowa.— Conyngham *v.* Smith, 16 Iowa 471.

Kansas.— Reynolds *v.* Quaely, 18 Kan. 361.

Kentucky.— Carpenter *v.* Miles, 17 B. Mon. (Ky.) 598.

Missouri.—Weinwick *v.* Bender, 33 Mo. 80; Turner *v.* Hayden, 33 Mo. App. 15.

New York.— Cummings *v.* Morris, 25 N. Y. 625; Combs *v.* Bateman, 10 Barb. (N. Y.) 573.

Wisconsin.—Wooliscroft *v.* Norton, 15 Wis. 198.

United States.— Pate *v.* Gray, Hempst. (U. S.) 155, 18 Fed. Cas. No. 10,794*a*.

11. Assignment sufficient in equity, sufficient at law.— Weinwick *v.* Bender, 33 Mo. 80; Greene *v.* Republic F. Ins. Co., 84 N. Y. 572; Hooker *v.* Eagle Bank, 30 N. Y. 83, 86 Am. Dec. 351; Chapman *v.* Plummer, 36 Wis. 262.

12. Planters' Bank *v.* Prater, 64 Ga. 609; Turk *v.* Cook, 63 Ga. 681.

An assignment of a claim for money due is not affected by a statute requiring assignments of goods and grants, or assignments of

mode of assignment, in the absence of any provision to the contrary, such mode is cumulative and does not prevent other modes of assignment in equity.[13] Where the statutes authorize assignments of choses in action at law, when applied to written instruments, it has been held to mean written assignments.[14] To pass the title to written instruments delivery thereof is not sufficient — the assignment must be in writing in order to authorize suit on the instrument by the assignee in his own name.[15] This rule has been applied to accounts.[16] To constitute a valid written assignment at law, where the statute requires an assignment to be in writing, there must be an assignee who takes, and an assignor who gives, title at the time the assignment is made, and both must be named in the instrument;[17] but in equity, even though the name of the assignee be left blank, the instrument will be upheld as an equitable assignment.[18] And it may be stated, generally, that a written instrument, though it may be insufficient at law, by reason of non-compliance with statutory requirements, to accomplish its purpose, may yet be sufficient in equity to transfer the beneficial interest in the subject-matter of the assignment.[19]

b. In Writing — (i) *Instrument Not Under Seal.* It has been held that an assignment in writing of an instrument in writing might be made, either by indorsement of the assignment on the instrument assigned[20] or by a separate

trusts, to be evidenced by writing. Chamberlin *v.* Gilman, 10 Colo. 94, 14 Pac. 107.

Property includes choses in action. See Tunno *v.* Robert, 16 Fla. 738.

Under the statute of frauds requiring the sale of "things in action" to be manifested by writing, if a mortgage and written bond were assigned in writing and delivered to one as security for a debt, a rehypothecation of the mortgage and bond to secure another debt to the same person was held to be valid, although by parol, as against a subsequent assignee by writing. Hoyt *v.* Hoyt, 8 Bosw. (N. Y.) 511. See also, generally, Frauds, Statute of.

Where a statute requires an assignment to be signed and sealed in the presence of witnesses, and the requisite number of witnesses are present at the time of signing and sealing the instrument, it is sufficient, even though the witnesses do not sign as witnesses. Bleibdrey *v.* Keppler, 33 N. J. L. 140; Phillips *v.* Barlow, 1 Bing. N. Cas. 433, 27 E. C. L. 708.

13. Statutory mode cumulative.— Gardner *v.* Mobile, etc., R. Co., 102 Ala. 635, 15 So. 271, 48 Am. St. Rep. 84. While, in order to pass the legal title to a judgment, the method prescribed by the statute must be followed, an assignment by any other method will pass the equitable interest so as to enable the assignee to sue on the judgment in his own name as the real party in interest. Kelley *v.* Love, 35 Ind. 106; Allen *v.* Newbery, 8 Iowa 65.

14. Written assignments.—*Alabama.*—Enloe *v.* Reike, 56 Ala. 500.

Arkansas.— Hardie *v.* Mills, 20 Ark. 153.

Mississippi.— Andrews *v.* Carr, 26 Miss. 577.

Missouri.— Miller *v.* Paulsell, 8 Mo. 355; Able *v.* Shields, 7 Mo. 120, where it was held that a written assignment of "all goods and chattels, effects and property of every kind," was not sufficient to transfer the legal title to a bond held by the assignor. Under the new code an action can be maintained by the equitable assignee in his own name. Weinwick *v.* Bender, 33 Mo. 80.

Tennessee.— Bradley County *v.* Surgoine, 6 Baxt. (Tenn.) 108.

15. *Alabama.*—Enloe *v.* Reike, 56 Ala. 500.

Arkansas.— Hardie *v.* Mills, 20 Ark. 153.

Illinois.— Chadsey *v.* Lewis, 6 Ill. 153.

Mississippi.— Andrews *v.* Carr, 26 Miss. 577.

Missouri.— Rittenhouse *v.* Myers, 10 Mo. 305.

See also *infra*, III, C, 3, b.

16. Accounts.— Andrews *v.* Brown, 1 Iowa 154. *Contra*, Wooliscroft *v.* Norton, 15 Wis. 198.

17. Naming assignor and assignee in instrument.— Mowry *v.* Wood, 12 Wis. 413; Galloway *v.* Finley, 12 Pet. (U. S.) 264, 9 L. ed. 1079.

18. Assignee's name left blank.— Mowry *v.* Wood, 12 Wis. 413.

19. Unwritten assignment may be sufficient in equity.— *Alabama.*— Gardner *v.* Mobile, etc., R. Co., 102 Ala. 635, 15 So. 271, 48 Am. St. Rep. 84.

Indiana.— Eagle *v.* Ross, 67 Ind. 110.

Kansas.— Stinson *v.* Geer, 42 Kan. 520, 22 Pac. 586.

New York.— White *v.* Brooklyn, 122 N. Y. 53, 25 N. E. 243, 33 N. Y. St. 307; Chapman *v.* Brooklyn, 40 N. Y. 372.

Pennsylvania.— Rhine *v.* Robinson, 27 Pa. St. 30; Buchanan *v.* Taylor, Add. (Pa.) 154.

Wisconsin.— Mowry *v.* Wood, 12 Wis. 413.

20. In many states statutes authorize assignments by indorsement of written obligations for the payment of money or property, so as to authorize suit thereon at law in the name of the assignee.

Alabama.— Flexner *v.* Dickerson, 65 Ala. 72; Henley *v.* Bush, 33 Ala. 636. The statutes of Alabama authorize an assignee, by indorsement, of the right of performance of any

instrument.[21] But, where the assignment is by a written instrument, simply signing or acknowledging the instrument will not be sufficient to transfer the property, but the instrument must be delivered to the assignee.[22] The mere indorsement of a transfer on an instrument, without proof of the delivery thereof, will not be sufficient to establish the assignment thereof.[23]

(II) *SPECIALTIES.* In regard to the assignment of instruments under seal it has been the rule, and still is in some of the states, that such instruments can only be assigned at law by an instrument of as high a nature — that is, by an instrument under seal[24] — but this rule no longer prevails in the states where sealed instruments may be assigned by writing, simply.[25] It is sometimes said that, if the

act or duty to bring an action thereon. Phillips *v.* Sellers, 42 Ala. 658.

Arkansas.— Block *v.* Walker, 2 Ark. 4.

California.— An assignment of an account by indorsement of the word "Assigned," signed by the owner, sufficient. Ryan *v.* Maddux, 6 Cal. 247.

Illinois.— Chadsey *v.* Lewis, 6 Ill. 153.

Indiana.— Hays *v.* Branham, 36 Ind. 219. A contract between a railroad company and individuals, whereby the company agrees to construct a depot at a certain place, and that, upon its construction, the individuals will pay to the company a certain sum of money, is negotiable by indorsement so as to vest the title to the contract in each assignee successively. Vannoy *v.* Duprez, 72 Ind. 26.

New Jersey.—Where an instrument is made assignable by statute, which statute does not prescribe any particular mode of assignment, and the instrument itself authorizes an assignment by indorsement, an indorsement thereof will pass the title thereto so as to allow the assignee to maintain an action thereon in his own name. Winfield *v.* Hudson, 28 N. J. L. 255.

Where the indorsement is in blank the holder by delivery thereof may fill up an indorsement with his name, and maintain an action in his own name.

Alabama.— Flexner *v.* Dickerson, 65 Ala. 72; Phillips *v.* Sellers, 42 Ala. 658; Henley *v.* Bush, 33 Ala. 636; Skinner *v.* Bedell, 32 Ala. 44.

Arkansas.—Worthington *v.* Curd, 15 Ark. 491.

California.— Lucas *v.* Pico, 55 Cal. 126.

Maryland.— McNulty *v.* Cooper, 3 Gill & J. (Md.) 214.

Minnesota.— But the indorsement in blank must have been made with the intention that it should operate as an assignment and pass by delivery; otherwise, it will not so operate. Beardsley *v.* Day, 52 Minn. 451, 55 N. W. 46.

New Jersey.— See, *contra*, Speer *v.* Post, 3 N. J. L. 585.

21. Separate instrument.— *Alabama.*— Planters, etc., Ins. Co. *v.* Tunstall, 72 Ala. 142.

Indiana.— Hays *v.* Branham, 36 Ind. 219.

Kentucky.— Armstrong *v.* Flora, 3 T. B. Mon. (Ky.) 43.

Maryland.— Kent *v.* Somervell, 7 Gill & J. (Md.) 265.

Missouri.— Thornton *v.* Crowther, 24 Mo. 164; Able *v.* Shields, 7 Mo. 120.

North Carolina.— See, *contra*, Estes *v.* Hairston, 12 N. C. 354.

Texas.— Durst *v.* Swift, 11 Tex. 273.

United States.— Assignment of goods at sea, not indorsed on bill of lading, is valid. D'Wolf *v.* Harris, 4 Mason (U. S.) 515, 8 Fed. Cas. No. 4,221.

And, where a statute permits assignees, by writing, of bonds, notes, and written instruments, or contracts to sue in their own name in courts of law, the assignment need not be on, or annexed to, the instrument assigned, but may be separate. Hays *v.* Branham, 36 Ind. 219; Armstrong *v.* Flora, 3 T. B. Mon. (Ky.) 43; Instone *v.* Williamson, 2 Bibb (Ky.) 83; Stine *v.* Young, 26 Md. 233; Kent *v.* Somervell, 7 Gill & J. (Md.) 265; Durst *v.* Swift, 11 Tex. 273.

Necessity of seal.—The term "assignment" does not, like the term "specialty," signify an instrument under seal. Barrett *v.* Hinckley, 124 Ill. 32, 7 Am. St. Rep. 331.

22. A deposit of an instrument of assignment in the United States mail, in the absence of a request from the assignee, was not a delivery thereof, especially in view of the postoffice regulation allowing the sender to stop the transmission thereof. Buehler *v.* Galt, 35 Ill. App. 225.

23. Proof of delivery essential.— *Indiana.* — Mewherter *v.* Price, 11 Ind. 199.

New York.— White *v.* Brooklyn, 122 N. Y. 53, 25 N. E. 243, 33 N. Y. St. 307; Frost *v.* Craig, 9 N. Y. Suppl. 437, 28 N. Y. St. 157; Kenny *v.* Hinds, 44 How. Pr. (N. Y.) 7; Lenx *v.* Jansen, 18 How. Pr. (N. Y.) 265.

Pennsylvania.—Ruth *v.* Looz, 1 Leg. Chron. (Pa.) 166.

Rhode Island.—A bill of lading not assignable by indorsement so as to permit the assignee to sue thereon at law in his own name. Falkenburg *v.* Clark, 11 R. I. 278.

Wisconsin.—Whitney *v.* State Bank, 7 Wis. 620.

United States.— Combs *v.* Hodge, 21 How. (U. S.) 397, 16 L. ed. 115.

24. Necessity of seal.— Kinniken *v.* Dulaney, 5 Harr. (Del.) 384; Bridgham *v.* Tileston, 5 Allen (Mass.) 371; Brewer *v.* Dyer, 7 Cush. (Mass.) 337; Dennis *v.* Twitchell, 10 Metc. (Mass.) 180; Wood *v.* Partridge, 11 Mass. 488; Perkins *v.* Parker, 1 Mass. 117.

25. No seal necessary.—*California.*—Moore *v.* Waddle, 34 Cal. 145.

Kentucky.— U. S. Bank *v.* Huth, 4 B. Mon. (Ky.) 423.

assigned instrument is under seal, the assignment thereof must be under seals unless the instrument itself is delivered, in which case an oral assignment is said to be sufficient.[26] The general principle that a specialty must be assigned by instrument under seal has been held not to apply to equitable assignments.[27]

(III) *Form of Written Assignment.* Where the assignment is in writing no special form of words or language is required to be used, though the operative words of an assignment generally used are "sell, assign, and transfer," or "sell, assign, and set over."[28] It may be in the form of an order on the debtor or holder of the fund assigned to pay the debt or fund to another person.[29] Any language, however informal, if it shows the intention of the owner of the chose in action to transfer it, will be sufficient to vest the property therein in the assignee.[30] The subject-matter of the assignment should be described with such particularity as to identify it,[31] but no greater particularity is required than is

Nebraska.—The assignment of an executory contract for the purchase of land need not comply with the requirements of the law in regard to the conveyance of land. Violet *v.* Rose, 39 Nebr. 660, 58 N. W. 216.

New York.— Horner *v.* Wood, 15 Barb. (N. Y.) 371; Morange *v.* Edwards, 1 E. D. Smith (N. Y.) 414; Dawson *v.* Coles, 16 Johns. (N. Y.) 51; Holliday *v.* Marshall, 7 Johns. (N. Y.) 211. The assignment of a right of action for a deed need not comply with the requirements of the law in regard to the conveyance of land. Bissell *v.* Morgan, 56 Barb. (N. Y.) 369.

Pennsylvania.— The assignment of a mortgage on land need not comply with the requirements in regard to the conveyance of real estate. Craft *v.* Webster, 4 Rawle (Pa.) 242.

South Carolina.—Howell *v.* Bulkley, 1 Nott & M. (S. C.) 249.

Texas.— Holman *v.* Criswell, 13 Tex. 38; Durst *v.* Swift, 11 Tex. 273.

See 4 Cent. Dig. tit. "Assignments," § 80.

26. Delivery and oral assignment.—Bridgham *v.* Tileston, 5 Allen (Mass.) 371; Brewer *v.* Dyer, 7 Cush. (Mass.) 337; Dennis *v.* Twitchell, 10 Metc. (Mass.) 180; Mowry *v.* Todd, 12 Mass. 281.

27. Equitable assignment.— Barrett *v.* Hinckley, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331; Dunn *r.* Snell, 15 Mass. 481; Tombigby R. Co. *v.* Bell, 7 How. (Miss.) 216; Cassagne *v.* Ostrander, 3 N. Y. Suppl. 844, 20 N. Y. St. 146.

28. Forms of assignments in writing may be found set out in full or in part in Youmans *v.* Edgerton, 91 N. Y. 403; Merchants' Nat. Bank *v.* Hall, 83 N. Y. 338, 38 Am. Rep. 434 [*affirming* 18 Hun (N. Y.) 176]; Viele *v.* Judson, 82 N. Y. 32 [*reversing* 15 Hun (N. Y.) 328]; Ten Eyck *v.* Craig, 62 N. Y. 406 [*affirming* 2 Hun (N. Y.) 452]; Van Buskirk *v.* Warren, 2 Keyes (N. Y.) 119; De Caumont *v.* Bogert, 36 Hun (N. Y.) 382; Vanderbilt *v.* Schreyer, 21 Hun (N. Y.) 537; Hendrickson *v.* Beers, 6 Bosw. (N. Y.) 639.

29. Order to pay.— Gray *v.* Trafton, 12 Mart. (La.) 702; Daves *v.* Haywood, 22 N. C. 313.

30. Any words showing intention to assign.

— *Georgia.*— Loudermilk *v.* Loudermilk, 93 Ga. 443, 21 S. E. 77.

Illinois.—Steingrebe *v.* French Mirror, etc., Beveling Co., 83 Ill. App. 587.

Kentucky.— Frankfort Bank *v.* Hunter, 3 A. K. Marsh. (Ky.) 292.

Louisiana.— Gray *v.* Trafton, 12 Mart. (La.) 702.

Massachusetts.— Adams *v.* Robinson, 1 Pick. (Mass.) 461.

Michigan.— Hyne *v.* Osborn, 62 Mich. 235, 28 N. W. 821; Wilcox *v.* Toledo, etc., R. Co., 43 Mich. 584, 5 N. W. 1003; Ellis *v.* Secor, 31 Mich. 185, 18 Am. Rep. 178.

Minnesota.— Crone *v.* Braun, 23 Minn. 239.

Missouri.— Ashby *v.* Winston, 26 Mo. 210; Bissell *v.* Hill, 10 Mo. App. 593.

New Hampshire.— Conway *v.* Cutting, 51 N. H. 407.

New Jersey.— Shannon *v.* Hoboken, 37 N. J. Eq. 123; Bower *v.* Hadden Blue Stone Co., 30 N. J. Eq. 171.

New York.— Hull *v.* Smith, 8 How. Pr. (N. Y.) 281.

South Carolina.— Dargan *v.* Richardson, 1 Cheves (S. C.) 197.

Texas.— Gulf, etc., R. Co. *v.* Cusenberry, 5 Tex. Civ. App. 114, 23 S. W. 851.

Vermont.— Harrington *v.* Rich, 6 Vt. 666.

Virginia.— Cunningham *v.* Herndon, 2 Call (Va.) 530.

See 4 Cent. Dig. tit. "Assignments," § 76; and generally, CONTRACTS.

Choses in action pass by transfer of "all his estate of whatever kind or nature soever," by assignor, and gives assignee prior right to a garnishing creditor, although the debtor was not notified before garnishment. Forepaugh *r.* Appold, 17 B. Mon. (Ky.) 625, 627.

Under Massachusetts statute requiring assignments of future wages to be in writing and recorded, the assignment, if intended as security, need not state what it is intended to secure, and it is not limited by the formal recital of consideration. Murphy *r.* Murphy, 121 Mass. 167.

31. Description of subject-matter.—Drakeley *v.* Deforest, 3 Conn. 272; Swan *v.* Warren, 138 Mass. 11; Raines *v.* U. S., 11 Ct. Cl. 648; Percival *r.* Dunn, 29 Ch. D. 128, 54

actually necessary to do this, with the aid of the attendant and surrounding circumstances.[32]

c. By Parol. As heretofore seen, assignments may be made by parol, so as to vest the equitable title of the chose assigned in the assignee,[33] in the absence of express or implied statutory provision. To constitute such assignment, however, it must be shown that the owner surrendered all control over the chose and made an absolute appropriation of it to the use of the assignee.[34]

d. By Conduct of the Parties. An assignment may be inferred from the conduct of the parties,[35] but a court of equity will not imply an equitable assignment where it is legally incompetent for the parties to make an express contract.[36] There must, however, be an appropriation of the debt or fund, and the assignor must confer the complete right or interest in the subject-matter of the assignment on the assignee and surrender all control over it, even if the circumstances do not permit the assignee to take immediate possession thereof.[37]

L. J. Ch. 570, 52 L. T. Rep. N. S. 320; Reeve *v.* Whitmore, 4 De G. J. & S. 1, 9 Jur. N. S. 1214, 33 L. J. Ch. 63, 9 L. T. Rep. N. S. 311, 3 N. R. 15, 12 Wkly. Rep. 113, 69 Eng. Ch. 1.

32. What particularity required.— McCain *v.* Wood, 4 Ala. 258; Adler *v.* Kansas City, etc., R. Co., 92 Mo. 242, 4 S. W. 917; Sandford *v.* Conant, 2 Sandf. (N. Y.) 143; Gulf, etc., R. Co. *v.* Cusenberry, 5 Tex. Civ. App. 114, 23 S. W. 851.

33. Oral assignments.— *Iowa.*— Barthol *v.* Blakin, 34 Iowa 452; Conyngham *v.* Smith, 16 Iowa 471; Williams *v.* Soutter, 7 Iowa 435.

Maine.— White *v.* Kilgore, 77 Me. 571, 1 Atl. 739; Sprague *v.* Frankfort, 60 Me. 253.

Maryland.— Chesley *v.* Taylor, 3 Gill (Md.) 251.

Michigan.— Harris *v.* Chamberlain, (Mich. 1901) 85 N. W. 728; Donovan *v.* Halsey Fire Engine Co., 58 Mich. 38, 24 N. W. 819.

Mississippi.— Tully *v.* Herrin, 44 Miss. 626.

Missouri.— Miller *v.* Paulsell, 8 Mo. 355; Thomas *v.* Cox, 6 Mo. 506; Boyle *v.* Clark, 63 Mo. App. 473.

New Jersey.— Allen *v.* Pancoast, 20 N. J. L. 68; Kamena *v.* Huelbig, 23 N. J. Eq. 78.

New York.—Thurber *v.* Chambers, 66 N. Y. 42; Doremus *v.* Williams, 4 Hun (N. Y.) 458; Epstein *v.* U. S. Fidelity, etc., Co., 29 Misc. (N. Y.) 295, 60 N. Y. Suppl. 527.

Tennessee.— Cook *v.* Shute, Cooke (Tenn.) 67.

Texas.— Rollison *v.* Hope, 18 Tex. 446; Texas, etc., R. Co. *v.* Wright, 2 Tex. App. Civ. Cas. § 340.

Vermont.— Noyes *v.* Brown, 33 Vt. 431.

England.— *In re* Richardson, 30 Ch. D. 396; Field *v.* Megaw, L. R. 4 C. P. 660.

See 4 Cent. Dig. tit. "Assignments," § 67 *et seq.*; and *supra*, note 3, p. 38; note 27, p. 42.

34. Surrender of control and appropriation to another.— White *v.* Kilgore, 77 Me. 571, 1 Atl. 739; Bradley *v.* Spofford, 23 N. H. 444, 55 Am. Dec. 205; Rupp *v.* Blanchard, 34 Barb. (N. Y.) 627; Gibson *v.* Stone, 28 How. Pr. (N. Y.) 468; Arpin *v.* Burch, 68 Wis. 619, 32 N. W. 681; Chapman *v.* Plummer, 36 Wis. 262. The defendant verbally agreed to assign to the claimant a demand in his favor against the trustee, whereupon the trustee was called and, in the claimant's presence, was informed by defendant that he had transferred his claim against him to the claimant, and was requested by defendant to pay it to the claimant, and it was understood by all three of the parties that the trustee was to account to the claimant for defendant's demand. It was held that the assignment from defendant to the claimant was a present and perfected one, and that the notice to the trustee was sufficient to prevent the subsequent attachment of the claim by means of trustee process by defendant's creditors. Hutchins *v.* Watts, 35 Vt. 360.

35. Chamberlin *v.* Gilman, 10 Colo. 94, 14 Pac. 107; Garnsey *v.* Gardner, 49 Me. 167; Coates *v.* Emporia First Nat. Bank, 91 N. Y. 20; Risley *v.* Phenix Bank, 83 N. Y. 318, 38 Am. Rep. 421; Weinhauer *v.* Morrison, 49 Hun (N. Y.) 498, 2 N. Y. Suppl. 544, 18 N. Y. St. 800.

36. Parties incompetent to make contract. — McInerny *v.* Reed, 23 Iowa 410. See also, generally, CONTRACTS.

37. Assignor must surrender control.— *Illinois.*— Story *v.* Hull, 143 Ill. 506, 32 N. E. 265.

Indiana.— Ford *v.* Garner, 15 Ind. 298.

Maine.— White *v.* Kilgore, 77 Me. 571, 1 Atl. 739.

Massachusetts.— Emerson *v.* Knower, 8 Pick. (Mass.) 63.

Michigan.— Herbestreit *v.* Beckwith, 35 Mich. 93.

Missouri.— State *v.* Lindsay, 73 Mo. App. 473.

Nebraska.— Nebraska Moline Plow Co. *v.* Fuehring, 30 Nebr. 316, 83 N. W. 69.

New Hampshire.— Bradley *v.* Spofford, 23 N. H. 444, 55 Am. Dec. 205.

New Jersey.— Weaver *v.* Atlantic Roofing Co., 57 N. J. Eq. 547, 40 Atl. 858.

New York.— Curry *v.* Powers, 70 N. Y. 212, 26 Am. Rep. 577; Drake *v.* New York Iron Mine, 89 Hun (N. Y.) 280, 34 N. Y. Suppl. 1005, 68 N. Y. St. 839; Rupp *v.* Blanchard, 34 Barb. (N. Y.) 627; Hoyt *v.* Story, 3 Barb. (N. Y.) 262; Dickenson *v.* Phil-

e. By Delivery. When supported by a valuable consideration, no writing is necessary to the assignment of written instruments, and the delivery of the chose in action, or the written evidence of the right, debt, or title, will be sufficient to pass the beneficial interest therein.[38]

lips, 1 Barb. (N. Y.) 454; Frost *v.* Craig, 9 N. Y. Suppl. 437, 28 N. Y. St. 157; Keyes *v.* Brush, 2 Paige (N. Y.) 311.

Vermont.— Hutchins *v.* Watts, 35 Vt. 360.

Wisconsin.— Arpin *v.* Burch, 68 Wis. 619, 32 N. W. 681.

United States.— Putnam Sav. Bank *v.* Beal, 54 Fed. 577.

As further security for a debt to a bank a stockholder therein agreed that his stock should be transferred to the bank or some persons for it, and agreed to, and did, give an irrevocable power of attorney to the cashier of the bank to make the transfer on the books of the bank. Before making the transfer the cashier died. It was held to be an equitable assignment of the stock to the bank. Lightner's Appeal, 82 Pa. St. 301.

Where a contractor for a building marked a bill for material furnished to the building "Approved," signing his name, it was held not to be an equitable assignment of so much of the contract-price for the building as would be sufficient to pay the bill. Flaherty *v.* Atlantic Lumber Co., 58 N. J. Eq. 467, 44 Atl. 186.

Where the owner of a cargo informed one who afterward accepted a draft drawn on him by the owner that the cargo would be consigned to him, and the cargo was not so consigned, but subsequently its proceeds came into his hands, it was held that, because he had accepted the draft, there was no equitable assignment as against a subsequent assignee of the cargo. Slater *v.* Gaillard, 3 Brev. (S. C.) 115.

38. *California.*— Bibend *v.* Liverpool, etc., F., etc., Ins. Co., 30 Cal. 78.

Connecticut.— Camp's Appeal, 36 Conn. 88, 4 Am. Rep. 39; Brown *v.* Brown, 18 Conn. 410, 46 Am. Dec. 328.

Iowa.— Cedar Rapids, etc., R. Co. *v.* Stewart, 25 Iowa 115; Andrews *v.* Brown, 1 Iowa 154.

Kansas.— Clark *v.* Wiss, 34 Kan. 553, 9 Pac. 281; McCrum *v.* Corby, 11 Kan. 464.

Maine.— Garnsey *v.* Gardner, 49 Me. 167; Jewett *v.* Dockray, 34 Me. 45; Littlefield *v.* Smith, 17 Me. 327; Harriman *v.* Hill, 14 Me. 127; Titcomb *v.* Thomas, 5 Me. 282; Swett *v.* Green, 4 Me. 384; Clark *v.* Clough, 3 Me. 357; Robbins *v.* Bacon, 3 Me. 346; Vose *v.* Handy, 2 Me. 322; Clark *v.* Rogers, 2 Me. 143.

Massachusetts.—Taft *v.* Bowker, 132 Mass. 277; Pierce *v.* Boston Five Cents Sav. Bank, 125 Mass. 593; Davis *v.* Ney, 125 Mass. 590, 28 Am. Rep. 272; Sheedy *v.* Roach, 124 Mass. 472, 26 Am. Rep. 680; Norton *v.* Piscataqua F. & M. Ins. Co., 111 Mass. 532; Foss *v.* Lowell Five Cents Sav. Bank, 111 Mass. 285; Kimball *v.* Leland, 110 Mass. 325; Crain *v.* Paine, 4 Cush. (Mass.) 483, 50 Am. Dec. 807; Dennis *v.* Twitchell, 10 Metc. (Mass.) 180; Grover *v.* Grover, 24 Pick. (Mass.) 261, 35 Am. Dec. 319; Jones *v.* Witter, 13 Mass. 304; Mowry *v.* Todd, 12 Mass. 281; Quiner *v.* Marblehead Social Ins. Co., 10 Mass. 476.

Michigan.— Owen *v.* Potter, (Mich. 1898) 73 N. W. 977.

Mississippi.— Ashby *v.* Carr, 40 Miss. 64; Byars *v.* Griffin, 31 Miss. 603; Anderson *v.* Miller, 7 Sm. & M. (Miss.) 586. But see Parker *v.* Bacon, 26 Miss. 425.

Missouri.— Boeka *v.* Nuella, 28 Mo. 180.

New Hampshire.— Pierce *v.* Nashua F. Ins. Co., 50 N. H. 297, 9 Am. Rep. 235; Sanders *v.* Hillsborough Ins. Co., 44 N. H. 238; Thompson *v.* Emery, 27 N. H. 269; Southern *v.* Mendum, 5 N. H. 420.

New Jersey.— Denton *v.* Cole, 30 N. J. Eq. 244; Galway *v.* Fullerton, 17 N. J. Eq. 389; Vreeland *v.* Van Horn, 17 N. J. Eq. 137; Morris Canal. etc., Co. *v.* Fisher, 9 N. J. Eq. 667, 64 Am. Dec. 423.

New York.— Greene *v.* The Republic F. Ins. Co., 84 N. Y. 572; Marcus *v.* St. Louis Mut. L. Ins. Co., 68 N. Y. 625; Fryer *v.* Rockefeller, 63 N. Y. 268; Westerlo *v.* De Witt, 36 N. Y. 340. 93 Am. Dec. 517; Bedell *v.* Carll, 33 N. Y. 581; Hooker *v.* Eagle Bank, 30 N. Y. 83, 86 Am. Dec. 351; Van Riper *v.* Baldwin, 19 Hun (N. Y.) 344 [*affirmed* in 85 N. Y. 618]; Allerton *v.* Lang, 10 Bosw. (N. Y.) 362; Brainerd *v.* New York, etc., R. Co., 10 Bosw. (N. Y.) 332; Sexton *v.* Fleet, 2 Hilt. (N. Y.) 477; Loftus *v.* Clark, 1 Hilt. (N. Y.) 310; Manheimer *v.* Levy, 3 N. Y. Suppl. 130, 19 N. Y. St. 682; Briggs *v.* Dorr, 19 Johns. (N. Y.) 95; Prescott *v.* Hull, 17 Johns. (N. Y.) 284; Runyan *v.* Mersereau, 11 Johns. (N. Y.) 534, 6 Am. Dec. 393; Green *v.* Hart, 1 Johns. (N. Y.) 580; Johnson *v.* Hart, 3 Johns. Cas. (N. Y.) 322.

North Carolina.— Thigpen *v.* Horne, 36 N. C. 20.

Ohio.— Emery *v.* Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299; Shanklin *v.* Madison County, 21 Ohio St. 575; Fourth Nat. Bank *v.* Flach, 1 Ohio N. P. 219.

Pennsylvania.— Licey *v.* Licey, 7 Pa. St. 251, 47 Am. Dec. 513; Malone's Estate, 8 Wkly. Notes Cas. (Pa.) 179.

Tennessee.— Ocoee Bank *v.* Nelson, 1 Coldw. (Tenn.) 185; Robinson *v.* Williams, 3 Head (Tenn.) 540. The assignment by indorsement and delivery of a grant of land is not a mode of conveyance recognized by law, and does not transfer the title, legal or equitable. Counts *v.* Pierce, 11 Heisk. (Tenn.) 561.

Texas.— Texas, etc., R. Co. *v.* Wright, 2 Tex. App. Civ. Cas. § 340.

Vermont.— Hackett *v.* Moxley, 65 Vt. 71, 25 Atl. 898.

Wisconsin.— Wooliscroft *v.* Norton, 15 Wis. 198.

England.— Duffield *v.* Elwes, 1 Bligh N. S. 497, 8 Eng. Reprint 959.

f. By Deposit of Title-Deeds. In England, the deposit of the title-deeds to land as a security for a debt has been held, in equity, to be good as an equitable mortgage of the land.[39] This doctrine has been adopted in some of the states of the United States,[40] though, in others, the courts have held such a doctrine to be forbidden by the statute of frauds, and that it is inconsistent with the registry laws enacted in those states.[41]

g. Equitable Assignments[42]—(i) *In General.* In order to work an equitable assignment there must be an absolute appropriation by the assignor of the debt or fund sought to be assigned to the use of the assignee.[43] The intention of the assignor must be to transfer a present interest in the debt or fund.[44] And the assignor must surrender all control over the debt or fund.[45] Where the transac-

See 4 Cent. Dig. tit. "Assignments," § 72 *et seq.*

39. English doctrine.— Russell *v.* Russell, 1 Bro. Ch. 269; Pain *v.* Smith, 2 Myl. & K. 417, 7 Eng. Ch. 417; *Ex p.* Langston, 17 Ves. Jr. 227.

40. English rule adopted.— *Georgia.*— Mounce *v.* Byars, 16 Ga. 469.

Maine.— Hall *v.* McDuff, 24 Me. 311.

Mississippi.— Williams *v.* Stratton, 10 Sm. & M. (Miss.) 418.

New York.— Stoddard *v.* Hart, 23 N. Y. 556; Rockwell *v.* Hobby, 2 Sandf. Ch. (N. Y.) 9.

Rhode Island.— Hackett *v.* Reynolds, 4 R. I. 512.

South Carolina.— Welsh *v.* Usher, 2 Hill Eq. (S. C.) 167, 29 Am. Dec. 63.

Wisconsin.— Jarvis *v.* Dutcher, 16 Wis. 307.

United States.— Mandeville *v.* Welch, 5 Wheat. (U. S.) 277, 5 L. ed. 87.

41. English rule not followed.— *Kentucky.*— Vanmeter *v.* McFaddin, 8 B. Mon. (Ky.) 435. See Ashcraft *v.* Brownfield, 7 T. B. Mon. (Ky.) 123.

Ohio.— Probasco *v.* Johnson, 2 Disn. (Ohio) 96.

Pennsylvania.— Strauss' Appeal, 49 Pa. St. 353; Shitz *v.* Dieffenbach, 3 Pa. St. 233; Bowers *v.* Oyster, 3 Penr. & W. (Pa.) 239; Kauffelt *v.* Bower, 7 Serg. & R. (Pa.) 64, 10 Am. Dec. 428. See also Edwards *v.* Trumbull, 50 Pa. St. 509.

Tennessee.— Meador *v.* Meador, 3 Heisk. (Tenn.) 562.

Vermont.— Bicknell *v.* Bicknell, 31 Vt. 498.

42. An equitable assignment may be defined to be such an assignment as gives the assignee a title which, although not cognizable at law, equity will protect. Such an assignment passes an immediate interest in the subject thereof, although it is not essential to the creation of the interest that it should be immediately enforceable by a suit to recover the interest assigned. Whether, in a given case, the transaction amounts to an equitable assignment depends to a great extent upon the intention. Holmes *v.* Evans, 129 N. Y. 140, 29 N. E. 233, 41 N. Y. St. 365; Dale *v.* Land Co., 3 Phila. (Pa.) 328, 16 Leg. Int. (Pa.) 21; and cases cited *infra*, note 43 *et seq.*

43. Absolute appropriation.— *Connecticut.*—Alderman *v.* Hartford, etc., Transp. Co., 66 Conn. 47, 33 Atl. 589.

Missouri.— Bank of Commerce *v.* Bogy, 44 Mo. 13, 100 Am. Dec. 247; Ford *v.* Angelrodt, 37 Mo. 50, 86 Am. Dec. 174; Kimball *v.* Donald, 20 Mo. 577, 64 Am. Dec. 209.

New Jersey.— Gray *v.* Pfeiffer, (N. J. Ch. 1900) 45 Atl. 967.

New York.— Collier *v.* Miller, 137 N. Y. 332, 33 N. E. 374, 50 N. Y. St. 784; Hoyt *v.* Story, 3 Barb. (N. Y.) 262.

United States.— Christmas *v.* Russell, 14 Wall. (U. S.) 69, 20 L. ed. 762.

What amounts to a present appropriation, which constitutes an equitable assignment, is a question of intention to be gathered from all the language, construed in the light of attendant circumstances. Dexter *v.* Gordon, 11 App. Cas. (D. C.) 60; Higgins *v.* Lansingh, 154 Ill. 301, 40 N. E. 362. See also Padfield *v.* Padfield, 72 Ill. 322; Otis *v.* Beckwith, 49 Ill. 121. A corporation issued certificates to its employees in the following form: "Due John Dacey, Sr., for labor, from the Marquette & Pacific Rolling Mill Company, four dollars, in goods, at the store of E. H. Mead & Co." M & Co. delivered goods for these certificates, marked them paid, and had a settlement with the M & P R Co. each month, when the accounts were paid. It was held that these certificates, though the words "for labor" were used in them, did not operate to assign to M & Co. claims of the employees for labor. Beecher *v.* Dacey, 45 Mich. 92, 93, 7 N. W. 689.

44. Intention of assignor.— Bank of Commerce *v.* Bogy, 44 Mo. 13, 100 Am. Dec. 247; Collier *v.* Miller, 137 N. Y. 332, 33 N. E. 374, 50 N. Y. St. R. 784; Cowperthwaite *v.* Sheffield, 3 N. Y. 243 [*affirming* 1 Sandf. (N. Y.) 416]; Netling *v.* Netling, 60 N. Y. App. Div. 409, 69 N. Y. Suppl. 984; Hoyt *v.* Story, 3 Barb. (N. Y.) 262; Dickenson *v.* Phillips, 1 Barb. (N. Y.) 454; Pope *v.* Luff, 7 Hill (N. Y.) 577 [*affirming* 5 Hill (N. Y.) 413]; Rogers *v.* Hosack, 18 Wend. (N. Y.) 319.

45. Surrender of control.— People's Bank *v.* Barbour, 14 Ky. L. Rep. 98, 19 S. W. 585; Parker *v.* Baxter, 19 Hun (N. Y.) 410 [*affirmed* in 86 N. Y. 586]. An instrument giving a person authority to receive certain funds of another, and to pay certain class of claims which may become due against the owner of the fund, is not an equitable assignment of the funds to the person having such a claim to the amount thereof. McHose *v.* Dutton, 55 Iowa 728, 8 N. W. 667. Where a drawee, who had accepted a draft, deposited

tion is evidenced by a written agreement or stipulation in writing, it depends, it seems, upon the intention of the parties as manifested in the writing, construed in the light of such extrinsic circumstances as, under the general rules of law, are admissible in aid of the interpretation of written instruments.[46] Any words or transaction which show an intention on the one side to assign and an intention on the other to receive, if there is a valuable consideration, will operate as an effective equitable assignment,[47] although the instrument assigned be a

money in a bank in his own name to pay this draft, it was held no equitable assignment to the payee of the amount so deposited. Scranton First Nat. Bank *v.* Higbee, 109 Pa. St. 130. Where, with intent to make a gift, a depositor delivered a check on a savings bank, payable after his death, stating that he wanted to retain control as long as he lived in order to receive the interest on the money, and also delivered to the payee of the check his bank pass-book, stating that the payee would want it to get the money, it was held to be no transfer of fund. Curry *v.* Powers, 70 N. Y. 212, 26 Am. Rep. 577.

46. *Illinois.*— Schwartz *v.* Messinger, 167 Ill. 474, 47 N. E. 719.

Indiana.— Smith *v.* Wood, 133 Ind. 221, 32 N. E. 921.

Iowa.— Foss *v.* Cobler, (Iowa 1898) 75 N. W. 516; Wood *v.* Duval, 100 Iowa 724, 69 N. W. 1061; Granfield *v.* Rowlings, 53 Iowa 654, 6 N. W. 31.

Maryland.— Brown *v.* Thomas, 46 Md. 636.

Missouri.— Keithley *v.* Pittman, 40 Mo. App. 596; Luthy *v.* Woods, 6 Mo. App. 67.

New Jersey.— Essex County *v.* Lindsey, 41 N. J. Eq. 189, 3 Atl. 391.

New York.— Holmes *v.* Evans, 129 N. Y. 140, 29 N. E. 233, 41 N. Y. St. 365; Gibson *v.* Stone, 43 Barb. (N. Y.) 285; Quinlan *v.* Russell, 47 N. Y. Super. Ct. 212.

South Carolina.— State *v.* Brownlee, 2 Speer (S. C.) 519.

Texas.— Houston City St. R. Co. *v.* Storrie, (Tex. Civ. App. 1898) 44 S. W. 693; Stillson *v.* Stevens, (Tex. Civ. App. 1893) 23 S. W. 322.

Virginia.— Hicks *v.* Roanoke Brick Co., (Va. 1893) 27 S. E. 596.

United States.— Badgerow *v.* Manhattan Trust Co., 74 Fed. 925; Farmers, etc., Bank *v.* Kansas City Pub. Co., 3 Dill. (U. S.) 287, 8 Fed. Cas. No. 4,652.

47. What will operate as an equitable assignment.— *Alabama.*— Lowery *v.* Peterson, 75 Ala. 109; Planters', etc., Ins. Co. *v.* Tunstall, 72 Ala. 142.

California.— McIntyre *v.* Hauser, 131 Cal. 11, 63 Pac. 69; Wiggins *v.* McDonald, 18 Cal. 126.

Florida.— Sammis *v.* L'Engle, 19 Fla. 800.

Illinois.— Savage *v.* Gregg, 150 Ill. 161, 37 N. E. 312; Steingrebe *v.* French Mirror, etc., Beveling Co., 83 Ill. App. 587; Smith *v.* Bates Mach. Co., 79 Ill. App. 519.

Indiana.— Bartholomew County *v.* Jameson, 86 Ind. 154; Slaughter *v.* Foust, 4 Blackf. (Ind.) 379.

Iowa.— Hoffman *v.* Smith, 94 Iowa 495, 63 N. W. 182; Metcalf *v.* Kincaid, 87 Iowa 443, 54 N. W. 867, 43 Am. St. Rep. 39; Foster *v.* Trenary, 65 Iowa 620, 22 N. W. 898; McWilliams *v.* Webb, 32 Iowa 577; Moore *v.* Lowrey, 25 Iowa 336, 95 Am. Dec. 790; Conyngham *v.* Smith, 16 Iowa 471.

Kentucky.— See Ashcraft *v.* Brownfield, 7 T. B. Mon. (Ky.) 123.

Louisiana.— Edwards *v.* Daley, 14 La. Ann. 384.

Massachusetts.— Macomber *v.* Doane, 2 Allen (Mass.) 541; Jones *v.* Witter, 13 Mass. 304.

Michigan.— Toledo, etc., R. Co. *v.* Johnson, 55 Mich. 456, 21 N. W. 888.

Minnesota.— Jackson *v.* Sevatson, 79 Minn. 275, 82 N. W. 634. "I, George Braun, do hereby certify and acknowledge that I have, on this first day of March, A. D. 1876, given up all claims I have against John Hauenstein in favor of John B. Karl," held assignment to K of all claims of B against H. Crone *v.* Braun, 23 Minn. 239.

Mississippi.— Pass *v.* McRea, 36 Miss. 143.

Missouri.— Sanguinett *v.* Webster, 153 Mo. 343, 54 S. W. 563; Macklin *v.* Kinealy, 141 Mo. 113, 41 S. W. 893; Bank of Commerce *v.* Bogy, 44 Mo. 13, 100 Am. Dec. 247; Ford *v.* Angelrodt, 37 Mo. 50, 88 Am. Dec. 174; Smith *v.* Sterritt, 24 Mo. 260; Kimball *v.* Donald, 20 Mo. 577, 60 Am. Dec. 209; Johnson County *v.* Bryson, 27 Mo. App. 341.

New Jersey.— Sparks *v.* McDonald, (N. J. 1898) 41 Atl. 369; Brokaw *v.* Brokaw, (N. J. 1886) 4 Atl. 66.

New York.— Fairbanks *v.* Sargent, 117 N. Y. 320, 22 N. E. 1039, 27 N. Y. St. 411, 6 L. R. A. 475; Williams *v.* Ingersoll, 89 N. Y. 508; Dickenson *v.* Phillips, 1 Barb. (N. Y.) 454; Danklessen *v.* Braynard, 3 Daly (N. Y.) 183; Wallace *v.* Arkell, 28 Misc. (N. Y.) 502, 59 N. Y. Suppl. 597; Riker *v.* Curtis, 17 Misc. (N. Y.) 134, 39 N. Y. Suppl. 340; Muir *v.* Schenck, 3 Hill (N. Y.) 228, 38 Am. Dec. 633; People *v.* Tioga Common Pleas, 19 Wend. (N. Y.) 73; Raymond *v.* Squire, 11 Johns. (N. Y.) 47; Bradley *v.* Root, 5 Paige (N. Y.) 632.

North Carolina.— As a general rule anything written, said, or done, in pursuance of an agreement and for a valuable consideration, or in consideration of some preëxisting debt to place a money right or fund out of the original owner's control, and to appropriate, in favor of another person, amounts to an equitable assignment. Hence, no writing or particular form of words is necessary, provided, only, a consideration be proved and the intention of the parties be made apparent by suitable evidence. Motz *v.* Stowe, 83 N. C. 434; Winberry *v.* Koonce, 83 N. C. 351.

specialty.[48] Any order, writing, or act which makes an appropriation of a debt or fund amounts to an equitable assignment thereof.[49]

(II) *AGREEMENTS TO PAY OUT OF PARTICULAR FUND.* An agreement to pay a debt out of a certain fund will not operate as an equitable assignment of the whole or any part of such fund,[50] such an agreement being a mere prom-

Pennsylvania.— Hercules Ice Mach. Co. *v.* Segal, 185 Pa. St. 605, 40 Atl. 89; *In re* Dutton's Estate, 181 Pa. St. 426, 37 Atl. 582; Ruple *v.* Bindley, 91 Pa. St. 296.

South Carolina.— Alexander *v.* Adams, 1 Strobh. (S. C.) 47, 47 Am. Dec. 547; Wadsworth *v.* Griswold, Harp. (S. C.) 17.

West Virginia.— Bentley *v.* Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. 584; Tingle *v.* Fisher, 20 W. Va. 497.

Wisconsin.— Chapman *v.* Plummer, 36 Wis. 262.

United States.— Burke *v.* Child, 21 Wall. (U. S.) 441, 22 L. ed. 623; Wylie *v.* Coxe, 15 How. (U. S.) 415, 14 L. ed. 753.

England.— Heath *v.* Hall, 2 Rose 271, 4 Taunt. 326, 13 Rev. Rep. 610; Whitfield *v.* Fausset, 1 Ves. 387; Row *v.* Dawson, 1 Ves. 331.

See 4 Cent. Dig. tit. "Assignments," § 85 *et seq.*

A mere admission by a party that he does not own certain property, but that it is owned by another, will not operate as an assignment of the property to the other. Brown *v.* Thomas, 46 Md. 636.

Mere oral agreement between plaintiff and third person that third person shall receive amount sued for is not an equitable assignment of the debt. Seaver *v.* Bradley, 6 Me. 60.

An agreement between a defendant and certain creditors that one having possession of property of the debtor should hold until a certain day, and then sell the same and divide the proceeds among said creditors, and the person so in possession agreed to execute the trust, this was held to amount to an equitable assignment of the property as against subsequently attaching creditors of the debtor. Mason *v.* Hidden, 6 Vt. 600.

Where plaintiff claimed a fund in defendant's hands under an assignment from a contractor, and defendant showed that, prior to such assignment, he and the contractor had agreed that the fund should be applied to the payment of certain notes indorsed by defendant for the contractor, and that he should have a lien on it for that purpose, this was held to be an equitable assignment of the fund to defendant. York *v.* Conde, 61 Hun (N. Y.) 26, 15 N. Y. Suppl. 380, 39 N. Y. St. 945.

48. Specialty.— Conyngham *v.* Smith, 16 Iowa 471; Allen *v.* Pancoast, 20 N. J. L. 68; Kamena *v.* Huelbig, 23 N. J. Eq. 78.

49. Order or act appropriating debt or fund. — *California.*— Wiggins *v.* McDonald, 18 Cal. 126.

Georgia.— Chattanooga First Nat. Bank *v.* Hartman Steel Co., 87 Ga. 435, 13 S. E. 586; Stanford *v.* Connery, 84 Ga. 731, 11 S. E. 507; Dugas *v.* Mathews, 9 Ga. 510, 54 Am. Dec. 361.

Illinois.—Higgins *v.* Lansingh, 154 Ill. 301, 40 N. E. 362.

Louisiana.—Aguader *v.* Quish, 21 La. Ann. 322.

New York.— Kelley *v.* Syracuse, 10 Misc. (N. Y.) 306, 31 N. Y. Suppl. 283, 63 N. Y. St. 534.

Oregon.— Wadhams *v.* Inman, (Oreg. 1900) 63 Pac. 11.

Pennsylvania.— Aycinena *v.* Peries, 6 Watts & S. (Pa.) 243; Clemson *v.* Davidson, 5 Binn. (Pa.) 392.

United States.— Laclede Bank *v.* Schuler, 120 U. S. 511, 7 S. Ct. 644, 30 L. ed. 704; Spain *v.* Brent, 1 Wall. (U. S.) 604, 17 L. ed. 619.

England.— Rodick *v.* Gandell, 12 Beav. 325, 1 De G. M. & G. 763, 13 Jur. 1087, 19 L. J. Ch. 113, 50 Eng. Ch. 591, 15 Eng. L. & Eq. 22.

See 4 Cent. Dig. tit. "Assignments," § 85.

The reason for this rule is that, the debt or fund being a matter not assignable at law or capable of manual possession, an appropriation of it is all that the nature of the case admits of, and, therefore, it is held good in a court of equity. As the assignee is, generally, entitled to all the remedies of the assignor, so he is subject to all the equities between the assignor and his debtor. But, in order to perfect his title against the debtor, it is indispensable that the assignee should immediately give notice to him of the assignment, for otherwise a priority of right may be obtained by subsequent assignees, or the debt may be discharged by payment to the assignor before such notice. Laclede Bank *v.* Schuler, 120 U. S. 511, 7 S. Ct. 644, 30 L. ed. 704; Spain *v.* Brent, 1 Wall. (U. S.) 604, 17 L. ed. 619.

50. *Colorado.*— Silent Friend Min. Co. *v.* Abbott, 7 Colo. App. 73, 42 Pac. 318.

Illinois.— Higgins *v.* Lansingh, 154 Ill. 301, 40 N. E. 362; Wyman *v.* Snyder, 112 Ill. 99; Padfield *v.* Padfield, 72 Ill. 322; Otis *v.* Beckwith, 49 Ill. 121; Newell *v.* Grant Locomotive Works, 50 Ill. App. 611; Story *v.* Hull, 41 Ill. App. 109 [*affirmed* in 143 Ill. 506, 32 N. E. 265].

Indiana.— Ford *v.* Garner, 15 Ind. 298.

Iowa.— Foss *v.* Cobler, 105 Iowa 728, 75 N. W. 516; Corning First Nat. Bank *v.* Van Brocklin, 72 Iowa 761, 33 N. W. 151.

Maine.— White Mountain Bank *v.* West, 46 Me. 15.

Maryland.— Gill *v.* Clagett, 4 Md. Ch. 153.

Massachusetts.— Borden *v.* Bordman, 157 Mass. 410, 32 N. E. 469.

Michigan.— Morse *v.* Allen, 99 Mich. 303, 58 N. W. 327.

Missouri.— Pearce *v.* Roberts, 27 Mo. 179.

ise.[51] Nor will a mere direction by a party to his agent to apply certain funds to the payment of a debt operate as an equitable assignment of such fund.[52] But, where an agreement is made between a debtor and his creditor that the debt of the latter should be paid out of a fund belonging to the debtor in the hands of a third party, and the agreement is communicated to such third party and is assented to by him, this will be effective, in equity, to transfer an interest in such fund to the extent of his debt to the creditor.[53]

(III) *Agreements Between Attorney and Client.* An agreement, between a client and his attorney, who prosecutes an action for him, that the attorney shall receive a certain portion of what is recovered will not, it has generally been held, give the attorney an equitable interest in the cause of action

Nebraska.— Fairbanks *v.* Welshaus, 55 Nebr. 362, 75 N. W. 865.

New Jersey.— Lanigan *v.* Bradley, etc., Co., 50 N. J. Eq. 201, 24 Atl. 505.

New York.— Fairbanks *v.* Sargent, 117 N. Y. 320, 22 N. E. 1039, 27 N. Y. St. 411, 6 L. R. A. 475, 104 N. Y. 108, 9 N. E. 870, 58 Am. Rep. 490; Addison *v.* Enoch, 48 N. Y. App. Div. 111, 62 N. Y. Suppl. 613; Arents *v.* Long Island R. Co., 36 N. Y. App. Div. 379, 55 N. Y. Suppl. 401; Wood *v.* Mitchell, 14 N. Y. Suppl. 7; Rogers *v.* Hosack, 18 Wend. (N. Y.) 319.

Ohio.— Christmas *v.* Griswold, 8 Ohio St. 558.

Pennsylvania.— Brown *v.* Lehigh Coal, etc., Co., 49 Pa. St. 270; Matter of Tyson, 2 Pearson (Pa.) 479. But see Moeser *v.* Schneider, 158 Pa. St. 412, 27 Atl. 1088.

Tennessee.— Hopkins *v.* Gallatin Turnpike Co., 4 Humphr. (Tenn.) 402.

Texas.— Scheuber *v.* Simmons, 2 Tex. Civ. App. 672, 22 S. W. 72.

Virginia.— Evans *v.* Rice, 96 Va. 50, 30 S. E. 463; Eib *v.* Martin, 5 Leigh (Va.) 132.

Wisconsin.— Dirimple *v.* State Bank, 91 Wis. 601, 65 N. W. 501.

United States.— Burke *v.* Child, 21 Wall. (U. S.) 441, 22 L. ed. 623; Christmas *v.* Gaines, 14 Wall. (U. S.) 69, 20 L. ed. 762; Plater *v.* Meng, 30 Fed. 308; *Ex p.* Tremont Nail Co., 24 Fed. Cas. No. 14,168.

England.— Field *v.* Megaw, L. R. 4 C. P. 660.

But see, contra, the following cases:

Illinois.— Gillett *v.* Hickling, 16 Ill. App. 392.

Iowa.— Gallinger *v.* Pomeroy, 3 Greene (Iowa) 178, 54 Am. Dec. 496.

Kentucky.— Taylor *v.* Gibbs, 3 B. Mon. (Ky.) 316.

Massachusetts.— Kingsbury *v.* Burrill, 151 Mass. 199, 24 N. E. 36.

Montana.— In Oppenheimer *v.* Butte First Nat. Bank, 20 Mont. 192, 50 Pac. 419, where a debtor agreed to transfer to a creditor a sum he had on deposit in bank, and both parties entered the transaction on their books and the debtor telegraphed to the bank to charge him and to credit the creditor with the amount, it was held this was a good equitable assignment of the fund as against subsequent attaching creditors of the debtor.

New York.— Montgomerie *v.* Ivers, 17 Johns. (N. Y.) 38.

North Carolina.—Perry *v.* Merchants' Bank, 69 N. C. 551.

Tennessee.— McGuffey *v.* Johnson, 9 Lea (Tenn.) 555. In Allison *v.* Pearce, (Tenn. Ch. 1900) 59 S. W. 192, it was decided that, where a borrower of money, in consideration of a loan, agreed to repay it out of a specified fund of the borrower at the time or subsequently to come into the hands of a third party, this operated as an equitable assignment of so much of the fund as was required to repay the loan.

United States.—Where plaintiff, for a consideration, agreed to pay defendants moneys collected on certain claims, and to assign the judgment thereon to plaintiff, this was held to be an equitable assignment of the judgment subsequently obtained. Clark *v.* Sigua Iron Co., 81 Fed. 310, 39 U. S. App. 753, 26 C. C. A. 423.

51. Mere promise.— Kelley *v.* Newman, 79 Ill. App. 285.

52. Mere direction to agent to pay.— *Alabama.*— Clark *v.* Cilley, 36 Ala. 652, 76 Am. Dec. 343.

Maine.— But see, *contra*, where a debtor ordered his agent to pay his creditor out of funds in his hands belonging to the debtor, and the agent promised to do so, and the creditor relied on this promise, and it was held that the debtor had no further control over that part of the fund necessary to pay the creditor his debt. Goodwin *v.* Bowden, 54 Me. 424.

Massachusetts.— Lazarus *v.* Swan, 147 Mass. 330, 17 N. E. 655.

New York.— Klaber *v.* Taylor, 70 Hun (N. Y.) 128, 24 N. Y. Suppl. 81, 53 N. Y. St. 766.

Texas.—Adoue *v.* Blum, 6 Tex. Civ. App. 286, 25 S. W. 335.

United States.—Aultman *v.* McConnell, 34 Fed. 724.

53. Fund in hands of third party.— *California.*— Wiggins *v.* McDonald, 18 Cal. 126.

Massachusetts.— Curtis *v.* Norris, 8 Pick. (Mass.) 280.

Minnesota.— Grand Forks Second Nat. Bank *v.* Sproat, 55 Minn. 14, 56 N. W. 254.

Oregon.— Baker *v.* Eglin, 11 Oreg. 333, 8 Pac. 280.

Pennsylvania.— Cabada *v.* De Jongh, 10 Phila. (Pa.) 422, 1 Wkly. Notes Cas. (Pa.) 342, 32 Leg. Int. (Pa.) 117.

or claim.[54] It has been held, however, in a number of cases, that where a client agrees that his attorney, who prosecutes his action, shall have a certain part of the recovery for his services in prosecuting the action, and the attorney performs the services and procures a judgment, he is to be regarded as an equitable assignee of part of the judgment obtained;[55] and this has been held where the action in which the judgment was obtained was on a cause of action for a tort in itself unassignable.[56]

(IV) *Checks, Drafts, and Orders*—(A) *In General.* A class of equitable assignments of considerable importance, and one which receives the attention of the courts constantly, is that of drafts, orders, and checks. As is often the case with subjects of great commercial importance where the interests of creditors enter, the law on this subject is by no means uniform. When an order by a creditor on a fund will operate as an assignment thereof, and between and against what parties it will so operate, are matters on which there is much contrariety of opinion among the courts of the different states and England. Several principles, however, meet with almost general approval. Among these is the one that an order or draft drawn on a debtor by his creditor, generally, and not on a particular fund, will not, before acceptance of the draft by the drawee, operate as an assignment of moneys due from the drawee to the drawer.[57] Similarly, checks

South Carolina.—Martin *v.* Maner, 10 Rich. (S. C.) 271, 70 Am. Dec. 223.

Virginia.— Lambert *v.* Jones, 2 Patt. & H. (Va.) 144.

United States.— Leonard *v.* Marshall, 82 Fed. 396.

See 4 Cent. Dig. tit. "Assignments," § 99.

Where a mortgagee consented to the sale of mortgaged property by the mortgagor on condition that the purchaser should pay the purchase-money to him, it was held that this would operate as an equitable assignment of the vendor's claim to the purchase-money even though the purchaser knew nothing of the conditional assent. McIntyre *v.* Hauser, 131 Cal. 11, 63 Pac. 69.

54. Not an equitable assignment.— Hargett *v.* McCadden, 107 Ga. 773, 33 S. E. 666; Kelley *v.* Newman, 79 Ill. App. 285; Story *v.* Hull, 41 Ill. App. 109 [*affirmed* in 143 Ill. 506, 32 N. E. 265]; Tone *v.* Shankland, 110 Iowa 525, 81 N. W. 789; Gillette *v.* Murphy, 7 Okla. 91, 54 Pac. 413. *Compare* Clayton *v.* Fawcett, 2 Leigh (Va.) 19. *Contra,* Canty *v.* Latterner, 31 Minn. 239, 17 N. W. 385, where it was held that an agreement of a client that his attorney should receive a certain sum from an amount due from a railroad company on account of the company's running through the lands of the client, the amount to be paid when suit was settled, was a good equitable assignment. It was held, further, that the fact that the compensation was contingent did not alter the case; nor that, at the time when the agreement was entered into, the railroad company had paid the amount into court, to be paid to the person entitled to receive it, and that the parties dealt in ignorance of such payment. *Compare* Maceuen's Estate, 2 Wkly. Notes Cas. (Pa.) 307.

55. Operates as an equitable assignment, when.— *Illinois.*— North Chicago St. R. Co. *v.* Ackley, 171 Ill. 100, 47 N. E. 22, 44 L. R. A. 177 [*reversing* 58 Ill. App. 572].

Missouri.— Schubert *v.* Herzberg, 65 Mo. App. 578.

New Jersey.— Terney *v.* Wilson, 45 N. J. L. 282.

New York.—Wright *v.* Wright, 70 N. Y. 98; Marshall *v.* Meech, 51 N. Y. 140, 10 Am. Rep. 572; McGregor *v.* Comstock, 28 N. Y. 237; Rooney *v.* Second Ave. R. Co., 18 N. Y. 368; Brown *v.* New York, 11 Hun (N. Y.) 21. See also Holmes *v.* Evans, 129 N. Y. 140, 29 N. E. 233, 41 N. Y. St. 365.

Pennsylvania.— Patten *v.* Wilson, 34 Pa. St. 299.

Texas.— Milmo Nat. Bank *v.* Convery, 8 Tex. Civ. App. 181, 27 S. W. 828.

56. North Chicago St. R. Co. *v.* Ackley, 171 Ill. 100, 43 N. E. 222, 44 L. R. A. 177 [*reversing* 58 Ill. App. 572]. In this case judgment had been rendered on a compromise between plaintiff and defendant in a suit for damages for personal injuries to plaintiff, the plaintiff's attorney not having any knowledge of the judgment entry. It was held that the defendant could not, after having notice of the agreement between plaintiff and his attorney that the latter should have a certain part of his recovery, pay the entire judgment to plaintiff, but was bound to pay plaintiff's attorney the part thereof which had been agreed between plaintiff and his attorney that the latter was to have for his services rendered in the action. See also Schubert *v.* Herzberg, 65 Mo. App. 578; Patten *v.* Wilson, 34 Pa. St. 299.

57. A draft drawn not payable out of a particular fund does not, before acceptance, operate as an assignment of money due from the drawee to the drawer.

Alabama.— Sands *v.* Matthews, 27 Ala. 399 [*overruling* Connoley *v.* Cheesborough, 21 Ala. 166]. In Anderson *v.* Jones, 102 Ala. 537, 14 So. 871, it was said that an order for a definite sum, not drawn on any particular fund, is not an assignment, but a bill of exchange within Ala. Civ. Code, § 1766.

which are drawn in the ordinary form, and which do not describe any particular fund or use any words of transfer of the whole or any part of the account standing

California.—Where an instrument in the form of a bill of exchange was given to the payee for value, and the drawer delivered certain property to the drawee, the proceeds of the sale of which by the drawee were to be applied on the bill, but there was no agreement that the bill was to be accepted before a sale of the property or that it should be wholly paid by the application of the proceeds of sale, or by payment of less than the amount of the bill, the instrument was held not to amount to an equitable assignment of the fund arising out of the sale of the property. Cashman *v.* Harrison, 90 Cal. 297, 27 Pac. 283.

Colorado.— Meldrum *v.* Henderson, 7 Colo. App. 256, 43 Pac. 148.

Georgia.— Talladega Mercantile Co. *v.* Robinson, etc., Co., 96 Ga. 815, 22 S. E. 1003; Kyle *v.* Chattahoochee Nat. Bank, 96 Ga. 693, 24 S. E. 149; Baer *v.* English, 84 Ga. 403, 11 S. E. 453, 20 Am. St. Rep. 372.

Maryland.—Exchange Bank *v.* Sutton Bank, 78 Md. 577, 28 Atl. 563, 23 L. R. A. 173.

Massachusetts.— Holbrook *v.* Payne, 151 Mass. 383, 24 N. E. 210, 21 Am. St. Rep. 456; Whitney *v.* Eliot Nat. Bank, 137 Mass. 351, 50 Am. Rep. 316; Gibson *v.* Cooke, 20 Pick. (Mass.) 15, 32 Am. Dec. 194.

Michigan.— Sunderlin *v.* Mecosta County Sav. Bank, 116 Mich. 281, 74 N. W. 478; McEntyre *v.* Farmers', etc., Bank, 115 Mich. 255, 73 N. W. 233; Grammel *v.* Carmer, 55 Mich. 201, 21 N. W. 418, 54 Am. Rep. 363.

Mississippi.— Bush *v.* Foote, 58 Miss. 5, 38 Am. Rep. 310.

Missouri.— Bank of Commerce *v.* Bogy, 44 Mo. 13, 100 Am. Dec. 247; Ford *v.* Angelrodt, 37 Mo. 50, 88 Am. Dec. 174; Pearce *v.* Roberts, 27 Mo. 179; Kimball *v.* Donald, 20 Mo. 577, 64 Am. Dec. 209; Chase *v.* Alexander, 6 Mo. App. 505.

Nevada.— Jones *v.* Pacific Wood, etc., Co., 13 Nev. 359, 29 Am. Rep. 308.

New York.—Schmittler *v.* Simon, 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737; Brill *v.* Tuttle, 81 N. Y. 454, 37 Am. Rep. 515; Atty.-Gen. *v.* Continental L. Ins. Co., 71 N. Y. 325, 27 Am. Rep. 55; Shaver *v.* Western Union Tel. Co., 57 N. Y. 459; Lowery *v.* Steward, 25 N. Y. 239, 82 Am. Dec. 346; Chapman *v.* White, 6 N. Y. 412, 57 Am. Dec. 464; Field *v.* New York, 6 N. Y. 179, 57 Am. Dec. 435; Winter *v.* Drury, 5 N. Y. 525; Cowperthwaite *v.* Sheffield, 3 N. Y. 243 [*affirming* 1 Sandf. (N. Y.) 416]; Harris *v.* Clark, 3 N. Y. 93, 51 Am. Dec. 352; Hall *v.* Buffalo, 1 Keyes (N. Y.) 193; Weinhauer *v.* Morrison, 49 Hun (N. Y.) 498, 2 N. Y. Suppl. 544, 18 N. Y. St. 800; Ballou *v.* Boland, 14 Hun (N. Y.) 355; Hutter *v.* Ellwanger, 4 Lans. (N. Y.) 8; Vreeland *v.* Blunt, 6 Barb. (N. Y.) 182; Patterson *v.* Stettauer, 40 N. Y. Super. Ct. 54; New York, etc., Stock Bank *v.* Gibson, 5 Duer (N. Y.) 574; Gunther *v.* Darmstadt, 14 Daly (N. Y.) 368; Finlay *v.* American Exch. Bank, 11 How. Pr. (N. Y.) 468; Pope *v.* Luff, 7 Hill (N. Y.) 577; Luff *v.* Pope, 5 Hill (N. Y.) 413; Morton *v.* Naylor, 1 Hill (N. Y.) 583; Weston *v.* Barker, 12 Johns. (N. Y.) 276, 7 Am. Dec. 319; Harrison *v.* Williamson, 2 Edw. (N. Y.) 430; Phillips *v.* Stagg, 2 Edw. (N. Y.) 108. But where money is deposited in a bank as that of the holder of the check and that communicated to the bank, the check is an equitable assignment and the payee may recover from the bank. Van Allen *v.* American Nat. Bank, 3 Lans. (N. Y.) 517.

Oregon.—A mere verbal acceptance is not sufficient. Erickson *v.* Inman, 34 Oreg. 44, 54 Pac. 949.

Pennsylvania.— Com. *v.* American L. Ins. Co., 162 Pa. St. 586, 29 Atl. 660, 42 Am. St. Rep. 844; Farmers', etc., Ins. Co. *v.* Simmons, 30 Pa. St. 299; Greenfield's Estate, 24 Pa. St. 232; Jordan's Appeal, 10 Wkly. Notes Cas. (Pa.) 37; Fabars *v.* Welsh, 1 Pa. L. J. Rep. 367.

United States.— Tiernan *v.* Jackson, 5 Pet. (U. S.) 580, 8 L. ed. 234; Mandeville *v.* Welch, 5 Wheat. (U. S.) 277, 5 L. ed. 87; Bosworth *v.* Jacksonville Nat. Bank, 64 Fed. 615, 24 U. S. App. 413, 12 C. C. A. 331; Rosenthal *v.* Mastin Bank, 17 Blatchf. (U. S.) 318, 20 Fed. Cas. No. 12,063; McLoon *v.* Linquist, 2 Ben. (U. S.) 9; 16 Fed. Cas. No. 8,899.

England.— Rodick *v.* Gandell, 12 Beav. 325, 1 De G. M. & G. 763, 13 Jur. 1087, 19 L. J. Ch. 113, 50 Eng. Ch. 591, 15 Eng. L. & Eq. 22; Burn *v.* Carvalho, 9 L. J. Ch. 65, 4 Myl. & C. 690, 18 Eng. Ch. 690, 7 Sim. 109, 8 Eng. Ch. 109; Watson *v.* Wellington, 8 L. J. Ch. O. S. 159, 1 Russ. & M. 602, 5 Eng. Ch. 602; Row *v.* Dawson, 1 Ves. 331.

But see, *contra*, the following cases:

Iowa.— Thomas *v.* Exchange Bank, 99 Iowa 202, 68 N. W. 780, 35 L. R. A. 379; Roberts *v.* Austin, 26 Iowa 315, 96 Am. Dec. 146.

Nebraska.— Columbia Nat. Bank *v.* German Nat. Bank, 56 Nebr. 803, 77 N. W. 346.

North Carolina.— Howell *v.* Boyd Mfg. Co., 116 N. C. 806, 22 S. E. 5.

Oregon.— See McDaniel *v.* Maxwell, 21 Oreg. 202, 27 Pac. 952, 28 Am. St. Rep. 740.

Texas.— Doty *v.* Caldwell, (Tex. Civ. App. 1897) 38 S. W. 1025.

Wisconsin.— Dillman *v.* Carlin, 105 Wis. 14, 80 N. W. 932, 76 Am. St. Rep. 902.

United States.— But parties may agree that it shall have effect to assign the fund. Fourth St. Nat. Bank *v.* Yardley, 165 U. S. 634, 17 S. Ct. 439, 41 L. ed. 855. See also Miller *v.* Hubbard, 4 Cranch C. C. (U. S.) 451, 17 Fed. Cas. No. 9,574; King *v.* Gorsline, 4 Cranch C. C. (U. S.) 150, 14 Fed. Cas. No. 7,796.

See 4 Cent. Dig. tit. "Assignments," § 85 *et seq.*

Where an order was drawn, generally, on a debtor, but for the full amount owing by him to the drawer, after notice to the drawee it

to the credit of the drawer, but contain only the usual request, directed to the bank, to pay to the order of the payee a certain sum of money, cannot, in the absence of acceptance thereof by the drawee, operate as assignments of funds of the drawer on deposit in the bank.[58]

was held to operate as an equitable assignment of the debt as against the assignor and his creditors. Wheatley *v.* Strobe, 12 Cal. 92. Where such was the intention of the parties. Canton First Nat. Bank *v.* Dubuque Southwestern R. Co., 52 Iowa 378, 3 N. W. 395, 35 Am. Rep. 280; Throop Grain Cleaner Co. *v.* Smith, 110 N. Y. 83, 17 N. E. 671, 16 N. Y. St. 881.

Where specific funds are turned over to the drawee with which to take up the draft and such purpose is communicated to the drawee, this operates as an equitable assignment of such funds to the payee, without an acceptance of the draft. Harwood *v.* Tucker, 18 Ill. 544; Seligman *v.* Wells, 17 Blatchf. (U. S.) 410, 1 Fed. 302; De Bernales *v.* Fuller, 2 Campb. 426, 14 East 590, note *a*, 11 Rev. Rep. 755.

58. Checks in the ordinary form.— *Alabama.*— National Commercial Bank *v.* Miller, 77 Ala. 168, 54 Am. Rep. 50.

Arizona.— Satterwhite *v.* Melczer, (Ariz. 1890) 24 Pac. 184.

California.— Cashman *v.* Harrison, 90 Cal. 297, 27 Pac. 283.

Colorado.— Boettcher *v.* Colorado Nat. Bank, 15 Colo. 16, 24 Pac. 582; Colorado Nat. Bank *v.* Boettcher, 5 Colo. 185, 40 Am. Rep. 142.

Georgia.— Georgia Seed Co. *v.* Talmadge, 96 Ga. 254, 22 S. E. 1001; Jones *v.* Glover, 93 Ga. 484, 21 S. E. 50; Haas *v.* Old Nat. Bank, 91 Ga. 307, 18 S. E. 188; Baer *v.* English, 84 Ga. 403, 11 S. E. 453, 20 Am. St. Rep. 372.

Indiana.— Harrison *v.* Wright, 100 Ind. 515, 50 Am. Rep. 805.

Maryland.—Exchange Bank *v.* Sutton Bank, 78 Md. 577, 28 Atl. 563, 23 L. R. A. 173; Moses *v.* Franklin Bank, 34 Md. 574.

Massachusetts.— Carr *v.* National Security Bank, 107 Mass. 45, 9 Am. Rep. 6; Dana *v.* Boston Third Nat. Bank, 13 Allen (Mass.) 445, 90 Am. Dec. 216; Bullard *v.* Randall, 1 Gray (Mass.) 605, 61 Am. Dec. 433; National Bank *v.* Eliot Bank, (Mass. 1857) 5 Am. L. Reg. 711.

Michigan.— Brennan *v.* Merchants', etc., Nat. Bank, 62 Mich. 343, 28 N. W. 881; Grammel *v.* Carmer, 55 Mich. 201, 2 N. W. 418, 54 Am. Rep. 363.

Mississippi.— Bush *v.* Foote, 58 Miss. 5, 38 Am. Rep. 310.

Missouri.— Coates *v.* Doran, 83 Mo. 337; Dickinson *v.* Coates, 79 Mo. 250, 49 Am. Rep. 228; Merchants' Nat. Bank *v.* Coates, 79 Mo. 168; St. John *v.* Homans, 8 Mo. 382; Dowell *v.* Vandalia Banking Assoc., 62 Mo. App. 482; Carroll Exch. Bank *v.* Carrollton First Nat. Bank, 58 Mo. App. 17. But see Lewis *v.* International Bank, 13 Mo. App. 202; State Sav. Assoc. *v.* Boatmen's Sav. Bank, 11 Mo. App. 292; Senter *v.* Continental Bank, 7 Mo. App. 532; Zelle *v.* German Sav. Inst., 4 Mo. App. 401.

New Jersey.— Creveling *v.* Bloomsbury Nat. Bank, 46 N. J. L. 255, 50 Am. Rep. 417.

New York.— Union Mills First Nat. Bank *v.* Clark, 134 N. Y. 368, 32 N. E. 38, 48 N. Y. St. 283, 17 L. R. A. 580; O'Connor *v.* Mechanics' Bank, 124 N. Y. 324, 26 N. E. 816, 36 N. Y. St. 277; Atty.-Gen. *v.* Continental L. Ins. Co., 71 N. Y. 325, 27 Am. Rep. 55; Tyler *v.* Gould, 48 N. Y. 682; Ætna Nat. Bank *v.* New York Fourth Nat. Bank, 46 N. Y. 182, 7 Am. Rep. 314; Chapman *v.* White, 6 N. Y. 412, 57 Am. Dec. 464; Citizens' Nat. Bank *v,* Importers, etc., Nat. Bank, 44 Hun (N. Y.) 386; Lunt *v.* Bank of North America, 49 Barb. (N. Y.) 221; Butterworth *v.* Peck, 5 Bosw. (N. Y.) 341; Finlay *v.* American Exch. Bank, 11 How. Pr. (N. Y.) 468; Dykers *v.* Leather Manufacturers' Bank, 11 Paige (N. Y.) 612.

North Carolina.— Marriner *v.* John L. Roper Lumber Co., 113 N. C. 52, 18 S. E. 94.

Ohio.— Cincinnati, etc., R. Co. *v.* Metropolitan Nat. Bank, 54 Ohio St. 60, 42 N. E. 700, 56 Am. St. Rep. 700, 31 L. R. A. 653; Marysville Bank *v.* Windisch-Muhlhauser Brewing Co., 50 Ohio St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660; Covert *v.* Rhodes, 48 Ohio St. 66, 27 N. E. 94.

Oklahoma.— Guthrie Nat. Bank *v.* Gill, 6 Okla. 560, 54 Pac. 434.

Pennsylvania.—Kuhn *v.* Warren Sav. Bank, (Pa. 1887) 11 Atl. 440; Tamaqua First Nat. Bank *v.* Shoemaker, 117 Pa. St. 94, 11 Atl. 304, 2 Am. St. Rep. 649; Saylor *v.* Bushong, 100 Pa. St. 23, 45 Am. Rep. 353; Mount Joy First Nat. Bank *v.* Gish, 72 Pa. St. 13; Loyd *v.* McCaffrey, 46 Pa. St. 410.

Tennessee.—Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 42 Am. St. Rep. 921, 25 L. R. A. 523; Pickle *v.* Muse, 88 Tenn. 380, 12 S. W. 919, 17 Am. St. Rep. 900, 7 L. R. A. 93; Imboden *v.* Perrie, 13 Lea (Tenn.) 504; Planters' Bank *v.* Merritt, 7 Heisk. (Tenn.) 177.

Texas.— House *v.* Kountze, 17 Tex. Civ. App. 402, 43 S. W. 561.

Virginia.— Purcell *v.* Allemong, 22 Gratt. (Va.) 739. But see Bell *v.* Alexander, 21 Gratt. (Va.) 1.

United States.— Florence Min. Co. *v.* Brown, 124 U. S. 385, 8 S. Ct. 531, 31 L. ed. 424; Laclede Bank *v.* Schuler, 120 U. S. 511, 7 S. Ct. 644, 30 L. ed. 704; Washington First Nat. Bank *v.* Whitman, 94 U. S. 343, 24 L. ed. 229; National Bank of Republic *v.* Millard, 10 Wall. (U. S.) 152, 19 L .ed. 897; Rosenthal *v.* Mastin Bank, 17 Blatchf. (U. S.) 318, 20 Fed. Cas. No. 12,063.

England.— Wharton *v.* Walker, 4 B. & C. 163, 6 D. & R. 288, 3 L. J. K. B. O. S. 183, 10 E. C. L. 527; Brown *v.* Kough, 5 Aspin. 433, 29 Ch. D. 848, 54 L. J. Ch. 1024, 53 L. T. Rep.

(B) *Drawn Against Consignment of Goods.* When a draft is drawn generally, the fact that it is stated to be drawn against a shipment of goods con-

N. S. 878, 34 Wkly. Rep. 2; Hopkinson *v.* Forster, L. R. 19 Eq. 74, 23 Wkly. Rep. 310; Shand *v.* Du Buisson, L. R. 18 Eq. 283, 43 L. J. Ch. 508, 22 Wkly. Rep. 483; Schroeder *v.* Central Bank, 34 L. T. Rep. N. S. 735, 24 Wkly. Rep. 710.

But see, *contra*, the following cases:

Illinois.— National Bank of America *v.* Indiana Banking Co., 114 Ill. 483, 2 N. E. 401; Springfield M. & F. Ins. Co. *v.* Peck, 102 Ill. 265; Union Nat. Bank *v.* Oceana County Bank, 80 Ill. 212, 22 Am. Rep. 185; Chicago Fourth Nat. Bank *v.* City Nat. Bank, 68 Ill. 398; Brown *v.* Leckie, 43 Ill. 497; Chicago M. & F. Ins. Co. *v.* Carpenter, 28 Ill. 360; Munn *v.* Burch, 25 Ill. 21; National Safe, etc., Co. *v.* People, 50 Ill. App. 336.

Iowa.— Roberts *v.* Corbin, 26 Iowa 315, 96 Am. Dec. 146. Where a check is delivered with the intention to transfer a present interest in the money represented thereby, and no revocation is attempted, the transaction will be held to transfer a present interest and right to payment after the death of the drawer, and that whether it is given as a mere gift or made on a valuable consideration. May *v.* Jones, 87 Iowa 188, 54 N. W. 231.

Kentucky.— Farmers' Bank, etc., Co. *v.* Newland, 97 Ky. 464, 17 Ky. L. Rep. 329, 31 S. W. 38; Lester *v.* Given, 8 Bush (Ky.) 357.

Louisiana.— Gordon *v.* Müchler, 34 La. Ann. 604 [*overruling* Case *v.* Henderson, 23 La. Ann. 49, 8 Am. Rep. 590]; Vanbibber *v.* State Bank, 14 La. Ann. 481, 74 Am. Dec. 442.

Nebraska.— Nebraska Moline Plow Co. *v.* Fuehring, 60 Nebr. 316, 83 N. W. 69; Fonner *v.* Smith, 31 Nebr. 107, 47 N. W. 632, 28 Am. St. Rep. 510, 11 L. R. A. 528.

South Carolina.— Fogarties *v.* State Bank, 12 Rich. (S. C.) 518, 78 Am. Dec. 468.

United States.— German Sav. Inst. *v.* Adae, 1 McCrary (U. S.) 501, 8 Fed. 106; *In re* Brown, 2 Story (U. S.) 502, 4 Fed. Cas. No. 1,985.

See 4 Cent. Dig. tit. "Assignments," § 89 *et seq.*

As between drawer and payee.— A check from the time it is drawn and delivered has been held to operate as an equitable assignment of the fund drawn on as between the drawer and the payee.

District of Columbia.— Deener *v.* Brown, 1 MacArthur (D. C.) 350.

North Carolina.— Hawes *v.* Blackwell, 107 N. C. 196, 12 S. E. 245, 22 Am. St. Rep. 870.

West Virginia.— Hulings *v.* Hulings Lumber Co., 38 W. Va. 351, 18 S. E. 620.

Wisconsin.— Pease *v.* Landauer, 63 Wis. 20, 22 N. W. 847, 53 Am. Rep. 247.

United States.— German Sav. Inst. *v.* Adae, 1 McCrary (U. S.) 501, 8 Fed. 106.

Exact balance.— But it has been said that a check for the exact balance in bank, given for a valuable consideration, is an effective equitable assignment of the balance to the payee. Walker *v.* Mauro, 18 Mo. 564; Muth *v.* St. Louis Trust Co., 77 Mo. App. 493; Hawes *v.* Blackwell, 107 N. C. 196, 12 S. E. 245, 22 Am. St. Rep. 870.

For orders held to constitute equitable assignments see:

Mississippi.— Menken *v.* Gumbel, 57 Miss. 756.

Montana.— Merchants', etc., Nat. Bank *v.* Barnes, 18 Mont. 335, 45 Pac. 218, 56 Am. St. Rep. 586, 47 L. R. A. 737.

New Jersey.— Binns *v.* Slingerland, 55 N. J. Eq. 55, 36 Atl. 277.

New York.— Brill *v.* Tuttle, 81 N. Y. 454, 37 Am. Rep. 515 [*reversing* 15 Hun (N. Y.) 289]; Risley *v.* Smith, 64 N. Y. 576; Schreyer *v.* New York, 40 N. Y. Super. Ct. 255; Hafner *v.* Kirby, 24 Misc. (N. Y.) 390, 53 N. Y. Suppl. 552; Gauld *v.* Lipman, 4 Misc. (N. Y.) 78, 23 N. Y. Suppl. 778 [*reversing* 1 Misc. (N. Y.) 475, 21 N. Y. Suppl. 464, 49 N. Y. St. 880]; Williams *v.* Edison Electric Illuminating Co., 16 N. Y. Suppl. 857, 43 N. Y. St. 126; Lenx *v.* Jansen, 18 How. Pr. (N. Y.) 265.

Pennsylvania.— Budd *v.* Himmelberger, 4 Pa. Dist. 545; Soley's Estate, 15 Wkly. Notes Cas. (Pa.) 351; Macenen's Estate, 3 Wkly. Notes Cas. (Pa.) 158, 11 Phila. (Pa.) 152, 33 Leg. Int. (Pa.) 408.

Texas.— Johnson *v.* Amarillo Imp. Co., 88 Tex. 505, 31 S. W. 503.

United States.— *In re* Hanna, 105 Fed. 587; Walker *v.* Seigel, 29 Fed. Cas. No. 17,085, 2 Centr. L. J. 508, 12 Nat. Bankr. Reg. 394.

For orders held not to constitute equitable assignments see:

Massachusetts.— Carrique *v.* Bristol Print Works, 8 Metc. (Mass.) 444.

New York.— Duffy *v.* Dawson, 2 Misc. (N. Y.) 401, 21 N. Y. Suppl. 978, 50 N. Y. St. 584 [*affirming* 19 N. Y. Suppl. 186, 46 N. Y. St. 268, 22 N. Y. Civ. Proc. 235]; Hawley *v.* Ross, 7 Paige (N. Y.) 103.

Oregon.— Commercial Nat. Bank *v.* Portland, 37 Oreg. 33, 54 Pac. 814, 60 Pac. 563.

Pennsylvania.— Radcliffe *v.* Shannon, 20 Pa. Co. Ct. 52; Murphy's Estate, 4 Wkly. Notes Cas. (Pa.) 39.

Rhode Island.— Crafts *v.* Sweeney, 18 R. I. 730, 30 Atl. 658.

Tennessee.— De Liquero *v.* Munson, 11 Heisk. (Tenn.) 15.

Virginia.— Hicks *v.* Roanoke Brick Co., 94 Va. 741, 27 S. E. 596.

For checks and drafts held to constitute equitable assignments see:

Iowa.— Thomas *v.* Exchange Bank, 99 Iowa 202, 68 N. W. 780, 35 L. R. A. 379.

Kentucky.— Taylor *v.* Taylor, 78 Ky. 470.

New York.— Ireland *v.* Smith, 1 Barb. (N. Y.) 419, 3 How. Pr. (N. Y.) 244.

Ohio.— Voorhes *v.* Hesket, 1 Ohio Cir. Ct. 1, 1 Ohio Cir. Dec. 1.

signed, or for the price of goods sold to the drawee, will not make the draft operate as an equitable assignment of the proceeds of the shipment or the price of the goods.[59]

(c) *Drawn on Specific Fund or Debt.* In order that a draft or order may operate as an equitable assignment of moneys belonging to the drawer in the hands of the drawee, it must be drawn on a specific fund or debt,[60] and must specify the particular fund or debt on which it is to operate;[61] but only such designation of the particular fund is necessary as will make the intention of the parties clear.[62]

Texas.— Neely *v.* Grayson County Nat. Bank, (Tex. Civ. App. 1901) 61 S. W. 559.

United States.— Laclede Bank *v.* Schuler, 120 U. S. 511, 7 S. Ct. 644, 30 L. ed. 704 [*reversing* 27 Fed. 424].

For checks and drafts held not to constitute equitable assignments see Johnson-Brinkman Commission Co. *v.* Missouri Pac. R. Co., 72 Mo. App. 437; Duncan *v.* Berlin, 60 N. Y. 151 [*affirming* 38 N. Y. Super. Ct. 31]; Miller *v.* Goodman, (Tex. Civ. App. 1897) 40 S. W. 743.

59. Canton First Nat. Bank *v.* Dubuque Southwestern R. Co., 52 Iowa 378, 3 N. W. 395, 35 Am. Rep. 280; Lewis *v.* Traders' Bank, 30 Minn. 134, 14 N. W. 587; Hale *v.* Caldwell, 4 Ohio Dec. 576, 2 Cleve. L. Rep. 401. Even though understood proceeds of certain goods were to be applied to payment of drafts. Cowperthwaite *v.* Sheffield, 3 N. Y. 243 [*affirming* 1 Sandf. (N. Y.) 416]; Marine, etc., Ins. Bank *v.* Jauncey, 3 Sandf. (N. Y.) 257.

But where a draft was drawn, in payment of an existing debt, for the exact balance expected to arise from the sale of the goods, and was accompanied by a letter from the consignor to the consignee directing him to account and settle with the holder of the draft for the proceeds of the sale when made, the consignee being required to account for a minimum price, it was held that the draft and letter operated as an equitable assignment of the interest of the consignor in the property. Sayler *v.* Merchants' Nat. Bank, 17 Cinc. L. Bul. 152.

60. *Kentucky.*— Hart *v.* Dixon, 5 Ky. L. Rep. 669.

Maine.— Hall *v.* Flanders, 83 Me. 242, 22 Atl. 158; National Exch. Bank *v.* McLoon, 73 Me. 498, 40 Am. Rep. 388.

Maryland.— Wilson *v.* Carson, 12 Md. 54.

Massachusetts.— Holbrook *v.* Payne, 151 Mass. 383, 24 N. E. 210, 21 Am. St. Rep. 456; Whitney *v.* Eliot Nat. Bank, 137 Mass. 351, 50 Am. Rep. 316; Kingman *v.* Perkins, 105 Mass. 111; Gibson *v.* Cooke, 20 Pick. (Mass.) 15, 32 Am. Dec. 194.

New Jersey.— Seyfried *v.* Stoll, 56 N. J. Eq. 187, 38 Atl. 955.

New York.— Atty.-Gen. *v.* Continental L. Ins. Co., 71 N. Y. 325, 27 Am. Rep. 55 [*overruling* Merrill *v.* Anderson, 10 Hun (N. Y.) 604]; Hall *v.* Buffalo, 2 Abb. Dec. (N. Y.) 301, 1 Keyes (N. Y.) 193; People *v.* Flower City L. Assoc., 85 Hun (N. Y.) 506, 33 N. Y. Suppl. 97; Phillips *v.* Stagg, 2 Edw. (N. Y.) 108; Reid *v.* Pryor, 20 Alb. L. J. 53.

Oregon.— McDaniel *v.* Maxwell, 21 Oreg. 202, 27 Pac. 952, 28 Am. St. Rep. 740.

Pennsylvania.— Oakes *v.* Oram, 43 Leg. Int. (Pa.) 520.

Texas.— Harris County *v.* Campbell, 68 Tex. 22, 3 S. W. 243, 2 Am. St. Rep. 467; Jones *v.* Cunningham, (Tex. App. 1889) 15 S. W. 38.

See 4 Cent. Dig. tit. "Assignments," § 99.

61. Specification of fund or debt.— Baer *v.* English, 84 Ga. 403, 11 S. E. 453, 20 Am. St. Rep. 372; Hart *v.* Dixon, 5 Ky. L. Rep. 669; McDonald *v.* Ballston Spa, 34 Misc. (N. Y.) 496, 7 N. Y. Suppl. 279.

Such designation may be by oral specification of the fund at some subsequent period, although the draft was originally drawn generally. Moore *v.* Lowrey, 25 Iowa 336, 95 Am. Dec. 790; McDaniel *v.* Maxwell, 21 Oreg. 202, 27 Pac. 952, 28 Am. St. Rep. 740; Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555. *Contra*, Weinhauer *v.* Morrison, 49 Hun (N. Y.) 498, 2 N. Y. Suppl. 544, 18 N. Y. St. 800.

Where checks were drawn on a bank "to be paid as soon as we settle with the county," it was competent to show by parol that it was understood by the drawer, drawee, and payee that the checks were to be paid out of a particular fund due the drawer from the county, which the drawer had previously assigned to the drawee as security for advances; and such checks were held to operate as an equitable assignment of such fund, though, at the time, the fund was not in the hands of the bank, but the bank had control over it. Des Moines County *v.* Hinkley, 62 Iowa 637, 17 N. W. 915.

62. Sufficiency of designation.— Hoagland *v.* Erck, 11 Nebr. 580, 10 N. W. 498. "Charge to our account for labor" was held a sufficient designation. Brill *v.* Tuttle, 81 N. Y. 454, 37 Am. Rep. 515. See also Munger *v.* Shannon, 61 N. Y. 251. Order, by contractor with a county for the erection of a building by him for it, to pay a subcontractor "such amounts as may be due him," which order has been accepted by the building committee of the county, is binding on the county as an equitable assignment, though no specific sums are mentioned in the order, if the sums could be ascertained definitely from contracts of the parties, and the county is bound to retain the sums to be paid under the subcontract before paying the principal contractor. People *v.* Westchester County, 57 N. Y. App. Div. 135, 67 N. Y. Suppl. 981.

(D) *For Whole of Particular Fund.* Where a draft or order is drawn by a creditor on his debtor and in favor of a third person for the whole of a particular fund or debt in the debtor's hands, it will operate as an equitable assignment of such fund or debt to the payee named in the draft or order;[63] and, after notice of such draft or order is communicated to the drawee, it will bind the fund or debt in his hands;[64] and an assignment in such manner may as well be made of a

63. *Alabama.*— Sands *v.* Matthews, 27 Ala. 399; Connoley *v.* Cheesborough, 21 Ala. 166.

California.— Lawrence Nat. Bank *v.* Kowalsky, 105 Cal. 41, 38 Pac. 517; Pope *v.* Huth, 14 Cal. 403; Pierce *v.* Robinson, 13 Cal. 116.

Colorado.— Patton *v.* Coen, etc., Carriage Mfg. Co., 3 Colo. 265.

Illinois.— Moore *v.* Gravelot, 3 Ill. App. 442.

Iowa.— McWilliams *v.* Webb, 32 Iowa 577.

Maine.— Hall *v.* Flanders, 83 Me. 242, 22 Atl. 158; Robbins *v.* Bacon, 3 Me. 346.

Massachusetts.— Hall *v.* Dorchester Mut. F. Ins. Co., 111 Mass. 53, 15 Am. Rep. 1; Kingman *v.* Perkins, 105 Mass. 111; Macomber *v.* Doane, 2 Allen (Mass.) 541; Tripp *v.* Brownell, 12 Cush. (Mass.) 376; Dennis *v.* Twitchell, 10 Metc. (Mass.) 180; Adams *v.* Robinson, 1 Pick. (Mass.) 461; Van Staphorst *v.* Pearce, 4 Mass. 258. A draft drawn by a master on the consignee of goods for a sum expressed to be the amount of freight on the goods consigned, held to be an equitable assignment of the money to become due for freight on the carriage of the goods. Cutts *v.* Perkins, 12 Mass. 206.

Michigan.— See, *Contra,* Detroit Second Nat. Bank *v.* Williams, 13 Mich. 282.

Minnesota.—Brady *v.* Chadbourne, 68 Minn. 117, 70 N. W. 981; Union Iron Works *v.* Kilgore, 65 Minn. 497, 67 N. W. 1017; Kelly *v.* Bronson, 26 Minn. 359, 4 N. W. 607.

Missouri.— Boyer *v.* Hamilton, 21 Mo. App. 520; Hydraulic Press Brick Co. *v.* Saville, 1 Mo. App. 96.

Montana.— State *v.* Conrow, 19 Mont. 104, 47 Pac. 640.

Nevada.— Jones *v.* Pacific Wood, etc., Co., 13 Nev. 359, 29 Am. Rep. 308.

New Jersey.—Not necessary that immediate payment be ordered to be made to the assignee. It is sufficient if the assignor, by the assignment, strips himself of his interest in all or a part of the fund. Weaver *v.* Atlantic Roofing Co., 57 N. J. Eq. 547, 40 Atl. 858.

New York.— Duffield *v.* Johnston, 96 N. Y. 369; Hackett *v.* Campbell, 10 N. Y. App. Div. 523, 42 N. Y. Suppl. 47; Shuttleworth *v.* Bruce, 7 Rob. (N. Y.) 160; Danklessen *v.* Braynard, 3 Daly (N. Y.) 183; Weston *v.* Barker, 12 Johns. (N. Y.) 276, 7 Am. Dec. 319; Campbell *v.* Smith, 7 Alb. L. J. 203. In Richardson *v.* Root, 19 Hun (N. Y.) 473, a decedent, shortly before his death, and in payment of a debt, delivered to his wife an order on the debtor to pay her the balance due him for certain services. The order was sent to the debtor the same day, but the money was not paid to the wife until after the death of the husband. This was a valid assignment to the wife, and the wife, as administratrix of her deceased husband's estate, was not bound to account for the money thus collected.

North Carolina.— Nimocks *v.* Woody, 97 N. C. 1, 2 S. E. 249, 2 Am. St. Rep. 268; Kahnweiler *v.* Anderson, 78 N. C. 133.

Ohio.— Gardner *v.* National City Bank, 39 Ohio St. 600.

Pennsylvania.— Hemphill *v.* Yerkes, 132 Pa. St. 545, 19 Atl. 342, 19 Am. St. Rep. 607.

Rhode Island.— Lee *v.* Robinson, 15 R. I. 369, 5 Atl. 290.

South Carolina.— McGahan *v.* Lockett, 54 S. C. 364, 32 S. E. 429, 71 Am. St. Rep. 796.

Texas.— Not necessary that order be accepted by debtor. Beaumont Lumber Co. *v.* Moore, (Tex. Civ. App. 1897) 41 S. W. 180.

Vermont.— Blin *v.* Pierce, 20 Vt. 25.

Virginia.— Switzer *v.* Noffsinger, 82 Va. 518.

United States.— Mandeville *v.* Welch, 5 Wheat. (U. S.) 277, 5 L. ed. 87; Spratley *v.* Hartford Ins. Co., 1 Dill. (U. S.) 392, 22 Fed. Cas. No. 13,256.

England.— Brice *v.* Bannister, 3 Q. B. D. 569, 47 L. J. Q. B. 722, 38 L. T. Rep. N. S. 739, 26 Wkly. Rep. 670; Lett *v.* Morris, 1 L. J. Ch. 17, 4 Sim. 607, 6 Eng. Ch. 607; *Ex p.* South, 3 Swanst. 392; Row *v.* Dawson, 1 Ves. 331.

See 4 Cent. Dig. tit. "Assignments," §§ 95, 99 *et seq.*

Where a draft was drawn on a debtor, generally, but for the exact amount of an account owing by him to the drawer, and a copy of the account was annexed to the draft, this was held an equitable assignment of the account as against garnishment. Moore *v.* Davis, 57 Mich. 251, 23 N. W. 800. *Compare* Gardner *v.* National City Bank, 39 Ohio St. 600.

64. Binding on drawee after notice.— *Alabama.*— Sands *v.* Matthews, 27 Ala. 399; Connoley *v.* Cheesborough, 21 Ala. 166.

California.— Joyce *v.* Wing Yet Lung, 87 Cal. 424, 25 Pac. 545; Wheatley *v.* Strobe, 12 Cal. 92.

Illinois.— Moore *v.* Gravelot, 3 Ill. App. 442.

Iowa.— Schollmier *v.* Schoendelen, 78 Iowa 426, 43 N. W. 282, 16 Am. St. Rep. 455; McWilliams *v.* Webb, 32 Iowa 577. But see Poole *v.* Carhart, 71 Iowa 37, 32 N. W. 16.

Kentucky.— Varnon *v.* Chestnut, 8 Ky. L. Rep. 428.

Maine.— Noyes *v.* Gilman, 65 Me. 589; Robbins *v.* Bacon, 3 Me. 346.

Maryland.— Wilson *v.* Carson, 12 Md. 54; Gibson *v.* Finley, 4 Md. Ch. 75.

Missouri.— Walker *v.* Mauro, 18 Mo. 564;

fund not yet in existence or of a debt not yet due, provided it has a potential existence.[65]

(E) *For Part of Particular Fund.* An order drawn on a debtor for a part of a fund in his hands, and unaccepted by him, will not operate as an equitable assignment of part of the fund, as against the drawee, even though drawn on a particular fund specified.[66] As between the drawer and payee, and after notice to the drawee as against attaching creditors of the drawer, such an order, drawn against a particular fund or debt, will operate as an equitable assignment of part of the fund.[67]

Missouri Pac. R. Co. *v.* Wright, 38 Mo. App. 141.

New Hampshire.— Conway *v.* Cutting, 51 N. H. 407.

New Jersey.— Brokaw *v.* Brokaw, (N. J. 1886) 4 Atl. 66.

New York.— Morton *v.* Naylor, 1 Hill (N. Y.) 583; Bradley *v.* Root, 5 Paige (N. Y.) 632; Clark *v.* Mauran, 3 Paige (N. Y.) 373.

United States.— Laclede Bank *v.* Schuler, 120 U. S. 511, 7 S. Ct. 644, 30 L. ed. 704; Mandeville *v.* Welch, 5 Wheat. (U. S.) 277, 5 L. ed. 87.

England.— Lett *v.* Morris, 1 L. J. Ch. 17, 4 Sim. 607, 6 Eng. Ch. 607; *Ex p.* Alderson, 1 Madd. 39, 15 Rev. Rep. 208; Yeates *v.* Groves, 1 Ves. Jr. 280.

65. Debt not due or fund not in existence. — Patton *v.* Coen, etc., Carriage Mfg. Co., 3 Colo. 265; Morton *v.* Naylor, 1 Hill (N. Y.) 583. But if the fund never comes into existence the order can only operate as an executory contract to assign, a breach of which may give a right to damages. The drawer cannot prevent the creation of the fund and interpose the absence of or failure of the fund as a defense in an action upon the order. Risley *v.* Smith, 64 N. Y. 576. A draft cannot operate as an assignment of funds deposited with the drawee if the deposit was not made until after the draft was made and delivered. Fordred *v.* Seamen's Sav. Bank, 10 Abb. Pr. N. S. (N. Y.) 425; Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

Where a manufacturing company gave a creditor an order authorizing its general agent "to assume and pay the creditor in approved notes or money, the proceeds of the sale of" its reapers, sold within a certain period to a certain amount, to be collateral security for the payment of all amounts due or to become due by the company to the creditor, and the agent accepted the order by agreeing "to turn over" to the creditor "approved notes," etc., in amount and within the time specified, it was held to be a good equitable assignment of such notes as against an assignee for creditors of the company, and that the latter would be compelled to deliver that amount of notes to the creditor. East Lewisburg Lumber, etc., Mfg. Co. *v.* Marsh, 91 Pa. St. 96.

66. Unaccepted order for part of fund.— *Illinois.*— Chicago First Baptist Church *v.* Hyde, 40 Ill. 150; Moore *v.* Gravelot, 3 Ill. App. 442.

Iowa.— Metcalf *v.* Kincaid, 87 Iowa 443, 54 N. W. 867, 43 Am. St. Rep. 391.

Kansas.— Snyder *v.* Board of Education, 16 Kan. 542.

Louisiana.— Poydras *v.* Delamare, 13 La. 98.

Maryland.— Gibson *v.* Finley, 4 Md. Ch. 75.

Massachusetts.— Papineau *v.* Naumkeag Steam Cotton Co., 126 Mass. 372; Gibson *v.* Cooke, 20 Pick. (Mass.) 15, 32 Am. Dec. 194.

Missouri.— Kimball *v.* Donald, 20 Mo. 577, 64 Am. Dec. 209; Missouri Pac. R. Co. *v.* Wright, 38 Mo. App. 141; Rice *v.* Dudley, 64 Mo. App. 383; Chase *v.* Alexander, 6 Mo. App. 505.

New York.— Noe *v.* Christie, 51 N. Y. 270.

Pennsylvania.— Jermyn *v.* Moffitt, 75 Pa. St. 399.

Wisconsin.— Baillie *v.* Stephenson, 95 Wis. 500, 70 N. W. 660.

United States.— Mandeville *v.* Welch, 5 Wheat. (U. S.) 277, 5 L. ed. 87.

England.— Rodick *v.* Gandell, 12 Beav. 325, 1 De G. M. & G. 763, 13 Jur. 1087, 19 L. J. Ch. 113, 50 Eng. Ch. 591, 15 Eng. L. & Eq. 22.

See also *supra*, II, B, 10.

In Maryland the statute [Md. Acts (1834), c. 79] providing that no transfer of any of the goods, or chattels, or credits of any non-resident defendant shall have any effect against an attachment if not recorded, includes choses in action. Neptune Ins. Co. *v.* Montell, 8 Gill (Md.) 228. But see Brady *v.* State, 26 Md. 290, 311, wherein it is said: "It is not necessary as the law now stands in Maryland, that an assignee of claims or moneys shall give notice, by registration or otherwise, in order to shield his claim from an attaching creditor."

67. Operates as an assignment, when.— *Arkansas.*— Moore *v.* Robinson, 35 Ark. 293.

Colorado.— Central Nat. Bank *v.* Spratlen, 7 Colo. App. 430, 43 Pac. 1048.

Illinois.—Dolese *v.* McDougall, 182 Ill. 486, 55 N. E. 547 [*affirming* 78 Ill. App. 629]; Warren *v.* Columbus First Nat. Bank, 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746; Phelps *v.* Northup, 56 Ill. 156, 8 Am. Rep. 681; Chicago First Baptist Church *v.* Hyde, 40 Ill. 150.

Indiana.— Indiana Mfg. Co. *v.* Porter, 75 Ind. 428; Lapping *v.* Duffy, 47 Ind. 51.

Iowa.— McWilliams *v.* Webb, 32 Iowa 577.

Kansas.— See McCubbin *v.* Atchison, 12 Kan. 166; Continental Ins. Co. *v.* Pratt, 8 Kan. App. 424, 55 Pac. 671.

Maine.— National Exch. Bank *v.* McLoon, 73 Me. 498, 40 Am. Rep. 388.

(F) *Upon Acceptance by Drawee.* An order drawn on a debtor, payable out of a debt or fund in or coming into his hands, will operate as an assignment of either the whole or part of such debt or fund, depending on whether the order is for the whole or for a part thereof, if the order is accepted by the drawee.[68]

Massachusetts.— James *v.* Newton, 142 Mass. 366, 8 N. E. 122, 56 Am. Rep. 692.

Minnesota.— Griggs *v.* St. Paul, 56 Minn. 150, 57 N. W. 401; Canty *v.* Latterner, 31 Minn. 239, 17 N. W. 385.

Mississippi.—Hutchinson *v.* Simon, 57 Miss. 628; Whitney *v.* Cowan, 55 Miss. 626; Moody *v.* Kyle, 34 Miss. 506.

Nebraska.— Slobodisky *v.* Curtis, 58 Nebr. 211, 78 N. W. 522; Code *v.* Carlton, 18 Nebr. 328, 25 N. W. 353.

New Jersey.— Bradley, etc., Co. *v.* Berns, 51 N. J. Eq. 437, 26 Atl. 908; Harlem Bank *v.* Bayonne, 48 N. J. Eq. 246, 21 Atl. 478; Kirtland *v.* Moore, 40 N. J. Eq. 106, 2 Atl. 269; Trustees Public Schools *v.* Heath, 15 N. J. Eq. 22.

New York.— Coates *v.* Emporia First Nat. Bank, 91 N. Y. 20; People *v.* Comptroller, 77 N. Y. 45; Ehrichs *v.* De Mill, 75 N. Y. 370; Kelly *v.* Roberts, 40 N. Y. 432; Parker *v.* Syracuse, 31 N. Y. 376; Lowery *v.* Steward, 25 N. Y. 239, 82 Am. Dec. 346; Field *v.* New York, 6 N. Y. 179, 57 Am. Dec. 435; Harris *v.* Clark, 3 N. Y. 93, 51 Am. Dec. 352; Hall *v.* Buffalo, 1 Keyes (N. Y.) 193; Ballou *v.* Boland, 14 Hun (N. Y.) 355; Lewis *v.* Berry, 64 Barb. (N. Y.) 593; Young Stone Dressing Co. *v.* Wardens, etc., St. James' Church, 61 Barb. (N. Y.) 489; Gray *v.* New York, 46 N. Y. Super. Ct. 494; Matter of Whitbeck, 22 Misc. (N. Y.) 494, 50 N. Y. Suppl. 932; Hurd *v.* Johnson Park Invest. Co., 13 Misc. (N. Y.) 643, 34 N. Y. Suppl. 915, 69 N. Y. St. 141; Williams *v.* Edison Electric Illuminating Co., 16 N. Y. Suppl. 857; Morton *v.* Naylor, 1 Hill (N. Y.) 583; Pattison *v.* Hull, 9 Cow. (N. Y.) 747; Wheeler *v.* Wheeler, 9 Cow. (N. Y.) 34; Taylor *v.* Bates, 5 Cow. (N. Y.) 376; Weston *v.* Barker, 12 Johns. (N. Y.) 276, 7 Am. Dec. 319; Peyton *v.* Hallett, 1 Cai. (N. Y.) 363; Bradley *v.* Root, 5 Paige (N. Y.) 632. But must be made on consideration. Alger *v.* Scott, 54 N. Y. 14.

North Carolina.— Kahnweiler *v.* Anderson, 78 N. C. 133.

Ohio.— Gamble *v.* Carlisle, 6 Ohio Dec. 48.

Oregon.— McDaniel *v.* Maxwell, 21 Oreg. 202, 27 Pac. 952, 28 Am. St. Rep. 740.

Pennsylvania.— Com. *v.* American L. Ins. Co., 162 Pa. St. 586, 29 Atl. 660, 42 Am. St. Rep. 844; Grove's Appeal, 103 Pa. St. 562; Caldwell *v.* Hartupee, 70 Pa. St. 74; Beaumont *v.* Lane, 3 Pa. Super. Ct. 73.

South Carolina.— Lowndes *v.* Ladson, Rich. Eq. Cas. (S. C.) 315.

Tennessee.— Spring City Bank *v.* Rhea County, (Tenn. Ch. 1900) 59 S. W. 442.

Texas.—Harris County *v.* Campbell, 68 Tex. 22, 3 S. W. 243, 2 Am. St. Rep. 467; Olive *v.* San Antonio Builders' Supply Co., (Tex. Civ. App. 1894) 27 S. W. 789; Collins, etc., Co. *v.* U. S. Insurance Co., 7 Tex. Civ. App. 579, 27 S. W. 147.

Virginia.—Chesapeake Classified Bldg. Assoc. *v.* Coleman, 94 Va. 433, 26 S. E. 843; Shenandoah Valley R. Co. *v.* Miller, 80 Va. 821; Jolliffe *v.* Higgins, 6 Munf. (Va.) 3; Brooks *v.* Hatch, 6 Leigh (Va.) 534.

Washington.—Seattle *v.* Liberman, 9 Wash. 276, 37 Pac. 433.

West Virginia.— Stevenson *v.* Kyle, 42 W. Va. 229, 24 S. E. 886, 57 Am. St. Rep. 854; Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

United States.— Christmas *v.* Gaines, 14 Wall. (U. S.) 69, 20 L. ed. 762; Union Ins. Co. *v.* Glover, 9 Fed. 529. *Compare* Fourth St. Nat. Bank *v.* Yardley, 165 U. S. 634, 17 S. Ct. 439, 41 L. ed. 855 [*reversing* 55 Fed. 850].

England.— Rodick *v.* Gandell, 12 Beav. 325, 1 De G. M. & G. 763, 13 Jur. 1087, 19 L. J. Ch. 113, 50 Eng. Ch. 591, 15 Eng. L. & Eq. 22; Burn *v.* Carvalho, 9 L. J. Ch. 65, 4 Myl. & C. 690, 18 Eng. Ch. 690, 7 Sim. 109, 8 Eng. Ch. 109; Lett *v.* Morris, 1 L. J. Ch. 17, 4 Sim. 607, 6 Eng. Ch. 607; Row *v.* Dawson, 1 Ves. 331; Yeates *v.* Groves, 1 Ves. Jr. 280.

Canada.— Bank of British North America *v.* Gibson, 21 Ont. 613.

See 4 Cent. Dig. tit. "Assignments," § 98.

Orders drawn by a contractor on sums to become due under a contract with a defendant city constituted an equitable assignment of so much of the fund on which they were drawn as was necessary for their payment, and, being valid when made, they were not invalidated by the subsequent default of the contractor. Dowling *v.* Seattle, (Wash. 1900) 61 Pac. 709.

68. *Arkansas.*—Moore *v.* Robinson, 35 Ark. 293.

California.— McEwen *v.* Johnson, 7 Cal. 258. A verbal acceptance will be sufficient. Joyce *v.* Wing Yet Lung, 87 Cal. 424, 25 Pac. 545.

Colorado.— Lewis *v.* San Miguel County, 14 Colo. 371, 23 Pac. 338. See also Meldrum *v.* Henderson, 7 Colo. App. 256, 43 Pac. 148.

Iowa.— Though it be accepted on the condition that the contract will be performed by the assignor. Cutler *v.* McCormick, 48 Iowa 406.

Kentucky.— Buckner *v.* Sayre, 18 B. Mon. (Ky.) 745; C. H. Brown Banking Co. *v.* Stockton, 21 Ky. L. Rep. 1212, 54 S. W. 854.

Maine.— McLellan *v.* Walker, 26 Me. 114; Johnson *v.* Thayer, 17 Me. 401; Legro *v.* Staples, 16 Me. 252.

Maryland.— Rosenstock *v.* Ortwine, 46 Md. 388. Not unless drawn on particular fund. See Wheeler *v.* Stone, 4 Gill (Md.) 38; Sheppard *v.* State, 3 Gill (Md.) 289.

Massachusetts.— Grant *v.* Wood, 12 Gray (Mass.) 220; Bourne *v.* Cabot, 3 Metc. (Mass.) 305. As to what is not an acceptance see Parkhurst *v.* Dickerson, 21 Pick. (Mass.) 307.

So, the acceptance of a check by a bank on which it is drawn will pass the equitable title to the fund drawn on to the holder of the check, to the amount thereof, and certification of a check is an acceptance thereof.[69] An order drawn by the owner of certain claims on his agent or attorney, to pay a certain sum out of the proceeds of such claims, only operates as an assignment of the proceeds of such claims as are collected by such agent or attorney, and does not operate as an equitable assignment of the claims themselves;[70] and it has also

An order by a laborer on his employer to pay his future wages for three months to another will operate as an equitable assignment of such wages if such order is accepted by the employer, though the laborer was hired by the day only. Lannan *v.* Smith, 7 Gray (Mass.) 150.

Minnesota.— Baylor *v.* Butterfass, (Minn. 1900) 84 N. W. 640.

Nebraska.— Crum *v.* Stanley, 55 Nebr. 351, 75 N. W. 851.

New Hampshire.— Pollard *v.* Pollard, 68 N. H. 356, 39 Atl. 329.

New York.— Schmittler *v.* Simon, 101 N. Y. 554, 5 N. E. 452, 54 Am. St. Rep. 737; Ehrichs *v.* De Mill, 75 N. Y. 370; Risley *v.* Indianapolis, etc., R. Co., 62 N. Y. 240; Munger *v.* Shannon, 61 N. Y. 251; Gallagher *v.* Nichols, 60 N. Y. 438, 16 Abb. Pr. N. S. (N. Y.) 337; Pilcher *v.* Brayton, 17 Hun (N. Y.) 429; Wells *v.* Williams, 39 Barh. (N. Y.) 567; Barber *v.* Lyon, 22 Barh. (N. Y.) 622; Vreeland *v.* Blunt, 6 Barh. (N. Y.) 182; Trask *v.* Jones, 5 Bosw. (N. Y.) 62; Hafner *v.* Kirby, 24 Misc. (N. Y.) 390, 53 N. Y. Suppl. 552; Sansone *v.* Alexander, 16 Misc. (N. Y.) 368, 38 N. Y. Suppl. 66; Gauld *v.* Lipman, 4 Misc. (N. Y.) 78, 23 N. Y. Suppl. 778, 53 N. Y. St. 137; McMenomy *v.* Ferrers, 3 Johns. (N. Y.) 71; Peyton *v.* Hallett, 1 Cai. (N. Y.) 363.

Pennsylvania.— Howe *v.* Short, 135 Pa. St. 379, 19 Atl. 1022; Esling *v.* Zantzinger, 13 Pa. St. 50; Matter of Ferran, 1 Ashm. (Pa.) 319; Phœnix Iron Co. *v.* Philadelphia, 11 Phila. (Pa.) 203, 33 Leg. Int. (Pa.) 176. A workman's order on his employer to pay wages coming to him to a third person for goods furnished him, and such order being accepted by the employer, is a valid equitable assignment of such wages. Strausser *v.* Taylor, 2 Kulp (Pa.) 214.

South Carolina.— Debesse *v.* Napier, 1 McCord (S. C.) 106, 10 Am. Dec. 658.

Tennessee.— Where the drawee verbally agreed to pay an order after settlement of accounts between himself and the drawer, it was held to be a valid equitable assignment as against subsequent attaching creditors of the drawer. McLin *v.* Wheeler, 5 Sneed (Tenn.) 686.

Texas.— Order of an owner of claims on an attorney to hold same subject to control of another and to pay proceeds to him, accepted by the attorney, is a valid equitable assignment of the proceeds. Brander *v.* Young, 12 Tex. 332.

United States.— Mandeville *v.* Welch, 5 Wheat. (U. S.) 277, 5 L. ed. 87; Weston *v.* Penniman, 1 Mason (U. S.) 306, 29 Fed. Cas. No. 17,455.

See 4 Cent. Dig. tit. "Assignments," §§ 86, 98 *et seq.*

Where a draft on its face notified the drawee that the drawer had made a general assignment, the drawee had no right to honor the draft, and his acceptance thereof was held not to operate as an equitable assignment of the fund drawn on. Meldrum *v.* Henderson, 7 Colo. App. 256, 43 Pac. 148.

Where an order was made in favor of an agent of the drawer and was for collection merely, the acceptance of the order will not make it operate as an equitable assignment to the payee. Halliburton *v.* Nance, 40 Ark. 161.

69. Acceptance of check by bank.— *Alabama.*— National Commercial Bank *v.* Miller, 77 Ala. 168, 54 Am. Rep. 50.

Illinois.— Buehler *v.* Galt, 35 Ill. App. 225.

New York.— Jersey City First Nat. Bank *v.* Leach, 52 N. Y. 350, 11 Am. Rep. 708; Willets *v.* Phœnix Bank, 2 Duer (N. Y.) 121.

Pennsylvania.— Girard Bank *v.* Penn Tp. Bank, 39 Pa. St. 92, 80 Am. Dec. 507.

United States.— Merchants' Nat. Bank *v.* Boston State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008.

In an action against a bank on a certified check, not indorsed, but delivered to plaintiff in payment of goods, with a statement by the drawer, after plaintiff had declined to receive the check, that "It is just as good as money; all that you have to do is to go and take the check and get the money," it was held that the inference might be drawn that there was an assignment to plaintiff of a part of the money on deposit equal to the amount of the check. Lynch *v.* Jersey City First Nat. Bank, 53 Hun (N. Y.) 430, 6 N. Y. Suppl. 283, 25 N. Y. St. 127 [*affirmed* in 119 N. Y. 635, 23 N. E. 1147, 29 N. Y. St. 991].

70. Proceeds of claims collected.— Morton *v.* Naylor, 1 Hill (N. Y.) 583; Matter of Cleary, 9 Wash. 605, 38 Pac. 79. *Contra*, see Spofford *v.* Kirk, 97 U. S. 484, 24 L. ed. 1032.

An order on the assignee of a bond by the assignor to pay to a third person a certain sum, and accepted, to be paid when in funds on collection of bond, does not operate as an assignment of the bond to a third person, and the obligor of the bond could legally pay it to the assignee. Com. *v.* Cummins, 155 Pa. St. 30, 25 Atl. 996.

Where a payee of a note gave a third party an order for money on his attorney, to be paid out of proceeds of a note in the latter's hands for collection, and the order was ac-

been held that such claims are subject to garnishment by the creditors of the drawer.[71]

(v) *Powers of Attorney.* A power of attorney given to one to collect or receive a debt or fund will, as between the parties thereto, operate as an equitable assignment of the debt or fund authorized to be collected or received, where such power is coupled with an interest in the subject-matter,[72] if made upon a valuable consideration, and where it is the intention of the parties that it should so operate.[73] But, if the power is not made upon a valuable consideration or is a mere naked authority, it will not operate as an equitable assignment.[74]

D. Assignments of Joint Rights of Action or Joint Debts. Where three are several holders of a chose in action or obligees of an instrument, in order to assign the chose in action or instrument at law all the holders or obligees must join in the assignment.[75] In equity, however, one of two or more owners of a

cepted by the attorney "to be paid out of the first money collected on the note," and the payee afterward compromised the claim and instructed the attorney to cancel the note, it was held no equitable assignment *pro tanto* of the note, and that the attorney was not liable to the payee in the order. Lindsay *v.* Price, 33 Tex. 280.

71. Garnishment by creditors of drawer.— Robertson *v.* Scales, 15 La. Ann. 545; White *v.* Coleman, 130 Mass. 316; Cushman *v.* Haynes, 20 Pick. (Mass.) 132. An order given by a landlord to his agent, to pay rents collected to a mortgagee in payment of interest on the mortgage, held not an equitable assignment of the rents not collected by the agent as against an assignee for the benefit of creditors of the landlord. Matter of Cleary, 9 Wash. 605, 38 Pac. 79. See also Morton *v.* Naylor, 1 Hill (N. Y.) 583.

But see, contra, where a debtor gave an order, to another, on his attorney, to pay over the amount of a note in his hands when collected "as the note is to be applied to the payment on a note" on which the payee of the order was surety. This order was accepted, to be paid when collected, reserving fees. It was held to be an appropriation of the note and an equitable assignment thereof to the payee in the order which could not be revoked by the drawer, even if there had been no acceptance, and the note was not liable to garnishment for debt of the drawer. Nesmith *v.* Drum, 8 Watts & S. (Pa.) 9, 10, 42 Am. Dec. 260. See Spalding *v.* Lesly, 2 Speers (S. C.) 754.

72. *Arkansas.*— Porter *v.* Hanson, 36 Ark. 591.

Massachusetts.— Weed *v.* Jewett, 2 Metc. (Mass.) 608, 37 Am. Dec. 115; Gerrish *v.* Sweetser, 4 Pick. (Mass.) 374.

Mississippi.— Cobb *v.* Champlin, 33 Miss. 406.

New York.— Stover *v.* Eycleshimer, 4 Abb. Dec. (N. Y.) 309; McEwen *v.* Brewster, 19 Hun (N. Y.) 337 [*overruling* McEwen *v.* Brewster, 17 Hun (N. Y.) 223]; People *v.* Tioga Common Pleas, 19 Wend. (N. Y.) 73; Canfield *v.* Monger, 12 Johns. (N. Y.) 346; Raymond *v.* Squire, 11 Johns. (N. Y.) 47; Bergen *v.* Bennett, 1 Cai. Cas. (N. Y.) 1; Knapp *v.* Alvord, 10 Paige (N. Y.) 205, 40 Am. Dec. 241; Matter of Oakley, 2 Edw. (N. Y.) 478.

Pennsylvania.— Keys' Estate, 137 Pa. St. 565, 20 Atl. 710, 21 Am. St. Rep. 896; Watson *v.* Bagaley, 12 Pa. St. 164, 51 Am. Dec. 595. But see Watson *v.* Philadelphia, 142 Pa. St. 179, 21 Atl. 815.

Tennessee.— An irrevocable power of attorney, authorizing the person to whom given to procure for his own use whatever lands the giver thereof may be entitled to from the state for military services, is an assignment in equity of land-warrants authorized to be issued to the giver under military bounty acts. Read *v.* Long, 4 Yerg. (Tenn.) 68.

United States.— See, *contra,* Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 174, 5 L. ed. 589.

England.— Bromley *v.* Holland, 7 Ves. Jr. 28, 6 Rev. Rep. 58.

See 4 Cent. Dig. tit. "Assignments." § 106.

73. There must be an intention to assign in order to constitute an equitable assignment. A power of attorney may constitute an equitable assignment, if so expressed, or if proved from the accompanying circumstances that such is the intention. Goodsell *v.* Benson, 13 R. I. 225; Casey *v.* Cavaroc, 96 U. S. 467, 24 L. ed. 779; Rodick *v.* Gandell, 12 Beav. 325, 1 De G. M. & G. 763, 13 Jur. 1087, 19 L. J. Ch. 113, 50 Eng. Ch. 591, 15 Eng. L. & Eq. 22; 2 White & T. Lead. Cas. (4th Am. ed.) 1641, 1648, 1654.

74. Illustration.— A manufacturer in England arranged with a merchant that the latter should manage the shipment of the former's goods on orders from the United States, and should advance freight and other charges, and to secure the latter the former executed a power of attorney, declared to be irrevocable, to the latter's agent in the United States, to collect the accounts due from customers of the former and to be remitted to the merchant in England and to be by him credited to the manufacturer. An order was shipped to a customer in Massachusetts and, before the account was collected by the agent, the customer was garnished for a debt of the manufacturer. It was held not to be a power coupled with an interest, and no equitable assignment of the debt to the merchant. Hall *v.* Jackson, 20 Pick. (Mass.) 194.

75. At law.— Robinson *v.* Denton, 6 Ark. 283; Roane *v.* Lafferty, 5 Ark. 465; Roberts *v.* Elliott, 3 T. B. Mon. (Ky.) 395.

One joint obligee cannot, by his separate

contract or chose in action may assign his share or interest therein,[76] and, in states where the real party in interest is authorized to sue, his assignee may join with the other owners in an action against the obligor or debtor.[77] As a creditor cannot split up his demand against a debtor, so he cannot assign a joint obligation of two debtors as against one merely.[78]

E. Reassignments. Where a written instrument has been assigned by written assignment placed thereon, and is redelivered and surrendered to the assignor, with an understanding that the assignment be considered void, this will operate as a reassignment;[79] or, where the instrument is in possession of the assignor, with the assignment canceled, the assignor may recover on it without formal proof of reassignment to him.[80]

F. Filing and Recording.[81] Except in regard to certain particular classes of choses in action — such as future earnings, which, by the statutes of several states, are required to be recorded with the clerk of the town where the assignor resides[82] — assignments of choses in action are not embraced by the registry acts,

act, transfer the legal title even to his interest in an obligation to a stranger so as to authorize him to sue in his own name, or in conjunction with the other obligees.

Alabama.— Skinner *v.* Bedell, 32 Ala. 44; Boyd *v.* Martin, 10 Ala. 700; Gayle *v.* Martin, 3 Ala. 593; Bebee *v.* Miller, Minor (Ala.) 364.

Indiana.— Boyd *v.* Holmes, 1 Ind. 480.

Kentucky.— Mardis *v.* Tyler, 10 B. Mon. (Ky.) 376; Hubbard *v.* Prather, 1 Bibb (Ky.) 178.

Massachusetts.—Smith *v.* Whiting, 9 Mass. 334.

Washington.— See McElroy *v.* Williams, 14 Wash. 627, 45 Pac. 306, where it was held that a suit by assignees who hold separate assignments from the original obligee of a bond might be maintained if brought jointly. *Compare* Grippin *v.* Benham, 5 Wash. 589, 32 Pac. 555.

Wisconsin.— Chapman *v.* Plummer, 36 Wis. 262.

Nor can he assign his interest to his co-obligees so as to permit them to sue at law in their own names. Haworth *v.* Fisher, 3 Blackf. (Ind.) 249. *Contra*, Smith *v.* Gregory, 75 Mo. 121; Canefox *v.* Anderson, 22 Mo. 347; Smith *v.* Oldham, 5 Mo. 483.

76. In equity.— Fordyce *v.* Nelson, 91 Ind. 447; Groves *v.* Ruby, 24 Ind. 418; Walpole *v.* Bridges, 5 Blackf. (Ind.) 222; McPike *v.* McPherson, 41 Mo. 521.

77. Under statutes authorizing real party in interest to sue.— Weik *v.* Pugh, 92 Ind. 382; Fordyce *v.* Nelson, 91 Ind. 447; Groves *v.* Ruby, 24 Ind. 418.

78. Lyon *v.* Lyon, 4 Bibb (Ky.) 438; Mulford *v.* Hodges, 10 Hun (N. Y.) 79. See, generally, JOINDER AND SPLITTING OF ACTIONS.

79. Assignor of chose in action, which has been reassigned to him, may bring an action in his own name although notice of the first assignment was given to the debtor, who promised to pay the debt to the assignee, and no notice was given to him of the reassignment, and debtor may avail himself of same defenses as if action were brought in the name of the assignee. Clark *v.* Parker, 4 Cush. (Mass.) 361. See also Ball *v.* Larkin, 3 E. D. Smith (N. Y.) 555; Conant *v.* Wills, 1 McLean (U. S.) 427, 6 Fed. Cas. No. 3,087.

No defense to action that plaintiff had assigned his interest, when claim had been reassigned to plaintiff. Drake *v.* Avanzini, 20 Colo. 104, 36 Pac. 846; Dodd *v.* Noble, 5 Blackf. (Ind.) 30.

80. Bogan *v.* Martin, 8 Ala. 807; Scraggs *v.* Hill, 37 W. Va. 706, 17 S. E. 185; Conant *v.* Wells, 1 McLean (U. S.) 427, 6 Fed. Cas. No. 3,087. But see, *contra*, to the effect that an assignee of an obligation, after assignment and delivery, cannot restore the legal title in the assignor by erasure and cancellation of the assignment. Block *v.* Walker, 2 Ark. 4.

81. As to what law governs as to recording assignments see *infra*, V, D.

Attestation and acknowledgment.— See Adams *v.* Lee, 82 Ind. 587; Eagle *v.* Ross, 67 Ind. 110; Livingston *v.* Jones, Harr. (Mich.) 165; McMillan *v.* Edfast, 50 Minn. 414, 52 N. W. 907. See also, generally, ACKNOWLEDGMENTS, 1 Cyc. 506.

82. In Maine, by statute, assignments of future wages are required to be in writing and filed in the office of the clerk of the city, town, or plantation where the assignor is commorant while earning such wages, in order to bind others than the immediate parties to the assignment. Gilman *v.* Inman, 85 Me. 105, 26 Atl. 1049; Pullen *v.* Monk, 82 Me. 412, 19 Atl. 909; Wright *v.* Smith, 74 Me. 495. This statute held not to apply to an unorganized town or plantation, and an assignment of future wages by an employee commorant in such unorganized town or plantation, in which there is no recording office, need not be recorded. Woods *v.* Ronco, 85 Me. 124, 26 Atl. 1056; Wade *v.* Bessey, 76 Me. 413. In Woods *v.* Ronco, 85 Me. 124, 26 Atl. 1056, it was held that the statute does not make the recording of such an assignment notice to the employer, but only to the creditors of the employee. The statute does not apply to assignments of wages wholly earned at the time of the assignment. Wright *v.* Smith, 74 Me. 495. See also Stinson *v.* Carwell, 71 Me. 510.

and such assignments are valid without filing and recording them.[83] And, where

An assignment of a contract to do certain work, and the earnings thereunder, need not be recorded under this statute. Augur *v.* Couture, 68 Me. 427.

In Massachusetts *assignments of future earnings* must be recorded in order to be valid against trustee process or attachment against the employee. Ouimet *v.* Sirois, 124 Mass. 162; Fuller *v.* Cunningham, 105 Mass. 442; Knowlton *v.* Cooley, 102 Mass. 233.

The term "earnings" is broader than the term "wages," and involves the idea of compensation for services rendered and is not limited to gains from merely personal services. Money due from an employer of labor to a third party for board and lodging furnished to his workmen is in the nature of compensation for services rendered to such employer, and the assignment thereof comes within the statute. Jenks *v.* Dyer, 102 Mass. 235. So, the compensation of one who agreed to furnish labor and materials for a house, to be paid for when the house is completed, is earnings, and its assignment must be recorded. Somers *v.* Keliher, 115 Mass. 165. Earnings do not cover rents under a lease if no service is to be performed by the lessor. Kendall *v.* Kingsley, 120 Mass. 94.

The assignment is sufficient if it identifies the fund and the assignor, though there is some obscurity as to the assignee. Ouimet *v.* Sirois, 124 Mass. 162. A workman's order to "pay to Hezekiah Cooley my wages as fast as they become due, to the amount of $150," accepted in writing by his employer, is not a bill of exchange but an assignment of wages, and must be recorded to be valid under the statute. Knowlton *v.* Cooley, 102 Mass. 233.

In New Hampshire assignments of future wages are invalid as against creditors of the laborer, unless made in writing, accepted by the employer, and filed in the town-clerk's office. Runnels *v.* Bosquet, 60 N. H. 38; Thompson *v.* Smith, 57 N. H. 306. In the latter case it was held that, even though the statute was complied with, if the assignment was not on a valuable consideration it was fraudulent as to creditors.

In Rhode Island assignments of future earnings are required to be in writing and recorded. The term "earnings" in connection with the use of the word "employed" and the context held to mean wages, and not to include the compensation of a contractor to build a house. Abbott *v.* Davidson, 18 R. I. 91, 25 Atl. 839. A hired B as a workman and, at the time of the hiring, made a verbal promise to C to be responsible for B's purchases of goods up to the amount of the wages to be due B. It was held that the promise of A was not an assignment of B's wages within the statute. Abbott *v.* Davidson, 18 R. I. 91, 25 Atl. 839. See also Lennon *v.* Parker, (R. I. 1900) 46 Atl. 44; Garland *v.* Linskey, (R. I. 1897) 36 Atl. 837; Browning *v.* Parker, 17 R. I. 183, 20 Atl. 835.

In Texas, under Tex. Rev. Stat. (1895), art. 4647, providing that, on sale of any cause of action, a written transfer thereof shall be recorded, which shall be notice to all parties, an agreement conveying to another one half of whatever sum may be realized out of and collected from a certain defendant in the suit then pending is a sufficient transfer of one half of the cause of action, within the statute. Texas, etc., R. Co. *v.* Vaughan, (Tex. Civ. App. 1897) 40 S. W. 1065.

The recording of an assignment of future wages, as provided by statute, is not constructive notice of the assignment to the employer, but only to the creditors of the employee. Corbett *v.* Fitchburg R. Co., 110 Mass. 204.

The filing for record, in the county clerk's office, of assignments of interests in a contract by parties claiming thereunder does not make the subsequent record in that office of other assignments to other parties of interests in the same contract notice to the first assignees, when they take further subsequent assignments of interests in such contract, if there is no statute providing for such record or making it notice. Burck *v.* Taylor, 152 U. S. 634, 14 S. Ct. 696, 38 L. ed. 578.

83. Need not be filed and recorded.— *Alabama.*— Falkner *v.* Jones, 12 Ala. 165; McCain *v.* Wood, 4 Ala. 258.

Kentucky.— Newby *v.* Hill, 2 Metc. (Ky.) 530; U. S. Bank *v.* Huth, 4 B. Mon. (Ky.) 423.

Massachusetts.— Marsh *v.* Woodbury, 1 Metc. (Mass.) 436.

Michigan.— Farrell Foundry, etc., Co. *v.* Preston Nat. Bank, 93 Mich. 582, 53 N. W. 831; Preston Nat. Bank *v.* George T. Smith Middlings Purifier Co., 84 Mich. 364, 47 N. W. 502.

Montana.— Board Trustees School Dist. No. 1 *v.* Whalen, 17 Mont. 1, 41 Pac. 849.

New York.— See Koehler, etc., Co. *v.* Flebbe, 21 N. Y. App. Div. 210, 47 N. Y. Suppl. 369.

Pennsylvania.— See Pepper's Appeal, 77 Pa. St. 373.

Tennessee.— Kelly *v.* Thompson, 2 Heisk. (Tenn.) 278; Mayer *v.* Pulliam, 2 Head (Tenn.) 346; Allen *v.* Bain, 2 Head (Tenn.) 100. See also Marshall *v.* Fields [*cited* in Allen *v.* Bain, 2 Head (Tenn.) 108].

Choses in action have been held not to be within the general recording acts in the following cases:

Iowa.— Lawrence *v.* McKenzie, 88 Iowa 432, 55 N. W. 505.

Kentucky.— U. S. Bank *v.* Huth, 4 B. Mon. (Ky.) 423.

Virginia.— Daily *v.* Warren, 80 Va. 512; Gordon *v.* Rixey, 76 Va. 694; Gregg *v.* Sloan, 76 Va. 497; Kirkland *v.* Brune, 31 Gratt. (Va.) 126.

West Virginia.— Fleshman *v.* Hoylman, 27 W. Va. 728; Tingle *v.* Fisher, 20 W. Va. 497.

United States.— Aultman *v.* McConnell, 34 Fed. 724.

the statute does not authorize the registry of assignments of choses in action, the filing and recording of them imparts no notice to any one.[84]

IV. VALIDITY.[85]

A. Duress, Fraud, Mistake, Etc.— 1. EFFECT OF. It may be said that fraud, undue influence, mental incapacity in the parties contracting, duress, or mistake, in connection with an assignment, vitiates it to the same extent as in the case of all other contracts.[86]

Compare Marshall *v.* Fields [*cited* in Allen *v.* Bain, 2 Head (Tenn.) 108].

Likewise, equitable assignments have been held not to be within the recording acts. Motz *v.* Stowe, 83 N. C. 434; Ocoee Bank *v.* Nelson, 1 Coldw. (Tenn.) 185; Robinson *v.* Williams, 3 Head (Tenn.) 540.

So, too, legacies are not within the recording acts. Kilbourne *v.* Fay, 29 Ohio St. 264, 23 Am. Rep. 741; Allen *v.* Bain, 2 Head (Tenn.) 100.

Where a title bond is recorded, an assignment thereof for a valuable consideration **and** *bona fide* need not be recorded to protect the assignee against creditors of the vendor. Motz *v.* Stowe, 83 N. C. 434; Sykes *v.* Hannawalt, 5 N. D. 335, 65 N. W. 682; Merriman *v.* Polk, 5 Heisk. (Tenn.) 717.

84. Filing not required by statute imparts no notice.— *Alabama.*— Stewart *v.* Kirkland, 19 Ala. 162.

Louisiana.— Thomas *v.* Callihan, 5 Mart. N. S. (La.) 180.

Tennessee.—Dews *v.* Olwill, 3 Baxt. (Tenn.) 432.

Texas.— Burnham *v.* Chandler, 15 Tex. 441.

Virginia.— Gordon *v.* Rixey, 76 Va. 694.

85. As to what law governs with respect to the validity of assignments see *infra*, V, A.

As to the validity of contracts, generally, see CONTRACTS.

As to the assignment of realty in adverse possession see CHAMPERTY AND MAINTENANCE.

86. *Illinois.*— Coffey *v.* Coffey, 74 Ill. App. 241.

Massachusetts.— Silsbee *v.* Webber, 171 Mass. 378, 50 N. E. 555.

New York.—McCormick *v.* St. Joseph's Home, 26 Misc. (N. Y.) 36. 55 N. Y. Suppl. 224; Schinotti *v.* Cuddy, 25 Misc. (N. Y.) 556, 55 N. Y. Suppl. 219; Dunn *v.* Wehle, 21 Misc. (N. Y.) 24, 46 N. Y. Suppl. 981 [*affirming* 20 Misc. (N. Y.) 24, 45 N. Y. Suppl. 1138].

Wisconsin.— Small *v.* Champeny, 102 Wis. 61, 78 N. W. 407.

England.— Simpson *v.* Lamb, 7 E. & B. 84, 3 Jur. N. S. 412, 26 L. J. Q. B. 121, 5 Wkly. Rep. 227, 90 E. C. L. 84; Anderson *v.* Ratcliffe, E. B. & E. 806, 6 Jur. N. S. 578, 29 L. J. Q. B. 128, 1 L. T. Rep. N. S. 487, 8 Wkly. Rep. 283, 96 E. C. L. 806.

See also, generally, CONTRACTS.

Fraud.— *Alabama.*—Griel *v.* Lomax, 86 Ala. 132, 5 So. 325.

Arkansas.— Du Val *v.* Marshall, 30 Ark. 230.

Kentucky.— Currens *v.* Hart, Hard. (Ky.) 37.

New York.— Hall *v.* Erwin, 60 Barb. (N. Y.) 349; Matter of Cleflin, 3 N. Y. Suppl. 621, 20 N. Y. St. 465.

United States.— Blease *v.* Garlington, 92 U. S. 1, 23 L. ed. 521; Rogers *v.* Lindsey, 13 How. (U. S.) 441, 14 L. ed. 215.

See 4 Cent. Dig. tit. "Assignments," § 125; and, generally, CONTRACTS.

Fraud as to creditors.—Prentiss *v.* Danaher, 20 Wis. 311. *Compare* Price *v.* Morning Star Min. Co., 83 Mo. App. 470. See also, generally, BANKRUPTCY; FRAUDULENT CONVEYANCES; INSOLVENCY.

Mere reservation by the assignor of an interest in the thing assigned, after the satisfaction of a debt for which it was assigned, will not render the assignment fraudulent as to creditors. Stoddard *v.* Benton, 6 Colo. 508; Smyth *v.* Ripley, 33 Conn. 306; Beach *v.* Bestor, 47 Ill. 521; Bailey *v.* Mills, 27 Tex. 434; Stringfellow *v.* Thompson, 1 Tex. App. Civ. Cas. § 1008.

Nor does a stipulation that the assignee should complete the article assigned and prepare it for sale render the assignment fraudulent as to creditors. Smith *v.* Beattie, 31 N. Y. 542; Dunham *v.* Waterman, 3 Duer (N. Y.) 166.

Mental incapacity.— In Longsdale's Estate, 29 Pa. St. 407, an assignment of a chose in action, without valuable consideration and not delivered until after the assignor became insane, was set aside where it was made for the purpose of defrauding the assignor's wife of a portion of the estate of the assignor conferred on her by law. See also INSANE PERSONS.

Mistake.— Erwin *v.* U. S., 97 U. S. 392, 24 L. ed. 1065. Where an only heir of the decedent, upon being informed that a certain note constituting the greater part of the estate of his ancestor was without consideration and intended as a legacy to the ancestor by the maker, in case the latter died first, for a small consideration assigned all his interest in the estate of the ancestor to the maker of the note, and, administration being subsequently taken out on the estate of the ancestor and the maker of the note being incompetent to testify in an action on the note by the administrator, judgment was rendered against him on the note, it was held that the mistake of the assignor was one of law merely, that the assignment was not void for fraud, and that the assignee was entitled to the proceeds in the administrator's hands. Hughes' Estate, 6 Pa. Co. Ct. 168.

Undue influence.— Leddel *v.* Starr, 20 N. J. Eq. 274; Colburn *v.* Van Velzer, 11 Fed. 795.

2. Right of Third Persons to Attack Assignment For. Where an assignment is voidable, at the option of the assignor and his creditors, and not absolutely void, the defect cannot be taken advantage of by the debtor as a defense to an action by the assignee on the debt.[87]

B. Estoppel and Waiver. There is nothing peculiar in the law of estoppel and waiver as applied to assignments. The rule that one who has, by his representations or conduct, led another to believe the existence of certain facts and to act on such belief, will not be permitted to deny the existence of such facts to the prejudice of such other, is applicable to the case of assignments.[88]

C. Motive. It is of no importance to the debtor what motives influenced the assignor in making the assignment.[89] Though an assignment be made for the purpose of enabling the assignor to become a competent witness[90] or to avoid an incapacity of the assignor to bring an action,[91] it is, nevertheless, valid where the transfer is complete.

87. *Alabama.*— Johnson *v.* Beard, 93 Ala. 96, 9 So. 535; Lehman *v.* Clark, 85 Ala. 109, 4 So. 651; Wood *v.* Steele, 65 Ala. 436; McCausland *v.* Drake, 3 Stew. (Ala.) 344.

Georgia.— Gilmore *v.* Bangs, 55 Ga. 403.

Iowa.— Reinecke *v.* Gruner, 111 Iowa 731, 82 N. W. 900; Cornish, etc., Co. *v.* Marty, (Iowa 1899) 79 N. W. 507; Small *v.* Chicago, etc., R. Co., 55 Iowa 582, 8 N. W. 437.

Kentucky.— Littell *v.* Hord, Hard. (Ky.) 81.

Massachusetts.— Pickens *v.* Hathaway, 100 Mass. 247.

Michigan.—Morey *v.* Forsyth, Walk. (Mich.) 465.

Minnesota.— Cannot be set up by stranger. Hanbrick *v.* Johnston, 23 Minn. 237.

New York.— See Greenwood *v.* Marvin, 111 N. Y. 423, 19 N. E. 228, 19 N. Y. St. 612; McDonnell *v.* Bauendahl, 4 Hun (N. Y.) 265; Kline *v.* Bauendahl, 6 Thomps. & C. (N. Y.) 546.

Pennsylvania.— Stoner *v.* Com., 16 Pa. St. 387.

South Carolina.— Tillman *v.* Walkup, 7 S. C. 60.

United States.— Blackford *v.* Westchester F. Ins. Co., 101 Fed. 90, 41 C. C. A. 226.

Debtor cannot set up irregularity of action of a corporation assignor where stock-holders do not object to the assignment. Castle *v.* Lewis, 78 N. Y. 131; The Prussia, 100 Fed. 484.

88. *Illinois.*— Cleveland, etc., R. Co. *v.* Wood, 189 Ill. 352, 59 N. E. 619 [*affirming* 90 Ill. App. 551].

Indiana.— Rowe *v.* Major, 92 Ind. 206.

Maine.— A debtor may, by his conduct, waive his right of set-off of claim against assignor. Merrill *v.* Merrill, 3 Me. 463, 14 Am. Dec. 247.

New Hampshire.— Clement *v.* Clement, 8 N. H. 472.

New York.— Simpson *v.* Del Hoyo, 94 N. Y. 189; Moore *v.* Metropolitan Nat. Bank, 55 N. Y. 41, 14 Am. Rep. 173. Assignor cannot, as against his assignee, allege non-assignability of contract. Jewelers' League *v.* De Forest, 151 N. Y. 654, 46 N. E. 1148; Roorbach *v.* Dale, 6 Johns. Ch. (N. Y.) 469.

North Carolina.— Gwyn *v.* Wellborn, 18 N. C. 313.

Ohio.— Mack *v.* Fries, 5 Ohio Dec. (Reprint) 174; Raymond *v.* Foster, 4 Ohio Dec. (Reprint) 240, 1 Clev. L. Rep. 149.

Pennsylvania.—Gray *v.* Bell, 4 Watts (Pa.) 410.

United States.— Cincinnati Siemens-Lungren Gas Illuminating Co. *v.* Western Siemens-Lungren Co., 152 U. S. 200, 14 S. Ct. 523, 38 L. ed. 411.

See 4 Cent. Dig. tit. "Assignments," § 127; and generally, Estoppel.

Consent to one assignment not waiver of right to object to further assignments. Arkansas Valley Smelting Co. *v.* Belden Min. Co., 127 U. S. 379, 8 S. Ct. 1308, 32 L. ed. 246. See also Folsom *v.* McCague, 29 Nebr. 124, 45 N. W. 269; Smith *v.* Clarke, 7 Wis. 551.

89. Rucker *v.* Bolles, 80 Fed. 504, 49 U. S. App. 358, 25 C. C. A. 600. See also Chase *v.* Dodge, (Wis. 1901) 86 N. W. 548.

90. To enable assignor to become witness. —Vasscar *v.* Livingston, 13 N. Y. 248; Nelson *v.* Smith, 3 Abb. Pr. (N. Y.) 117. *Contra*, where a statute provided that an assignee *bona fide* may sue in his own name. It may be shown, in order to negative such good faith, what the motives of the assignor were, and, if it appeared that the account was assigned because of its being barred by the statute of limitations and for the purpose of enabling the assignor to testify as a witness to prove the claim and a promise of the defendant so as to take the case out of the statute, the assignment might be impeached as not having been made in good faith. Crawford *v.* Brooke, 4 Gill (Md.) 213. Where the assignment was in consideration of love and affection and for the mere purpose of enabling the assignor to be a witness, a court of equity will not recognize the assignment and permit the assignee to maintain an action against the debtor. Hopkins *v.* Hopkins, 4 Strobh. Eq. (S. C.) 207, 53 Am. Dec. 663.

91. To enable assignor to sue.— Petersen *v.* Chemical Bank, 32 N. Y. 21, 88 Am. Dec. 298. But see Mann *v.* Fairchild, 3 Abb. Dec. (N. Y.) 152, where it was held that right of receiver of a corporation to call the debtor

V. By What Law Governed.

A. As to Validity — 1. Law of Owner's Domicile. As to assignments by acts of the parties, their validity is determined by the law of the owner's domicile,[92] in the absence of a prohibition of such assignments by the statutes[93] or public policy[94] of the state where the property is situated.

2. Law of Place of Performance. But, where the contract is made in one state to be performed in another, the law of the place of performance will control in determining the validity of the assignment.[95]

B. As to Construction. An assignment is to be construed according to the law of the place where made.[96]

C. As to Remedies. The remedy of an assignee is to be determined by the law of the place where suit is brought.[97]

D. As to Recording. If the laws of the *situs* of personal property require recording of transfers so as to render them valid, and all parties are domiciled in another state, by the laws of which record is not required, the courts of the state in which the property is situated will not recognize the transfer, as against creditors and subsequent purchasers, unless it is recorded.[98]

VI. Operation and Effect.

A. Invalid Assignment. A void assignment is inoperative, and moneys of

of a corporation to account and charge him as trustee of assets does not pass to an assignee to whom the debt is assigned for purpose of changing rule of limitation.

92. *Arkansas.*— Lanigan *v.* North, (Ark. 1901) 63 S. W. 62.

Connecticut.— Vanbuskirk *v.* Hartford F. Ins. Co., 14 Conn. 583.

Florida.— Walters *v.* Whitlock, 9 Fla. 86, 76 Am. Dec. 607.

Iowa.—See, *contra*, Vimont *v.* Chicago, etc., R. Co., 69 Iowa 296, 22 N. W. 906, 28 N. W. 612.

Louisiana.— Olivier *v.* Townes, 2 Mart. N. S. (La.) 93.

New Jersey.— Frazier *v.* Fredericks, 24 N. J. L. 162; Frazier *v.* Barnum, 19 N. J. Eq. 316, 97 Am. Dec. 666.

New York.— Warner *v.* Jaffray, 96 N. Y. 248, 48 Am. Rep. 616; Kelly *v.* Crapo, 45 N. Y. 86, 6 Am. Rep. 35 [*reversed* in 16 Wall. (U. S.) 610, 21 L. ed. 430]; McBride *v.* Farmers' Bank, 26 N. Y. 450 [*affirming* 25 Barb. (N. Y.) 657]; Moore *v.* Willett, 35 Barb. (N. Y.) 663; Vanbuskirk *v.* Warren, 34 Barb. (N. Y.) 457; Tyler *v.* Strang, 21 Barb. (N. Y.) 198; Holmes *v.* Remsen, 4 Johns. Ch. (N. Y.) 460, 8 Am. Dec. 581.

Pennsylvania.— Law *v.* Mills, 18 Pa. St. 185; Speed *v.* May, 17 Pa. St. 91, 55 Am. Dec. 540.

Tennessee.— Lally *v.* Holland, 1 Swan (Tenn.) 396.

Wisconsin.— Smith *v.* Chicago, etc., R. Co., 23 Wis. 267.

United States.— Black *v.* Zacharie, 3 How. (U. S.) 483, 11 L. ed. 690; Davis *v.* Mills, 99 Fed. 39; J. M. Atherton Co. *v.* Ives, 20 Fed. 894. *Compare* McClintic *v.* Cummins, 3 McLean (U. S.) 158, 15 Fed. Cas. No. 8,699.

See 4 Cent. Dig. tit. "Assignments," § 4; and generally, Contracts.

93. Statutory prohibition.— Herschfeld *v.* Dexel, 12 Ga. 582; Varnum *v.* Camp, 13 N. J. L. 326, 25 Am. Dec. 476; Guillander *v.* Howell, 35 N. Y. 657. *Contra*, Richardson *v.* Leavitt, 1 La. Ann. 430, 45 Am. Dec. 90.

94. Public policy.— Allen *v.* Bain, 2 Head (Tenn.) 100. *Contra*, Greene *v.* Mowry, 2 Bailey (S. C.) 163.

An assignment, made in one state, though valid by the laws of that state, of a chose in action due from a citizen of another state, will not be recognized in the latter state, even after notice to the debtor, if its effect would be to give a preference to citizens of other states over the resident creditors of the debtor. Zipcey *v.* Thompson, 1 Gray (Mass.) 243.

95. Abt *v.* American Trust, etc., Bank, 159 Ill. 467, 42 N. E. 856, 50 Am. St. Rep. 175 [*affirming* 57 Ill. App. 369]; National Bank of America *v.* Indiana Banking Co., 114 Ill. 483, 2 N. E. 401; Lewis *v.* Bush, 30 Minn. 244, 15 N. W. 113. See also, generally, Contracts.

96. Bank of England *v.* Tarleton, 23 Miss. 173. See also, generally, Contracts.

97. Drake *v.* Rice, 130 Mass. 410; Leach *v.* Greene, 116 Mass. 534; Orr *v.* Amory, 11 Mass. 25; Tully *v.* Herrin, 44 Miss. 626; Kirkland *v.* Lowe, 33 Miss. 423, 69 Am. Dec. 355; Fisk *v.* Brackett, 32 Vt. 798, 78 Am. Dec. 612; Pickering *v.* Fisk, 6 Vt. 102. *Contra*, Levy *v.* Levy, 78 Pa. St. 507, 21 Am. Rep. 35. See also, generally, Contracts.

98. Van Buskirk *v.* Warren, 4 Abb. Dec. (N. Y.) 457, 2 Keyes (N. Y.) 119; Hervey *v.* Rhode Island Locomotive Works, 93 U. S. 664, 23 L. ed. 1003; Green *v.* Van Buskirk, 7

the assignor collected thereunder by the assignee are the property of the assignor, and may be reached as such by his creditors.[99] And where, at the time of the assignment, the subject-matter of the assignment has ceased to exist, the assignment confers no right on the assignee as against the former debtor.[1]

B. Valid Assignment — 1. Absolute Assignment. A valid and unqualified assignment of a chose in action, which has a present existence, transfers to the assignee the chose assigned — that is to say, the assignee takes the legal or equitable title to the chose to the same extent to which the assignor had the title.[2] It passes the whole right of the assignor, nothing remaining in him capable of being assigned,[3] and the assignor has no further interest in the subject-

Wall. (U. S.) 139, 19 L. ed. 109; Green *v.* Van Buskirk, 5 Wall. (U. S.) 307, 18 L. ed. 599. *Contra*, Vanbuskirk *v.* Hartford F. Ins. Co., 14 Conn. 583.

As to the necessity of filing and recording see *supra*, III, F.

99. *California.*— Blood *v.* Marcuse, 38 Cal. 590, 99 Am. Dec. 435; Ritter *v.* Stevenson, 7 Cal. 388.

Nebraska.— Union Pac. R. Co. *v.* Douglas County Bank, 42 Nebr. 469, 60 N. W. 886.

New York.—People *v.* Tioga Common Pleas, 19 Wend. (N. Y.) 73.

Pennsylvania.— Philadelphia's Appeals, 86 Pa. St. 179.

Texas.— Gulf, etc., R. Co. *v.* Wooten, 10 Tex. Civ. App. 54, 30 S. W. 684.

As to the effect of invalid contracts, generally, see Contracts.

1. When subject-matter has ceased to exist. — *Maine.*— Kennedy *v.* Jones, 67 Me. 538; Fogg *v.* Sanborn, 48 Me. 432.

Minnesota.— MacDonald *v.* Kneeland, 5 Minn. 352.

New Jersey.— See Albright *v.* Teas, 37 N. J. Eq. 171, where held that an assignment of a non-patentable invention is of no force.

New York.— Pulver *v.* Harris, 52 N. Y. 73; Munsell *v.* Lewis, 4 Hill (N. Y.) 635.

West Virginia.— But, where a deed of trust was executed in lieu of one that was canceled, an assignment subsequently made on the canceled deed of all right, title, and interest due thereunder was construed to mean an assignment of all right, title, and interest in the deed issued in lieu thereof, and was upheld as against a subsequent assignment of such deed. Tingle *v.* Fisher, 20 W. Va. 497.

Assignment of void contract.— It has been said that the assignment of a void contract is not, necessarily, an assignment of the obligation on which it is founded, so as to permit the assignee to recover on such obligation. Neugass *v.* New Orleans, 43 La. Ann. 78, 9 So. 25. *Contra*, Oneida Bank *v.* Ontario Bank, 21 N. Y. 490, where it was held that the transfer of a void obligation passes right to recover money paid for it. In McCormick *v.* District of Columbia, 18 D. C. 534, it was held that the assignment of a void certificate of damages issued to a lot-owner for a debt was an equitable assignment of a claim for damages, enforceable by the assignee against a city to the extent of the debt secured.

But where the assignment was on the back of a contract, which contract was void for want of authority of the agent of a city to make the same, and assigned the articles of agreement on the other side thereof written, and all moneys hereafter due, payable, or to be paid therefrom, and the full benefit, profit, and advantage thereof, it was held to be not a mere assignment of the written contract, but the transfer of the right to recover on a *quantum meruit* for work and labor. Wetmore *v.* San Francisco, 44 Cal. 294.

2. Assignee takes title.— *Connecticut.*—St. John *v.* Smith, 1 Root (Conn.) 156.

Illinois.— Dole *v.* Olmstead, 41 Ill. 344, 89 Am. Dec. 386.

Indiana.— Thompson *v.* Allen, 12 Ind. 539. An assignment to an officer of a corporation by name and without specifying his office, in trust for the corporation, is an assignment to the officer and not to the corporation. Crescent City Bank *v.* Carpenter, 26 Ind. 108.

Massachusetts.— Wood *v.* Donovan, 132 Mass. 84.

New York.— Sanders *v.* Soutter, 136 N. Y. 97, 32 N. E. 638, 49 N. Y. St. 63 [*affirming* 17 N. Y. Suppl. 141, 42 N. Y. St. 437]; Bush *v.* Lathrop, 22 N. Y. 535; Brown *v.* Jones, 46 Barb. (N. Y.) 400.

West Virginia.— Assignee of non-negotiable instrument takes equitable title although he can sue in his own name. Bentley *v.* Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. 584.

An agreement between a debtor and a creditor holding a trust deed, whereby the debtor is to discontinue his efforts to prevent the sale of land under trust deed, and the creditor, in case he acquires title at trustee's sale, is to select out of the land one hundred and sixty acres and appropriate it to certain agreed purposes, is, in equity, a complete assignment by the debtor of any interest he may have had in the land so to be selected. Dressor *v.* McCord, 96 Ill. 389.

3. Assignor's whole right passes.— *Nebraska.*— Hoover *v.* Columbia Nat. Bank, 58 Nebr. 420, 78 N. W. 717.

New Jersey.— Kennedy *v.* Parke, 17 N. J. Eq. 415.

New York.— Hoyt *v.* Thompson, 3 Sandf. (N. Y.) 416.

Ohio.— Straus *v.* Wessel, 30 Ohio St. 211.

Texas.— Winn *v.* Fort Worth, etc., R. Co., 12 Tex. Civ. App. 198, 33 S. W. 593.

See also *infra*, VII.

matter of the assignment.[4] But, as heretofore seen, when the subject-matter of the assignment is a mere possibility or expectancy, the assignment thereof does not operate to vest any present title thereto in the assignee thereof, but operates merely by way of executory contract, to take effect as an assignment when the interest assigned becomes a vested interest.[5] Such assignments have no validity at law, in the absence of statutes authorizing them, and fail in equity in the event that the expectancy is not realized.[6]

2. Qualified Assignment — a. In General. An assignment may be qualified,[7] as well as absolute, and an absolute assignment may be shown to be for security only;[8] but an assignment absolute on its face will not be construed to be qualified unless very clearly shown to be so.[9]

b. As Security For Debt — (i) *In General.* An assignment that is made as collateral security for a debt gives the assignee only a qualified interest in the assigned chose,[10] although the assignment be absolute on its face.[11] An assign-

4. No interest remains in assignor.—Loomis *v.* Smith, 37 Mich. 595; Papin *v.* Massey, 27 Mo. 445; Holmes *v.* Bigelow, 3 Desauss. (S. C.) 497.

5. Mere possibilities and expectancies.— *Maryland.*— Cooke *v.* Husbands, 11 Md. 492; Hamilton *v.* Rogers, 8 Md. 301.

Massachusetts.—Osborne *v.* Jordan, 3 Gray (Mass.) 277.

New York.— Johnson *v.* Williams, 63 How. Pr. (N. Y.) 233.

North Carolina.— McDonald *v.* McDonald, 58 N. C. 211, 75 Am. Dec. 434; McNeeley *v.* Hart, 32 N. C. 63, 51 Am. Dec. 377.

Rhode Island.— Bailey *v.* Hoppin, 12 R. I. 560.

South Carolina.— Allston *v.* State Bank, 2 Hill Eq. (S. C.) 235.

See also *supra*, I, C; II, A; II, B, 2.

6. Porter *v.* Hanson, 36 Ark. 591; Pierce *v.* Robinson, 13 Cal. 116; Jones *v.* New York, 90 N. Y. 387; Ruple *v.* Bindley, 91 Pa. St. 296.

7. Herbstreit *v.* Beckwith, 35 Mich. 93. See *infra*, VI, B, 2, b, c.

8. Bend *v.* Susquehanna Bridge, etc., Co., 6 Harr. & J. (Md.) 128, 14 Am. Dec. 261; Despard *v.* Walbridge, 15 N. Y. 274; Wormuth *v.* Tracy, 15 Hun (N. Y.) 180. See *infra*, VI, B, 2, b.

9. Presumption, when absolute on face.— Desport *v.* Metcalf, 3 Head (Tenn.) 424.

10. Assignee's qualified interest.— Hudson *v.* Maze, 4 Ill. 578; Wilson *v.* Fatout, 42 Ind. 52.

See also, generally, Chattel Mortgages; Mortgages; Pledges.

11. Immaterial that assignment is absolute on its face.— *Iowa.*— In absence of stipulation, an assignment of property to pay debts is security merely, and not payment. Bebb *v.* Preston, 1 Iowa 460.

New Jersey.— Bacon *v.* Kienzel, (N. J. 1891) 21 Atl. 37.

New York.— Assignment made to assignee to collect and apply on debt is *prima facie* as security, and not absolute. Mulford *v.* Muller, 3 Abb. Dec. (N. Y.) 330, 1 Keyes (N. Y.) 31.

North Carolina.— Where a transfer absolute in terms of all the effects of a firm, consisting of property and choses in action, is made in the firm-name by one partner, without the consent of his copartner, for a certain sum which is the amount of the firm's debts, it will be held to be an assignment for security. High *v.* Lack, 61 N. C. 175.

Pennsylvania.— Assignment may be shown to be a mortgage even though absolute in form. Fryer *v.* Rishel, 1 Walk. (Pa.) 470; Price's Estate, 2 Woodw. (Pa.) 467.

United States.— A cashier of a bank was called to meet a member of a firm indebted to the bank, and was then informed of the failing condition of the firm, and that it desired to save the bank from loss, and he thereupon took an assignment of the property for an expressed consideration of double the amount of the debt. The bank took possession under the assignment and held the property until it was taken away from it under judicial process, and continued improvements thereon, which it paid with money furnished by the partner making the assignment and by the firm bookkeeper, and collected from persons with whom the firm had dealings. It was alleged that the transfer was in payment and not as security, and that the partner making the transfer was individually given the right to redeem, and that subsequent payments were made with his money. The account on the books of the bank was not closed and no receipt was given. In a suit against the other partner to recover the debt it was held that the transfer was by way of security only. Jarboe *v.* Templer, 38 Fed. 213.

But if the property is assigned in payment of a debt, the assignee takes a complete title to it as against the assignor and those claiming under him, even if it is worth more than the debt in payment of which it is given (Nathan *v.* King, 51 Cal. 521); and an assignment originally for security may, by agreement of the parties, be thereafter made absolute (Page *v.* Burnstine, 3 MacArthur (D. C.) 194).

Under the Judicature Act, an assignment for security, the assignee to receive debts and out of them pay a sum due to him from the assignor, and then pay the surplus to the assignor, is an absolute assignment. Burlinson *v.* Hall, 12 Q. B. D. 347, 48 J. P. 216, 53 L. J. Q. B. 222, 50 L. T. Rep. N. S. 723, 32 Wkly. Rep. 492; Comfort *v.* Betts, [1891] 1

ment of property to secure a debt does not constitute an obligation on which suit may be brought against the assignor, although it may constitute such an acknowledgment of the debt as will prevent the running of the statute of limitations.[12]

(II) *Rights, Duties, and Liabilities of Parties*—(A) *Before Debt Paid.* To the extent of his interest, the assignee is the owner of the collateral as against the assignor and those claiming under him, or against attaching creditors of the assignor,[13] and may sue thereon in his own name.[14] But, if all the parties in interest are parties to the suit, he can recover only the amount necessary to pay his debt.[15] His ownership of the assigned chose is not such that he can modify the terms thereof,[16] or employ an attorney to collect,[17] or a watchman to protect the same,[18] at the expense of the assignor; nor is he such owner as to make him liable for costs within a statute making a person liable for costs where the cause of action becomes his property by assignment.[19] The interest of the assignor in property assigned as collateral is a valid subject of assignment.[20]

(B) *After Debt Paid.* Where the debt for which the collateral is given is paid, the right to hold the collateral ceases,[21] and after that time the assignee has

Q. B. 737, 55 J. P. 630, 60 L. J. Q. B. 656, 64 L. T. Rep. N. S. 685, 39 Wkly. Rep. 595; *In re* Bell, [1896] 1 Ch. 1, 65 L. J. Ch. 188, 73 L. T. Rep. N. S. 391, 44 Wkly. Rep. 99.

12. Right to sue assignor — Statute of limitations.— Tolles' Appeal, 54 Conn. 521, 9 Atl. 402; Crouse *v.* McKee, 14 N. Y. St. 158.

13. Ownership of assignee.— *California.*— Matter of Phillips, 71 Cal. 285, 12 Pac. 169. Where a mortgage was made to secure a debt and there was a foreclosure thereunder and a decree of sale, and an agreement between the mortgagor and the mortgagee that the order of sale should not issue for a period agreed upon, and that the mortgagee should be at liberty to enter upon the premises and collect the rents therefrom and apply them to a satisfaction of the decree, the agreement amounts to an assignment of the rents to the mortgagee for the period named, unless the decree is sooner satisfied, and a court of equity will not permit the mortgagor to assert his legal title or to disturb the mortgagee in his possession. Frink *v.* Le Roy, 49 Cal. 314.

Iowa.— Henry *v.* Wilson, 85 Iowa 60, 51 N. W. 1157.

Maine.— Percival *v.* Hichborn, 56 Me. 575.

Maryland.— McAleer *v.* Young, 40 Md. 439.

Massachusetts.— Sullivan *v.* Sweeney, 111 Mass. 366.

New Jersey.— A assigned a decree to B for which B agreed to pay a specified portion of the sum due on the decree in cash, residue at the end of the year. To secure the last payment it was agreed that A should have a lien upon the decree as fully and as perfectly as if the same had not been assigned, and, in case the last sum was not paid, he should have power to collect the same on the decree, giving B thirty days' notice, and if the sale of the property authorized by the decree should bring more than the last sum, the balance was to be paid to B. It was held that under this assignment B had no authority as attorney of A to collect the money and discharge the decree. Hudson Mfg. Co. *v.* Elmendorf, 9 N. J. Eq. 478.

New York.— Harris *v.* Schultz, 40 Barb. (N. Y.) 315.

Texas.— Schmick *v.* Bateman, 77 Tex. 326, 14 S. W. 22.

14. Assignee's right to sue.— Warner *v.* Wilson, 4 Cal. 310; Bean *v.* Atlantic, etc., R. Co., 58 Me. 82; Nelson *v.* Edwards, 40 Barb. (N. Y.) 279; Mandeville *v.* Welch, 5 Wheat. (U. S.) 277, 5 L. ed. 87.

As to assignee's right to sue in his own name see *infra*, VIII, A.

15. Amount of assignee's recovery.— McCrum *v.* Corby, 11 Kan. 464.

16. Cannot modify terms of chose assigned. — Litchfield *v.* Garratt, 10 Mich. 426.

17. Employment of attorney.— Noonan *v.* Mechanics', etc., Bank, 17 N. Y. Suppl. 845, 44 N. Y. St. 768.

18. Employment of watchman.— Jarboe *v.* Templer, 38 Fed. 213.

19. Liability for costs.— Peck *v.* Yorks, 75 N. Y. 421.

But where the assigned property is subject to forfeiture for non-payment of moneys on account thereof by the assignor, the assignee may incur such expenses at the charge of the assigned property as will be necessary to keep the same from being forfeited. Hill *v.* Eldred, 49 Cal. 398; Osborn *v.* Thomas, 46 Barb. (N. Y.) 514.

20. Assignor's interest subject to assignment.— Tracy *v.* G. H. Hammond Co., 5 N. Y. App. Div. 39, 40 N. Y. Suppl. 30, 74 N. Y. St. 640.

21. Right to hold collateral ceases.— *Iowa.* — Collins *v.* Jennings, 42 Iowa 447.

Maine.— Hamlin *v.* European, etc., R. Co., 72 Me. 83.

Massachusetts.— An assignee to whom goods have been assigned as security agreed verbally, in consideration of part payment of the debt and of the deposit of securities for the balance, to give up all goods so assigned, and did actually give up all but a small portion thereof. This portion was in a loft which the assignor had leased to the assignee, and the assignee promised to give up the lease and the key to the premises, but, having failed to do so, the assignor took possession of the property without the assignee's knowledge. It was held that the assignee had no lien on

no interest in the collateral that he can transfer to another.[22] The assignee is liable to the assignor and to the creditors of the assignor for any balance realized from the collateral over and above the debt due him.[23]

c. For Collection. When a chose, capable of legal assignment, is assigned absolutely to one, but the assignment is made for purpose of collection, the legal title thereto vests in the assignee, and it is no concern of the debtor that the equitable title is in another.[24] The assignee may prosecute an action thereon in his own name.[25] But an obligation assigned in due form, and in writing reassigned to the assignor by the assignee, stating that he agrees to pay all moneys collected of the assignor, after expenses of collection, does not vest the absolute title in the assignee;[26] and an irrevocable power to collect a debt is not in itself an assignment of the debt.[27] An assignee for collection merely has no power to transfer the assigned chose.[28]

C. Property Passing by Assignment — 1. In General. All property and property rights pass by an assignment that are comprehended by the terms used therein,[29] and, as hereafter seen, such rights and remedies of the assignor as are

the goods, the security deposited having turned out to be worthless. Parks *v.* Hall, 2 Pick. (Mass.) 206.

Texas.— Lewy *v.* Gilliard, 76 Tex. 400, 13 S. W. 304; Cawthon *v.* Perry, 76 Tex. 383, 13 S. W. 268.

United States.— Wilbur *v.* Almy, 12 How. (U. S.) 180, 13 L. ed. 944.

See also, generally, PLEDGES.

22. An assignment to a receiver in a creditors' suit becomes void as soon as the debt is satisfied. The property then reverts to the assignor without formal reassignment. Anderson *v.* Treadwell, Edm. Sel. Cas. (N. Y.) 201.

23. Liability for balance realized.— Henry *v.* Davis, 7 Johns. Ch. (N. Y.) 40.

The assignee to whom property worth more than a debt is assigned as security for such debt, and to whom is given power of sale, is under no further duty to the assignor or his creditors than to sell the goods without uncalled-for sacrifice and in good faith. Cohen *v.* Wolffe, 12 Mo. 213.

24. Vests legal title in assignee.— Greig *v.* Riordan, 99 Cal. 316, 33 Pac. 913.

25. Assignee may sue in his own name.— Goodnow *v.* Litchfield, 63 Iowa 275, 19 N. W. 226. As to assignee's right to sue on his own name, generally, see *infra*, VIII, A.

26. Napier *v.* McLeod, 9 Wend. (N. Y.) 120. See also *supra*, III, E.

27. Power to collect, not an assignment.— Porter *v.* Davis, 2 How. Pr. (N. Y.) 30.

28. Assignee's power to transfer.— Irish *v.* Sunderhaus, 122 Cal. 308, 54 Pac. 1113.

29. *Alabama.*— Assignment of an obligation is an assignment of money to be collected thereunder. Gayle *v.* Benson, 3 Ala. 234.

Illinois.— *Compare* Glover *v.* Condill, 163 Ill. 566, 45 N. E. 173, 35 L. R. A. 360.

Iowa.—Assignment of his interest in the accounts of a firm, by a member thereof, includes his interest in an account due the firm by one of the partners. Cook *v.* Gilchrist, 82 Iowa 277, 48 N. W. 84.

Maine.— Assignment of property includes the interest on the proceeds realized therefrom, as well as the principal. Gannett *v.* Cunningham, 34 Me. 56.

Maryland.— An assignment of the equity of redemption of the assignor in certain property carries his equity, although the property be conveyed by a conveyance absolute on its face, but in fact a mortgage. Banks *v.* McClellan, 24 Md. 62, 87 Am. Dec. 594.

Massachusetts.— Leonard *v.* Nye, 125 Mass. 455; Lea *v.* Robeson, 12 Gray (Mass.) 280. A transfer to A by all the members of a dissolved firm, which voluntarily dissolved four years before the expiration of the time limited by the articles of copartnership, of "all their right and title in and to all and singular the rights, privileges and interest secured," to them by the articles of copartnership, was held to transfer to A, as partnership property, to be used by him until the expiration of the time limited in the articles, all the property of the firm, although part of such property was originally property of some of the individual partners. Caswell *v.* Howard, 16 Pick. (Mass.) 562, 566. *Compare* Williams *v.* Williams, (Mass. 1901) 59 N. E. 626; Woods *v.* Murphy, (Mass. 1901) 58 N. E. 1027.

Michigan.— Spicer *v.* Bonker, 45 Mich. 630, 8 N. W. 518.

Missouri.— See Morris *v.* Du Puy, 85 Mo. App. 651.

Nebraska.— State *v.* School Dist., (Nebr. 1897) 71 N. W. 727.

New York.—James *v.* Work, 70 Hun (N. Y.) 296, 24 N. Y. Suppl. 149, 54 N. Y. St. 166. An assignment by a devisee of real estate of all money then being or thereafter coming into the hands of an executor is sufficient to pass his claim against the executor for return of moneys arising from the sale of real estate by the executor to pay debts and used by him for that purpose, personal property which by will was made chargeable with debts having subsequently been discovered. Couch *v.* Delaplaine, 2 N. Y. 397. An assignment by a widow of her interest in the residuary estate of her husband, the husband having, by the will of his deceased father, an interest in the residue of his father's estate, vests in the assignee the interest of the widow as a residuary legatee of her husband in the interest of her husband in the estate of his father.

incidents to the assigned property are vested in the assignee by virtue of the assignment.[30] A chose embraced within the terms of an assignment will pass thereby, although, at the time of the assignment, both the assignor and assignee were ignorant of the fact that the assignor had an interest in it.[31] But collateral rights arising out of an assigned contract do not pass by the assignment of the contract.[32]

2. Under General Terms. An assignment of all estate, of whatever nature or kind soever,[33] or of all personal property whatever,[34] will operate to pass to the assignee choses in action of the assignor. But when such general terms are used in connection with other terms customarily used to designate only personal property in possession, they have been held not to include choses in action.[35]

3. Of Moneys Due and to Become Due. The term "moneys due," used in an assignment, has been said to mean moneys payable at the time when the assignment was made.[36] Assignments of amounts due and to become due until a date certain include amounts coming due on that date.[37] If the assignment is of moneys to become due from a particular person under contracts, or for breach of contracts, it will be construed to mean under contracts then existing.[38] An assignment of moneys to be recovered under a contract, or to be paid in settlement thereof, or on account thereof, by compromise or otherwise, includes moneys voluntarily paid for labor done under the contract, the contract having been declared invalid,[39] or moneys paid by a debtor to buy peace.[40] In the absence of stipulation the assignment of profits under contracts or arising out of property

Sanders *v.* Soutter, 136 N. Y. 97, 32 N. E. 638, 49 N. Y. St. 63 [*affirming* 17 N. Y. Suppl. 141, 42 N. Y. St. 437].

Tennessee.— Cates *v.* Bearden, (Tenn. Ch. 1897) 42 S. W. 473; Daniel *v.* Fain, 5 Lea (Tenn.) 319.

Wisconsin.— Ellis *v.* Southwestern Land Co., (Wis. 1896) 69 N. W. 363.

United States.— Shoecraft *v.* Bloxham, 124 U. S. 730, 8 S. Ct. 686, 31 L. ed. 574.

See 4 Cent. Dig. tit. "Assignments," § 138 *et seq.*

30. See *infra*, VI, C, 6.

31. Cram *v.* Union Bank, 1 Abb. Dec. (N. Y.) 461, 4 Keyes (N. Y.) 558 [*affirming* 42 Barb. (N. Y.) 426].

32. An assignment by a partner of his interest in a special partnership does not operate to pass his right to expenses and costs incurred as agent of the partnership. Stewart *v.* Stebbins, 30 Miss. 66.

33. All estate of whatever nature.— Van Pelt *v.* Hurt, 97 Ga. 660, 25 S. E. 489; Baltimore, etc., R. Co. *v.* Countryman, 16 Ind. App. 139, 44 N. E. 265; Forepaugh *v.* Appold, 17 B. Mon. (Ky.) 625; Knevals *v.* Blauvelt, 82 Me. 458, 19 Atl. 818.

But a general deed of assignment to trustees does not vest in them the legal title to bonds held by the assignor so as to authorize them to sue thereon in their own names. State *v.* Washington Bank, 18 Ark. 554.

34. All personal property whatever.— Sherman *v.* Dodge, 28 Vt. 26. An assignment of "all right, title, and interest in and to all property, real and personal, legal and equitable, which I now own or claim to own, or in which I have any interest," is sufficient to transfer the assignor's shares of stock to recover which he has sued, but not to transfer his claim for services to be rendered in that suit subsequently to the assignment. Ellis *v.* Southwestern Land Co., 94 Wis. 531, 69 N. W. 363. But see, *contra*, White *v.* Robbins, 21 Minn. 370; Cook *v.* Conway, 2 Cranch C. C. (U. S.) 99, 6 Fed. Cas. No. 3,154, to the effect that an assignment of all assignor's estate and effects in possession, or which may accrue and become due and owing to him, will not transfer a mere possibility of a legacy.

35. General terms used in connection with other terms.— Miller *v.* Paulsell, 8 Mo. 355; Kendall *v.* Almy, 2 Sumn. (U. S.) 278, 14 Fed. Cas. No. 7,690. See also *infra*, VI, D.

36. Moneys due.— Collins *v.* Janey, 3 Leigh (Va.) 389.

An assignment of all interest in vouchers or warrants due under a contract does not include moneys subsequently earned under the contract. Ryan *v.* Douglas County, 47 Nebr. 9, 66 N. W. 30.

Does not include moneys earned under a subsequent contract. Pierce *v.* Devlin, 22 N. Y. Suppl. 208, 51 N. Y. St. 799.

37. Moneys due and to become due until a date.— Kendall *v.* Kingsley, 120 Mass. 94; Peck-Hammond Co. *v.* Williams, 77 Miss. 824, 27 So. 995.

38. Moneys to become due under contract. — Chicago, etc., R. Co. *v.* Becker, 33 Ill. App. 290; Mulhall *v.* Quinn, 1 Gray (Mass.) 105, 61 Am. Dec. 414. See 4 Cent. Dig. tit. "Assignments," § 141.

39. Moneys to be recovered, etc., under contract.— Kingsbury *v.* Burrill, 151 Mass. 199, 24 N. E. 36.

40. Moneys paid by debtor to buy peace.— Beran *v.* Tradesmen's Nat. Bank, 10 N. Y. Suppl. 677, 32 N. Y. St. 999.

are usually held to mean profits accruing subsequently to the assignment.[41] An assignment of moneys due and to become due under a contract is not an assignment of the contract.[42] But an assignment of moneys due under a contract includes moneys to become due in payment of expenditures as well as for labor.[43]

4. Of Contracts. An assignment of a contract, after the same has been modified by the parties thereto, is an assignment of the contract as modified, and not of the original contract.[44] An assignment of a continuing contract is not an assignment of a cause of action for breach of contract by the other contracting party before the assignment.[45]

5. Of Evidences of Title. An assignment of the evidence of one's title vests the title to the property of which it is the evidence in the assignee. With reference to personal property not in possession of the assignor the title of the assignor thereto becomes vested in the assignee by a transfer of the evidence of title.[46] But an assignment of the evidences of title to real estate vests in the assignee thereof only the equitable title to the land.[47]

6. Incidents to the Chose Assigned — a. Rule Stated — (i) *In Absence of Stipulation.* In the absence of any stipulation or provision in the contract of assignment concerning the securities or other incidents, an unqualified assignment of a chose in action carries with it, as incident to the chose, all securities held by the assignor as collateral to the claim, and all rights incidental thereto,[48]

41. Profits under contracts.— Gwin *v.* Biel, 70 Ind. 505; Van Driel *v.* Rosierz, 26 Iowa 575.

An order by one having a contract to cut brush on land for all money that belonged to him for cutting the brush carries all money to be earned under the contract. St. Johns *v.* Charles, 105 Mass. 262.

The assignment of the right to do work under a partially performed contract does not vest in the assignee the right to recover retained percentage on work already done. Connolly *v.* Dunbar, 102 Fed. 44.

42. Not an assignment of contract.— Keefe *v.* Flynn, 116 Mass. 563. An assignment of "all sums of money and demands which at any time between the date hereof and May 1st next may become due to me from A for services as subcontractor, meaning especially to transfer all sums of money falling due to me by said A for work done by me for him in the town of W," is not an assignment of the contract with A for work in W nor of all sums that might at any time become due thereunder, but only of sums earned before May 1st. Segee *v.* Downes, 143 Mass. 240, 9 N. E. 565. An agreement between a government contractor and the surety on his bond, by which the surety agrees to advance the money necessary to carry out the contract and the contractor agrees to divide the profits of the contract with the surety, does not amount to a transfer of the contract to the surety. Bowe *v.* U. S., 42 Fed. 761.

43. Tracy *v.* Waters, 162 Mass. 562, 39 N. E. 190.

44. Assignment of contract as modified.—A made an oral contract with B for the erection of a house for B. Subsequently some modifications were orally agreed on. Then A made an assignment in writing as follows: "I . . . hereby assign, set over and transfer unto said Wood all my right, title and interest in and to a certain contract with Dennis Donovan, which contract was to build for said Donovan a certain house on Border Street." It was held that the assignment was of the contract as it was after it was modified. Wood *v.* Donovan, 132 Mass. 84.

45. Not assignment of cause of action for prior breach.— Love *v.* Van Every, 18 Mo. App. 196; Ryan Vapor Engine Co. *v.* Pacific Gas Engine Co., 49 Fed. 68, 7 U. S. App. 73, 1 C. C. A. 169. Especially where assignor admits that no damage has accrued to him by such breach. Chicago Cheese Co. *v.* Fogg, 53 Fed. 72.

See also, on the subject of contracts, *supra*, II, B, 7.

46. Personal property.— *Indiana.*—Domestic Sewing Mach. Co. *v.* Arthurhultz, 63 Ind. 322, holding, however, that when evidence of ownership is conditional and shows that the title is to remain in the original seller until the property is paid for, then the assignment thereof does not vest the title to the property in the assignee of the original buyer.

Kansas.— The assignment of a certificate of deposit transfers to the assignee whatever right or equity the assignor had in the fund thus represented, although such assignor may not have had full title to the certificate or immediate right to the possession thereof. Atchison First Nat. Bank *v.* Wattles, 8 Kan. App. 136, 54 Pac. 1103.

New York.—Dows *v.* Cobb, 12 Barb. (N. Y.) 310.

North Carolina.— *Contra*, Waugh *v.* Miller, 33 N. C. 235.

South Carolina.— Southworth *v.* Sebring, 2 Hill (S. C.) 587.

United States.— Adams *v.* Brig Pilgrim, 10 West. L. J. 141.

47. Real property.—Helm *v.* Sapp, 19 Ky. L. Rep. 1614, 44 S. W. 107.

48. *Alabama.*— Assignment of "the property known and described as the Mobile Daily

and vests in the assignee the equitable title to such collateral securities and

and Weekly Register newspaper, and all the property and materials in and belonging to the printing establishment thereof, and of the job-printing and book-binding establishment, and of the offices connected therewith, with the rights, contracts, and privileges attaching thereto," does not convey any interest in the house and lot in which the business is conducted, although it belongs to one of the assignors individually and has been used for the purposes of the business. Rapier *v.* Gulf City Paper Co., 64 Ala. 330.

California.— Cross *v.* Sacramento Sav. Bank, 66 Cal. 462, 6 Pac. 94.

Georgia.—A demand of payment will enure to the assignee. Banks *v.* Darden, 18 Ga. 318.

Illinois.— Dorsey *v.* Wolff, 142 Ill. 589, 32 N. E. 495, 34 Am. St. Rep. 99, 18 L. R. A. 428; Union Oil Co. *v.* Maxwell, 33 Ill. App. 421. But books of account in which assigned accounts are contained do not pass by an assignment of the accounts. Hudson *v.* Maze, 4 Ill. 578.

Indiana.— Right to keep tender of deed good passes to assignee of right to recover purchase-money. Salem Bank *v.* Caldwell, 16 Ind. 469.

Iowa.— Everett *v.* Central Iowa R. Co., 73 Iowa 442, 35 N. W. 609.

Kansas.— Piper *v.* Union Pac. R. Co., 14 Kan. 574.

Kentucky.— Harrison *v.* Lexington, etc., R. Co., 9 B. Mon. (Ky.) 470.

Maine.— Assignment of a demand after attachment of real estate thereon will pass the equitable title to the land to the assignee. Warren *v.* Ireland, 29 Me. 62.

Massachusetts.— Townsend *v.* Tyndale, 165 Mass. 293, 43 N. E. 107, 52 Am. St. Rep. 513; Beharrell *v.* Quimby, 162 Mass. 571, 39 N. E. 407; Codman *v.* Brooks, 159 Mass. 477, 34 N. E. 689. The right to recover a dividend is incident to a sale of stock. Ellis *v.* Proprietors Essex Merrimack Bridge, 2 Pick. (Mass.) 243.

Michigan.— Hilton *v.* Woodman, 124 Mich. 326, 82 N. W. 1056; Hooper *v.* Van Husan, 105 Mich. 592, 63 N. W. 522; Cadwell *v.* Pray, 86 Mich. 266, 49 N. W. 150.

Minnesota.— Woodland Co. *v.* Mendenhall, (Minn. 1901) 85 N. W. 164.

Mississippi.— Assignment of receipts from an attorney for claims given him for collection carries with it the equitable right to proceeds of judgment. Richardson *v.* Lightcap, 52 Miss. 508.

Missouri.— Right to a refund of money paid under a void special tax bill does not pass to an assignee of land to whom the bill was delivered with other evidences of title. Bernays *v.* Wurmb, 4 Mo. App. 231. Assignment of a contract by which one has a right of selection of land does not assign right of choice. McQueen *v.* Chouteau, 20 Mo. 222, 64 Am. Dec. 178.

New York.— Rose *v.* Baker, 13 Barb. (N. Y.) 230. Assignment of a chose includes profits to accrue on the assigned chose. Van Rensselaer *v.* Read, 26 N. Y. 558; De Graf *v.* Wyckoff, 13 Daly (N. Y.) 366 [*affirmed* in 110 N. Y. 617, 17 N. E. 869, 16 N. Y. St. 994]; Muller *v.* New York, 29 N. Y. Suppl. 1096, 23 N. Y. Civ. Proc. 261; Kane *v.* Bloodgood, 7 Johns. Ch. (N. Y.) 90, 11 Am. Dec. 417. Accumulations of income are incident to a debt so as to pass by a transfer thereof. Morgan *v.* Williams, 66 How. Pr. (N. Y.) 139. Assignment of all assignor's real estate, and reservations and rents arising therefrom, together with all debts due from rents, passes all the covenants, conditions, and rights of entry connected with grants in fee reserving rent. Main *v.* Green, 32 Barb. (N. Y.) 448. But an assignment of moneys to be received under a contract for public work does not carry with it a gratuity of the public given by law to the original contractor. Munsell *v.* Lewis, 4 Hill (N. Y.) 635. Nor does a right to recover the amount of an assessment for local improvements erroneously paid on a lot pass to the grantee of the lot as an incident to the property. Pinchbeck *v.* New York, 12 Hun (N. Y.) 556; Kitchen *v.* Conklin, 51 How. Pr. (N. Y.) 308.

North Carolina.— Assignment of a contract includes increased allowances for the work to be done thereunder, made by the other contracting party. Winslow *v.* Elliott, 50 N. C. 111. The transfer by an executor of property of the estate, the transferee to indemnify the executor against all claims on him relative to such property, gives to the transferee, as between himself and the executor, the right to the executor's commissions allowed on account of the transferred property. Burroughs *v.* McNeill, 22 N. C. 297.

Ohio.— Morgan *v.* Mason, 20 Ohio 401, 55 Am. Dec. 464.

Oregon.— Assignment of a contract for the payment of the price of goods sold carries with it the right to take possession and retain the property in the goods for condition broken. Landigan *v.* Mayer, 32 Oreg. 245, 51 Pac. 649, 67 Am. St. Rep. 521.

Pennsylvania.— Morris *v.* McCulloch, 83 Pa. St. 34. Assignment of a debt carries all securities, although there are several and but one is mentioned. Hawkins *v.* Oswald, 2 Woodw. (Pa.) 395.

Rhode Island.—McDonald *v.* Kelly, 14 R. I. 335.

Tennessee.— Kramer *v.* Wood, (Tenn. 1899) 52 S. W. 1113. Assignment of a principal amount carries the interest. But assignment of bonds has been held not to include detached coupons. Mabry *v.* Memphis, 12 Heisk. (Tenn.) 539.

United States.— George *v.* Tate, 102 U. S. 564, 26 L. ed. 232; Winstead *v.* Bingham, 4 Woods (U. S.) 510, 14 Fed. 1; The Hull of a New Ship, 2 Ware (U. S.) 203, 12 Fed. Cas. No. 6,859. A trade-mark passes as an

incidental rights.[49] An assignment of property is an assignment of the proceeds thereof;[50] but an assignment of expected proceeds of property is not an assignment of the property.[51] As the right to the chose and its incidents pass to the assignee thereof, so does the right to the remedies which the assignor had for the enforcement of the same.[52] Thus, it has been held that an assignment of an

incident of the assignment of all the property of a firm or corporation. Atlantic Milling Co. *v.* Robinson, 20 Fed. 217; Morgan *v.* Rogers, 19 Fed. 596; Blackwell *v.* Dibrell, 3 Hughes (U. S.) 151, 3 Fed. Cas. No. 1,475. See also Lawrence *v.* Montgomery, 37 Cal. 183; Kenedy *v.* Benson, 54 Fed. 836; Dwight *v.* Smith, 9 Fed. 795; Campbell *v.* James, 18 Blatchf. (U. S.) 92, 2 Fed. 338; Ware *v.* Brown, 2 Bond (U. S.) 267, 29 Fed. Cas. No. 17,170.

See 4 Cent. Dig. tit. "Assignments," § 145 *et seq.*

49. **Vests equitable title in assignee.**—*Alabama.*— Black *v.* Everett, 5 Stew. & P. (Ala.) 60.

Connecticut.— Lyon *v.* Summers, 7 Conn. 399.

Massachusetts.— Day *v.* Whitney, 1 Pick. (Mass.) 503; Dunn *v.* Snell, 15 Mass. 481.

New Jersey.—Sloan *v.* Sommers, 14 N. J. L. 509.

South Carolina.— Wadsworth *v.* Griswold, Harp. (S. C.) 17.

Vermont.— Batchelder *v.* Jenness, 59 Vt. 104, 7 Atl. 279.

Virginia.— Garland *v.* Richeson, 4 Rand. (Va.) 266.

The promise of third person to pay debt of another, if made upon a valuable consideration, is held to be an incident to the debt so as to pass by the assignment thereof, although not specifically assigned. Lahmers *v.* Schmidt, 35 Minn. 434, 29 N. W. 169; Barlow *v.* Myers, 64 N. Y. 41, 21 Am. Rep. 582 [*reversing* 3 Hun (N. Y.) 720, 6 Thomps. & C. (N. Y.) 183]; Claflin *v.* Ostrom, 54 N. Y. 581; Craig *v.* Parkis, 40 N. Y. 181, 100 Am. Dec. 469; Smith *v.* Starr, 4 Hun (N. Y.) 123; Small *v.* Sloan, 1 Bosw. (N. Y.) 352; Waring *v.* Cheeseborough, 4 Rich. (S. C.) 243. The assignment, by a subcontractor for construction of part of a building, carries with it an order drawn by the contractor on the owner in favor of the subcontractor, and its acceptance by the owner. Gallagher *v.* Nichols, 60 N. Y. 438, 16 Abb. Pr. N. S. (N. Y.) 337.

50. **Assignment of property** carries proceeds thereof. Allen *v.* Brown, 51 Barb. (N. Y.) 86 [*affirmed* in 44 N. Y. 228]. Assignment of goods shipped after commencement of voyage is an assignment of the proceeds. Hodges *v.* Harris, 6 Pick. (Mass.) 360. Moneys arising from land pass by assignment of all right, title, and interest in the land. Klock *v.* Buell, 56 Barb. (N. Y.) 398.

51. **Assignment of expected proceeds.**— Philips *v.* Barbaroux, 2 B. Mon. (Ky.) 89; Thayer *v.* Havener, 6 Me. 212; Tiernan *v.* Jackson, 5 Pet. (U. S.) 580, 8 L. ed. 234.

Assignment by a legatee of a fund to be realized from the sale of land will not pass the title to the land. Henderson *v.* Henderson, 133 Pa. St. 399, 19 Atl. 424, 19 Am. St. Rep. 650.

52. **Passes right to remedies.**— *Minnesota.* — Schlieman *v.* Bowlin, 36 Minn. 198, 30 N. W. 879.

New York.—King *v.* Kirby, 28 Barb. (N. Y.) 49; Rose *v.* Baker, 13 Barb. (N. Y.) 230; Oertel *v.* Wood, 40 How. Pr. (N. Y.) 10; Wyman *v.* Smead, 31 How. Pr. (N. Y.) 353.

North Carolina.— Waterman *v.* Williamson, 35 N. C. 198.

Ohio.— Whitman *v.* Keith, 18 Ohio St. 134.

Pennsylvania.—Farmers', etc., Bank *v.* Fordyce, 1 Pa. St. 454; Mehaffy *v.* Share, 2 Penr. & W. (Pa.) 361.

Tennessee.—Kennedy *v.* Howard, 6 Humphr. (Tenn.) 64.

See 4 Cent. Dig. tit. "Assignments," § 147; and *infra*, VII, A, 1.

As to actions by assignee see *infra*, VIII.

As to what law governs as to the remedy see *supra*, V, C.

Illustrations.— Thus, where the assignor might have sued to set aside a conveyance of his debtor for fraud (Emmons *v.* Barton, 109 Cal. 662, 42 Pac. 303; Billingsley *v.* Clelland, 41 W. Va. 234, 23 S. E. 812; Hickox *v.* Elliott, 10 Sawy. (U. S.) 415, 22 Fed. 13), or to set aside a previous conveyance made by himself on the ground that it is invalid (Reeder Bros. Shoe Co. *v.* Prylinski, 102 Mich. 468, 60 N. W. 969; McMahon *v.* Allen, 35 N. Y. 403; Sutton *v.* Hasey, 58 Wis. 556, 17 N. W. 416, under statute [but see Crocker *v.* Bellangee, 6 Wis. 645, 70 Am. Dec. 489]; Traer *v.* Clews, 115 U. S. 528, 6 S. Ct. 155, 29 L. ed. 467), or to have the same reformed for fraud or mistake (Bentley *v.* Smith, 1 Abb. Dec. (N. Y.) 126), the assignee can so sue. It has been said that an assignment of property *in transitu* gives assignee right to sue carrier for breach of contract of carriage (O'Neill *v.* New York Cent., etc., R. Co., 60 N. Y. 138 [*reversing* 3 Thomps. & C. (N. Y.) 399]; Waldron *v.* Willard, 17 N. Y. 466; Texas, etc., R. Co. *v.* Wright, 1 Tex. App. Civ. Cas. § 340); and that assignment of personal property after conversion carries the right to sue for the conversion (Dickson *v.* Merchants' Elevator Co., 44 Mo. App. 498; McKeage *v.* Hanover F. Ins. Co., 81 N. Y. 38, 37 Am. Rep. 471; Sherman *v.* Elder, 24 N. Y. 381 [*reversing* 1 Hilt. (N. Y.) 476]; Mahaney *v.* Walsh, 16 N. Y. App. Div. 601, 44 N. Y. Suppl. 969; Peyser *v.* McCarthy, 58 N. Y. Super. Ct. 325, 11 N. Y. Suppl. 631, 33 N. Y. St. 761 [but see, *contra*, Hicks *v.* Cleveland, 39 Barb. (N. Y.) 573]). But *compare* Campbell v. Henderson, 70 N. Y. Suppl. 1101.

interest in a firm vests in the assignee the right to sue for an accounting of the firm's affairs.[53]

(II) *Under Stipulation.* In assigning a chose in action, the assignor may expressly assign the collateral securities held by him to secure the performance of the duty, or other things incidental to the chose,[54] or he may assign the chose and stipulate that the security shall not be assigned with it.[55]

b. Applications of Rule — (I) *Assignment of Claims of Laborers or Materialmen.* In many of the states, statutes give preference to laborers and materialmen for the claims to payment of debts due them for labor or material furnished in certain classes of undertakings or to certain classes of persons; or, in the absence of statute, courts of equity recognize preferential liens for certain classes of debts, and it has been generally held that these rights to priority of payment, so given or recognized, pass to the assignees of the claims of the laborer or materialman.[56]

(II) *Assignment of Judgment.* As an incident to the assignment of a judgment, the claim upon which the judgment is founded, and all remedies incident thereto, pass by the assignment.[57]

(III) *Assignment of Mortgage Securing Note.* The assignment of a

53. Greenwood *v.* Marvin, 111 N. Y. 423, 19 N. E. 228, 19 N. Y. St. 612.

54. Chester *v.* Toklas, (Cal. 1885) 6 Pac. 85; Chapman *v.* Brooks, 31 N. Y. 75.

55. Stipulation not to assign.— Cannon *v.* Kreipe, 14 Kan. 324; Rolston *v.* Brockway, 23 Wis. 407.

56. *Alabama.*— Leftwich Lumber Co. *v.* Florence Mut. Bldg., etc., Assoc., 104 Ala. 584, 18 So. 48.

California.— Lien given laborer for working on threshing-machine. Duncan *v.* Hawn, 104 Cal. 10, 37 Pac. 626.

Iowa.— Lien on steamboat for supplies. Strother *v.* The Steamboat Hamburg, 11 Iowa 59.

Maine.— Right of priority for wages on insolvency of employer. McAvity *v.* Lincoln Pulp, etc., Co., 82 Me. 504, 20 Atl. 82.

Michigan.— Right to require corporation to see that labor-claims are paid before paying contractors or subcontractors. Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. 884; Martin *v.* Michigan, etc., R. Co., 62 Mich. 458, 29 N. W. 40.

Minnesota.— Clifford *v.* Northern Pac. R. Co., 55 Minn. 150, 56 N. W. 590. Right of laborer to sue on bond required by law to be given for his benefit. Salisbury *v.* Keigher, 47 Minn. 367, 50 N. W. 246; Sepp *v.* McCann, 47 Minn. 364, 50 N. W. 246.

New York.— Right to enforce labor-claim against stock-holder of a corporation. Krauser *v.* Ruckel, 17 Hun (N. Y.) 463. But a labor-claim entitled to preference in the event that an employer corporation goes into the hands of a receiver is not entitled to preference in the hands of an assignee who took the same before the time when the corporation went into the receiver's hands. People *v.* Remington, 45 Hun (N. Y.) 329 [*affirmed* in 109 N. Y. 631, 16 N. E. 680, 15 N. Y. St. 993].

Pennsylvania.— Fink's Appeal, (Pa. 1886) 6 Atl. 384; Riddlesburg Coal, etc., Co.'s Appeal, 114 Pa. St. 58, 6 Atl. 381. All rights assignor would have had. Allentown Nat. Bank *v.* Helios Dry Color, etc., Co., 9 Pa. Super. Ct. 275.

Texas.— Texas, etc., R. Co. *v.* Allen, 1 Tex. App. Civ. Cas. § 570; Texas, etc., R. Co. *v.* McMullen, 1 Tex. App. Civ. Cas. § 160.

United States.— Laborer's lien for preference out of the estate of insolvent in bankruptcy passes by an assignment of his claims after the filing of the petition. *In re* Campbell, 102 Fed. 686. Equitable lien on railroad for labor and supplies passes with assignment of supply or labor-claim. Union Trust Co. *v.* Walker, 107 U. S. 596, 2 S. Ct. 299, 27 L. ed. 490. Right of payment out of funds in hands of receiver for goods furnished to receiver passes with assignment of the claim for the purchase-price of the goods. Burnham *v.* Bowen, 111 U. S. 776, 4 S. Ct. 675, 28 L. ed. 596.

As to assignment of mechanics' liens, generally, see Mechanics' Liens.

But it has been said that the assignment of a claim for which the assignor has a special lien before action brought destroys the right of lien, and that a reassignment does not restore the right. Beifeld *v.* International Cement Co., 79 Ill. App. 318; Goodman, etc., Co. *v.* Pence, 21 Nebr. 459, 32 N. W. 219; Tewksbury *v.* Bronson, 48 Wis. 581, 4 N. W. 749.

57. Mansfield *v.* Hoagland, 52 Ill. 320; Frost *v.* Parker, 65 Iowa 178, 21 N. W. 507; Bolen *v.* Crosby, 49 N. Y. 183; Hagemann's Appeal, 88 Pa. St. 21; *In re* Baldwin, 4 Pa. St. 248; Fox *v.* Foster, 4 Pa. St. 119; Foster *v.* Fox, 4 Watts & S. (Pa.) 92. In Barker *v.* Gilliam, 5 Iowa 510, it was decided that the assignment of a judgment and the demand upon which it was founded carried with it, as an incident, the promise of a purchaser of property on which the judgment was a lien to pay the judgment if the judgment creditor would forbear from the enforcement of the lien for a reasonable time, and it was further decided that the assignee could sue in his own name on such promise.

mortgage will not carry with it, as an incident, the note to secure which the mortgage was given.[58]

(IV) *ASSIGNMENT OF NOTE SECURED BY MORTGAGE.* But if the holder of a note secured by mortgage assigns the note, without specially assigning the mortgage, it has uniformly been held that the mortgage passes to the assignee of the note as an incident to the assignment of the note.[59] It has been said that, where the assignment of a note is without recourse, the security will not pass as an incident thereto.[60]

(V) *ASSIGNMENT OF PURCHASE-MONEY DEBT.* A class of cases also frequently occurring, where this doctrine is applied, is that of the lien of the vendor for unpaid purchase-money, whether the lien arises by inference or out of express contract, which is held to pass by an assignment of the purchase-money debt.[61]

7. AS AFFECTED BY INTENTION OF PARTIES. To ascertain the intention of the assignor and assignee as to what interests, rights, or property they intended should pass under the assignment, and to carry out such intention, as nearly as

As to assignment of judgments, generally, see JUDGMENTS.

58. Does not pass note.— Cooper *v.* Newland, 17 Abb. Pr. (N. Y.) 342; Wright *v.* Eaves, 10 Rich. Eq. (S. C.) 582. But see Belden *v.* Meeker, 2 Lans. (N. Y.) 470, where it was said that the assignment of a bond and mortgage, and the moneys due and to grow due thereon, carries by its terms a note for which they were held as collateral.

As to assignment of mortgages, generally, see MORTGAGES.

59. Passes mortgage.— *California.*— Hurt *v.* Wilson, 38 Cal. 263.

Illinois.— Himrod *v.* Bolton, 44 Ill. App. 516.

Indiana.— Kemp *v.* Dickson, Wils. (Ind.) 42.

Louisiana.—Perot *v.* Levasseur, 21 La. Ann. 529; Terrill *v.* Gamblin, 10 La. Ann. 623.

New York.— Cooper *v.* Newland, 17 Abb. Pr. (N. Y.) 342.

Ohio.— Swartz *v.* Leist, 12 Ohio St. 419.

Pennsylvania.— Dubois' Appeal, 38 Pa. St. 231, 80 Am. Dec. 478.

South Carolina.— Wilson *v.* Dean, 21 S. C. 327; Cleveland *v.* Cohrs, 10 S. C. 224; Wright *v.* Eaves, 10 Rich. Eq. (S. C.) 582.

Tennessee.— Cleveland *v.* Martin, 2 Head (Tenn.) 128.

Texas.— Cannon *v.* McDaniel, 46 Tex. 303.

West Virginia.— Briggs *v.* Enslow, 44 W. Va. 499, 29 S. E. 1008; Thomas *v.* Linn, 40 W. Va. 122, 20 S. E. 878.

Assignment of notes given for a title bond will not pass interest in the land. Morrison *v.* Chambers, 122 N. C. 689, 30 S. E. 141.

Right of the mortgagor to sue his grantor for breach of covenant of title does not pass by an assignment of a note secured by mortgage. Kansas City Invest. Co. *v.* Fulton, 86 Mo. App. 138.

As an incident to the transfer of notes secured by mortgage, agreements made between mortgagees as to the priority of their respective mortgages, and agreements between the mortgagor and mortgagee concerning credits on the mortgage debt, pass to a transferee of the debt and enure to the benefit or operate to the detriment of the assignee, as the case may be, although not expressly assigned. Crow *v.* Vance, 4 Iowa 434. The right of one purchasing land subject to a mortgage to have his claim for services rendered to the mortgagor applied on the mortgage debt, under an agreement with the mortgagee that this should be done, may be enforced by the assignee of the land and of the claim for services of his assignor against the assignee of the mortgage. Hartley *v.* Tatham, 1 Rob. (N. Y.) 246, 26 How. Pr. (N. Y.) 158.

60. Note assigned "without recourse."— Johnson *v.* Nunnerly, 30 Ark. 153; Schnebly *v.* Ragan, 7 Gill & J. (Md.) 120, 28 Am. Dec. 195. *Contra,* Kemp *v.* Dickson, Wils. (Ind.) 42.

61. Passes vendor's lien.—*Alabama.*—Griffin *v.* Camack, 36 Ala. 695, 76 Am. Dec. 344.

Indiana.— Perry *v.* Roberts, 30 Ind. 244, 95 Am. Dec. 689.

Iowa.— Paramore *v.* Nabers, 42 Iowa 659.

Kentucky.— Summers *v.* Kilgus, 14 Bush (Ky.) 449; Guy *v.* Butler, 6 Bush (Ky.) 508; Forwood *v.* Dehoney, 5 Bush (Ky.) 174; Edwards *v.* Bohannon, 2 Dana (Ky.) 98; Johnston *v.* Gwathmey, 4 Litt. (Ky.) 317, 14 Am. Dec. 135; Kenny *v.* Collins, 4 Litt. (Ky.) 289.

Louisiana.— Swan *v.* Gayle, 24 La. Ann. 498. But the right of a vendor to have sale dissolved for failure of the payment of the purchase-price does not pass by an assignment of the purchase-money notes. Swan *v.* Gayle, 24 La. Ann. 498. But see Castle *v.* Floyd, 38 La. Ann. 583.

Maryland.— See, *contra,* Iglehart *v.* Armiger, 1 Bland (Md.) 519.

See also JUDGMENTS; VENDOR AND PURCHASER.

The seller's lien on personal property, reserved by the contract of sale, passes as an incident to the transfer of notes given to witness the purchase-price. Ross-Meehan Brake Shoe Foundry Co. *v.* Pascagoula Ice Co., 72 Miss. 608, 18 So. 364; Esty *v.* Graham, 46 N. H. 169.

may be done without violence to the language used by them, is, as in the case of other contracts, a cardinal rule.[62]

D. Interpretation of Assignment[63] — **1. In General.** In the construction of assignments, the intention of the parties is to be sought in the words and language employed, and, if the words are free from ambiguity and express plainly the purpose of the instrument, there is no occasion for interpretation.[64] But surrounding circumstances may be considered in order to more perfectly understand the intention of the parties.[65]

2. Ambiguity. If the contract of assignment is ambiguous or uncertain in its terms, it has been said that the assignment should be construed most strictly against the assignor;[66] that the extent of an interest transferred in general terms should be construed as limited by a special designation of the right or property transferred;[67] that if the general terms used in the contract in describing the subject-matter of the assignment are broad enough to cover both choses which the assignor could validly assign and choses the assignment of which would render it void, the assignment should be considered to include only those choses which the assignor could validly assign;[68] and that when the parties, by their

62. Weaver *v.* Stacy, (Iowa 1898) 75 N. W. 640; Pass *v.* McRea, 36 Miss. 143; Lanigan *v.* Bradley, 50 N. J. Eq. 201, 24 Atl. 505; Thomas *v.* Schumacher, 17 N. Y. App. Div. 441, 45 N. Y. Suppl. 166; Jaffe *v.* Bowery Bank, 31 Misc. (N. Y.) 778, 65 N. Y. Suppl. 210.

As to the intention of the parties as governing the interpretation of assignments, generally, see *infra*, VI, D, 1.

Extent and limits of rule.— But a mere unexecuted intention to assign cannot operate as an assignment. Harris *v.* Earle, 4 Harr. & J. (Md.) 274; Patty *v.* Jones, (Miss. 1893) 13 So. 931; Hopkins *v.* Gallatin Turnpike Co., 4 Humphr. (Tenn.) 402. And if the language employed in an instrument by the parties thereto has a well-ascertained meaning and does not include a chose which the parties intended to convey thereby, the instrument will not operate as an assignment of that chose. Belknap *v.* Belknap, 128 Mass. 14; Patty *v.* Jones, (Miss. 1893) 13 So. 931; Talcott *v.* Wabash R. Co., 66 Hun (N. Y.) 456, 21 N. Y. Suppl. 318, 50 N. Y. St. 423.

63. As to what law governs in the interpretation of assignments see *supra*, V, B.

64. **Assignments are to be read and understood according to the natural and obvious import of the language employed,** without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation. Courts cannot correct suspected errors, omissions, or defects, or, by construction, vary the contract of the parties if the words employed convey a definite meaning, and if there is no contradiction or ambiguity in the different parts of the same instrument, then the apparent meaning must be regarded as the one intended.

Alabama.— Behr *v.* Gerson, 95 Ala. 438, 11 So. 115.

Massachusetts.— Weed *v.* Jewett, 2 Metc. (Mass.) 608, 37 Am. Dec. 115.

New York.— An assignment by two to secure their liabilities for assignor does not secure their several liabilities. Yelverton *v.* Shelden, 2 Sandf. Ch. (N. Y.) 481. See also Schoonmaker *v.* Hoyt, 148 N. Y. 425, 42 N. E. 1059.

Pennsylvania.— Moore's Appeal, 92 Pa. St. 309.

Tennessee.— Quinby *v.* Merritt, 11 Humphr. (Tenn.) 439.

See 4 Cent. Dig. tit. "Assignments," § 131 *et seq.*; *supra*, VI, C, 7; and, generally, Contracts.

65. **Surrounding circumstances considered.** — Heron *v.* Saucer, 13 Ind. 148; Wormuth *v.* Tracy, 15 Hun (N. Y.) 180; Tingle *v.* Fisher, 20 W. Va. 497.

Illustration.— S assigned to K & Co. books of account "for the payment of my indebtedness to them, due and to become due." At time S owed K & Co. over one thousand dollars and K & Co. were indorser's on S's note for five hundred dollars, which note was not then due, but which they paid when it became due, and S owed them two hundred and twenty-five dollars in addition. They collected on accounts more than enough to pay the one thousand dollars, and indorsed the balance on the note for five hundred dollars. Under circumstances shown by parol it was held that the five hundred dollars was an indebtedness to become due, and not a mere contingent liability, and that the balance was properly applied on it. Kellogg *v.* Barber, 14 Barb. (N. Y.) 11.

66. **Construed strictly against assignor.**— Swan *v.* Warren, 138 Mass. 11. See also, generally, Contracts.

67. **General terms limited by special designations.**— Moses *v.* Murgatroyd, 1 Johns. Ch. (N. Y.) 473. An assignment of all estate, etc., as at large and fully explained by a schedule thereof annexed, is restricted and conveys nothing more than is contained in the schedule. Scott *v.* Coleman, 5 Litt. (Ky.) 349, 15 Am. Dec. 71. See also, generally, Contracts.

68. Miller *v.* Williamson, 5 Md. 219; Armstrong *v.* Mutual L. Ins. Co., 20 Blatchf. (U. S.) 493, 11 Fed. 573.

acts, have placed a certain construction on their contract, that construction should be given weight.[69]

3. Consisting of Several Writings. Where an assignment consists of several writings, all of such writings should be considered together in order to determine the meaning of the parties.[70]

E. Restrictions and Conditions. With reference to restrictions and conditions in contracts concerning the assignment thereof, it may be said that these are usually construed to be for the benefit of the debtor party thereto, and that if he does not see fit to invoke his rights others cannot complain.[71] Stipulations against assignment are not intended to prevent assignment as collateral.[72] But parties may expressly or impliedly stipulate that an assignment shall make the contract void, and an assignment in violation of such stipulation would not vest any rights in the assignee.[73]

F. Priorities — 1. In General. In determining the priority of assignments the date on which an assignment purports to have been made is *prima facie* the date on which it was made.[74]

2. As Between Assignee and Assignor's Creditors. As between an assignee of a chose in action and the creditors of the assignor, the assignee will be entitled to priority, within the limitations applicable to fraudulent conveyances;[75] and this

69. Construction by parties.— Boyd *v.* McNaughton, 51 Pa. St. 225. See also, generally, Contracts.

70. See, generally, Contracts.

An absolute assignment of stock to one and the instrument executed by the assignee and his surety simultaneously, setting forth the object of the assignment, are one and the same transaction. Parks *v.* Comstock, 59 Barb. (N. Y.) 16.

When an assignment is written on the back of an instrument and refers to it in express language, and conveys the same property, the contract may be looked to in construing the assignment. Cuthbert *v.* Wolfe, 19 Ala. 373.

71. In whose favor construed.— *Iowa.*— Wilson *v.* Reuter, 29 Iowa 176.

Massachusetts.— Staples *v.* Somerville, 176 Mass. 237, 57 N. E. 380.

Montana.— Board Trustees School Dist. No. 1 *v.* Whalen, 17 Mont. 1, 41 Pac. 849.

New Jersey.— Burnett *v.* Jersey City, 31 N. J. Eq. 341.

New York.— Fortunato *v.* Patten, 147 N. Y. 277, 41 N. E. 572, 69 N. Y. St. 671.

South Dakota.— Sykes *v.* Canton First Nat. Bank, 2 S. D. 242, 49 N. W. 1058.

See *supra*, note 39, p. 21; and generally, Contracts.

Where an assignment is made on a condition subsequent it is not, necessarily, avoided by a breach of the condition if the breach does not prejudice the assignor. De Forest *v.* Bates, 1 Edw. (N. Y.) 394.

72. Stipulation against assignment.— Norton *v.* Whitehead, 84 Cal. 263, 24 Pac. 154, 18 Am. St. Rep. 172.

Where a contract provided that it should not be negotiable or assignable, and that the purchase-money should be payable to the vendor, and to him only and to none other, it was held that the contract could be assigned as collateral security. Butler *v.* Rockwell, 14 Colo. 125, 23 Pac. 462.

73. Assignments in violation of stipulations.— Board Trustees School Dist. No. 1 *v.* Whalen, 17 Mont. 1, 41 Pac. 849; Grigg *v.* Landis, 19 N. J. Eq. 350.

A sale of standing timber, title reserved in vendor until paid for, vendee to make certain payments before removing the timber, upon default wherein the vendor was to have the option to avoid the contract. With the consent of the vendor the vendee made a contract for the sale of the timber, the agreement being that this consent should not be construed to be a waiver on the part of the vendor of any right under the original contract, and if the original vendee defaulted the buyer was to have the right to cut the timber on the same terms. It was held that an assignment to a third party without the consent of the vendor was void. Jackson *v.* Sessions, 109 Mich. 216, 67 N. W. 315.

A stipulation that one party is to have a right to retain, out of moneys due under a contract, sufficient to pay laborers and materialmen cannot operate to deprive the contractor of the right to assign money due or to become due under the contract to a person who advanced money to carry on the work. Shannon *v.* Hoboken, 37 N. J. Eq. 123. But see Greenville Sav. Bank *v.* Lawrence, 76 Fed. 545, 42 U. S. App. 179, 22 C. C. A. 646.

Persons whose claims for labor or material against a public contractor arose a year after the assignment by him of his rights under the contract are not within the protection of an act providing that no contractor for public work shall make an assignment of his contract while the debts of contractors, laborers, or workmen remain unpaid. McBroom's Appeal, 44 Pa. St. 92.

74. Date of assignment.— Sandidge *v.* Graves, 1 Patt. & H. (Va.) 101.

75. Following rules applicable to fraudulent conveyances.— *Alabama.*— Falkner *v.* Jones, 12 Ala. 165.

California.— Early *v.* Redwood City, 57 Cal. 193.

is true, although the assignment be made as collateral merely or for the purpose of paying the assignee and others to whom he is to distribute the money realized,[76] although the debtor has not been notified of the assignment and the chose has been attached or garnished in his hands as the property of the assignor by the creditors of the latter, who have instituted their proceedings without notice of the assignment,[77] and regardless of the fact whether the moneys assigned are due at

Louisiana.— Hopkins *v.* Pratt, 7 La. Ann. 336.

Maine.— Brett *v.* Thompson, 46 Me. 480.

Maryland.— Baldwin *v.* Wright, 3 Gill (Md.) 241.

Massachusetts.— See Carroll *v.* Sullivan, 103 Mass. 31.

Missouri.— But the assignee for value of a distributive share in the estate of a decedent takes the same subject to debts of the distributee to the estate. Ford *v.* O'Donnell, 40 Mo. App. 51.

New Jersey.— Crater *v.* Crater, 32 N. J. Eq. 484.

New York.— See Yorke *v.* Conde, 66 Hun (N. Y.) 316, 20 N. Y. Suppl. 961, 49 N. Y. St. 544. *Compare* Kinney *v.* Reid Ice-Cream Co., 57 N. Y. App. Div. 206, 68 N. Y. Suppl. 325.

North Carolina.— When a debt is not specifically assigned, but is one of a number of similarly assigned debts, a court of equity will not permit the assignee to hold the same, to the exclusion of creditors of the assignor, without showing that the remaining debts assigned are insufficient to satisfy his claim. Perry *v.* Merchants' Bank, 69 N. C. 551.

South Carolina.— Money paid to an attorney to be applied on certain judgments which he had obtained for the judgment creditors, but which were not so applied, when assigned by the judgment debtor to other creditors of his belongs to such other creditors in preference to the judgment creditor. Huntingdon *v.* Spann, 1 McCord Eq. (S. C.) 167; Slater *v.* Gaillard, 3 Brev. (S. C.) 115.

Tennessee.— Flickey *v.* Loney, 4 Baxt. (Tenn.) 169. But proceedings, in court charged with the distribution of a fund, showing the assignment are sufficient. Nelson *v.* Trigg, 7 Lea (Tenn.) 69.

United States.— See Hubbard *v.* Turner, 2 McLean (U. S.) 519, 12 Fed. Cas. No. 6,819.

See 4 Cent. Dig. tit. "Assignments," § 152; and generally, FRAUDULENT CONVEYANCES.

76. Assignment as collateral.— Porter *v.* Bullard, 26 Me. 448; Wheeler *v.* Emerson, 44 N. H. 182; Claflin *v.* Kimball, 52 Vt. 6. See Finnigan *v.* Floeck, 8 Tex. Civ. App. 518, 28 S. W. 268, where it was held that one who is not under obligations to make advances to another, but who has taken an assignment of a chose from that other to secure a preëxisting indebtedness and such advances as he may make, is not entitled, as against a creditor of the assignor garnishing the chose, to payment out of the chose of advances made by him after garnishment.

Valuable consideration must support assignment made as collateral. Langley *v.* Berry, 14 N. H. 82; Giddings *v.* Coleman, 12 N. H. 153.

77. Notice to debtor.—*Alabama.*— Jones *v.* Lowery Banking Co., 104 Ala. 252, 16 So. 75.

California.— Morgan *v.* Lowe, 5 Cal. 325, 63 Am. Dec. 132.

Colorado.— Chamberlin *v.* Gilman, 10 Colo. 94, 14 Pac. 107; Kitzinger *v.* Beck, 4 Colo. App. 206, 35 Pac. 278.

Connecticut.— Clark *v.* Connecticut Peat Co., 35 Conn. 303; Willes *v.* Pitkin, 1 Root (Conn.) 47. *Contra*, Vanbuskirk *v.* Hartford F. Ins. Co., 14 Conn. 141, 36 Am. Dec. 473; Judah *v.* Judd, 5 Day (Conn.) 534; Woodbridge *v.* Perkins, 3 Day (Conn.) 364.

Georgia.— Whitten *v.* Little, 2 Ga. Dec. 99.

Illinois.— Knight *v.* Griffey, 161 Ill. 85, 45 N. E. 727; Price *v.* German Exch. Bank, 60 Ill. App. 418; Knight *v.* Griffey, 57 Ill. App. 583; Gregg *v.* Savage, 51 Ill. App. 281. *Contra*, Moore *v.* Gravelot, 3 Ill. App. 442. In Illinois one cannot transfer a chose in action, as against an attaching or garnishing creditor, after the institution of the attachment or garnishment proceeding. Commercial Nat. Bank *v.* Payne, 161 Ill. 316, 43 N. E. 1070. Neither as against the attaching creditor who has commenced a suit, or as against other attaching creditors who, under the garnishment law, are entitled to share alike in the attached fund by reason of their having recovered judgment at the same term of court. Reeve *v.* Smith, 113 Ill. 47.

Indiana.— In Indiana, upon proceedings supplemental to execution, both the judgment debtor and his debtor are necessary parties and both must be served, and if, before service is had on the judgment debtor, he assigns the debt, nothing can be recovered by the process, although the assignment be to assignees in bankruptcy. Hoadley *v.* Caywood, 40 Ind. 239.

Iowa.— McGuire *v.* Pitts, 42 Iowa 535; Easley *v.* Gibbs, 29 Iowa 129; Weire *v.* Davenport, 11 Iowa 49, 77 Am. Dec. 132; Smith *v.* Clarke, 9 Iowa 241.

Kentucky.— West *v.* Sanders, 1 A. K. Marsh. (Ky.) 108; Manly *v.* Bitzer, 12 Ky. L. Rep. 262.

Louisiana.— See, *contra*, Golsan *v.* Powell, 32 La. Ann. 521; Carlin *v.* Dumartrait, 8 Mart. N. S. (La.) 212.

Maine.— Littlefield *v.* Smith, 17 Me. 327.

Maryland.— Myer *v.* Liverpool, etc., Ins. Co., 40 Md. 595; Baldwin *v.* Wright, 3 Gill (Md.) 241.

Massachusetts.— Kimball *v.* Le Pert, 1 Allen (Mass.) 469; Gardner *v.* Hoeg, 18 Pick. (Mass.) 168; Brown *v.* Maine Bank, 11 Mass. 153; Dix *v.* Cobb, 4 Mass. 508; Perkins *v.* Parker, 1 Mass. 117. But see Brown *v.* Foster, 4 Cush. (Mass.) 214.

the time of the assignment or are to become due thereafter.[78] But, unless such notice be given prior to the entry of a judgment against the debtor garnishee, the creditor will be entitled to a preference over the assignee.[79]

3. As Between Assignee and Prior Lien-Holders. An assignee of a chose in action takes the same subject to valid liens on the same at the time of the assignment.[80]

4. As Between Successive Assignees — a. In General. A subsequent assignee, buying with notice of a prior assignment, takes the chose subject to the rights of the prior assignee;[81] and, as heretofore seen, the general rule is that, as between

Minnesota.— MacDonald *v.* Kneeland, 5 Minn. 352.

Mississippi.— Schoolfield *v.* Hirsh, 71 Miss. 55, 14 So. 528, 42 Am. St. Rep. 450. *Contra,* Hart *v.* Forbes, 60 Miss. 745.

Missouri.— Smith *v.* Sterritt, 24 Mo. 260.

New Hampshire.— Sleeper *v.* Weymouth, 26 N. H. 34.

New Jersey.— Kafes *v.* McPherson, (N. J. 1895) 32 Atl. 710; Board of Education *v.* Duparquet, 50 N. J. Eq. 234, 24 Atl. 922.

New York.— Coates *v.* Emporia First Nat. Bank, 91 N. Y. 20 [*reversing* 47 N. Y. Super. Ct. 322]; Callanan *v.* Edwards, 32 N. Y. 483. *Contra,* Bishop *v.* Garcia, 14 Abb. Pr. N. S. (N. Y.) 69.

Oregon.— Meier *v.* Hess, 23 Oreg. 599, 32 Pac. 755.

Pennsylvania.— Pellman *v.* Hart, 1 Pa. St. 263. *Contra,* Miner *v.* Kosek, 7 Kulp (Pa.) 72. Under the Pennsylvania statute an assignee in bankruptcy is not a *bona fide* assignee, so as to require notice to him of an attachment of debtor's effects on execution. Cowden *v.* Pleasants, 9 Pa. St. 59.

Rhode Island.— Tiernay *v.* McGarity, 14 R. I. 231; Tracy *v.* McGarty, 12 R. I. 168.

South Carolina.— Bischoff *v.* Ward, 5 S. C. 140; Brown *v.* Minis, 1 McCord (S. C.) 80.

Tennessee.— Johnson *v.* Irby, 8 Humphr. (Tenn.) 654. *Contra,* Rodes *v.* Haynes, 95 Tenn. 673, 33 S. W. 564; Robertson *v.* Baker, 10 Lea (Tenn.) 300; Penniman *v.* Smith, 5 Lea (Tenn.) 130.

Vermont.— See, *contra,* Nichols *v.* Hooper, 61 Vt. 295, 17 Atl. 134.

England.— Davis *v.* Freethy, 24 Q. B. D. 522, 59 L. J. Q. B. 318; Badeley *v.* Consolidated Bank, 38 Ch. D. 238, 57 L. J. Ch. 468, 59 L. T. Rep. N. S. 419, 36 Wkly. Rep. 745; *In re* General Horticultural Co., 32 Ch. D. 512, 55 L. J. Ch. 608, 54 L. T. Rep. N. S. 898, 34 Wkly. Rep. 681.

See 4 Cent. Dig. tit. "Assignments," § 153.

78. Time when moneys are due.— Smith *v.* Jennings, 15 Gray (Mass.) 69.

79. Debtor must be notified when.— *Iowa.* — Walters *v.* Washington Ins. Co., 1 Iowa 404, 63 Am. Dec. 451.

Kentucky.— Where attached property was sold by order of court and the proceeds paid to the attaching creditor under order of court, and, subsequently, the judgment was set aside and the suit dismissed as having been improperly instituted, and thereafter the defendant conveyed his interest in the property, it was held that the creditors could retain the amount due them, but not the amounts paid them for costs in the attachment proceedings. Jackson *v.* Holloway, 14 B. Mon. (Ky.) 108.

Massachusetts.— Wood *v.* Partridge, 11 Mass. 488.

Minnesota.— But see MacDonald *v.* Kneeland, 5 Minn. 352, where a judgment rendered against the debtor of the assignor, upon garnishment at the instance of a creditor of the assignor, was set aside before any part of the judgment had been paid, at the suit of an assignee whose judgment antedated the garnishment, but who had not given notice thereof. It was there said that a party making an absolute assignment of a chose in action parts with all his interest in the same, and a subsequent attaching creditor or assignee can acquire no interest therein; that if the debtor pays the assignor without notice of the assignment the latter will be held to have received the same as trustee for the assignee, and even a judgment obtained against the debtor as garnishee, before payment thereof, will not defeat the rights of the assignee — at least where the facts proved in the action to set aside the judgment disclose superior equities in the assignee.

Missouri.— Richards *v.* Griggs, 16 Mo. 416, 57 Am. Dec. 240.

Pennsylvania.—Bishel *v.* Echert, 3 Leg. Op. (Pa.) 375.

80. *California.*— Early *v.* Redwood City, 57 Cal. 193.

Florida.— Randall *v.* Archer, 5 Fla. 438.

Iowa.— Hetherington *v.* Hayden, 11 Iowa 335.

Massachusetts.— First Ward Nat. Bank *v.* Thomas, 125 Mass. 278; Coverdale *v.* Aldrich, 19 Pick. (Mass.) 394.

New York.— Corning *v.* White, 2 Paige (N. Y.) 567, 22 Am. Dec. 659.

Pennsylvania.— Franklin F. Ins. Co. *v.* West, 8 Watts & S. (Pa.) 350.

A assigned a claim, upon which he had brought suit, together with all the avails of the suit, to a trustee for certain persons, first deducting and paying out of any money that might be realized all charges for costs and attorney's fees. It was held that a trust was thereby created in favor of the attorney for fees and disbursements in suit on the claim. Tyler *v.* Mayre, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196.

81. Takes subject to rights of prior assignee.— *Illinois.*— Ostertag *v.* Evans, 176 Ill. 215, 52 N. E. 255.

Iowa.— Heins *v.* Wicke, 102 Iowa 396, 71 N. W. 345.

successive assignees of the same chose in action from the same assignor, the assignee prior in point of time is prior in point of right even though he has failed to give notice of the assignent to the debtor, and a subsequent assignee, who took without notice of the prior assignment, has given notice to the debtor of the assignment to him,[82] although the courts of the United States and of some of the states hold to the contrary view.[83] But, as between successive assignees tak-

Kentucky.— McCormac *v.* Smith, 3 T. B. Mon. (Ky.) 429.

New York.— People *v.* Syracuse Third Nat. Bank, 159 N. Y. 382, 54 N. E. 35.

Oklahoma.— Gillette *v.* Murphy, 7 Okla. 91, 54 Pac. 413.

Ohio.— Creed *v.* Lancaster Bank, 1 Ohio St. 1.

Tennessee.— Paul *v.* Williams, 12 Lea (Tenn.) 215.

Wisconsin.— Leonard *v.* Burgess, 16 Wis. 41.

See 4 Cent. Dig. tit. "Assignments," § 149 *et seq.*; and supra, III, B, 4.

82. Notice to debtor.—*Alabama.*—Hatchett *v.* Molton, 76 Ala. 410.

California.—Chandler *v.* People's Sav. Bank, 61 Cal. 396; Fore *v.* Manlove, 18 Cal. 436.

Indiana.— White *v.* Wiley, 14 Ind. 496.

Iowa.— Moore *v.* Lowrey, 25 Iowa 336, 95 Am. Dec. 790.

Kansas.— Sargent *v.* Kansas Midland R. Co., 48 Kan. 672, 29 Pac. 1063.

Kentucky.— Madeiras *v.* Catlett, 7 T. B. Mon. (Ky.) 475; Talbot *v.* Cook, 7 T. B. Mon. (Ky.) 438; Millar *v.* Field, 3 A. K. Marsh. (Ky.) 104.

Maryland.— Clary *v.* Grimes, 12 Gill & J. (Md.) 31; Gill *v.* Clagett, 4 Md. Ch. 153.

Massachusetts.— Putnam *v.* Story, 132 Mass. 205; Thayer *v.* Daniels, 113 Mass. 129.

Minnesota.— MacDonald *v.* Kneeland, 5 Minn. 352.

Mississippi.— Fitch *v.* Stamps, 6 How. (Miss.) 487.

New Hampshire.— Hale *v.* Nashua, etc., R. Co., 60 N. H. 333.

New York.— Chester *v.* Jumel, 125 N. Y. 237, 26 N. E. 297, 35 N. Y. St. 4 [*reversing* 5 N. Y. Suppl. 809, 24 N. Y. St. 214]; Muir *v.* Schenck, 3 Hill (N. Y.) 228, 38 Am. Dec. 633; Bradley *v.* Root, 5 Paige (N. Y.) 632. But see People *v.* Syracuse Third Nat. Bank, 159 N. Y. 382, 54 N. E. 35; Parks *v.* Innes, 33 Barb. (N. Y.) 37.

Ohio.— Porter *v.* Dunlap, 17 Ohio St. 591.

Pennsylvania.—Sibbald's Estate, 18 Pa. St. 240; Inglis *v.* Inglis, 2 Dall. (Pa.) 45, 1 L. ed. 282. See also Johnson *v.* Allegheny City, 139 Pa. St. 330, 20 Atl. 999.

South Carolina.— Southworth *v.* Sehring, 2 Hill (S. C.) 587; Mayhin *v.* Kirby, 4 Rich. Eq. (S. C.) 105.

Texas.— Harris County *v.* Donaldson, 20 Tex. Civ. App. 9, 48 S. W. 791.

Vermont.— Ormsby *v.* Fifield, 38 Vt. 143.

West Virginia.—Tingle *v.* Fisher, 20 W. Va. 497; Clarke *v.* Hogeman, 13 W. Va. 718.

See 4 Cent. Dig. tit. "Assignments," § 150; and *supra*, III, B, 4, a.

A contractor verbally agreed that if defendants would furnish him money he would turn over to them moneys he was to receive in payment of a certain contract. The defendants thereupon furnished the money to him. Subsequently he assigned in writing to plaintiff the money to be paid to him under the contract, but, upon obtaining a draft for the money, he gave the draft to defendants, who held other security for the money they had advanced to the contractor. It was held that defendants were entitled to the draft and that plaintiff's right to the security held by defendants could not be determined in an action brought by plaintiff to recover the proceeds of the draft from defendants. Yorke *v.* Conde, 66 Hun (N. Y.) 316, 20 N. Y. Suppl. 961, 49 N. Y. St. 544.

An order on a city comptroller by a contractor with the city to make payments to his subcontractor, according to partial and final estimates of the city engineer, as the work progressed, was held to give such subcontractor a priority of right to reserve funds under the contract — the contract providing for the payment of seventy per cent as the work progressed, and thirty per cent upon its completion — as against a subsequent assignee claiming under an assignment of all funds due the contractor. Seattle *v.* Liberman, 9 Wash. 276, 37 Pac. 433.

83. Contrary view.—Merchants', etc., Bank *v.* Hewitt, 3 Iowa 93, 66 Am. Dec. 49; Murdoch *v.* Finney, 21 Mo. 138 [but see Thomas *v.* Liebke, 13 Mo. App. 389]; Burck *v.* Taylor, 152 U. S. 634, 14 S. Ct. 696, 38 L. ed. 578; Spain *v.* Bent, 1 Wall. (U. S.) 604, 17 L. ed. 619; Judson *v.* Corcoran, 17 How. (U. S.) 612, 15 L. ed. 231; Methven *v.* Staten Island Light, etc., Co., 66 Fed. 113, 35 U. S. App. 67, 13 C. C. A. 362; Farmers', etc., Bank *v.* Farwell, 58 Fed. 633, 19 U. S. App. 256, 7 C. C. A. 391; *In re* Gillespie, 15 Fed. 734; Brice *v.* Bannister, 3 Q. B. D. 569, 47 L. J. Q. B. 722, 38 L. T. Rep. N. S. 739, 26 Wkly. Rep. 670; Johnstone *v.* Cox, 16 Ch. D. 571; Meux *v.* Bell, 1 Hare 73, 6 Jur. 123, 11 L. J. Ch. 77, 23 Eng. Ch. 73; Loveridge *v.* Cooper, 2 L. J. Ch. O. S. 75, 3 Russ. 31, 27 Rev. Rep. 1, 3 Eng. Ch. 1; Dearle *v.* Hall, 2 L. J. Ch. O. S. 62, 3 Russ. 1, 27 Rev. Rep. 1, 3 Eng. Ch. 1; Foster *v.* Blackstone, 2 L. J. Ch. 84, 1 Myl. & K. 297, 7 Eng. Ch. 297.

But, in order to be entitled to priority, a subsequent assignee must be a *bona fide* purchaser, and one who takes an assignment for a preëxisting debt is not such. Walker *v.* Miller, 11 Ala. 1067; Frow *v.* Downman, 11 Ala. 880; Schwartz *v.* Jenney, 21 Hun (N. Y.) 33; Evertson *v.* Evertson, 5 Paige (N. Y.) 644; Harris *v.* Horner, 21 N. C. 455, 30 Am. Dec. 182; The Elmbank, 72 Fed. 610.

ing equal equitable titles, the rule is that the one obtaining the legal title will prevail.[84]

b. Under Recording Acts. But, where the statutes of a state require the recording of transfers of certain classes of choses in action, an assignee who fails to record his assignment will have no priority over a subsequent assignee who places his assignment of record.[85]

c. Under Stipulations in Contract Out of Which Chose Arises. The parties to the contract out of which the chose arises may, in their contract, provide for the manner of assignment of rights arising thereunder; and, if they do so, an assignee whose assignor complies with the contract provisions concerning assignments of rights thereunder will be preferred to one who claims by prior assignment of such rights, but whose assignment is not made in conformity with the provisions of the contract.[86]

d. Where Portions of the Same Debt Are Assigned to Several Assignees. Where fractional parts of a debt secured by lien are successively assigned to different persons, and the proceeds of the property subject to the lien are insufficient to pay them all, they take *pro rata*, and not in the order of their assignment.[87]

e. Where Prior Assignee Forfeits His Rights. A prior assignee may forfeit his right by permitting his assignor to remain in possession of the evidences of the chose, whereby the assignor is enabled to dispose of it to a subsequent *bona fide* assignee for value,[88] or by his laches in standing by and permitting a subsequent *bona fide* assignee for value to recover on the chose.[89]

VII. RIGHTS AND LIABILITIES OF PARTIES.

A. In General — 1. Rule Stated. As heretofore seen, the general rule is that the unqualified assignment of a chose in action vests in the assignee the title

84. Legal title better than equitable title. — Carlisle *v.* Jumper, 81 Ky. 282; Judson *v.* Corcoran, 17 How. (U. S.) 612, 15 L. ed. 231; Hallas *v.* Robinson, 15 Q. B. D. 288, 54 L. J. Q. B. 364, 33 Wkly. Rep. 246; Joseph *v.* Lyons, 15 Q. B. D. 280, 54 L. J. Q. B. 1, 51 L. T. Rep. N. S. 740, 33 Wkly. Rep. 145.

85. Peabody *v.* Lewiston, 83 Me. 286, 22 Atl. 171. See *supra*, III, F.

86. The assignment of a contract is cum onere, and the right of laborers for the contractor to be paid out of the moneys to become due under the contract will be preferred to the claim of the assignee of the contract. Union Pac. R. Co. *v.* Douglas County Bank, 42 Nebr. 469, 60 N. W. 886.

Where a contract provided that moneys to be earned thereunder should not be assigned without the consent of the other contracting party, and that no assignee should acquire any right to such moneys unless the other party had so consented, it was held that a prior assignee without such consent could not acquire any rights to such moneys as against a subsequent assignee with such consent. Fortunato *v.* Patten, 147 N. Y. 277, 41 N. E. 572, 69 N. Y. St. 671 [*reversing* 5 Misc. (N. Y.) 234, 25 N. Y. Suppl. 333, 54 N. Y. St. 832].

Where an assignment is made with power of revocation a subsequent assignment of the chose revokes the first assignment. McCornick *v.* Sadler, 14 Utah 463, 47 Pac. 667.

87. Pro rata taking. — Moore's Appeal, 92 Pa. St. 309; Hancock's Appeal, 34 Pa. St. 155; Perry's Appeal, 22 Pa. St. 43, 60 Am. Dec. 63; Donley *v.* Hays, 17 Serg. & R. (Pa.) 400.

In equity, assignments of portions of the same debt, made at the same time, and not accepted by the debtor, are equal in equity. Skobis *v.* Ferge, 102 Wis. 122, 78 N. W. 426.

88. Assignor allowed to retain possession of evidences. — Wilson *v.* Heslep, 4 Cal. 300; Mitchell *v.* Cook, 17 How. Pr. (N. Y.) 110; Gamble *v.* Carlisle, 6 Ohio Dec. 48.

A subsequent assignee of book-accounts and bills receivable, who notifies the debtor of such assignment, has a superior title to that of a prior assignee thereof, who has failed to give such notice, especially where the accounts and bills were left with the assignor for collection, and the second assignee took possession thereof without notice of the prior assignment. Graham Paper Co. *v.* Pembroke, 124 Cal. 117, 56 Pac. 627, 71 Am. St. Rep. 26, 44 L. R. A. 632.

But the mere fact that the assignor is permitted to remain in possession of land to which the assigned contract relates is not, if made upon a valuable consideration, sufficient to make the assignment fraudulent as against his creditors. Dodge *v.* Brokaw, 32 N. J. Eq. 154.

89. Laches of prior assignee. — Monticello Sav. Bank *v.* Stuart, 73 Mo. App. 279. Where a foreign government seized goods insured by a marine policy of assurance, the underwriters acknowledged the loss, paid the policy, the owners having abandoned the goods to them, and afterward, under a convention between

thereto to the same extent as the assignor had it at the date of the assignment, and no more.[90] But the rule is subject to the qualification that, where one places in the hands of another evidences that that other is the absolute owner of a chose, an assignment by the latter will vest in a *bona fide* assignee of the chose for a valuable consideration the title thereto as against the true owner.[91] The interest of the assignee, whether it is legal or equitable, will be protected by courts of law and courts of equity against all persons having notice thereof;[92] and the remedies open to the assignor for the enforcement of the obligation are open to the assignee.[93] The rights and liabilities of the parties — assignor, assignee, and debtor — are such as would naturally follow from the operation of the rules above stated.[94]

the United States and the foreign government, the latter agreed to pay claims advanced on account of seizure of the goods and made an award to the assured on account thereof, the assured transferring such award to a third person, and after that the United States, under an agreement with the foreign government, agreed to pay such award and confirmed the right of the assignee of the claim, the underwriters all the time not taking any steps to protect their interest, it was held that the assignee was entitled to the amount of the award as against the underwriters. Mercantile Mar. Ins. Co. *v.* Corcoran, 1 Gray (Mass.) 75.

90. Only assignor's rights vest in assignee. — *California.*— Bullard *v.* Kinney, 10 Cal. 60.

Colorado.—Moffatt *v.* Corning, 14 Colo. 104, 24 Pac. 7.

Illinois.— Brooks *v.* Record, 47 Ill. 30; Brown *v.* Morgan, 4 Ill. App. 233.

Indiana.— Sims *v.* Wilson, 47 Ind. 226; Smith *v.* Rogers, 14 Ind. 224.

Kentucky.— Ward *v.* Kenton, Ky. Dec. 3; Ward *v.* Fox, Hughes (Ky.) 406; Eagan *v.* Hinch, Hughes (Ky.) 93.

Maryland.— Green *v.* Early, 39 Md. 223; Phalen *v.* State, 12 Gill & J. (Md.) 18.

Massachusetts.— Belknap *v.* Belknap, 5 Allen (Mass.) 468.

Missouri.— Hill *v.* McPherson, 15 Mo. 204, 55 Am. Dec. 142.

New York.— Chambers *v.* Lancaster, 160 N. Y. 342, 54 N. E. 707 [*affirming* 3 N. Y. App. Div. 215, 38 N. Y. Suppl. 253]; Saratoga County Bank *v.* King, 44 N. Y. 87; Foster *v.* Magee, 2 Lans. (N. Y.) 182; Jones *v.* Savage, 24 Misc. (N. Y.) 158, 53 N. Y. Suppl. 308.

Oregon.— Brower Lumber Co. *v.* Miller, 28 Oreg. 565, 43 Pac. 659, 52 Am. St. Rep. 807.

South Carolina.— Elders *v.* Vauters, 4 Desauss. (S. C.) 155.

Tennessee.— Trahue *v.* Bankhead, 2 Tenn. Ch. 412.

Wisconsin.— Kelley *v.* Schupp, 60 Wis. 76, 18 N. W. 725.

United States.— Campbell *v.* District of Columbia, 117 U. S. 615, 6 S. Ct. 922, 29 L. ed. 1007; Cowdrey *v.* Vandenburgh, 101 U. S. 572, 25 L. ed. 923; Western Union Tel. Co. *v.* Western, etc., R. Co., 91 U. S. 283, 23 L. ed. 350; Pennington *v.* Hunt, 20 Fed. 195; Cook *v.* Bidwell, 8 Fed. 452.

See 4 Cent. Dig. tit. "Assignments," § 156 *et seq.*; and *supra*, VI, B, 1.

The Louisiana statutes provide that one who buys a claim which he knows to be in suit is entitled to recover on it only what he paid for it, with legal interest from date of transfer to him. Bonner *v.* Beard, 43 La. Ann. 1036, 10 So. 373; McDougall *v.* Nonlezun, 38 La. Ann. 223; Spears *v.* Jackson, 30 La. Ann. 523; Kellar *v.* Blanchard, 21 La. Ann. 38; Billiot *v.* Robinson, 13 La. Ann. 529; Prevost *v.* Johnson, 9 Mart. (La.) 123; Morgan *v.* Livingston, 6 Mart. (La.) 19. This statute does not apply to claims sold under execution. Tilghman's Succession, 11 Rob. (La.) 124; Winchester *v.* Cain, 1 Rob. (La.) 421; Early *v.* Black, 12 La. 205. The statute does not permit one to contest suit for a long time, and then avail himself of the benefits of the statute. Cucullu *v.* Hernandez, 103 U. S. 105, 26 L. ed. 322.

91. Qualification of rule.—Cochran *v.* Stewart, 21 Minn. 435; Clarke *v.* Roberts, 25 Hun (N. Y.) 86 [*affirmed* in 90 N. Y. 652]; Combes *v.* Chandler, 33 Ohio St. 178; Moore *v.* Holcombe, 3 Leigh (Va.) 597, 24 Am. Dec. 683. But, in order that the assignee should come within the rule, he must be a purchaser in good faith for value, and without notice. Jamieson *v.* Forbes, 3 Desauss. (S. C.) 529; Rogers *v.* Lindsey, 13 How. (U. S.) 441, 14 L. ed. 215. See also McConnell *v.* Wenrich, 16 Pa. St. 365.

92. Assignee's interest protected by courts. — *Illinois.*— Fitzpatrick *v.* Beatty, 6 Ill. 454.

Maryland.— Crise *v.* Lanahan, (Md. 1887) 11 Atl. 842.

Massachusetts.— Brown *v.* Maine Bank, 11 Mass. 153.

New Hampshire.— Thompson *v.* Emery, 27 N. H. 269.

New York.— Yorke *v.* Conde, 147 N. Y. 486, 42 N. E. 193, 70 N. Y. St. 72 [*affirming* 24 N. Y. Suppl. 1149, 54 N. Y. St. 937]; Gibson *v.* Haggarty, 23 How. Pr. (N. Y.) 260.

93. Remedies open to assignor open to assignee.— Crippen *v.* Jacobson, 56 Mich. 386, 23 N. W. 56; Martin *v.* Hawks, 15 Johns. (N. Y.) 405; Banks *v.* McClellan, 24 Md. 62, 87 Am. Dec. 594. See also *supra*, VI, C, 6, a, (I).

94. *Alabama.*— Where specific performance of a contract would have been decreed between original parties it will be decreed between assignees and privies in absence of some new equity intervening. Morris *v.* Crawford, 15 Ala. 271.

Arkansas.— Block *v.* Walker, 2 Ark. 4.

2. As Affected by Estoppel. Under some circumstances the assignee may, as against the debtor, acquire a higher right than the assignor had. That is to say, the debtor may by his conduct estop himself from asserting, against the assignee, his equities against the assignor.[95]

3. As Affected by Revocation. While a mere direction from one to his agent to pay money to a third party is revocable by the principal or his representatives at any time before payment,[96] an assignment in which the assignee has an interest when once the rights of the parties become fixed thereunder, whether the assignment is made on consideration or not, is irrevocable.[97]

California.—Dorris *v.* Sullivan, 90 Cal. 279, 27 Pac. 216.

Illinois.— Barling *v.* Peters, 131 Ill. 78, 21 N. E. 809; Parmly *v.* Buckley, 103 Ill. 115.

Indiana.— Mewherter *v.* Price, 11 Ind. 199.

Kentucky.— Casey *v.* Allen, 1 A. K. Marsh. (Ky.) 465, 10 Am. Dec. 750. Where obligor of bond is estopped to plead failure of consideration as to first assignee benefit enures to subsequent assignees. Short *v.* Jackson, Ky. Dec. 192.

Maine.— Brown *v.* Leavitt, 26 Me. 251.

Maryland.— Harrison *v.* McConkey, 1 Md. Ch. 34.

Minnesota.— Where debtor, pleading inability to do so, refuses to comply with contract, it is not incumbent on assignee to tender purchase-money or exhibit authority. Wilson *v.* Hentges, 29 Minn. 102, 12 N. W. 151.

New Hampshire.— Duncklee *v.* Greenfield Steam Mill Co., 23 N. H. 245.

New York.—Rochester Lantern Co. *v.* Stiles, etc., Press Co., 16 N. Y. Suppl. 781, 40 N. Y. St. 851; Wheeler *v.* Wheeler, 9 Cow. (N. Y.) 34; Allen *v.* Randolph, 4 Johns. Ch. (N. Y.) 693. In suit by assignee for breach of contract, it is not necessary to show that assignee notified other contracting party of assignment, and of his willingness to carry it out. Wemple *v.* Stewart, 22 Barb. (N. Y.) 154.

Ohio.— James *v.* Cincinnati, etc., R. Co., 2 Disn. (Ohio) 261.

Pennsylvania.— East Lewisburg Lumber, etc., Co. *v.* Marsh, 91 Pa. St. 96. Assignee takes contract subject to rights of contracting parties at time of assignment. Marshall *v.* Brick, 174 Pa. St. 190, 34 Atl. 520.

South Carolina.— Frazer *v.* Charleston, 13 S. C. 533. Title of assignee not affected by fact that assignor had been enjoined from selling chose. Robertson *v.* Segler, 24 S. C. 387.

Vermont.— Smith *v.* Foster, 36 Vt. 705; Spafford *v.* Page, 15 Vt. 490.

Canada.— Reid *v.* Whitehead, 10 Grant Ch. (U. C.) 446.

95. Fugate *v.* Hansford, 3 Litt. (Ky.) 262; Follett *v.* Reese, 20 Ohio 546, 55 Am. Dec. 472; Faull *v.* Tinsman, 36 Pa. St. 108; Cowdrey *v.* Vandenburgh, 101 U. S. 572, 25 L. ed. 923. But an estoppel cannot be based on a mistake of law. Brick *v.* Campbell, 122 N. Y. 337, 25 N. E. 493, 33 N. Y. St. 520, 10 L. R. A. 259. See also, generally, Estoppel; and *supra*, IV, B.

Illustrations.— Thus, it has been held that, as against a *bona fide* assignee for a valuable consideration (Ferguson *v.* Millikin, 42 Mich. 441, 4 N. W. 185; Rodriguez *v.* Heffernan, 5 Johns. Ch. (N. Y.) 417), the debtor is estopped to deny that a condition of facts exists, the existence of which he has asserted in the assigned writing (Fugate *v.* Hansford, 3 Litt. (Ky.) 263); that if the debtor promises the assignee, before assignment made, that he will pay the full amount called for by the obligation (Morrison *v.* Beckwith, 4 T. B. Mon. (Ky.) 73, 16 Am. Dec. 136; Short *v.* Jackson, Ky. Dec. 192; Kemp *v.* McPherson, 7 Harr. & J. (Md.) 320; Jaques *v.* Esler, 4 N. J. Eq. 461; L'Amoreux *v.* Vischer, 2 N. Y. 278; Foster *v.* Newland, 21 Wend. (N. Y.) 94; Van Lew *v.* Parr, 2 Rich. Eq. (S. C.) 321. *Contra*, Da Costa *v.* Shrewsbury, 1 Bay (S. C.) 211), or after assignment promises, in consideration of indulgence on the part of the assignee, to pay the full amount of the debt (Cabiness *v.* Herndon, Litt. Sel. Cas. (Ky.) 469), or admits liability and proceeds to carry out the obligation as if he had no defense thereto (Cornell *v.* Townsend, 19 How. Pr. (N. Y.) 184; Henry *v.* Brown, 19 Johns. (N. Y.) 49; Goodnow *v.* Parsons, 36 Vt. 46. *Contra*, however, if at time the debtor had no notice of such equities. Hall *v.* Purnell, 2 Md. Ch. 137; Harper *v.* Jeffries, 5 Whart. (Pa.) 26), or conceals his equity when the assignee applies for information, he will be estopped from setting up, as against the assignee, any equity he has against the assignor (Jones *v.* Hardesty, 10 Gill & J. (Md.) 404, 32 Am. Dec. 180; Lee *v.* Kirkpatrick, 14 N. J. Eq. 264; Moore *v.* Metropolitan Nat. Bank, 55 N. Y. 41, 14 Am. Rep. 173; McNeil *v.* New York Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341).

96. Revocability.—*Arkansas.*— Halliburton *v.* Nance, 40 Ark. 161.

Indiana.— Slaughter *v.* State, 2 Ind. 220.

Massachusetts.— Langdon *v.* Langdon, 4 Gray (Mass.) 186.

New York.— Noe *v.* Christie, 51 N. Y. 270; Geary *v.* Page, 9 Bosw. (N. Y.) 290.

South Carolina.— Spalding *v.* Lesly, 2 Speers (S. C.) 754.

Virginia.— Beers *v.* Spooner, 9 Leigh (Va.) 153.

See also, generally, Contracts.

97. Irrevocability.— *Arkansas.*— Block *v.* Walker, 2 Ark. 4.

Maine.— Reed *v.* Nevins, 38 Me. 193.

Maryland.— McNulty *v.* Cooper, 3 Gill & J. (Md.) 214.

Mississippi.—Sevier *v.* McWhorter, 27 Miss. 442.

Missouri.— Davis *v.* Christy, 8 Mo. 569.

New York.— De Forest *v.* Bates, 1 Edw. (N. Y.) 394.

B. Of the Assignor — 1. Rights Against Assignee. As between the assignee and the assignor, the assignee is bound to carry out the provisions of the assigned contract, and in all respects to comply with the terms of the assignment, and the assignor may recover from him the damages he sustains by reason of the failure of the assignee to comply with the contract.[98] Where the assignment is for collection or as security for debt, the assignor may hold the assignee for want of reasonable care in the selection of agents for collecting, or a want of diligence in the collection of, the assigned chose, by reason of which the assignor suffers loss.[99]

2. Obligations to Assignee — a. Express. In assigning a chose the assignor may expressly warrant the willingness and ability of the debtor to meet the obligation.[1]

b. Implied — (I) *In General.* The assignee of choses in action, not assignable at law, was considered only as the agent or attorney of the assignor to recover the chose, with an equitable lien thereon to reimburse himself for what he had advanced upon the assignment;[2] but where, by statute, the legal title to a chose passes by an assignment of it, it would seem that the rights of the assignee thereof, as against the assignor, should be governed by the rules applicable to transfers of personal property.[3]

(II) *As to Validity of Claim Assigned.* In the absence of an express warranty, the assignor of a chose in action, for a valuable consideration, impliedly warrants to the assignee that the chose assigned is a valid, subsisting obligation in his favor against the debtor to the extent to which it purports to be such.[4] If the

Pennsylvania.— Nagle's Appeal, 1 Mon. (Pa.) 557.

South Carolina.— Matheson *v.* Rutledge, 12 Rich. (S. C.) 41.

98. *California.*— Cutting Packing Co. *v.* Packers Exchange, 86 Cal. 574, 25 Pac. 52, 21 Am. St. Rep. 63, 10 L. R. A. 369.

Missouri.— *Compare* Everett *v.* St. Joseph Nat. Bank, 67 Mo. App. 284.

Montana.— Bach *v.* Boston, etc., Consol. Copper, etc., Min. Co., 16 Mont. 467, 41 Pac. 75.

New Jersey.— A contract of indemnity by assignee to assignor is construed to be prospective. Warwick *v.* Hutchinson, 45 N. J. L. 61.

New York.— Allen *v.* Brown, 44 N. Y. 228 [*affirming* 51 Barb. (N. Y.) 86].

South Carolina.—Moore *v.* Holland, 16 S. C. 15.

Texas.— Heard *v.* Lockett, 20 Tex. 162.

99. Where assignment is for collection or as security.— Prentice *v.* Buxton, 3 B. Mon. (Ky.) 35; Gooch *v.* Parker, (Tex. Civ. App. 1897) 41 S. W. 662; Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555. Where an assignee agrees to save the assignor harmless on account of liability, it is not necessary for the assignor to show that he paid out any money, but only that the liability to pay the same exists. Mills *v.* Allen, 133 U. S. 423, 10 S. Ct. 413, 33 L. ed. 717.

1. Warranty as to debtor's ability.— *Arkansas.*— Sabin *v.* Hamilton, 2 Ark. 485.

Louisiana.— Taylor *v.* Curtis, 3 Mart. N. S. (La.) 132, assignor warranting solvency of his debtor.

Maryland.— Lewis *v.* Hoblitzell, 6 Gill & J. (Md.) 259, warranting the collectibility of chose assigned.

New York.—Keyes *v.* Brush, 2 Paige (N. Y.) 311.

Virginia.— Minnis *v.* Pollard, 1 Call (Va.) 226.

Where an assignor of part of a judgment agreed with the assignee that, in the event that the assignee failed to make that part of the judgment assigned out of the judgment debtor in three years, he would pay the amount to the assignee, it was held that, in order that the assignee might recover, he must show that he used reasonable diligence in attempting to collect the judgment. Berry *v.* Kenney, 5 B. Mon. (Ky.) 120.

2. If the assignee made use of all the diligence for the recovery of the chose which a faithful agent or attorney ought to use, and the money was lost notwithstanding, it was lost to the assignor, and that upon legal principles. Stout *v.* Stevenson, 4 N. J. L. 206; Bennet *v.* McFall, 3 Brev. (S. C.) 558.

3. Stout *v.* Stevenson, 4 N. J. L. 206.

4. That chose is a valid subsisting obligation.— *Georgia.*— Hunt *v.* Burk, 22 Ga. 129.

Illinois.— Tyler *v.* Bailey, 71 Ill. 34.

Iowa.— McCormack *v.* Reece, 3 Greene (Iowa) 591.

Kentucky.—Winstell *v.* Hehl, 6 Bush (Ky.) 58; Emmerson *v.* Claywell, 14 B. Mon. (Ky.) 15, 58 Am. Dec. 645; Hunt *v.* Armstrong, 5 B. Mon. (Ky.) 399. It is sufficient, as against demurrer, to show that the assigned obligation is voidable by the debtor where suit is brought against the assignor and debtor, for the debtor may elect to avoid the obligation in that suit, and thereupon the obligation of the assignor becomes fixed. Hughes *v.* Brown, 3 Bush (Ky.) 660.

Massachusetts.— Eaton *v.* Mellus, 7 Gray (Mass.) 566.

assigned chose is invalid then the warranty is broken as soon as it is made, and the assignee need not wait until the maturity of the chose, but may sue the assignor thereon at once, and need not return the assigned chose.[5] The measure of the assignee's damages for breach of such warranty is, generally, the amount he paid the assignor for the chose.[6]

(III) *As to Non-Interference With Thing Assigned.* By the mere fact of assignment, the assignor further guarantees that he will not interfere with the chose thereafter, and if he does interfere to the damage of the assignee he renders himself liable to the assignee for any damage resulting from such interference.[7]

(IV) *As to Solvency of Debtor.* The assignor, by the mere fact of assignment, does not impliedly warrant the solvency of the debtor, or that he will or can perform the obligation assigned.[8] In some of the states the rule has been so

New York.— Sanders *v.* Aldrich, 25 Barb. (N. Y.) 63; Corwin *v.* Wesley, 34 N. Y. Super. Ct. 109.

Vermont.— Kingsley *v.* Fitts, 55 Vt. 293; Gilchrist *v.* Hilliard, 53 Vt. 592, 38 Am. Rep. 706.

But if the assignment is without recourse no warranty will be implied. Coffman *v.* Allin, Litt. Sel. Cas. (Ky.) 200; Flynn *v.* Allen, 57 Pa. St. 482; Crawford *v.* McDonald, 2 Hen. & M. (Va.) 189; Houston *v.* McNeer, 40 W. Va. 365, 22 S. E. 80. *Contra*, Samuel *v.* Hall, 9 B. Mon. (Ky.) 374.

This warranty has been said to extend only to the immediate assignee of the chose. Mardis *v.* Tyler, 10 B. Mon. (Ky.) 376; McGee *v.* Lynch, 3 Hayw. (Tenn.) 105. Particularly where remote assignee purchased it from one who had not paid value therefor. Wood *v.* Duval, 9 Leigh (Va.) 6. *Contra*, Redwine *v.* Brown, 10 Ga. 311. But rule different in conveyance of real estate with express warranty. Hopkins *v.* Lane, 9 Yerg. (Tenn.) 78.

5. Flynn *v.* Allen, 57 Pa. St. 482.

Time and manner of bringing suit against assignor.— Assignee is under no obligation to institute suit on chose, when the warranty is broken, before seeking the return of the consideration paid therefor. Walsh *v.* Rogers, 15 Nebr. 309, 18 N. W. 135. But if the debtor's defense is a set-off against the assignor, the assignee cannot sue the assignor without first having the validity of the set-off determined in a suit against the debtor (Hunt *v.* Armstrong, 5 B. Mon. (Ky.) 399), and must give the assignor notice of any discount or defense set up against the assigned chose; otherwise the assignee assumes the risk (Drayton *v.* Thompson, 1 Bay (S. C.) 263).

6. Measure of damages.— Dougherty *v.* Maple, 4 Bibb (Ky.) 557; Cravens *v.* Hopson, 4 Bibb (Ky.) 286; Spratt *v.* McKinney, 1 Bibb (Ky.) 595; Boyd *v.* Anderson, 1 Overt. (Tenn.) 437, 3 Am. Dec. 762; Barley *v.* Layman, 79 Va. 518 (in absence of proof of amount of consideration damages consist in value of thing assigned); Lawton *v.* Howe, 14 Wis. 241.

Interest.— Elliott *v.* Threlkeld, 16 B. Mon. (Ky.) 341; Metcalf *v.* Pilcher, 6 B. Mon. (Ky.) 529; Tribble *v.* Davis, 3 J. J. Marsh. (Ky.) 633.

If the assignee has brought suit against the debtor on a chose found to be invalid, he may include, in his recovery from the assignor, the costs and expenses of that action. Hammett *v.* Smith, 5 Ala. 156; Cartwright *v.* Carpenter, 7 How. (Miss.) 328, 40 Am. Dec. 66; Phœnix Ins. Co. *v.* Parsons, 129 N. Y. 86, 29 N. E. 87, 41 N. Y. St. 505; Giffert *v.* West, 33 Wis. 617. Where assignee of notes held invalid mortgage to secure them, and was not only defeated in foreclosure suit but also had to pay judgment in a suit for conversion of the chattels held under the mortgage, and the assignor had notice of both suits, it was held the assignee was entitled to recover the amount of both judgments, and costs and attorneys' fees in both cases. Daskam *v.* Ullman, 74 Wis. 474, 43 N. W. 321.

7. *Georgia.*— Alston *v.* Gillespie, 78 Ga. 665.

Massachusetts.—Eaton *v.* Mellus, 7 Gray (Mass.) 566.

New York.— Sanders *v.* Aldrich, 25 Barb. (N. Y.) 63.

South Carolina.— Willson *v.* Winn, 2 Bay (S. C.) 517.

Tennessee.— Boyd *v.* Anderson, 1 Overt. (Tenn.) 437, 3 Am. Dec. 762.

Texas.— Ripley *v.* Withee, 27 Tex. 14.

Virginia.— Fant *v.* Fant, 17 Gratt. (Va.) 11.

Wisconsin.— Giffert *v.* West, 33 Wis. 617. Compare *supra*, VII, B, 2, b, (I).

8. *Alabama.*— Carrier *v.* Eastis, 112 Ala. 474, 20 So. 595.

Arkansas.— Hazer *v.* Yost, 54 Ark. 485, 16 S. W. 372.

Georgia.— Cochran *v.* Strong, 44 Ga. 636.

Illinois.—Strong *v.* Leoffler, 85 Ill. 73; Robinson *v.* McNeill, 51 Ill. 225; Condrey *v.* West, 11 Ill. 146; Grote *v.* Clerihan, 32 Ill. App. 323.

Indiana.— Shirts *v.* Irons, 37 Ind. 98.

Kentucky.— Brothers *v.* Porter, 6 B. Mon. (Ky.) 106.

Michigan.— Prudden *v.* Nester, 103 Mich. 540, 61 N. W. 777.

Mississippi.— Houston *v.* Burney, 2 Sm. & M. (Miss.) 583.

New Jersey.—Stout *v.* Stevenson, 4 N. J. L. 206.

South Carolina.— Walker *v.* Scott, 2 Nott & M. (S. C.) 286; Parker *v.* Kennedy, 1 Bay (S. C.) 398.

Tennessee.—Chandler *v.* Jobe, 5 Lea (Tenn.) 591; Graves *v.* Caruthers, Meigs (Tenn.) 58.

modified as to make the assignor impliedly warrant the solvency of the debtor where the assignment is of a bond or other obligation for the payment of money;[9] and the rule may be stated to be that by the mere fact of assignment the assignor impliedly agrees with the assignee that if the assignee will use due diligence in endeavoring to collect the moneys due on the chose from the debtor, and will, without success, exhaust all legal and equitable remedies in his endeavor so to do, the assignor will repay to the assignee the consideration paid to him by the assignee on account of the assigned chose, and the moneys expended by the assignee in his endeavor to collect from the debtor.[10]

3. OBLIGATIONS TO THIRD PARTIES. The assignment of a contract does not discharge the assignor from his original undertaking.[11]

C. Of the Assignee — 1. RIGHTS AGAINST ASSIGNOR. As against the assignor and his creditors, the assignee becomes the owner of the chose from the time of

Especially is this true where the assignment purports to convey only all the assignor's right, title, and interest in the subject-matter of the assignment. Griel *v.* Lomax, 86 Ala. 132, 5 So. 325; Hazer *v.* Yost, 54 Ark. 485, 16 S. W. 372; Northampton First Nat. Bank *v.* Massachusetts L. & T. Co., 123 Mass. 330; Herrod *v.* Blackburn, 56 Pa. St. 103, 94 Am. Dec. 49.

9. Modification of rule.— Bedal *v.* Stith, 3 T. B. Mon. (Ky.) 290; Moredock *v.* Rawlings, 3 T. B. Mon. (Ky.) 73; Dougherty *v.* Maple, 4 Bibb (Ky.) 557; Cravens *v.* Hopson, 4 Bibb (Ky.) 286; Spratt *v.* McKinney, 1 Bibb (Ky.) 595; Sibley *v.* Stull, 15 N. J. L. 332 (assignee under no obligation to assignor to notify him of non-payment); Bird *v.* Ross, 12 N. C. 472.

But there must be consideration for the assignment and it must be alleged. Duncan *v.* Littell, 2 Bibb (Ky.) 424.

In Missouri an action is given by statute in favor of the assignee against the assignor, and has been held to mean only immediate assignors, although said that assignee may recover against remote assignor in equity. Weaver *v.* Beard, 21 Mo. 155.

10. *Delaware.*— Bennett *v.* Moore, 5 Harr. (Del.) 350.

Indiana.— Due diligence requires assignee to pursue without the state a non-resident debtor if he was such at the time of the assignment, but not otherwise. Stevens *v.* Alexander, 82 Ind. 407.

Kentucky.— Chambers *v.* Keene, 1 Metc. (Ky.) 289; Levi *v.* Evans, 7 B. Mon. (Ky.) 115; Harnett *v.* McGarvy, 4 B. Mon. (Ky.) 393; McFadden *v.* Finnell, 3 B. Mon. (Ky.) 121; Sayre *v.* Bayless, 1 B. Mon. (Ky.) 304; Tribble *v.* Davis, 3 J. J. Marsh. (Ky.) 633; Parker *v.* Owings, 3 A. K. Marsh. (Ky.) 59; Smith *v.* Blunt, 2 A. K. Marsh. (Ky.) 522; McGinnis *v.* Burton, 3 Bibb (Ky.) 6; Thompson *v.* Caldwell, 2 Bibb (Ky.) 290; Hogan *v.* Vance, 2 Bibb (Ky.) 34; Smallwood *v.* Woods, 1 Bibb (Ky.) 542; Rives *v.* Brown, 5 Ky. L. Rep. 745; Ward *v.* Grayson Banking Co., 4 Ky. L. Rep. 535. Need not press suit further than he would if he was solely interested. Young *v.* Cosby, 3 Bibb (Ky.) 227. After return of *nulla bona*, mere proof that debtor had property is no defense to assignor without showing that assignee was aware of the fact. Luman *v.* Neete, 3 B. Mon. (Ky.) 165. Where several obligations are assigned by the same assignor to the same assignee, the assignee owes a duty to the assignor to proceed on each as it matures, and, if he fails to do so, he cannot thereafter, upon recovering upon all the obligations against the debtor and realizing but part thereof, apply the part recovered in satisfaction of the obligations to recover which he did not exercise due diligence as they matured, so as to charge the assignor with payment of the balance. Coleman *v.* Tully, 7 Bush (Ky.) 72.

Maryland.—Boyer *v.* Turner, 3 Harr. & J. (Md.) 285.

North Carolina.— Bird *v.* Ross, 12 N. C. 472.

Pennsylvania.— Graham *v.* Goudy, Add. (Pa.) 55.

Virginia.— Smith *v.* Triplett, 4 Leigh (Va.) 590; Johnston *v.* Hackley, 6 Munf. (Va.) 448; Barksdale *v.* Fenwick, 4 Call (Va.) 492; Mackie *v.* Davis, 2 Wash. (Va.) 219, 1 Am. Dec. 482. If enjoined must show disposition of injunction. McClung *v.* Arbuckle, 6 Munf. (Va.) 315.

West Virginia.— Thomas *v.* Linn, 40 W. Va. 122, 20 S. E. 878.

Assignee can discharge himself from suing the debtor by showing that the debtor has removed from the state before the maturity of the assigned obligation (Tucker *v.* Fogle, 7 Bush (Ky.) 290); that the debtor has been discharged in bankruptcy (Roberts *v.* Atwood, 8 B. Mon. (Ky.) 209); by showing that the debtor was insolvent at the time of the assignment, and that the assignor was aware of that fact at that time (Cope *v.* Arberry, 2 J. J. Marsh. (Ky.) 296; Boyd *v.* Snelling, 7 T. B. Mon. (Ky.) 415); that a pursuit of the debtor would be unavailing (Morrison *v.* Lovell, 4 W. Va. 346), or that the assignee has, under directions of the assignor, refrained from pursuing the debtor (Hall *v.* Rixey, 84 Va. 790, 6 S. E. 215).

Election to sue assignor must be within a reasonable time, otherwise assignor will be discharged from liability. Wood *v.* Berthoud, 4 J. J. Marsh. (Ky.) 303.

11. Martin *v.* Orndorff, 22 Iowa 504; Hart *v.* Summers, 38 Mich. 399; Currier *v.* Taylor, 19 N. H. 189. See also *supra*, II, B, 7.

the assignment, subject to the qualifications heretofore stated.[12] After that time, the assignor loses all right of control over the same and will not be allowed to defeat the rights of the assignee, whether the assignment be good at law or only in equity.[13] He has no right to collect or compromise the chose, nor in any way to discharge the debtor therefrom,[14] nor to qualify the chose in any manner.[15]

12. See *supra*, III, B, 4, a; VI, B, 1.

13. **Assignor loses all right of control.**— *Indiana.*— Gwan *v.* Doe, 7 Blackf. (Ind.) 210.

Iowa.— Taylor *v.* Galland, 3 Greene (Iowa) 17.

Maine.— Reed *v.* Nevins, 38 Me. 193; Hackett *v.* Martin, 8 Me. 77.

Maryland.— Shriner *v.* Lamborn, 12 Md. 170.

Massachusetts.— Pacific Nat. Bank *v.* Windram, 133 Mass. 175; Jenkins *v.* Brewster, 14 Mass. 291; Jones *v.* Witter, 13 Mass. 304.

Minnesota.— Schilling *v.* Mullen, 55 Minn. 122, 56 N. W. 586, 43 Am. St. Rep. 475.

Missouri.— Leahey *v.* Dugdale, 41 Mo. 517; Lord *v.* Schamloeffel, 50 Mo. App. 360; Buffington *v.* South Missouri Land Co., 25 Mo. App. 492.

New Hampshire.— Chapman *v.* Haley, 43 N. H. 300.

New Jersey.— Flemming *v.* Hoboken, 40 N. J. L. 270.

New York.— Van Gelder *v.* Van Gelder, 81 N. Y. 625; Field *v.* New York, 6 N. Y. 179, 57 Am. Dec. 435; Frear *v.* Evertson, 20 Johns. (N. Y.) 142; Littlefield *v.* Storey, 3 Johns. (N. Y.) 425.

North Carolina.— Ellis *v.* Amason, 17 N. C. 273.

Pennsylvania.—Stevens *v.* Stevens, 1 Ashm. (Pa.) 190.

South Carolina.— Canty *v.* Sumter, 2 Bay (S. C.) 93; Newman *v.* Crocker, 1 Bay (S. C.) 246.

Vermont.— Blin *v.* Pierce, 20 Vt. 25.

Wisconsin.— Mowry *v.* Crocker, 6 Wis. 326.

See 4 Cent. Dig. tit. "Assignments," § 166 *et seq.*; and VI, B, 1.

14. **Assignor has no right to collect, compromise, or discharge.**— *California.*— McCarthy *v.* Mt. Tecarte Land, etc., Co., 110 Cal. 687, 43 Pac. 391; Rauer *v.* Fay, 110 Cal. 361, 42 Pac. 902.

Connecticut.— Tuttle *v.* Fowler, 22 Conn. 58.

Indiana.— McWhorter *v.* Norris, 9 Ind. App. 491, 34 N. E. 854, 37 N. E. 21.

Missouri.— Ashby *v.* Winston, 34 Mo. 311.

New Jersey.— Dignan *v.* Dignan, 50 N. J. Eq. 458, 26 Atl. 133; Starr *v.* Haskins, 26 N. J. Eq. 414.

South Dakota.—Sykes *v.* Canton First Nat. Bank, 2 S. D. 242, 49 N. W. 1058.

See *supra*, VII, B, 2, b, (III).

But assignee cannot complain if compromise does not injure him. Howard *v.* Pensacola, etc., R. Co., 24 Fla. 560, 5 So. 356.

If thereafter assignor does collect the chose, the moneys in his hands arising therefrom will be held to be trust funds belonging to the assignee, and if, after assignment, the money is paid to a third party the assignee may recover it from such third party.

Connecticut.— Camp *v.* Tompkins, 9 Conn. 545.

Kentucky.— Hubbard *v.* Prather, 1 Bibb (Ky.) 178.

Maryland.— Spiker *v.* Nydegger, 30 Md. 315.

Minnesota.— Sibley *v.* Pine County, 31 Minn. 201, 17 N. W. 337; MacDonald *v.* Kneeland, 5 Minn. 352.

Missouri.— Page *v.* Gardner, 20 Mo. 507.

New Hampshire.— Frost *v.* Reed, 30 N. H. 17.

New York.— Carver *v.* Creque, 48 N. Y. 385 [*affirming* 46 Barb. (N. Y.) 507].

North Carolina.— Winslow *v.* Elliott, 50 N. C. 111. But where assignment is equitable the assignee cannot sue the assignor in a court of law for moneys collected on account thereof. Smith *v.* Gray, 18 N. C. 42.

Pennsylvania.— Bullitt *v.* Methodist Episcopal Church Chartered Fund, 26 Pa. St. 108.

South Dakota.— Sykes *v.* Canton First Nat. Bank, 2 S. D. 242, 49 N. W. 1058.

United States.— Pendleton *v.* Wambersie, 4 Cranch (U. S.) 73, 2 L. ed. 554.

England.— *In re* Patrick, [1891] 1 Ch. 82.

Where a chose was assigned, with power to the assignee to collect and reimburse himself for moneys advanced to the assignor, and then to pay balance to assignor or his order, and the assignor subsequently ordered balance paid to third party, and the prior assignee accepted the order on condition that, after reimbursing itself, it would pay the amount due to the second assignee out of any balance remaining from the moneys collected, it was held that, where it was probable that a suit instituted for the collection of the chose would fail, the first assignee could compromise the same although not enough money was realized from the compromise to pay its claim, and although it had formerly rejected an offer of a larger amount in compromise. Meyer *v.* Farmers', etc., Bank, 77 Iowa 388, 42 N. W. 329.

15. **An assignor having indulged his debtor,** whereby the sureties were exonerated, is liable to the assignee for so much of the debt as was thereby lost to the assignee. Kenningham *v.* Bedford, 1 B. Mon. (Ky.) 325; Eels *v.* Finch, 5 Johns. (N. Y.) 193; Sykes *v.* Canton First Nat. Bank, 2 S. D. 242, 49 N. W. 1058.

In an action brought in the name of the vendee to the use of the assignee of a contract to convey land, it was shown that, before the suit was brought, the vendor was notified by the vendee not to make a deed to the assignee, and had made a deed to the

The assignee is the owner whether the assignment be absolute or conditional,[16] or valid or voidable.[17]

2. RIGHTS AGAINST DEBTOR. The assignee takes the chose subject to all equities between the assignor and the debtor existing at the time of the assignment, to all counter-claims against the assignor then held by the debtor, and to arrangements made between the debtor and the assignor prior to the time when the debtor receives notice of the assignment.[18] But the chose in the hands of the assignee is not subject to set-offs or counter-claims against the assignor in the hands of the debtor, if the obligation thus held by the debtor has not matured at the time of the

vendee. It was held that the action could not be maintained against the vendor, as he had complied with his covenant to convey to the vendee. Hamilton *v.* Brown, 18 Pa. St. 87.

16. Assignee the owner.—*Arkansas.*—Roberts *v.* Jacks, 31 Ark. 597, 25 Am. Rep. 584.

California.— Myers *v.* South Feather Water Co., 10 Cal. 579.

Indiana.— Felton *v.* Smith, 84 Ind. 485.

Massachusetts.— Foss *v.* Lowell Five Cents Sav. Bank, 111 Mass. 285; Derby *v.* Sanford, 9 Cush. (Mass.) 263.

New York.— Towsley *v.* McDonald, 32 Barb. (N. Y.) 604.

United States.— Donnelly *v.* District of Columbia, 119 U. S. 339, 7 S. Ct. 276, 30 L. ed. 465; Looney *v.* District of Columbia, 113 U. S. 258, 5 S. Ct. 463, 28 L. ed. 974; Cowdrey *v.* Vandenburgh, 101 U. S. 572, 25 L. ed. 923.

See also *supra*, VI.

17. Baca *v.* Fulton, 3 N. M. 215, 5 Pac. 467.

18. Takes subject to equities.— *Alabama.* — Andrews *v.* McCoy, 8 Ala. 920, 42 Am. Dec. 669; Tuscumbia, etc., R. Co. *v.* Rhodes, 8 Ala. 206.

Arkansas.— Smith *v.* Carder, 33 Ark. 709; Small *v.* Strong, 2 Ark. 198.

California.— Pacific Rolling Mill Co. *v.* English, 118 Cal. 123, 50 Pac. 383.

Colorado.— Smith *v.* Wall, 12 Colo. 363, 21 Pac. 42.

Connecticut.— Adams *v.* Leavens, 20 Conn. 73.

District of Columbia.— Boogher *v.* Roach, 12 App. Cas. (D. C.) 477.

Georgia.— Chattanooga, etc., R. Co. *v.* Warthen, 98 Ga. 599, 25 S. E. 988.

Indiana.— Holcroft *v.* Hunter, 3 Blackf. (Ind.) 147.

Iowa.— Forest Home Independent School Dist. *v.* Mardis, 106 Iowa 295, 76 N. W. 794; Callanan *v.* Windsor, 78 Iowa 193, 42 N. W. 652; Downing *v.* Gibson, 53 Iowa 517, 5 N. W. 699; Reynolds *v.* Martin, 51 Iowa 324, 1 N. W. 620.

Kansas.— Gardner *v.* Risher, 35 Kan. 93, 10 Pac. 584.

Kentucky.— Frazer *v.* Edwards, 5 Dana (Ky.) 538; Stewart *v.* Wilson, 5 Dana (Ky.) 50; White *v.* Prentiss, 3 T. B. Mon. (Ky.) 449; Searcy *v.* Reardon, 1 A. K. Marsh. (Ky.) 1.

Louisiana.— Bach *v.* Twogood, 18 La. 414.

Maryland.— Norris *v.* Lantz, 18 Md. 260; Hardesty *v.* Jones, 10 Gill & J. (Md.) 404, 32 Am. Dec. 180.

Michigan.— Van Akin *v.* Dunn, 117 Mich. 421, 75 N. W. 938; Fisken *v.* Milwaukee Bridge, etc., Works, 87 Mich. 591, 49 N. W. 873 [*affirming* 86 Mich. 199, 49 N. W. 133]; Spinning *v.* Sullivan, 48 Mich. 5, 11 N. W. 758; Ferguson *v.* Millikin, 42 Mich. 441, 4 N. W. 185; Warner *v.* Whittaker, 6 Mich. 133, 72 Am. Dec. 65. Especially when assignment not for value. Matteson *v.* Morris, 40 Mich. 52.

Mississippi.— Railey *v.* Bacon, 26 Miss. 455; Chaplain *v.* Briscoe, 11 Sm. & M. (Miss.) 372.

Missouri.— Ford *v.* O'Donnell, 40 Mo. App. 51.

Nebraska.— Lewis *v.* Holdrege, 56 Nebr. 379, 76 N. W. 890.

New Jersey.—Decker *v.* Adams, 28 N. J. L. 511, 78 Am. Dec. 65; Barrow *v.* Bispham, 11 N. J. L. 110; Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311; Willink *v.* Morris Canal, etc., Co., 4 N. J. Eq. 377.

New York.— Blydenburgh *v.* Thayer, 1 Abb. Dec. (N. Y.) 156, 3 Keyes (N. Y.) 293, 1 Transcr. App. (N. Y.) 221; Benedict *v.* Calkins, 45 Hun (N. Y.) 549; Harway *v.* New York, 1 Hun (N. Y.) 628; Commercial Bank *v.* Colt, 15 Barb. (N. Y.) 506; Townsend *v.* Corning, 1 Barb. (N. Y.) 627; Jones *v.* Savage, 24 Misc. (N. Y.) 158, 53 N. Y. Suppl. 308; Seymour *v.* Lewis, 19 Wend. (N. Y.) 512; Murray *v.* Gouverneur, 2 Johns. Cas. (N. Y.) 438, 1 Am. Dec. 177. Especially where assignment without consideration. French *v.* Stevenson, 10 N. Y. Suppl. 386, 32 N. Y. St. 766. Money voluntarily paid by debtor to creditor of assignor no such equity. Doyle *v.* Trinity Church Corp., 5 N. Y. St. 53. See Ely *v.* Cooke, 28 N. Y. 365.

Oklahoma.— Gillette *v.* Murphy, 7 Okla. 91, 54 Pac. 413.

Pennsylvania.— Egbert *v.* Kimberly, 146 Pa. St. 96, 23 Atl. 437; Lane *v.* Smith, 103 Pa. St. 415; Romig *v.* Erdman, 5 Whart. (Pa.) 112, 34 Am. Dec. 533; Kellogg *v.* Krauser, 14 Serg. & R. (Pa.) 137, 16 Am. Dec. 480; McMurtrie *v.* Twitchell, 11 Phila. (Pa.) 351, 33 Leg. Int. (Pa.) 238.

South Carolina.— Westbury *v.* Simmons, 57 S. C. 467, 35 S. E. 764; Pittman *v.* Raysor, 49 S. C. 469, 27 S. E. 475; British American Mortg. Co. *v.* Smith, 45 S. C. 83, 22 S. E. 747; Gibson *v.* Hutchins, 43 S. C. 287, 21 S. E. 250; Patterson *v.* Rabb, 38 S. C.

notice,[19] and is not subject to equities existing between the debtor and creditors of

138, 17 S. E. 463, 19 L. R. A. 831; Buttz *v.* Charleston County, 27 S. C. 585; Bobo *v.* Vaiden, 20 S. C. 271; Whitesides *v.* Wallace, 2 Speers (S. C.) 193; Maybin *v.* Kirby, 4 Rich. Eq. (S. C.) 105; Brown *v.* Smith, 3 Rich. Eq. (S. C.) 465; Winthrop *v.* Lane, 3 Desauss. (S. C.) 310.

Texas.— Russell *v.* Kirkbride, 62 Tex. 455; Punchard *v.* Delk, 55 Tex. 304.

United States.— New Orleans, etc., R. Co. *v.* Mellen, 12 Wall. (U. S.) 362, 20 L. ed. 434; Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199; Dunham *v.* Cincinnati, etc., R. Co., 1 Wall. (U. S.) 254, 17 L. ed. 584; Kinsman *v.* Parkhurst, 18 How. (U. S.) 289, 15 L. ed. 385. Especially where instrument itself puts him on notice. Smith *v.* Orton, 131 U. S. lxxv, appendix, 18 L. ed. 62.

England.—Drew *v.* Josolyne, 18 Q. B. D. 590, 56 L. J. Q. B. 490, 57 L. T. Rep. N. S. 5, 35 Wkly. Rep. 570; Walker *v.* Bradford Old Bank, 12 Q. B. D. 511, 53 L. J. Q. B. 280, 32 Wkly. Rep. 645; Rolt *v.* White, 31 Beav. 520, 9 Jur. N. S. 343, 7 L. T. Rep. N. S. 586; Ord *v.* White, 3 Beav. 357, 43 Eng. Ch. 357; Bergmann *v.* Macmillan, 17 Ch. D. 423, 42 L. T. Rep. N. S. 794, 29 Wkly. Rep. 890; Hooper *v.* Smart, 1 Ch. D. 90, 45 L. J. Ch. 99; Stocks *v.* Dobson, 4 De G. M. & G. 11, 17 Jur. 539, 22 L. J. Ch. 884, 53 Eng. Ch. 8; Young *v.* Kitchin, 3 Ex. D. 127, 47 L. J. Exch. 579, 26 Wkly. Rep. 403; Tooth *v.* Hallett, L. R. 4 Ch. 242; Turton *v.* Benson, 10 Mod. 455, 1 P. Wms. 496, 3 Prec. Ch. 522, 1 Str. 240, 2 Vern. 764.

Canada.— Martin *v.* Bearman, 45 U. C. Q. B. 205; Exchange Bank *v.* Stinson, 32 U. C. C. P. 158; Elliott *v.* McConnell, 21 Grant Ch. (U. C.) 276; Gould *v.* Close, 21 Grant Ch. (U. C.) 273; Farquhar *v.* Toronto, 12 Grant Ch. (U. C.) 186.

See 4 Cent. Dig. tit. "Assignments," § 177 *et seq.*

In Greene *v.* Darling, 5 Mason (U. S.) 201, 10 Fed. Cas. No. 5,765, the rule stated by Story, J., is that the assignee takes the chose in action subject to all the equities existing between the original parties as to that very chose in action; but that is very different from admitting that he takes it subject to all equities subsisting between the parties as to other debts or transactions. The assignment of a chose in action conveys merely the rights which the assignor then possesses to that thing, but it does not, necessarily, draw after it all other equities of an independent nature.

Claims after assignment and before notice must be such as arise out of the assigned chose. Terney *v.* Wilson, 45 N. J. L. 282; Cumberland Bank *v.* Hann, 18 N. J. L. 222; Burrough *v.* Moss, 10 B. & C. 558, 21 E. C. L. 238; Oulds *v.* Harrison, 3 C. L. R. 353, 10 Exch. 572, 24 L. J. Exch. 66, 3 Wkly. Rep. 160.

Rule as to equities does not apply to choses in action in the nature of real estate. Juvenal *v.* Patterson, 10 Pa. St. 282.

Under Louisiana statutes it is held that debtor acquires no equity as against assignor by acquiring debt against assignor, but of which acquisition assignor is not notified prior to assignment. Newman *v.* Irwin, 43 La. Ann. 1114, 10 So. 181. See also Wing *v.* Page, 62 Iowa 87, 11 N. W. 639, 17 N. W. 181; Reynolds *v.* Martin, 51 Iowa 324, 1 N. W. 620; Zugg *v.* Turner, 8 Iowa 223.

Where a husband assigned a chose of the wife, and the assignee brought suit thereon in the name of the husband and wife and recovered judgment, the judgment debtor was warranted in paying the amount of the judgment to the husband as against the assignee, it appearing that the amount was small, the husband insolvent, and the wife entitled to the money as her settlement. Eastburn *v.* Wells, 7 Dana (Ky.) 430.

19. Set-off or counter-claim maturing after notice.— *Alabama.*— Chilton *v.* Comstock, 4 Ala. 58.

Indiana.— Adams *v.* Rodarmel, 19 Ind. 339.

Iowa.— Davis *v.* Milburn, 3 Iowa 163.

Kentucky.— Graham *v.* Tilford, 1 Metc. (Ky.) 112.

Massachusetts.— Breen *v.* Seward, 11 Gray (Mass.) 118.

Michigan.— Lockwood *v.* Beckwith, 6 Mich. 168, 72 Am. Dec. 69.

New York.— Myers *v.* Davis, 22 N. Y. 489; Fort *v.* McCully, 59 Barb. (N. Y.) 87; Nelson *v.* Edwards, 40 Barb. (N. Y.) 279; Wells *v.* Stewart, 3 Barb. (N. Y.) 40; Martin *v.* Kunzmuller, 10 Bosw. (N. Y.) 16 [*affirmed* in 37 N. Y. 396].

Ohio.— Benedict *v.* Steiglitz, 27 Ohio St. 365; Fuller *v.* Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312.

Texas.— Texas, etc., R. Co. *v.* Vaughan, (Tex. Civ. App. 1897) 40 S. W. 1065.

But set-offs or counter-claims arising out of independent contract not allowed, whether contract made before or after notice. Seaman *v.* Van Rensselaer, 10 Barb. (N. Y.) 81; *In re* Asphaltic Wood Pavement Co., 30 Ch. D. 216, 54 L. J. Ch. 460, 53 L. T. Rep. N. S. 65, 33 Wkly. Rep. 513; Webb *v.* Smith, 30 Ch. D. 192, 53 L. T. Rep. N. S. 737; *In re* Milan Tramways Co., 22 Ch. D. 122, 25 Ch. D. 587, 50 L. T. Rep. N. S. 545, 32 Wkly. Rep. 601; Watson *v.* Mid Wales R. Co., 36 L. J. C. P. 285, L. R. 2 C. P. 593, 17 L. T. Rep. N. S. 94, 15 Wkly. Rep. 1107.

But may avail himself of set-off arising out of same contract after notice. Newfoundland *v.* Newfoundland R. Co., 13 App. Cas. 199, 57 L. J. P. C. 35, 58 L. T. Rep. N. S. 285; Bergmann *v.* Macmillan, 17 Ch. D. 423, 44 L. T. Rep. N. S. 794, 29 Wkly. Rep. 890.

A note against the assignor, not due at the time of the assignment, is not a valid offset against the assignee under a statute providing that the assignee may sue on bonds, etc., in the same manner as the original holder

the assignor, or between the assignor and third parties.[20] When the legal title is in the assignee he may recover the full amount of the obligation from the debtor, although the assignee holds the chose as security for a debt or upon trust for creditors.[21]

3. Obligations to Third Parties. The assignment of a mere personal contract does not give the other contracting party a right to sue the assignee for a breach thereof.[22] If the assignee expressly promises, in the contract of assignment, upon a valuable consideration, to pay third parties, such third parties may sue him on his promise.[23]

D. Of the Debtor — 1. Rights Against Assignee. Until the debtor receives notice of the assignment, or, as the rule is sometimes stated, until he has knowledge of such facts concerning the same as are sufficient to put him on inquiry,[24]

could do and recover so much thereof as shall appear to be due at the time of the assignment, provided nothing the act contained be construed to change any defense defendant might have against the assignee or assignor. Small *v.* Strong, 2 Ark. 198.

20. *California.* — Bridgeport First Nat. Bank *v.* Perris Irrigation Dist., 107 Cal. 55, 40 Pac. 45.

Illinois.— Himrod *v.* Bolton, 44 Ill. App. 516.

Indiana.— Fordice *v.* Hardesty, 36 Ind. 23.

Kentucky.— Newby *v.* Hill, 2 Metc. (Ky.) 530.

Louisiana.— Cox *v.* White, 2 La. 422.

Maryland.— Ohio L. Ins., etc., Co. *v.* Ross, 2 Md. Ch. 25.

Massachusetts. — Murphy *v.* Marland, 8 Cush. (Mass.) 575.

Michigan.— Bloomer *v.* Henderson, 8 Mich. 395, 77 Am. Dec. 453.

Mississippi.— Duke *v.* Clark, 58 Miss. 465; Mathews *v.* Hamblin, 28 Miss. 611.

Missouri.— Bartlett *v.* Eddy, 49 Mo. App. 32.

Nebraska.— Williams *v.* Donnelly, 54 Nebr. 193, 74 N. W. 601.

New Jersey.— De Witt *v.* Van Sickle, 29 N. J. Eq. 209; Starr *v.* Haskins, 26 N. J. Eq. 414.

New York.— Greene *v.* Warnick, 64 N. Y. 220; Trustees Union College *v.* Wheeler, 61 N. Y. 88; Moore *v.* Miller, 6 Lans. (N. Y.) 396; Beecher *v.* Bennett, 11 Barb. (N. Y.) 374; Quinlan *v.* Russell, 47 N. Y. Super. Ct. 212; James *v.* Morey, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; Livingston *v.* Dean, 2 Johns. Ch. (N. Y.) 479. *Contra,* Bush *v.* Lathrop, 22 N. Y. 535; Spicer *v.* Snyder, 12 N. Y. Suppl. 744, 34 N. Y. St. 376; Murphy *v.* Bowery Nat. Bank, 30 Hun (N. Y.) 40; Murray *v.* Lylburn, 2 Johns. Ch. (N. Y.) 441; Murray *v.* Ballou, 1 Johns. Ch. (N. Y.) 566.

Pennsylvania.— Mifflin County Nat. Bank's Appeal, 98 Pa. St. 150; Hendrickson's Appeal, 24 Pa. St. 363; Fisher *v.* Knox, 13 Pa. St. 622, 53 Am. Dec. 503; Mott *v.* Clark, 9 Pa. St. 399, 49 Am. Dec. 566.

Vermont.— See, *contra,* Downer *v.* South Royalton Bank, 39 Vt. 25.

See 4 Cent. Dig. tit. "Assignments," § 183.

21. Paschal *v.* Scott, 22 Ark. 255; Ginocchio *v.* Amador Canal, etc., Co., 67 Cal. 493, 8 Pac. 29.

22. Right to sue assignee.— Comstock *v.* Hitt, 37 Ill. 542; Suydam *v.* Dunton, 84 Hun (N. Y.) 506, 32 N. Y. Suppl. 333, 65 N. Y. St. 491; Adams *v.* Wadhams, 40 Barb. (N. Y.) 225; Heinze *v.* Buckingham, 17 N. Y. Suppl. 12, 42 N. Y. St. 427; Smith *v.* Kellogg, 46 Vt. 560.

Assignment of encumbered land does not personally obligate assignee to pay encumbrance. Lavelle *v.* Gordon, 15 Mont. 515, 39 Pac. 740.

Limitations of rule.— But where a contract is made with the intention that it should be assigned to the assignee, and he takes it upon the express stipulation that he will be bound by the covenants thereof, he will be bound thereby, and may be sued thereon by the other contracting party (Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 73 Mo. 389, 39 Am. Rep. 519); and where an assignee takes property subject to the payment of a debt, and that debt is not a lien on the property conveyed, the assignee will be personally obligated to the holder of the debt to pay the same (Dingeldein *v.* Third Ave. R. Co., 37 N. Y. 575 [*reversing* 9 Bosw. (N. Y.) 79]).

23. Express promise to pay.— Smith *v.* Flack, 95 Ind. 116; Wightman *v.* Spofford, 56 Iowa 145, 8 N. W. 680; Parks *v.* Clark, 2 N. Y. St. 329.

Promise must be unconditional.— Roe *v.* Barker, 17 Hun (N. Y.) 84 [*affirmed* in 82 N. Y. 431].

But, in the absence of such promise, the assignee cannot be sued by third persons to whom the assignor was under obligations by reason of the assigned contract. New England Dredging Co. *v.* Rocknort Granite Co., 149 Mass. 381, 21 N. E. 947; Morrill *v.* Lane, 136 Mass. 93; Turner *v.* McCarty, 22 Mich. 265; Shafer *v.* Niver, 9 Mich. 253.

24. Absence of notice to debtor.— Campbell *v.* Sneed, 9 Ark. 118; Jacob Dold Packing Co. *v.* G. Ober, etc., Co., 71 Md. 155, 18 Atl. 34; Robinson *v.* Weeks, 6 How. Pr. (N. Y.) 161; Davenport *v.* Ludlow, 4 How. Pr. (N. Y.) 337; Countryman *v.* Boyer, 3 How. Pr. (N. Y.) 386; Ten Broeck *v.* De Witt, 10 Wend. (N. Y.) 617; Bradt *v.* Koon, 4 Cow. (N. Y.) 416; Briggs *v.* Dorr, 19 Johns. (N. Y.) 95; Martin *v.* Hawks, 15 Johns. (N. Y.) 405;

he may deal with the assignor as if no assignment had been made. He may pay the assignor,[25] even though the debt be not due at the time he makes such payment,[26] or pay a subsequent assignee of whose assignment he has notice,[27] or any person vested with apparent authority to receive payment,[28] or an attaching creditor of the assignor under order of the court,[29] the whole or any part of the debt. The debtor may subject the chose in the hands of the assignee to all equities against the assignor,[30] and all defenses he had against the assignor,[31] prior

Anderson *v.* Van Alen, 12 Johns. (N. Y.) 343 [but see Meghan *v.* Mills, 9 Johns. (N. Y.) 64, where it was said notice must be direct and positive, and not enough to demand payment of debtor without stating in what capacity demand is made]; Tritt *v.* Colwell, 31 Pa. St. 228. See also *supra*, III, B, 4.

The mere fact that the original creditor is in possession of the evidences of the chose, which were delivered to him for a special purpose, will not authorize a debtor to pay to one to whom the creditor wrongfully assigned the chose, if the evidences show on their face that the chose had been theretofore assigned to another; and the mere fact that the debtor could not read, or that he had overlooked the assignment, would not discharge him, his duty being to exercise ordinary care. Pier *v.* Bullis, 48 Wis. 429, 4 N. W. 381.

25. May pay assignor.— *California.*— Hogan *v.* Black, 66 Cal. 41, 4 Pac. 943.

Connecticut.— Bacon *v.* Warner, 1 Root (Conn.) 349.

Georgia.— Pulliam *v.* Cantrell, 77 Ga. 563, 3 S. E. 280.

Illinois.— Sears *v.* Wesleyan University, 28 Ill. 183.

Kansas.— Chapman *v.* Steiner, 5 Kan. App. 326, 48 Pac. 607; Lockrow *v.* Cline, 4 Kan. App. 716, 46 Pac. 720.

Kentucky.— Clark *v.* Boyd, 6 T. B. Mon. (Ky.) 293; Harrison *v.* Burgess, 5 T. B. Mon. (Ky.) 417; Stockton *v.* Hall, Hard. (Ky.) 160.

Louisiana.—Styles *v.* McNeil, 6 Mart. N. S. (La.) 296.

Maine.— Bartlett *v.* Pearson, 29 Me. 9.

Maryland.— Robinson *v.* Marshall, 11 Md. 251.

Mississippi.—Shields *v.* Taylor, 25 Miss. 13.

Missouri.— Leahi *v.* Dugdale, 34 Mo. 99; Weinwick *v.* Bender, 33 Mo. 80.

New Hampshire.— Duncklee *v.* Greenfield Steam Mill Co., 23 N. H. 245.

New York.— Deach *v.* Perry, 6 N. Y. Suppl. 940. 25 N. Y. St. 891; Huntington *v.* Potter, 32 Barb. (N. Y.) 300.

Pennsylvania.— Com. *v.* Sides, 176 Pa. St. 616, 35 Atl. 136; Foster *v.* Carson, 159 Pa. St. 477, 28 Atl. 356, 39 Am. St. Rep. 696; Brindle *v.* McIlvaine, 9 Serg. & R. (Pa.) 74.

England.— Williams *v.* Sorrell, 4 Ves. Jr. 389.

26. Debt not due.— Merrick *v.* Hulbert, 15 Ill. App. 606.

27. May pay subsequent assignee.— Burge *v.* Miner, 7 Ohio Dec. (Reprint) 156, 1 Cinc. L. Bul. 186.

28. Laughlin *v.* District of Columbia, 116 U. S. 485, 6 S. Ct. 472, 29 L. ed. 701.

29. May pay attaching creditor as assignor. —*California.*—McCarthy *v.* Mt. Tecarte Land, etc., Co., 110 Cal. 687, 43 Pac. 391; Rauer *v.* Fay, 110 Cal. 361, 42 Pac. 902.

Connecticut.— Tuttle *v.* Fowler, 22 Conn. 58.

Illinois.— Springfield M. & F. Ins. Co. *v.* Peck, 102 Ill. 265; Creighton *v.* Hyde Park, 6 Ill. App. 272.

Indiana.—McFadden *v.* Wilson, 96 Ind. 253; Daggett *v.* Flanagan, 78 Ind. 253.

Maine.— Milliken *v.* Loring, 37 Me. 408; Swett *v.* Green, 4 Me. 384; Clark *v.* Rogers, 2 Me. 143.

Vermont.— Lampson *v.* Fletcher, 1 Vt. 168, 18 Am. Dec. 676.

30. Equities prior to notice.— See *supra*, VII, C, 2. But see Thorn *v.* Myers, 5 Strobh. (S. C.) 210, where it was said that where the assignment passes the legal title to the chose to the assignee, the debtor cannot set up equities he may acquire against the assignor after the assignment and before he receives notice thereof.

31. Defenses against assignor.— *Arkansas.* — Smith *v.* Carder, 33 Ark. 709; Walker *v.* Johnson, 13 Ark. 522; Robinson *v.* Swigart, 13 Ark. 71.

Connecticut.— Beecher *v.* Buckingham, 18 Conn. 110, 44 Am. Dec. 580; Homer *v.* New Haven Sav. Bank, 7 Conn. 478.

Delaware.— Burton *v.* Willin, 6 Houst. (Del.) 522, 22 Am. St. Rep. 363; Lattomus *v.* Garman, 3 Del. Ch. 232; Hall *v.* Hickman, 2 Del. Ch. 318; Robinson *v.* Jefferson, 1 Del. Ch. 244.

Illinois.— Commercial Nat. Bank *v.* Burch, 141 Ill. 519, 31 N. E. 420, 33 Am. St. Rep. 331; Shuteldt *v.* Gillilan, 124 Ill. 460, 16 N. E. 879; Roberts *v.* Clelland, 82 Ill. 538; Allen *v.* Watt, 79 Ill. 284; Hughes *v.* Trahern, 64 Ill. 48; Fortier *v.* Darst, 31 Ill. 212; Olds *v.* Cummings, 31 Ill. 188; Sutherland *v.* Reeve, 41 Ill. App. 295; Weber *v.* Rosenheim, 37 Ill. App. 72.

Indiana.— Wagner *v.* Winter, 122 Ind. 57, 23 N. E. 754; Marshall *v.* Billingsly, 7 Ind. 250; Robertson *v.* Cooper, 1 Ind. App. 78, 27 N. E. 104.

Iowa.— Miller *v.* Centerville, 57 Iowa 640, 11 N. W. 631; Ayres *v.* Campbell, 9 Iowa 213, 74 Am. Dec. 346.

Kentucky.— Lester *v.* Given, 8 Bush (Ky.) 357; Trimble *v.* Ford, 5 Dana (Ky.) 517; Frazier *v.* Broadnax, 2 Litt. (Ky.) 249; Chiles *v.* Corn, 3 A. K. Marsh. (Ky.) 230; Porter *v.* Breckenridge, Hard. (Ky.) 21; Bibb *v.* Prather, Ky. Dec. 136, 2 Am. Dec. 711.

Louisiana.— Kugler *v.* Taylor, 19 La. Ann. 100; Gray *v.* Thomas, 18 La. Ann. 412.

to the time when he received notice of the assignment; but as to equities arising thereafter the rule is otherwise.[32]

2. **Obligations to Assignee.** After notice of the assignment, the debtor deals with the assignor at his peril, and discharge or modification of the obligation by the assignor, after that time, will not avail him.[33] Where the assignee has only

Maine.— Leathers *v.* Carr, 24 Me. 351; Hooper *v.* Brundage, 22 Me. 460.

Maryland.—Diffenbach *v.* New York L. Ins. Co., 61 Md. 370; Hampson *v.* Owens, 55 Md. 583; Butler *v.* Rahm, 46 Md. 541; Timms *v.* Shannon, 19 Md. 296, 81 Am. Dec. 632; Watkins *v.* Worthington, 2 Bland (Md.) 509; Mullikin *v.* Mullikin, 1 Bland (Md.) 538; Estep *v.* Watkins, 1 Bland (Md.) 486; Ohio L. Ins., etc., Co. *v.* Ross, 2 Md. Ch. 25.

Massachusetts.— Connor *v.* Parker, 114 Mass. 331; Dyer *v.* Homer, 22 Pick. (Mass.) 253.

Michigan.—McKenna *v.* Kirkwood, 50 Mich. 544, 15 N. W. 898; Seligman *v.* Ten Eyck, 49 Mich. 104, 13 N. W. 377; Wilcox *v.* Allen, 36 Mich. 160; Hull *v.* Swarthout, 29 Mich. 249.

Minnesota.— State *v.* Lake City, 25 Minn. 404.

Missouri.— Sumrall *v.* Sun Mut. Ins. Co., 40 Mo. 27; Ewing *v.* Miller, 1 Mo. 234.

New Hampshire.— Dearborn *v.* Nelson, 61 N. H. 249; Thompson *v.* Emery, 27 N. H. 269.

New Jersey.— De Witt *v.* Van Sickle, 29 N. J. Eq. 209; Conover *v.* Van Mater, 18 N. J. Eq. 481; Losey *v.* Simpson, 11 N. J. Eq. 246; Jaques *v.* Esler, 4 N. J. Eq. 461.

New York.— Littlefield *v.* Albany County Bank, 97 N. Y. 581; Davis *v.* Bechstein, 69 N. Y. 440, 25 Am. Rep. 218; Merrill *v.* Green, 66 Barb. (N. Y.) 582; Commercial Bank *v.* Colt, 15 Barb. (N. Y.) 506; Donaldson *v.* Hall, 2 Daly (N. Y.) 325; French *v.* Stevenson, 10 N. Y. Suppl. 386, 32 N. Y. St. 766; Marvin *v.* Inglis, 39 How. Pr. (N. Y.) 329; Cornell *v.* Townsend, 19 How. Pr. (N. Y.) 184; Terry *v.* Roberts, 15 How. Pr. (N. Y.) 65; Miner *v.* Hoyt, 4 Hill (N. Y.) 193; Chamberlain *v.* Gorham, 20 Johns. (N. Y.) 144; Niagara Bank *v.* McCracken, 18 Johns. (N. Y.) 493; Gay *v.* Gay, 10 Paige (N. Y.) 369; Bartlett *v.* Gale, 4 Paige (N. Y.) 503.

North Carolina.— Martin *v.* Richardson, 68 N. C. 255; King *v.* Lindsay, 38 N. C. 77; Moody *v.* Sitton, 37 N. C. 382; McKinnie *v.* Rutherford, 21 N. C. 14.

Ohio.— Osborn *v.* McClelland, 43 Ohio St. 284, 1 N. E. 644; Martindale *v.* Harris, 26 Ohio St. 379; Follett *v.* Reese, 20 Ohio 546, 55 Am. Dec. 472.

Oregon.— Rayburn *v.* Hurd, 20 Oreg. 229, 25 Pac. 635.

Pennsylvania.— Eldred *v.* Hazlett, 33 Pa. St. 307; Rider *v.* Johnson, 20 Pa. St. 190; Solomon *v.* Kimmel, 5 Binn. (Pa.) 232.

South Carolina.—Neal *v.* Sullivan, 10 Rich. Eq. (S. C.) 276.

Tennessee.— Ford *v.* Thompson, 1 Head (Tenn.) 265; Breedlove *v.* Sommerville, 3 Yerg. (Tenn.) 257; Kennedy *v.* Woolfolk, 3 Hayw. (Tenn.) 195.

Texas.— East Texas F. Ins. Co. *v.* Coffee, 61 Tex. 287; York *v.* McNutt, 16 Tex. 13, 67 Am. Dec. 607.

Vermont.—Downer *v.* South Royalton Bank, 39 Vt. 25; Barney *v.* Grover, 28 Vt. 391; Foot *v.* Ketchum, 15 Vt. 258, 40 Am. Dec. 678.

Virginia.— Stebbins *v.* Bruce, 80 Va. 389; Feazle *v.* Dillard, 5 Leigh (Va.) 30; Norton *v.* Rose, 2 Wash. (Va.) 233.

Wisconsin.— St. Paul Second Nat. Bank *v.* Larson, 80 Wis. 469, 50 N. W. 499; Rockwell *v.* Daniels, 4 Wis. 432.

United States.— Withers *v.* Greene, 9 How. (U. S.) 213, 13 L. ed. 109; Scott *v.* Shreeve, 12 Wheat. (U. S.) 605, 6 L. ed. 744; Barhorst *v.* Armstrong, 42 Fed. 2.

Although the assignee has no notice of such defenses. Wood *v.* Perry, 1 Barb. (N. Y.) 114; Townsend *v.* Corning, 1 Barb. (N. Y.) 627; Tyler Car, etc., Co. *v.* Wettermark, 12 Tex. Civ. App. 399, 34 S. W. 807; McFarland *v.* Lyon, 4 Tex. Civ. App. 586, 23 S. W. 554; Rockwell *v.* Daniels, 4 Wis. 432; Stocks *v.* Dobson, 4 De G. M. & G. 11, 17 Jur. 539, 22 L. J. Ch. 884, 53 Eng. Ch. 8.

32. Equities subsequent to notice.— *Alabama.*—Cook *v.* Citizens Mut. Ins. Co., 53 Ala. 37; Wray *v.* Furniss, 27 Ala. 471; Stewart *v.* Kirkland, 19 Ala. 162.

California.— Bridgeport First Nat. Bank *v.* Perris Irrigation Dist., 107 Cal. 55, 40 Pac. 45.

Georgia.— Guerry *v.* Perryman, 6 Ga. 119.

Kentucky.— Walker *v.* McKay, 2 Metc. (Ky.) 294; McDonald *v.* Ford, 1 Dana (Ky.) 464; Ridgway *v.* Collins, 3 A. K. Marsh. (Ky.) 410.

Louisiana.—Adams *v.* Webster, 25 La. Ann. 117.

Massachusetts.— St. Andrew *v.* Manchaug Mfg. Co., 134 Mass. 42.

New York.— Bates *v.* New York Ins. Co., 3 Johns. Cas. (N. Y.) 238.

Pennsylvania.—Philips *v.* Lewistown Bank, 18 Pa. St. 394; Rundle *v.* Ettwein, 2 Yeates (Pa.) 23; Wheeler *v.* Hughes, 1 Dall. (Pa.) 23, 1 L. ed. 20.

Vermont.— Loomis *v.* Loomis, 26 Vt. 198; Walker *v.* Sargeant, 14 Vt. 247; Cummings *v.* Fullam, 13 Vt. 434; Weeks *v.* Hunt, 6 Vt. 15.

Virginia.— Finney *v.* Bennett, 27 Gratt. (Va.) 365.

Canada.— Quick *v.* Colchester South Tp., 30 Ont. 645.

Notice given by one assignee enures to benefit of successive assignees. Hunt *v.* Martin, 2 Litt. (Ky.) 82; Harrison *v.* Wilson, 5 Rob. (La.) 275.

33. After notice.— *Alabama.*— Holland *v.* Dale, Minor (Ala.) 265.

Arkansas.— State *v.* Jennings, 10 Ark. 428.

California.— McCloskey *v.* San Francisco, 66 Cal. 104, 4 Pac. 943.

a qualified interest in the chose, the debtor may, even after notice of the assignment, deal with the assignor, subject to the interest of the assignee, and is accountable to the assignee only to the extent of his interest.[34] It has been said that, in order that the debtor should be bound, the debt or fund assigned must be some recognized or definite fund or debt, in the hands of a person who admits the obligation to pay the assignor.[35]

E. Of Successive Assignees. Successive assignees of a chose in action take the same subject to the equities between the original assignor and his assignee,[36] as well as to equities existing between the original assignor and the debtor,[37] especially where the transfer is only of all right, title, and interest of the assignee to the chose.[38]

VIII. ACTIONS.[39]

A. In General — 1. At Common Law — a. Generally. At common law it is

Colorado.— Chamberlin *v.* Gilman, 10 Colo. 94, 14 Pac. 107; Stoddard *v.* Benton, 6 Colo. 508.

Connecticut.— Porter *v.* Seeley, 13 Conn. 564.

Massachusetts.— Eastman *v.* Wright, 6 Pick. (Mass.) 316.

Mississippi.— Parker *v.* Kelly, 10 Sm. & M. (Miss.) 184.

Missouri.— Ferguson *v.* Davidson, 147 Mo. 664, 49 S. W. 859; Ashby *v.* Winston, 34 Mo. 311; Bardon *v.* Savage, 1 Mo. 560.

New Jersey.— Dexter *v.* Meigs, 47 N. J. Eq. 488, 21 Atl. 114. Though assignment be but partial. Todd *v.* Meding, 56 N. J. Eq. 83, 38 Atl. 349.

New York.— Sanders *v.* Soutter, 136 N. Y. 97, 32 N. E. 638, 49 N. Y. St. 63; Heermans *v.* Ellsworth, 64 N. Y. 159 [*affirming* 3 Hun (N. Y.) 473, 5 Thomps. & C. (N. Y.) 605]; Danvers *v.* Lugar, 30 Misc. (N. Y.) 98, 61 N. Y. Suppl. 778; Ernst *v.* Estey Wire Works Co., 20 Misc. (N. Y.) 365, 45 N. Y. Suppl. 932; Wheeler *v.* Wheeler, 9 Cow. (N. Y.) 34; Raymond *v.* Squire, 11 Johns. (N. Y.) 47; Bebee *v.* State Bank, 1 Johns. (N. Y.) 529, 3 Am. Dec. 353; Wardell *v.* Eden, 2 Johns. Cas. (N. Y.) 121; Andrews *v.* Beecher, 1 Johns. Cas. (N. Y.) 411; Southgate *v.* Montgomery, 1 Paige (N. Y.) 41.

North Carolina.— Governor *v.* Griffin, 13 N. C. 352.

Ohio.—Patterson *v.* Wilkins, Wright (Ohio) 501.

Texas.— Franklin County Co-operative Assoc. *v.* Eubanks, (Tex. 1891) 18 S. W. 699.

Vermont.— Upton *v.* Moore, 44 Vt. 552; Hall *v.* Dana, 2 Aik. (Vt.) 381.

England.— Liquidation, etc., Co. *v.* Willoughby, [1898] A. C. 321, 67 L. J. Ch. 251, 78 L. T. Rep. N. S. 329; Walker *v.* Bradford Old Bank, 12 Q. B. D. 511, 53 L. J. Q. B. 280, 32 Wkly. Rep. 645; Legh *v.* Legh, 1 B. & P. 447; *In re* Milan Tramways Co., 22 Ch. D. 122, 25 Ch. D. 587, 50 L. T. Rep. N. S. 545, 32 Wkly. Rep. 601.

34. Qualified interest only in assignee.— Sanders *v.* Soutter, 136 N. Y. 97, 32 N. E. 638, 49 N. Y. St. 63 [*affirming* 17 N. Y. Suppl. 141, 42 N. Y. St. 437]; Blackman *v.* Dunkirk, 21 Wis. 36.

35. Nature of fund or debt.— Beran *v.* Tradesmen's Nat. Bank, 57 Hun (N. Y.) 592, 10 N. Y. Suppl. 677, 32 N. Y. St. 999 [*reversed* in 137 N. Y. 450, 33 N. E. 593, 51 N. Y. St. 170]; Mixon *v.* Jones, 1 Rich. (S. C.) 395; Kendall *v.* U. S., 7 Wall. (U. S.) 113, 19 L. ed. 85. In Brown *v.* Rees, 3 Brev. (S. C.) 191, it is said that the law does not countenance assignments of open book-debts which may be liable to errors and disputes, and notice of such assignments is not binding on the debtor, who can discharge himself by settlement with the assignor. The only remedy of the assignee would be a suit against the assignor for breach of contract.

In Iowa the debtor may pay the assignor of open accounts despite notice, but he is not compelled to do so, and may recognize an assignment by the assignor of such accounts, in which event the assignee will be entitled to the same as against garnishing creditors of the assignor. Bailey *v.* Union Pac. R. Co., 62 Iowa 354, 17 N. W. 567.

Where the release by the assignor is given merely to right a wrong he has done to the debtor by a pretended claim, an assignee of such claim, without consideration and with knowledge of the facts, will not be heard to complain. Atkinson *v.* Runnells, 60 Me. 440.

36. Subject to equities between original assignor and assignee.— Sutherland *v.* Reeve, 151 Ill. 384, 38 N. E. 130 [*affirming* 41 Ill. App. 295]; Commercial Nat. Bank *v.* Burch, 40 Ill. App. 505. See also Southgate *v.* Montgomery, 1 Paige (N. Y.) 41. See also *supra*, VI, F, 4.

But where assignee, for valuable consideration and without notice, acquires the legal title to an obligation, he is not affected by an equity the original assignor had against his assignor. Anderson *v.* Wells, 6 B. Mon. (Ky.) 540; Royal *v.* Miller, 3 Dana (Ky.) 55.

37. Subject to equities between original assignor and debtor.—Clute *v.* Robison, 2 Johns. (N. Y.) 595; Murray *v.* Gouverneur, 2 Johns. Cas. (N. Y.) 438, 1 Am. Dec. 177; Metzgar *v.* Metzgar, 1 Rawle (Pa.) 227.

38. Sanders *v.* Soutter, 136 N. Y. 97, 32 N. E. 638, 49 N. Y. St. 63 [*affirming* 17 N. Y. Suppl. 141, 42 N. Y. St. 437]. See also *supra*, VII, A, 1.

39. As to alteration of instruments as affecting the right of assignee to sue see AL-

the legal interest in a chose in action which is enforced by suit.[40] Where the legal title is in several all must join in an action to enforce it.[41] Since it is the legal interest that is enforced it is no concern of the debtor that the chose in action or debt on which he is sued has been assigned, or that the action is brought for the use of another, his only concern being with the legal title.[42] Though, at common law, an assignee of a chose in action was not recognized as possessing the full title to the chose so as to enable him to assert his rights in his own name,[43] yet his rights as the beneficial owner of the chose came to be recognized in actions brought in a court of law. The equitable title of the assignee was not permitted to affect the remedy or procedure in the enforcement of the chose in action, nor was it regarded in applying rules in regard to parties to actions.[44]

b. Action in Name of Assignor — (i) *Necessity of.* At common law, the assignee of a chose in action could proceed for the enforcement of the debt or chose assigned only in the name of the assignor.[45] A covenant to pay rent was,

TERATIONS OF INSTRUMENTS, 2 Cyc. 184 note, 185 note, 201 note.

As to appeals by assignee see APPEAL AND ERROR, VII, D, 1, c, (II) [2 Cyc. 822]. See also APPEAL AND ERROR, 2 Cyc. 579 note, 636 note, 637 note.

40. Though a note is duly assigned the legal title to the security does not pass without a conveyance, and, while the security equitably follows the debt and assignee of the note can proceed in equity to foreclose, he cannot sue at law to enforce the security, nor can he sue for a conversion of the security. French *v.* Haskins, 9 Gray (Mass.) 195; Crain *v.* Paine, 4 Cush. (Mass.) 483, 50 Am. Dec. 807; Buzzell *v.* Cummings, 61 Vt. 213, 18 Atl. 93; Batchelder *v.* Jenness, 59 Vt. 104, 7 Atl. 279.

41. Legal title in several.— Eble *v.* Purdy, 6 Wend. (N. Y.) 629; Scott *v.* Brown, 48 N. C. 541, 67 Am. Dec. 256.

42. Debtor concerned only with legal title. — *Georgia.*— Gilmore *v.* Bangs, 55 Ga. 403.

Illinois.— Chadsey *v.* Lewis, 6 Ill. 153. See also McHenry *v.* Ridgely, 3 Ill. 309, 35 Am. Dec. 110; West Chicago St. R. Co. *v.* Lundahl, 82 Ill. App. 553; Lee *v.* Pennington, 7 Ill. App. 247.

Mississippi.— Field *v.* Weir, 28 Miss. 56.

Missouri.— Labeaume *v.* Sweeney, 17 Mo. 153.

New Hampshire.— State *v.* Boston, etc., R. Co., 58 N. H. 510.

New York.—Raymond *v.* Johnson, 11 Johns. (N. Y.) 488. But an assignor cannot bring a suit for the use of his assignee without the latter's consent, as the latter is liable for costs. Hopkins *v.* Banks, 7 Cow. (N. Y.) 650.

Pennsylvania.— Memphis, etc., R. Co. *v.* Wilcox, 48 Pa. St. 161; Armstrong *v.* Lancaster, 5 Watts (Pa.) 68, 30 Am. Dec. 293.

See 4 Cent. Dig. title "Assignments," § 193.

43. Assignee cannot assert right in his own name.— Merchants Ins. Co. *v.* Union Ins. Co., 162 Ill. 173, 44 N. E. 409; Myers *v.* York, etc., R. Co., 43 Me. 232; Riley *v.* Taber, 9 Gray (Mass.) 372. An equitable assignee of a mortgage cannot sue in his own name for conversion of the mortgaged property. Baker *v.* Seavey, 163 Mass. 522, 40 N. E. 863, 47 Am. St. Rep. 475. Where defendant, by his contract, agreed to take certain stock from, and pay the price therefor to, another person or his order, it was held that the assignee of the other person could sue defendant in his own name. Reed *v.* Ingraham, 3 Dall. (Pa.) 505, 1 L. ed. 697, 4 Dall. (Pa.) 169, 1 L. ed. 786. See also *supra*, I, D; *infra*, VIII, A, 1, b.

44. Safford *v.* Miller, 59 Ill. 205.

That the assignee's name appear in the proceeding is not even necessary. Hamilton *v.* Brown, 18 Pa. St. 87.

Where one of the obligees of a bond was also an obligor therein, and the other obligees assigned the bond to a third person, it was held that as the obligees could not maintain an action against the obligor, their co-obligee, neither could their assignee. Gatewood *v.* Lyle, 5 T. B. Mon. (Ky.) 6.

45. Must sue in name of assignor.— *Alabama.*— Planters', etc., Bank *v.* Willis, 5 Ala. 770; Black *v.* Everett, 5 Stew. & P. (Ala.) 60.

Connecticut.— Sanford *v.* Nichols, 14 Conn. 324, wherein it was held, however, that where a judgment was obtained on a note in the name of the assignor, and the officer whose duty it was to enforce execution thereon was guilty of neglect in doing so, an action against such officer for his neglect could be brought only by the assignee of the note. The right of action is not against the debtor, but against a third person, and does not affect the debt.

Florida.— Kendig *v.* Giles, 9 Fla. 278; Hooker *v.* Gallagher, 6 Fla. 351.

Illinois.— Hauze *v.* Powell, 90 Ill. App. 448.

Maine.— Pollard *v.* Somerset Mut. F. Ins. Co., 42 Me. 221.

Maryland.— Leighton *v.* Preston, 9 Gill (Md.) 201.

Massachusetts.— Riley *v.* Taber, 9 Gray (Mass.) 372; Holly *v.* Huggeford, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; Dunn *v.* Snell, 15 Mass. 481.

Mississippi.—Tully *v.* Herrin, 44 Miss. 626; Field *v.* Weir, 28 Miss. 56; Lee *v.* Gardiner, 26 Miss. 521; Scott *v.* Metcalf, 13 Sm. & M. (Miss.) 563; Vanhouten *v.* Reily, 6 Sm. & M. (Miss.) 440; Wilson *v.* McElroy, 2 Sm.

however, assignable, at common law, as to rents to become due, so as to authorize the assignee to sue in his own name therefor.[46]

(II) *Right of Assignee to Bring* — (A) *In General.* By an assignment of a chose in action the assignee acquires the right to proceed at common law to enforce the chose in the name of the assignor as the legal plaintiff for his own benefit.[47] The right to control the action is in the assignee, and the assignor will

& M. (Miss.) 241; Tombigby R. Co. *v.* Bell, 7 How. (Miss.) 216. See also Lowenburg *v.* Jones, 56 Miss. 688, 31 Am. Rep. 379.

Missouri.— Miller *v.* Paulsell, 8 Mo. 355; Thomas *v.* Cox, 6 Mo. 506.

New Jersey.— Except where there is an express promise by the debtor. Flanagan *v.* Camden Mut. Ins. Co., 25 N. J. L. 506.

New York.— Conover *v.* Mutual Ins. Co., 3 Den. (N. Y.) 254; Eels *v.* Finch, 5 Johns. (N. Y.) 193. An action by the grantee of lands in possession of another could be brought only in the name of the grantor. Lowber *v.* Kelly, 9 Bosw. (N. Y.) 494.

Pennsylvania.— Sturdevant *v.* Roberts, 5 Kulp (Pa.) 99. See also Cummings *v.* Lynn, 1 Dall. (Pa.) 444, 1 L. ed. 215; Guthrie *v.* White, 1 Dall. (Pa.) 268, 1 L. ed. 131.

South Carolina.— Potts *v.* Richardson, 2 Bailey (S. C.) 15.

Tennessee.— McGee *v.* Lynch, 3 Hayw. (Tenn.) 105.

Texas.— *Compare* Stewart *v.* State, 42 Tex. 242.

Virginia.— Minnis *v.* Pollard, 1 Call (Va.) 226.

United States.— In states where the common-law procedure prevails, the assignee of an insurance policy payable to the assured, his executors, administrators, and assigns, cannot maintain an action at law in his own name. Nederland L. Ins. Co. *v.* Hall, 84 Fed. 278, 55 U. S. App. 598, 27 C. C. A. 390.

See 4 Cent. Dig. tit. "Assignments," § 200 *et seq.*; and *supra*, VIII, A, 1, a.

In Louisiana no distinction exists between the legal and equitable title, and the assignee of an account may sue in his own name. Martin *v.* Ihmsen, 21 How. (U. S.) 394, 16 L. ed. 134. And an assignee of a non-negotiable chose may sue thereon in his own name. Kilgour *v.* Ratcliff, 2 Mart. N. S. (La.) 252.

One of several obligees could not assign his interest in a bond to his co-obligee, so as to authorize him to sue at law alone. Ehle *v.* Purdy, 6 Wend. (N. Y.) 629; Scott *v.* Brown, 48 N. C. 541, 67 Am. Dec. 256. One of several execution plaintiffs could not assign his interest in the execution so as to permit his assignee to proceed alone against the sheriff for failure to account and pay the money collected on the execution. Lovins *v.* Humphries, 67 Ala. 437.

46. Covenant to pay rent.—Potter *v.* Gronbeck, 117 Ill. 404, 7 N. E. 586; Wineman *v.* Hughson, 44 Ill. App. 22; Van Rensselaer *v.* Read, 26 N. Y. 558; Willard *v.* Tillman, 2 Hill (N. Y.) 274; Demarest *v.* Willard, 8 Cow. (N. Y.) 206.

47. In name of assignor for use of assignee. — *Alabama.*— Carville *v.* Reynolds, 9 Ala. 969.

Connecticut.—Beach *v.* Fairbanks, 52 Conn. 167.

Florida.— See Kendig *v.* Giles, 9 Fla. 278.

Illinois.— People *v.* Barnett, 91 Ill. 422; Dazey *v.* Mills, 10 Ill. 67; Ransom *v.* Jones, 2 Ill. 291.

Iowa.— Roberts *v.* Smith, Morr. (Iowa) 426; Sater *v.* Hendershott, Morr. (Iowa) 118.

Kentucky.— Marshall *v.* Craig, 3 Bibb (Ky.) 291.

Louisiana.— See Dicks *v.* O'Conner, 5 Mart. N. S. (La.) 547.

Maine.— Penobscot R. Co. *v.* Mayo, 60 Me. 306; Southwick *v.* Hopkins, 47 Me. 362; Pollard *v.* Somerset Mut. F. Ins. Co., 42 Me. 221. Where one co-obligee of an instrument assigns his rights therein to his co-obligee, the latter has the right to use the name of his assignor in conjunction with his own to recover the debt. Southwick *v.* Hopkins, 47 Me. 362; Lunt *v.* Stevens, 24 Me. 534. It is only where an assignee of an instrument acquires title from or through the payee that he can maintain an action in the name of the payee. Ballard *v.* Greenbush, 24 Me. 336.

Massachusetts.— Pitts *v.* Holmes, 10 Cush. (Mass.) 92; Brigham *v.* Clark, 20 Pick. (Mass.) 43; Day *v.* Whitney, 1 Pick. (Mass.) 503. An assignee is entitled to use the name of his assignor in all necessary legal proceedings. Amherst Academy *v.* Cowls, 6 Pick. (Mass.) 427, 17 Am. Dec. 387. Where A's property is attached in a suit against another person, and A sells the property to B while it is under the attachment, B can maintain an action of trespass against the officer levying the attachment in the name of A. Holly *v.* Huggeford, 8 Pick. (Mass.) 73, 19 Am. Dec. 303.

Michigan.— Moon *v.* Harder, 38 Mich. 566.

Mississippi.— Tully *v.* Herrin, 44 Miss. 626; Field *v.* Weir, 28 Miss. 56; Lee *v.* Gardiner, 26 Miss. 521; Anderson *v.* Miller, 7 Sm. & M. (Miss.) 586; Defrance *v.* Davis, Walk. (Miss.) 69.

New Hampshire.— Currier *v.* Hodgdon, 3 N. H. 82.

New Jersey.— Belton *v.* Gibbon, 12 N. J. L. 76; Carhart *v.* Miller, 5 N. J. L. 675.

New York.— Carter *v.* United Ins. Co., 1 Johns. Ch. (N. Y.) 463.

Rhode Island.— Tucker *v.* Providence, etc., R. Co., 18 R. I. 322, 27 Atl. 448.

Tennessee.— Johnson *v.* Irby, 8 Humphr. (Tenn.) 654; McGee *v.* Lynch, 3 Hayw. (Tenn.) 105; Davis, etc., Bldg., etc., Co. *v.* Caigle, (Tenn. Ch. 1899) 53 S. W. 240.

Vermont.— Halloran *v.* Whitcomb, 43 Vt. 306.

Virginia.— Dunn *v.* Price, 11 Leigh (Va.)

not be permitted by any act to interfere with or defeat this right of the assignee.[48] But this right to control the action exists only where the entire chose is assigned, and not where there is a partial assignment merely.[49] And it has been held that, in some cases, the assignor may require an indemnity from the assignee for costs.[50] Where an action is brought for the enforcement of a chose in action in the name of the assignor, the debtor cannot make a collateral attack on the assignment,[51] though, where an action is brought by an assignee in the name of his assignor, which action is expressed to be for the use of the assignee, it has been held that the debtor may deny the assignment and question the right of the assignee to use the name of the assignor to enforce the chose.[52]

(B) *As Affected by Bankruptcy of Assignor.* The right of an assignee of a chose in action to maintain an action at law for the enforcement of the chose in the name of the assignor is not affected by the assignor subsequently making an assignment for the benefit of his creditors and taking the benefit of the insolvency laws,[53] or by his becoming a bankrupt, but the action may still be brought in the name of the assignor.[54]

(C) *As Affected by Death of Assignor.* Where the assignor dies the assignee may bring an action to enforce the chose assigned in the name of the executor or administrator of the assignor.[55]

210; Garland *v.* Richeson, 4 Rand. (Va.) 266.

West Virginia.— See Whitteker *v.* Charleston Gas Co., 16 W. Va. 717; Clarke *v.* Hogeman, 13 W. Va. 718.

United States.— Mandeville *v.* Welch, 5 Wheat. (U. S.) 277, 5 L. ed. 87; Welch *v.* Mandeville, 1 Wheat. (U. S.) 233, 4 L. ed. 79.

England.— Heath *v.* Hall, 2 Rose 271, 4 Taunt. 326, 13 Rev. Rep. 610; Master *v.* Miller, 4 T. R. 320; Winch *v.* Keeley, 1 T. R. 619.

See 4 Cent. Dig. tit. "Assignments," § 200.

At common law a conveyance of land in possession of another adverse to the grantor is void as to the one in possession and passes no title. But it is valid between the grantor and grantee, and by the conveyance the grantor impliedly authorizes the grantee to use his name to recover the land. Steeple *v.* Downing, 60 Ind. 478; McMahan *v.* Bowe, 114 Mass. 140, 19 Am. Rep. 321; Farnum *v.* Peterson, 111 Mass. 148; Hamilton *v.* Wright, 37 N. Y. 502.

48. Assignee has control of action.— *Kentucky.*— Marr *v.* Hanna, 7 J. J. Marsh. (Ky.) 642, 23 Am. Dec. 449.

Maine.— Southwick *v.* Hopkins, 47 Me. 362.

Mississippi.— Anderson *v.* Miller, 7 Sm. & M. (Miss.) 586.

New Hampshire.— Gordon *v.* Drury, 20 N. H. 353.

North Carolina.— A court of equity will restrain the assignor from interfering with an action brought by his assignee in the assignor's name. Deaver *v.* Eller, 42 N. C. 24; ——— *v.* Arrington, 2 N. C. 189.

Tennessee.—Wright *v.* McLemore, 10 Yerg. (Tenn.) 234.

Texas.— McFadin *v.* MacGreal, 25 Tex. 73.

Vermont.— Halloran *v.* Whitcomb, 43 Vt. 306.

United States.— Mandeville *v.* Welch, 5 Wheat. (U. S.) 277, 5 L. ed. 87; Welch *v.* Mandeville, 1 Wheat. (U. S.) 233, 4 L. ed. 79.

See 4 Cent. Dig. tit. "Assignments," § 211; and *supra*, VII, B, 2, b, (III).

49. Partial assignment.—Chapman *v.* Shattuck, 8 Ill. 49; Mandeville *v.* Welch, 5 Wheat. (U. S.) 277, 5 L. ed. 87.

50. Indemnity from assignee.—Anderson *v.* Miller, 7 Sm. & M. (Miss.) 586. See Welch *v.* Mandeville, 1 Wheat. (U. S.) 233, 4 L. ed. 79. Where the defense was that, after the assignment, the debt had been paid to the assignee, the assignor could require the assignee, who sued in the name of the assignor, to give him indemnity for the costs of the action. Farnsworth *v.* Sweet, 5 N. H. 267. See also Gordon *v.* Drury, 20 N. H. 353.

51. Collateral attack of assignment by debtor.— Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526; Gilmore *v.* Bangs, 55 Ga. 403; Ensign *v.* Kellogg, 4 Pick. (Mass.) 1; Hamilton *v.* Brown, 18 Pa. St. 87; Blanchard *v.* Com., 6 Watts (Pa.) 309.

52. Field *v.* Weir, 28 Miss. 56.

53. Insolvent assignor.— Defrance *v.* Davis, Walk. (Miss.) 69.

54. Bankrupt assignor.— *Maine.*—Sawtelle *v.* Rollins, 23 Me. 196.

Massachusetts.— Where assignee in bankruptcy consents. Reed *v.* Paul, 131 Mass. 129; Mayhew *v.* Pentecost, 129 Mass. 332.

New Hampshire.— Hayes *v.* Pike, 17 N. H. 564.

Virginia.— Dunn *v.* Price, 11 Leigh (Va.) 210.

England.— Winch *v.* Keeley, 1 T. R. 619.

But where a chose in action is transferred by the assignee in bankruptcy, the transferee can maintain an action to enforce the chose only in the name of the assignee in bankruptcy. Benoist *v.* Darby, 12 Mo. 196.

55. Phillips *v.* Wilson, 25 Ill. App. 427; Riley *v.* Taber, 9 Gray (Mass.) 372; Grover *v.* Grover, 24 Pick. (Mass.) 261, 35 Am. Dec. 319; Cutts *v.* Perkins, 12 Mass. 206; Dawes *v.* Boylston, 9 Mass. 337, 6 Am. Dec. 72; Biddle *v.* Sheep, 20 Pa. Co. Ct. 548 (con-

c. Protection of Rights of Assignee. Wherever an assignment of a debt or chose in action is brought to the attention of a court of law in any action or proceeding in any way involving a debt or chose in action which has been assigned, the court will protect the equitable rights acquired by the assignee under the assignment as against all persons who have notice of the assignment.[56] After an assignment of a debt or chose in action is brought to the notice of the debtor, no act of the assignor or of the debtor will be allowed to defeat the equitable rights of the assignee.[57]

2. In Equity — a. When Assignee Cannot File Bill. No bill to enforce his rights as assignee can be maintained by the assignee of a legal chose in action merely because no action could be maintained in his own name at law.[58] The assignee is entitled to no greater remedies than his assignor could have, and, by an action at law in the name of his assignor, under the protection which courts of law afford the rights of an assignee, the latter can obtain all the remedies of his assignor.[59]

struing Pennsylvania statute); Lowndes *v.* King, 1 S. C. 102.

56. *Arkansas.*— Campbell *v.* Sneed, 9 Ark. 118.

Georgia.— Sheftall *v.* Clay, T. U. P. Charlt. (Ga.) 227.

Illinois.— Donk *v.* Alexander, 117 Ill. 330, 7 N. E. 672; Morris *v.* Cheney, 51 Ill. 451; Dazey *v.* Mills, 10 Ill. 67.

Massachusetts.— Jones *v.* Witter, 13 Mass. 304; Boylston *v.* Greene, 8 Mass. 465; Perkins *v.* Parker, 1 Mass. 117.

Mississippi.— Pass *v.* McRea, 36 Miss. 143.

New Jersey.— Henry *v.* Milham, 13 N. J. L. 266.

New York.— Wilkins *v.* Batterman, 4 Barb. (N. Y.) 47; Kimball *v.* Huntington, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590; Briggs *v.* Dorr, 19 Johns. (N. Y.) 95; Martin *v.* Hawks, 15 Johns. (N. Y.) 405; Anderson *v.* Van Alen, 12 Johns. (N. Y.) 343; Eels *v.* Finch, 5 Johns. (N. Y.) 193; Van Vechten *v.* Graves, 4 Johns. (N. Y.) 403; Littlefield *v.* Storey, 3 Johns. (N. Y.) 425; Wardell *v.* Eden, 2 Johns. Cas. (N. Y.) 121; Johnson *v.* Bloodgood, 1 Johns. Cas. (N. Y.) 51, 1 Am. Dec. 93.

See also *supra*, VII, A, 1.

57. Ransom *v.* Jones, 2 Ill. 291; Pollard *v.* Somerset Mut. F. Ins. Co., 42 Me. 221; Webb *v.* Steele, 13 N. H. 230; Tillou *v.* Kingston Mut. F. Ins. Co., 5 N. Y. 405; Allen *v.* Hudson River Mut. Ins. Co., 19 Barb. (N. Y.) 442; Traders' Ins. Co. *v.* Robert, 9 Wend. (N. Y.) 404; Wardel *v.* Eden, 3 Johns. Cas. (N. Y.) 500. See also *supra*, III, B, 4.

Attachment or garnishment by creditor of assignor will not be permitted to defeat the equitable rights of the assignee. Campbell *v.* Sneed, 9 Ark. 118 (garnishment); Morris *v.* Cheney, 51 Ill. 451 (attachment); Gardner *v.* Hoeg, 18 Pick. (Mass.) 168 (trustee process); Willard *v.* Sturtevant, 7 Pick. (Mass.) 193 (foreign attachment); Johnson *v.* Irby, 8 Humphr. (Tenn.) 654 (attachment).

Payment of the debt to the assignor by the debtor will not be allowed as a defense in an action at law by the assignee in the name of the assignor. Shriner *v.* Lamborn, 12 Md. 170; Tombigby R. Co. *v.* Bell, 7 How. (Miss.) 216; Ten Broeck *v.* De Witt, 10 Wend. (N. Y.) 617.

Release of the debt by the assignor will not be allowed as a defense in an action at law by the assignee in the name of the assignor. Campbell *v.* Sneed, 9 Ark. 118; Ransom *v.* Jones, 2 Ill. 291; Penobscot R. Co. *v.* Mayo, 60 Me. 306; Kimball *v.* Huntington, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590; Briggs *v.* Dorr, 19 Johns. (N. Y.) 95; Raymond *v.* Squire, 11 Johns. (N. Y.) 47.

Set-off of claims against assignor.— The debtor will not be allowed to set off against the claim of the assignee a debt or claim, against the assignor, acquired since he had notice of the assignment. Pass *v.* McRea, 36 Miss. 143; Bradt *v.* Koon, 4 Cow. (N. Y.) 416; Anderson *v.* Van Alen, 12 Johns. (N. Y.) 343.

58. Angell *v.* Stone, 110 Mass. 54; Haywood *v.* Andrews, 106 U. S. 672, 1 S. Ct. 544, 27 L. ed. 271. But compare *infra*, VIII, A, 2, b.

59. See *supra*, VI, C, 6.

Because of this the assignee of a legal chose in action or debt will not be permitted to invoke the assistance of a court of equity to enforce the chose or collect the debt unless some circumstances intervene that show that his remedy at law is or may be obstructed.

Alabama.— McGhee *v.* Dougherty, 10 Ala. 863.

Arkansas.— See, *contra*, Caldwell *v.* Meshew, 44 Ark. 564.

District of Columbia.— Glenn *v.* Sothoron, 4 App. Cas. (D. C.) 125.

Illinois.— See, *contra*, Dixon *v.* Buell, 21 Ill. 203.

Kentucky.— Farmer *v.* Bascom, 9 B. Mon. (Ky.) 23.

Maryland.— Adair *v.* Winchester, 7 Gill & J. (Md.) 114; Gover *v.* Christie, 2 Harr. & J. (Md.) 67.

Massachusetts.— Walker *v.* Brooks, 125 Mass. 241; Angell *v.* Stone, 110 Mass. 54.

Missouri.— See, *contra*, Dobyns *v.* McGovern, 15 Mo. 662.

New York.— Ontario Bank *v.* Mumford, 2

b. When Assignee May File Bill. But where no action could be instituted or maintained at law in the name of the assignor, or where such an action would not afford him an adequate remedy, the assignee of a chose in action may bring a bill in equity to enforce his rights against the debtor;[60] and, where a court of equity entertains jurisdiction for the enforcement of the rights acquired by an assignee, the assignee is not allowed to file a bill in the name of his assignor, but must proceed in his own name.[61]

3. Under Statutes — In Name of Assignee — a. In General. Under statutes, choses in action are now assignable in many jurisdictions, and assignees thereof permitted to maintain actions thereon at law in their own names.[62]

b. Expressly Authorized. In a number of states assignees are expressly authorized to sue in their own names.[63]

Barb. Ch. (N. Y.) 596; Carter *v.* United Ins. Co., 1 Johns. Ch. (N. Y.) 463.

South Carolina.— See Hopkins *v.* Hopkins, 4 Strobh. Eq. (S. C.) 207, 53 Am. Dec. 663.

Tennessee.— Smiley *v.* Bell, Mart. & Y. (Tenn.) 378, 17 Am. Dec. 813.

Virginia.— Va. Code (1873), c. 141, § 19, takes away the jurisdiction of chancery courts of suits by assignees on bonds, notes, or writings. The statute, however, only applies where the remedy at law is adequate. Walters *v.* Farmers Bank, 76 Va. 12. See also Winn *v.* Bowles, 6 Munf. (Va.) 23. And *compare* Moseley *v.* Boush, 4 Rand. (Va.) 392.

United States.— New York Guaranty, etc., Co. *v.* Memphis Water Co., 107 U. S. 205, 2 S. Ct. 279, 27 L. ed. 484.

England.— Motteux *v.* London Assur. Co., 1 Atk. 545; Cator *v.* Burke, 1 Bro. Ch. 434; De Ghetoff *v.* London Assur. Co., 4 Bro. P. C. 436; Hammond *v.* Messenger, 6 Jur. 655, 7 L. J. Ch. 310, 9 Sim. 327, 16 Eng. Ch. 327; Rose *v.* Clarke, 1 Y. & C. Ch. 534, 20 Eng. Ch. 534.

See also, generally, Equity.

60. No adequate remedy at law.— Glenn *v.* Sothoron, 4 App. Cas. (D. C.) 125 (where the relief sought could only be obtained in equity); Beauchamp *v.* Davis, 3 Bibb (Ky.) 111; Cobb *v.* Thompson, 1 A. K. Marsh. (Ky.) 507 (where the assignor died and his administrator was a non-resident); Person *v.* Barlow, 35 Miss. 174, 72 Am. Dec. 121 (where the charter of the assignor, a corporation, was dissolved); Riddle *v.* Mandeville, 5 Cranch (U. S.) 322, 3 L. ed. 114; Lenox *v.* Roberts, 2 Wheat. (U. S.) 373, 4 L. ed. 264 (where the charter of the assignor, a banking corporation, had expired). *Compare* Gleason, etc., Mfg. Co. *v.* Hoffman, 168 Ill. 25, 48 N. E. 143 [*affirming* 63 Ill. App. 294]; Bullion *v.* Campbell, 27 Tex. 653.

See also, generally, Equity; and compare *supra*, VIII, A, 2, a.

61. Assignee must proceed in his own name.— Sammis *v.* Wightman, 31 Fla. 45, 12 So. 536; Haskell *v.* Hilton, 30 Me. 419; Gleason *v.* Gage, 7 Paige (N. Y.) 121; Rogers *v.* Traders' Ins. Co., 6 Paige (N. Y.) 583; Field *v.* Maghee, 5 Paige (N. Y.) 539; Varney *v.* Bartlett, 5 Wis. 276.

62. Assignee may sue in own name.— *Arizona.*— Glendale Fruit Co. *v.* Hirst, (Ariz. 1899) 59 Pac. 103.

Kansas.— Thornburgh *v.* Cole, 27 Kan. 490; Shively *v.* Beeson, 24 Kan. 352.

Kentucky.— Sanders *v.* Blain, 6 J. J. Marsh. (Ky.) 446, 22 Am. Dec. 86; Conn *v.* Jones, Hard. (Ky.) 8.

Tennessee.— Only where the legal title is transferred. Bradley County *v.* Surgoine, 6 Baxt. (Tenn.) 108.

Virginia.— The statute authorizing assignment of "bonds, bills, or promissory notes for the payment of money" does not authorize an action to be brought in his own name by the assignee of a bond with a collateral condition. Henderson *v.* Hepburn, 2 Call (Va.) 232; Craig *v.* Craig, 1 Call (Va.) 483. See also Lewis *v.* Harwood, 6 Cranch (U. S.) 82, 3 L. ed. 160.

United States.— Morrison *v.* North American Transp., etc., Co., 85 Fed. 802 (construing an Ohio statute); May *v.* Logan County, 30 Fed. 250 (construing a Rhode Island statute).

See 4 Cent. Dig. tit. "Assignments," § 201 *et seq.*; and *supra*, I, D; II, B, 4.

In all cases where the assignee may sue in his own name it is by virtue of some statutory regulation. Smith *v.* Cook, 2 McMull. (S. C.) 58.

63. *Alabama.*— The assignee by indorsement of a contract for the performance of any act or duty may sue in his own name. Phillips *v.* Sellers, 42 Ala. 658; Henley *v.* Bush, 33 Ala. 636; Skinner *v.* Bedell, 32 Ala. 44. A judgment is not a contract in writing for the payment of money or other thing, the assignee of which, under statute, could sue in his own name. Lovins *v.* Humphries, 67 Ala. 437; Bunnell *v.* Magee, 9 Ala. 433.

Arkansas.— In certain cases. Gamblin *v.* Walker, 1 Ark. 220. Assignee of a bond. Block *v.* Walker, 2 Ark. 4.

Illinois.— Under statute, where a nominal plaintiff, in whose name an action is brought for the use of his assignee, dies, the action may be continued in the name of the assignee. Phillips *v.* Wilson, 25 Ill. App. 427. *Compare* Wetherbee *v.* Fitch, 117 Ill. 67, 7 N. E. 513.

Iowa.— See Goodnow *v.* Litchfield, 63 Iowa 275, 19 N. W. 226.

Maryland.— The assignee of a bond or chose in action for the payment of money, or of a

c. Real Party in Interest. Under the codes of many states, actions are authorized or required to be brought in the name of the real parties in interest in the subject of the litigation. Under these statutes the equitable assignee of a chose in action may, as the real party in interest, sue in his own name for the enforcement of the chose assigned to him.[64]

legacy. Outtoun *v.* Dulin, 72 Md. 536, 20 Atl. 134; Crisfield *v.* State, 55 Md. 192. Under the Maryland act of 1829 see Lucas *v.* Byrne, 35 Md. 485; Kent *v.* Somervell, 7 Gill & J. (Md.) 265. But see Gable *v.* Scarlett, 56 Md. 169.

Michigan.— Cilley *v.* Van Patten, 58 Mich. 404, 25 N. W. 326; Watertown F. Ins. Co. *v.* Grover, etc., Sewing Mach. Co., 41 Mich. 131, 1 N. W. 961, 32 Am. Rep. 146; Blackwood *v.* Broom, 32 Mich. 104; Draper *v.* Fletcher, 26 Mich. 154. Under How. Anno. Stat. (Mich.), § 7344, see Robinson *v.* Watson, 101 Mich. 466, 59 N. W. 811; Hyma *v.* Three Rivers Nat. Bank, 79 Mich. 167, 44 N. W. 427.

Mississippi.— See Wright *v.* Hardy, (Miss. 1899) 24 So. 697.

Nebraska.— Weir *v.* Anthony, 35 Nebr. 396, 53 N. W. 206.

New Jersey.— Vickers *v.* Electrozone, etc., Co., (N. J. 1901) 48 Atl. 604; Howe *v.* Smeeth Copper, etc., Co., (N. J. 1900) 48 Atl. 24; Marts *v.* Cumberland Mut. F. Ins. Co., 44 N. J. L. 478. Assignee of bond may sue in his own name, although bond was not payable to assignee. Allen *v.* Pancoast, 20 N. J. L. 68.

New York.— Barker *v.* Clark, 12 Abb. Pr. N. S. (N. Y.) 106. See also Armstrong *v.* Cushney, 43 Barb. (N. Y.) 340; Monahan *v.* Story, 2 E. D. Smith (N. Y.) 393; Cobb *v.* Howard, 10 N. Y. Leg. Obs. 353. Under New York act of 1853 see Van Derveer *v.* Wright, 6 Barb. (N. Y.) 547; Seeley *v.* Seeley, 2 Hill (N. Y.) 496.

Pennsylvania.— In Elmer *v.* Hall, 148 Pa. St. 345, 23 Atl. 971, it was held that where, under the New York statute, a chose in action could be assigned and the assignee sue thereon in his own name, an assignment by an administrator in New York of a debt due from a resident in New York was valid, the assignee would be permitted to sue in Pennsylvania in his own name.

South Carolina.—Waring *v.* Cheeseborough, 4 Rich. (S. C.) 243 note. Under the South Carolina act of 1808 see Farmer *v.* Baker, 3 Brev. (S. C.) 548.

Tennessee.— Where the assignment is of a note or agreement for the payment or delivery of specific articles, or for the performance of any duty. Marrigan *v.* Page, 4 Humphr. (Tenn.) 246.

Texas.—Assignees of non-negotiable instruments. Knight *v.* Holloman, 6 Tex. 153; Koeningheim *v.* Randolph, 1 Tex. App. Civ. Cas. § 764.

Vermont.— Chandler *v.* Warren, 30 Vt. 510.

Virginia.— Under Va. Code (1873), c. 141, § 17, the assignee of any bond, note, or writing, not negotiable, may maintain any action in his own name which the original obligee or payee might have brought, but must allow setoffs against himself and those existing against the assignor at the time of notice to the debtor of the assignment. Glenn *v.* Scott, 28 Fed. 804. But the statute does not authorize one to whom an open account, between two firms having common members, was assigned to maintain an action on the account at law. Aylett *v.* Walker, 92 Va. 540, 24 S. E. 226.

West Virginia.— The assignee of any bond, note, account, or writing, not negotiable, may, in his own name, maintain any action thereon that the assignor could. W. Va. Code (1887), c. 99, § 14; Thomas *v.* Linn, 40 W. Va. 122, 20 S. E. 878.

England.—Under the Judicature Act of 1873 [36 & 37 Vict. c. 66, § 25 (6)], where the assignment of a debt or other legal chose in action is by an absolute assignment in writing, and notice is given thereof to the debtor, the assignee acquires all the remedies that the assignor had for the enforcement of the debt or chose.

See 4 Cent. Dig. tit. "Assignments," §§ 201, 205; and *supra*, I, D.

That assignee cannot, under the statute, sue in his own name unless the assignment is in writing see:

Georgia.— Kirkland *v.* Dryfus, 103 Ga. 127, 29 S. E. 612; Planters' Bank *v.* Prater, 64 Ga. 609; Turk *v.* Cook, 63 Ga. 681.

Iowa.— Williams *v.* Soutter, 7 Iowa 435; Andrews *v.* Brown, 1 Iowa 154.

Maryland.—Chesley *v.* Taylor, 3 Gill (Md.) 251.

Mississippi.— Tully *v.* Herrin, 44 Miss. 626.

United States.—New York Mut. L. Ins. Co. *v.* Watson, 30 Fed. 653, construing a Georgia statute.

64. *Arkansas.*— Caldwell *v.* Meshew, 44 Ark. 564; Heartman *v.* Franks, 36 Ark. 501.

California.— McLaren *v.* Hutchinson, 22 Cal. 187, 83 Am. Dec. 59. The provision of the code providing that persons doing business as partners must file and publish a certificate showing the members of the firm and their residence, and that until they do so they shall not maintain an action on any contract or transaction made in their partnership name, does not prevent an action from being maintained by their assignee in his own name. Quan Wye *v.* Chin Lin Hee, 123 Cal. 185, 55 Pac. 783; Wing Ho *v.* Baldwin, 70 Cal. 194, 11 Pac. 565; Cheney *v.* Newberry, 67 Cal. 126, 7 Pac. 445.

Colorado.— Perkins *v.* Peterson, 2 Colo. App. 242, 29 Pac. 1135.

Florida.— Robinson *v.* Nix, 22 Fla. 321.

Indiana.— Sinker *v.* Kidder, 123 Ind. 528, 24 N. E. 341; Swails *v.* Coverdill, 17 Ind. 337; Patterson *v.* Crawford, 12 Ind. 241; Mewherter *v.* Price, 11 Ind. 199.

Iowa.— Younker *v.* Martin, 18 Iowa 143; Shepard *v.* Ford, 10 Iowa 502 [*overruling* Farrell *v.* Tyler, 5 Iowa 536]; State *v.* But-

d. When Action Must Be Brought in Name of Assignee. Where the statute merely authorizes, but does not require, actions by assignees to be brought in their own names, an assignee of a chose in action may still, as at common law, sue for the enforcement of the chose in the name of the assignor.[65] But, where choses in action are made assignable by statute, the assignment thereof vesting the legal title in the assignee, the action must be brought in the name of the assignee.[66] Where the code provides that actions must be prosecuted by the real parties in interest, an assignee of a chose in action can no longer sue at law in the name of his assignor, but must proceed in his own name on the chose.[67]

terworth, 2 Iowa 158. See also Barthol *v.* Blakin, 34 Iowa 452; Conyngham *v.* Smith, 16 Iowa 471.

Kentucky.— Hicks *v.* Doty, 4 Bush (Ky.) 420.

Minnesota.— Russell *v.* Minnesota Outfit, 1 Minn. 162.

Missouri.— Suit must be brought in name of real party in interest. Turner *v.* Hayden, 33 Mo. App. 15.

Nebraska.— See Weir *v.* Anthony, 35 Nebr. 396, 53 N. W. 206.

New York.— Oneida Bank *v.* Ontario Bank, 21 N. Y. 490; Small *v.* Sloan, 1 Bosw. (N. Y.) 352; Hastings *v.* McKinley, 1 E. D. Smith (N. Y.) 273. See also Van Vechten *v.* Graves, 4 Johns. (N. Y.) 403.

Ohio.— Hall *v.* Cincinnati, etc., R. Co., 1 Disn. (Ohio) 58.

Oregon.— But, where part only of the chose is assigned, the assignee cannot sue alone. The owners of the entire interest in the chose must sue. State Ins. Co. *v.* Oregon R., etc., Co., 20 Oreg. 563, 26 Pac. 838.

South Carolina.— Childs *v.* Alexander, 22 S. C. 169.

Texas.— East Texas F. Ins. Co. *v.* Coffee, 61 Tex. 287; Galveston, etc., R. Co. *v.* Freeman, 57 Tex. 156; Bullion *v.* Campbell, 27 Tex. 653; Ogden *v.* Slade, 1 Tex. 13. Even though he has not the legal title. Hopkins *v.* Upshur, 20 Tex. 89, 70 Am. Dec. 375; Devine *v.* Martin, 15 Tex. 25.

Wisconsin.— Chase *v.* Dodge, (Wis. 1901) 86 N. W. 548.

United States.— Davis *v.* Bilsland, 18 Wall. (U. S.) 659, 21 L. ed. 969 (assignee of a mechanic's lien); Robinson *v.* Memphis, etc., R. Co., 16 Fed. 57 (assignee of bill of lading). Under the Iowa code requiring actions to be brought in the name of the real party in interest, the assignee of a claim for damages for overcharges, under Interstate Commerce Act, §§ 8, 9, may sue therefor in his own name. Edmunds *v.* Illinois Cent. R. Co., 80 Fed. 78.

See 4 Cent. Dig. tit. "Assignments," § 202.

But an action by a grantee of land in the adverse possession of a third person is properly brought against such third person in the name of the grantor as legal plaintiff. The deed being void as to such third person, the grantor is, as to him, the real party in interest. Steeple *v.* Downing, 60 Ind. 478; Hamilton *v.* Wright, 37 N. Y. 502.

65. Where statute authorizes but does not require.— *Maine.*— McDonald *v.* Laughlin, 74 Me. 480.

Maryland.— Canfield *v.* McIlwaine, 32 Md. 94.

South Carolina.—Thorn *v.* Myers, 5 Strobh. (S. C.) 210; Ware *v.* Key, 2 McCord (S. C.) 373.

Virginia.— Dunn *v.* Price, 11 Leigh (Va.) 210; Garland *v.* Richeson, 4 Rand. (Va.) 266.

West Virginia.— Bentley *v.* Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. 584; Scraggs *v.* Hill, 37 W. Va. 706, 17 S. E. 185; Clarke *v.* Hogeman, 13 W. Va. 718.

66. Where, by statute, choses in action are assignable.— *Indiana.*— Mountjoy *v.* Adair, 1 Smith (Ind.) 93.

Kentucky.— Neyfong *v.* Wells, Hard. (Ky.) 561.

Mississippi.—Where the legal title is transferred, the assignor cannot, but the assignee must, sue. Beck *v.* Rosser, 68 Miss. 72, 8 So. 259; Lake *v.* Hastings, 24 Miss. 490.

Missouri.— Jeffers *v.* Oliver, 5 Mo. 433.

New Jersey.— The assignee of an obligation for the payment of money must sue in his own name. Carhart *v.* Miller, 5 N. J. L. 675; Reed *v.* Bainbridge, 4 N. J. L. 406.

Pennsylvania.— The assignment of an equitable interest in a contract for the erection of a school-house is not covered by a statute, providing a mode of assignment of bonds, specialties, and notes in writing, under which suit may be brought only in the name of the assignee. Philadelphia *v.* Lockhardt, 73 Pa. St. 211.

Rhode Island.—*Compare* Herscovitz *v.* Guertin, (R. I. 1901) 48 Atl. 934.

Texas.— See East Texas F. Ins. Co. *v.* Coffee, 61 Tex. 287; Winn *v.* Ft. Worth, etc., R. Co., 12 Tex. Civ. App. 198, 33 S. W. 593.

67. Where statute requires real party in interest to sue.— *Arkansas.*— But one to whom a chose was assigned for collection held not to be the real party in interest, who is bound to sue in his own name. Dickinson *v.* Burr, 15 Ark. 372.

Colorado.— But see Jackson *v.* Hamm, 14 Colo. 58, 23 Pac. 88.

Indiana.— Mountjoy *v.* Adair, 1 Ind. 254.

Iowa.— Allen *v.* Newbery, 8 Iowa 65.

Kansas.— If a plaintiff before judgment assigns his interest and dies, the action should be revived in the name of the assignee, and not in that of plaintiff's administrator. Reynolds *v.* Quaely, 18 Kan. 361.

Kentucky.— Even though the chose was not made assignable by statute and the legal title did not pass. Lytle *v.* Lytle, 2 Metc. (Ky.) 127.

4. Necessity of Demand on Debtor. No demand is necessary by an assignee of a chose in action as a condition precedent to his bringing suit.[68]

5. Where Assignment Is Made Pending Suit. Where a plaintiff in an action assigns his interest therein the assignee acquires the right to control the action, and his rights as assignee will be protected.[69] But there must be notice of the assignment to bind the debtor.[70] It is no defense to an action that, since the commencement of an action, it has been assigned, even where, under the statute, an assignee may sue in his own name.[71]

B. Parties[72] —1. In Actions at Law — a. Where Legal Title Is Transferred. Where an assignment of anything in action is absolute in its terms, so that the entire apparent legal title vests in the assignee, the assignee may sue in his own

Minnesota.— St. Anthony Mill Co. *v.* Vandall, 1 Minn. 246.

Missouri.— Long *v.* Heinrich, 46 Mo. 603; Weise *v.* Gerner, 42 Mo. 527; Van Doren *v.* Relfe, 20 Mo. 455. After an assignment of a chose in action the assignor cannot sue thereon. Conn *v.* Long-Bell Lumber Co., 66 Mo. App. 483.

Nebraska.— Crum *v.* Stanley, 55 Nebr. 351, 75 N. W. 851; Hoagland *v.* Van Etten, 22 Nebr. 681, 35 N. W. 869, 23 Nebr. 462, 36 N. W. 755; Hicklin *v.* Nebraska City Nat. Bank, 8 Nebr. 463; Seymour *v.* Street, 5 Nebr. 85; Mills *v.* Murry, 1 Nebr. 327.

Nevada.— Peck *v.* Dodds, 10 Nev. 204.

New York.— Sheridan *v.* New York, 68 N. Y. 30; Carter *v.* Jarvis, 9 Johns. (N. Y.) 143. Though an action was brought at law in another state in the name of the assignor, for the use of the assignee of a chose in action, and a judgment obtained therein against the debtor, an action in New York on the judgment could be brought only in the name of the assignee. Greene *v.* Niagara F. Ins. Co., 6 Hun (N. Y.) 128, 51 How. Pr. (N. Y.) 73.

North Carolina.— State *v.* Rousseau, 94 N. C. 355.

Wisconsin.—One of several owners of chose, to whom the other owners have assigned their interest, must sue in his own name. Stuckey *v.* Fritsche, 77 Wis. 329, 46 N. W. 59.

Where the statute merely authorizes actions to be brought by the real parties in interest, an assignee may still sue in the name of the assignor. Sammis *v.* Wightman, 31 Fla. 10, 12 So. 526.

68. Ruse *v.* Bromberg, 88 Ala. 619, 7 So. 384; Lassiter *v.* Jackman, 88 Ind. 118; Levine *v.* Lubow, 48 N. Y. Suppl. 145. *Contra*, Sears *v.* Patrick, 23 Wend. (N. Y.) 528, holding that, where assignee sued at common law on promise of debtor to be implied from circumstances, there must be notice of assignment and a demand made on debtor. See also Van Hassell *v.* Borden, 1 Hilt. (N. Y.) 128. *Compare* Actions, I, N, 3 [1 Cyc. 694].

As to sufficiency of demand, when necessary, see Heard *v.* Lodge, 20 Pick. (Mass.) 53, 32 Am. Dec. 197; Niles *v.* Mathusa, 20 N. Y. App. Div. 483, 47 N. Y. Suppl. 38. See also Actions, I, N, 3, b [1 Cyc. 696].

Although a warrant had been drawn for the payment of plaintiff's claim, a demand by plaintiff held unnecessary where he was informed by the town-clerk that the warrant had been delivered to another person, who was entitled to it, and that it had been paid to him. Stimpson *v.* Malden, 109 Mass. 313.

69. Assignee controls action.— *California.* — Walker *v.* Felt, 54 Cal. 386.

Iowa.— Kreuger *v.* Sylvester, 100 Iowa 647, 69 N. W. 1059.

Kentucky.— Marr *v.* Hanna, 7 J. J. Marsh. (Ky.) 642, 23 Am. Dec. 449.

Missouri.— Ashby *v.* Winston, 26 Mo. 210.

Pennsylvania.— McCullum *v.* Coxe, 1 Dall. (Pa.) 139, 1 L. ed. 72.

United States.— See Platt *v.* Jerome, 19 How. (U. S.) 384, 15 L. ed. 623. Assignor impliedly gives the assignee the right to use his name to protect the rights assigned. *Ex p.* South, etc., Alabama R. Co., 95 U. S. 221, 24 L. ed. 355.

See also *supra*, VIII, A, 1, b, (II), (A).

Where a plaintiff brought an action to set aside a deed to land and to have his title quieted, and obtained a decree, and then conveyed the land to a third person, and an appeal was afterward taken by defendant, it was held that, where the assignee alleged that, after the conveyance to him, defendant and plaintiff had collusively agreed that the judgment should be reversed and plaintiff had delivered a written confession of errors to defendant, the confession of errors would be disregarded and the assignee be allowed to defend the appeal in the name of the assignor plaintiff. Roszell *v.* Roszell, 105 Ind. 77, 4 N. E. 423.

Where an assignment was made after suit brought by the assignor the action may be continued in the name of the assignor (Kreuger *v.* Sylvester, 100 Iowa 647, 69 N. W. 1059), or assignee may be substituted under statute (Lowry *v.* Anderson, 57 Ohio St. 179, 48 N. E. 810).

70. Notice necessary to bind debtor.— Benson *v.* Whitney, 12 Cush. (Mass.) 234; Chisholm *v.* Clitherall, 12 Minn. 375.

As to necessity of notice to debtor, generally, see *supra*, III, B, 4.

One to whom a suit has been assigned should have the same entered to his use on the docket. But if this is done, he is not obliged to see that the entry to his use is made on every docket on which the suit is subsequently entered. Gill *v.* Clagett, 4 Md. Ch. 153.

71. Dolberry *v.* Trice, 49 Ala. 207.

72. See, generally, Parties.

name without joining the assignor as a party,[73] although there was no consideration for the assignment and notwithstanding whatever collateral arrangements exist between him and the assignor as to the disposition to be made of the proceeds,[74] the assignment being a complete protection to the assignor. And this has been held although the chose was assigned as collateral security merely.[75]

73. Assignee may sue without joining assignor.— *Indiana.*— Colerick *v.* Hooper, 3 Ind. 316, 56 Am. Dec. 505.

Iowa.— Vimont *v.* Chicago, etc., R. Co., 64 Iowa 513, 17 N. W. 31, 21 N. W. 9. See also Shambaugh *v.* Current, 111 Iowa 121, 82 N. W. 497.

Kentucky.— See Snelling *v.* Boyd, 5 T. B. Mon. (Ky.) 172; Snelling *v.* Boyds, 2 T. B. Mon. (Ky.) 132; Oldham *v.* Rowan, 3 Bibb (Ky.) 534.

New York.— Allen *v.* Smith, 16 N. Y. 415.

Ohio.— Allen *v.* Miller, 11 Ohio St. 374.

Washington.— See Van Horne *v.* Watrous, 10 Wash. 525, 39 Pac. 136.

Wisconsin.— Gunderson *v.* Thomas, 87 Wis. 406, 58 N. W. 750.

74. Regardless of consideration or collateral agreements.— *Idaho.*— Brumback *v.* Oldham, 1 Ida. 709.

Indiana.— Pugh *v.* Miller, 126 Ind. 189, 25 N. E. 1040.

Iowa.— Wardner *v.* Jack, 82 Iowa 435, 48 N. W. 729; Whittaker *v.* Johnson County, 10 Iowa 161.

Maine.— Norris *v.* Hall, 18 Me. 332.

Missouri.— Wolff *v.* Matthews, 39 Mo. App. 376.

New York.— Stone *v.* Frost, 61 N. Y. 614; Richardson *v.* Mead, 27 Barb. (N. Y.) 178; Arthur *v.* Brooks, 14 Barb. (N. Y.) 533. Where one partner assigned his interest to his copartner, though for a nominal consideration only, an action brought in the name of both partners was held erroneous. Clark *v.* Downing, 1 E. D. Smith (N. Y.) 406.

Oregon.— Gregoire *v.* Rourke, 28 Oreg. 275, 42 Pac. 996; Dawson *v.* Pogue, 18 Oreg. 94, 22 Pac. 637, 6 L. R. A. 176.

Assignment for collection.— *Arizona.*— Stroufe *v.* Soto, (Ariz. 1896) 43 Pac. 221.

California.— Ingham *v.* Weed, (Cal. 1887) 48 Pac. 318; Tuller *v.* Arnold, 98 Cal. 522, 33 Pac. 445; Gradwohl *v.* Harris, 29 Cal. 150.

Colorado.— Bassett *v.* Inman, 7 Colo. 270, 3 Pac. 383; Gomer *v.* Stockdale, 5 Colo. App. 489, 39 Pac. 355.

Indiana.— Butler *v.* Sturges, 6 Blackf. (Ind.) 186.

Iowa.— Knadler *v.* Sharp, 36 Iowa 232.

Kansas.— Walburn *v.* Chenault, 43 Kan. 352, 23 Pac. 657.

Minnesota.—Struckmeyer *v.* Lamb, 64 Minn. 57, 65 N. W. 930; Anderson *v.* Reardon, 46 Minn. 185, 48 N. W. 777; Castner *v.* Austin, 2 Minn. 44.

Missouri.— Guerney *v.* Moore, 131 Mo. 650, 32 S. W. 1132; Beattie *v.* Lett, 28 Mo. 596; Peters *v.* St. Louis, etc., R. Co., 24 Mo. 586; Webb *v.* Morgan, 14 Mo. 428; Dean *v.* Chandler, 44 Mo. App. 338; Haysler *v.* Dawson, 28 Mo. App. 531.

New York.— Meeker *v.* Claghorn, 44 N. Y. 349; Hoogland *v.* Trask, 6 Rob. (N. Y.) 540; Curran *v.* Weiss, 6 Misc. (N. Y.) 138, 26 N. Y. Suppl. 8, 56 N. Y. St. 284; Moore *v.* Robertson, 11 N. Y. Suppl. 798, 25 Abb. N. Cas. (N. Y.) 173 [*affirmed* in 17 N. Y. Suppl. 554, 43 N. Y. St. 245]; Cornell *v.* Donovan, 13 N. Y. St. 741. Where assignment of a chose in action is absolute, the assignee is, as to the debtor, the real party in interest, though the assignor is to receive the proceeds. Sheridan *v.* New York, 68 N. Y. 30; Allen *v.* Brown, 51 Barb. (N. Y.) 86 [*affirmed* in 44 N. Y. 228]; Walcott *v.* Hilman, 23 Misc. (N. Y.) 459, 51 N. Y. Suppl. 358; Cunningham *v.* Cohn, 14 Misc. (N. Y.) 12, 35 N. Y. Suppl. 125, 69 N. Y. St. 498.

North Carolina.— Where claims were assigned to an attorney to collect and apply the proceeds to the payment of debts of the assignor in the attorney's hands for collection, the assignee is the real party in interest, and may sue alone. Wynne *v.* Heck, 92 N. C. 414 [*distinguishing* Abrams *v.* Cureton, 74 N. C. 523; Willey *v.* Gatling, 70 N. C. 410].

See 4 Cent. Dig. tit. "Assignments," § 203.

Contra, where assignee is to account for proceeds of chose.— He is not the real party in interest and cannot maintain an action in his own name. Pleasants *v.* Erskine, 82 Ala. 386, 2 So. 122; Gaffney *v.* Tammany, 72 Conn. 701, 46 Atl. 156; Metropolitan L. Ins. Co. *v.* Fuller, 61 Conn. 252, 23 Atl. 193, 29 Am. St. Rep. 196; Hoagland *v.* Van Etten, 22 Nebr. 681, 35 N. W. 869, 23 Nebr. 462, 36 N. W. 755; Abrams *v.* Cureton, 74 N. C. 523.

75. Assignment as collateral security.— *California.*— Wetmore *v.* San Francisco, 44 Cal. 294.

Colorado.— Butler *v.* Rockwell, 14 Colo. 125, 23 Pac. 462.

New York.—Lawler *v.* National Life Assoc., 83 Hun (N. Y.) 393, 31 N. Y. Suppl. 875, 64 N. Y. St. 785.

Texas.— East Texas F. Ins. Co. *v.* Coffee, 61 Tex. 287.

West Virginia.— Bentley *v.* Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. 584.

Contra, where chose in action is assigned as collateral security.— The assignor must be made a party in an action by the assignee, as he is one of the parties in interest. Cerf *v.* Ashley, 68 Cal. 419, 9 Pac. 658 (assignor and assignee may join); Chew *v.* Brumagim, 21 N. J. Eq. 520. See Western Bank *v.* Sherwood, 29 Barb. (N. Y.) 383; Boynton *v.* Clinton, etc., Mut. Ins. Co., 16 Barb. (N. Y.) 254.

Under the Judicature Act of 1873, the assignee of a chose in action cannot sue in his own name unless the assignment is absolute; an assignment by way of security is not

b. Where Assignee Sues as Trustee of Express Trust. Though, under the code, an action is to be brought by the real party in interest, if the assignee of a chose holds for the benefit of another, or under an agreement is bound to account to another for the proceeds of the chose, he is, in a number of states, regarded as the trustee of an express trust, and, as such, permitted to sue in his own name without joining his beneficiary.[76]

c. Where Part of Chose Is Assigned. Under code provisions providing that actions may be brought by the real parties in interest, where a partial assignment of a chose in action is made, the assignor may join with the assignee in an action to enforce the chose assigned.[77] Where a debtor consents to the assignment of part of his debt, the assignee may sue him for such part.[78] Where there are several assignees of a debt, all should join in an action to enforce it.[79]

d. Where Assignor Is Necessary Party. In some states, though an equitable assignee may sue at law in his own name as the real party in interest, yet the assignor must be made a party to the action.[80]

sufficient. Durham *v.* Robertson, [1898] 1 Q. B. 765.

76. *Kansas.*— Walburn *v.* Chenault, 43 Kan. 352, 23 Pac. 657.

Minnesota.— Murphin *v.* Scovell, 44 Minn. 530, 47 N. W. 256; Cremer *v.* Wimmer, 40 Minn. 511, 42 N. W. 467; Lake *v.* Albert, 37 Minn. 453, 35 N. W. 177; St. Anthony Mill Co. *v.* Vandall, 1 Minn. 246.

Missouri.— Guerney *v.* Moore, 131 Mo. 650, 32 S. W. 1132; Dean *v.* Chandler, 44 Mo. App. 338; Haysler *v.* Dawson, 28 Mo. App. 531.

Nevada.— Carpenter *v.* Johnson, 1 Nev. 331.

New York.— Cummins *v.* Barkalow, 1 Abb. Dec. (N. Y.) 479; Allen *v.* Brown, 51 Barb. (N. Y.) 86 [*affirmed* in 44 N. Y. 228], Lewis *v.* Graham, 4 Abb. Pr. (N. Y.) 106.

Wisconsin.— Robbins *v.* Deverill, 20 Wis. 142; Kimball *v.* Spicer, 12 Wis. 668.

See also, generally, TRUSTS.

77. Assignor may join with assignee.— *California.*— Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423.

Connecticut.— Hamilton *v.* Lamphear, 54 Conn. 237, 7 Atl. 19.

Indiana.— Singleton *v.* O'Blenis, 125 Ind. 151, 25 N. E. 154; Earnest *v.* Barrett, 6 Ind. App. 371, 33 N. E. 635.

Michigan.— Where part of a policy of insurance was assigned the assignee must be joined in an action thereon. Wood *v.* Metropolitan L. Ins. Co., 96 Mich. 437, 56 N. W. 8.

Minnesota.—An agreement by plaintiff with his attorneys that they should have part of the recovery does not make them such parties in interest as to require them to be made parties. Herrick *v.* Minneapolis, etc., R. Co., 32 Minn. 435, 21 N. W. 471.

New York.— *Compare* Chambers *v.* Lancaster, 160 N. Y. 342, 54 N. E. 707 [*affirming* 3 N. Y. App. Div. 215, 38 N. Y. Suppl. 253].

United States.—The rule that a debtor cannot be sued for part of an entire demand does not prevent a suit being brought by the assignee of part of a debt, in conjunction with his assignor, to recover the entire debt. Evans *v.* Durango Land, etc., Co., 80 Fed. 433, 49 U. S. App. 320, 25 C. C. A. 531.

In New York it was held that the assignee of part of a chose in action could maintain an action therefor. Risley *v.* Phenix Bank, 83 N. Y. 318, 38 Am. Rep. 421; Cushman *v.* Family Fund Soc., 13 N. Y. Suppl. 428, 36 N. Y. St. 856. See also Danvers *v.* Lugar, 30 Misc. (N. Y.) 98, 61 N. Y. Suppl. 778; Penhollow *v.* Lawyers Title Ins. Co., 63 N. Y. Suppl. 390.

78. Debtor's consent to assignment.—Richmond *v.* Parker, 12 Metc. (Mass.) 48.

79. Several assignees should join.— Allard *v.* Orleans Nav. Co., 14 La. 27; Atwood *v.* Norton, 27 Barb. (N. Y.) 638. But the defect of want of parties must be taken advantage of by pleading. Abbe *v.* Clark, 31 Barb. (N. Y.) 238.

80. *Indiana.*— Unless assignment is by indorsement in writing, assignor must be made a party defendant. Keller *v.* Williams, 49 Ind. 504; Swails *v.* Coverdill, 17 Ind. 337; Stewart *v.* Fralich, 14 Ind. App. 260, 42 N. E. 951; Watson *v.* Conwell, 3 Ind. App. 518, 30 N. E. 5. And where assignor is dead, his personal representatives must be made parties. St. John *v.* Hardwick, 11 Ind. 251. Where a partnership claim was assigned by surviving partner, the latter is a necessary party in an action by assignee, but the representatives of the deceased partner are not necessary parties. Willson *v.* Nicholson, 61 Ind. 241.

Kentucky.— Where the chose is not made assignable by statute. Hicks *v.* Doty, 4 Bush (Ky.) 420; Lytle *v.* Lytle, 2 Metc. (Ky.) 127; Gill *v.* Johnson, 1 Metc. (Ky.) 649; Colvin *v.* Newell, 8 Ky. L. Rep. 959; Maynard *v.* Cassady, 4 Ky. L. Rep. 836. See Feebach *v.* Brunker, 5 Ky. L. Rep. 314.

Ohio.— Stevens *v.* Swallow, 2 Ohio Dec. (Reprint) 305.

Tennessee.— Kramer *v.* Wood, (Tenn. Ch. 1899) 52 S. W. 1113.

United States.— Delaware County *v.* Diebold Safe, etc., Co., 133 U. S. 473, 10 S. Ct. 399, 33 L. ed. 674, construing Indiana statute.

The assignor is not rendered a necessary party in an action by assignee by the fact that defendant sets up as a set-off a claim

2. In Suits in Equity[81] — **a. Assignor** — (i) *In General.* The object of a court of equity being to settle all controversies touching any matter in one action, and that no decree should be made affecting the right of persons without a hearing, in order to avoid multiplicity of suits, it has been said that the person holding the legal title in the subject-matter of a bill must be made a party, either as plaintiff or defendant, although he has no beneficial interest.[82] It has also been said that assignor is a proper party in any case where a bill is filed by his assignee.[83]

(ii) *Where Assignment Is Absolute.* The weight of authority is to the effect that, where an assignment is absolute and unconditional as to the entire equitable interest, and the extent and validity of the assignment are not doubted or denied and there is no remaining liability in the assignor to be affected by the decree, it is not necessary to make the assignor a party to a bill filed by the assignee.[84]

which he had against assignor, and exceeding the amount of the debt assigned. Davis *v.* Sutton, 23 Minn. 307.

81. As to parties to suits in equity, generally, see Equity.

82. Assignor is a necessary party.— *Alabama.*— See Broughton *v.* Mitchell, 64 Ala. 210.

Arkansas.— Boles *v.* Jessup, 57 Ark. 469, 21 S. W. 880, holding that assignor may be made a party after action is brought.

Indiana.— Elderkin *v.* Shultz, 2 Blackf. (Ind.) 345. But see Blair *v.* Shelby County Agricultural, etc., Assoc., 28 Ind. 175.

Kentucky.— Craig *v.* Johnson, 3 J. J. Marsh. (Ky.) 572; Young *v.* Rodes, 5 T. B. Mon. (Ky.) 498; Gatewood *v.* Rucker, 1 T. B. Mon. (Ky.) 21; Bradley *v.* Morgan, 2 A. K. Marsh. (Ky.) 369; Allen *v.* Crockett, 4 Bibb (Ky.) 240. Where title bond for land was assigned by obligee to another, and again assigned by the latter, in a proceeding by last assignee for specific performance of the contract the intermediate assignee was held to be a necessary party, as well as the obligor. Hancock *v.* Beckham, 5 Litt. (Ky.) 135. See also Madeiras *v.* Catlett, 7 T. B. Mon. (Ky.) 475. So, in an action by a vendor against a remote assignee to enforce a vendor's lien on land successively assigned, the original vendee was held to be a necessary party, and the intermediate assignees proper parties. Wickliffe *v.* Clay, 1 Dana (Ky.) 585.

North Carolina.— Jones *v.* Carter, 73 N. C. 148; McKinnie *v.* Rutherford, 21 N. C. 14.

Ohio.— In a proceeding, by assignee of a policy of insurance, after a loss, to have the policy reformed to make it conform to the intention of the parties, assignor is a necessary party. Sykora *v.* Forest City Mut. Ins. Co., 7 Ohio Dec. (Reprint) 372, 2 Cinc. L. Bul. 223.

Virginia.— In Corbin *v.* Emmerson, 10 Leigh (Va.) 697, it was said that wherever a bill is filed by a complainant to enforce his rights as assignor of another, assignor is a proper and necessary party. But see James River, etc., Co. *v.* Littlejohn, 18 Gratt. (Va.) 53.

England.— Cathcart *v.* Lewis, 3 Bro. Ch. 516, 1 Ves. Jr. 463; Ray *v.* Fenwick, 3 Bro. Ch. 25.

83. Broughton *v.* Mitchell, 64 Ala. 210; Blevins *v.* Buck, 26 Ala. 292; Congregation Shomri Laboker Anshe Sakoler *v.* Sindrack, 15 N. Y. App. Div. 82, 44 N. Y. Suppl. 295; Thompson *v.* McDonald, 22 N. C. 463; Wilson *v.* Davidson County, 3 Tenn. Ch. 536. But see *infra*, VIII, B, 2, a, (II), (III).

84. Assignor not necessary party to bill.— *Alabama.*— Walker *v.* Mobile Bank, 6 Ala. 452. But see Broughton *v.* Mitchell, 64 Ala. 210.

District of Columbia.— Young *v.* Kelly, 3 App. Cas. (D. C.) 296.

Florida.— Sammis *v.* Wightman, 31 Fla. 45, 12 So. 536; Robinson *v.* Springfield Co., 21 Fla. 203; Betton *v.* Williams, 4 Fla. 11.

Illinois.— Gleason, etc., Mfg. Co. *v.* Hoffman, 168 Ill. 25, 48 N. E. 143.

Indiana.— Garrett *v.* Puckett, 15 Ind. 485.

Kentucky.— Anderson *v.* Wells, 6 B. Mon. (Ky.) 540; Kennedy *v.* Davis, 7 T. B. Mon. (Ky.) 372; Cobb *v.* Thompson, 1 A. K. Marsh. (Ky.) 507; Lemmon *v.* Brown, 4 Bibb (Ky.) 308.

Maine.— Moor *v.* Veazie, 32 Me. 343, 54 Am. Dec. 655; Miller *v.* Whittier, 32 Me. 203.

Massachusetts.— Currier *v.* Howard, 14 Gray (Mass.) 511; Montague *v.* Lobdell, 11 Cush. (Mass.) 111; Haskell *v.* Codman, 8 Metc. (Mass.) 536; Ensign *v.* Kellogg, 4 Pick. (Mass.) 1.

Michigan.— Morey *v.* Forsyth, Walk. (Mich.) 465.

Mississippi.— Everett *v.* Winn, Sm. & M. Ch. (Miss.) 67.

New Jersey.— King *v.* Berry, 3 N. J. Eq. 44; Bruen *v.* Crane, 2 N. J. Eq. 347.

New York— Connecticut Mut. L. Ins. Co. *v.* Cornwell, 72 Hun (N. Y.) 199, 25 N. Y. Suppl. 348, 55 N. Y. St. 480; Miller *v.* Bear, 3 Paige (N. Y.) 466; Ward *v.* Van Bokkelen, 2 Paige (N. Y.) 289.

North Carolina.— Thompson *v.* McDonald, 22 N. C. 463; Polk *v.* Gallant, 22 N. C. 395, 34 Am. Dec. 410.

Rhode Island.— Sayles *v.* Tibbitts, 5 R. I. 79.

Vermont.— Day *v.* Cummings, 19 Vt. 496.

Virginia.— Lynchburg Iron Co. *v.* Tayloe, 79 Va. 671; Omohundro *v.* Henson, 26 Gratt. (Va.) 511; James River, etc., Co. *v.* Littlejohn, 18 Gratt. (Va.) 53. Assignor of foreclosure decree is not a necessary party to a

(III) *Where Assignment Is Not Absolute.* But, where the assignment is not absolute,[85] or the assignor retains an interest in the chose,[86] or there is a controversy between the assignor and the assignee touching the assignment,[87] or there remains a liability on part of the assignor,[88] the assignor should be made a party to the bill brought by the assignee to enforce the chose assigned.

b. Assignee. When it appears in a proceeding in equity that the subject-matter, or an interest therein, has been assigned, the assignee is a necessary party to the proceeding brought by the assignor,[89] or against him.[90] The assignee of a chose in action for whose benefit an action at law has been brought in the name of the assignor must be made a party to a bill in equity affecting the judgment obtained by the plaintiff in such action.[91]

C. Pleadings[92]— **1. In General.** The parties are bound to plead those facts upon which their right of recovery or defense depends.[93]

bill by his assignee against grantee of mortgagor who had assumed payment of mortgage debt, where the assignment of decree was unconditional. Tatum *v.* Ballard, 94 Va. 370, 26 S. E. 871. Where legal title to a mortgage is transferred to assignee, assignor is not a necessary party to a foreclosure bill. Newman *v.* Chapman, 2 Rand. (Va.) 93, 14 Am. Dec. 766.

West Virginia.— Chapman *v.* Pittsburgh, etc., R. Co., 18 W. Va. 184; Scott *v.* Ludington, 14 W. Va. 387; Vance *v.* Evans, 11 W. Va. 342.

United States.— Boon *v.* Chiles, 8 Pet. (U. S.) 532, 8 L. ed. 1034; New Mexico Land Co. *v.* Elkins, 20 Fed. 545; Trecothick *v.* Austin, 4 Mason (U. S.) 16, 24 Fed. Cas. No. 14,164.

England.— Blake *v.* Jones, 3 Anstr. 651; Brace *v.* Harrington, 2 Atk. 235; Bromley *v.* Holland, 7 Ves. Jr. 3, 6 Rev. Rep. 58.

85. *Florida.*— Robinson *v.* Springfield Co., 21 Fla. 203.

Massachusetts.— Hobart *v.* Andrews, 21 Pick. (Mass.) 526.

New Jersey.— Miller *v.* Henderson, 10 N. J. Eq. 320.

New York.— Kittle *v.* Van Dyck, 1 Sandf. Ch. (N. Y.) 76; Whitney *v.* McKinney, 7 Johns. Ch. (N. Y.) 144; Topping *v.* Van Pelt, Hoffm. (N. Y.) 545.

North Carolina.— Thompson *v.* McDonald, 22 N. C. 463.

United States.— Where the agreement between the assignor and the assignee is executory, the assignor should be made a party. New Mexico Land Co. *v.* Elkins, 20 Fed. 545.

86. Assignor retaining interest in chose.— Insurance Co. of North America *v.* Martin, 139 Ind. 317, 37 N. E. 394 (holding, however, that, where the part of the claim retained by the assignor has been paid, the assignor need not be made a party to a bill filed by the assignee); Schilling *v.* Mullen, 55 Minn. 122, 56 N. W. 586, 43 Am. St. Rep. 475 (holding that, where the assignor refuses to join as complainant, he should be made a defendant); Dean *v.* St. Paul, etc., R. Co., 53 Minn. 504, 55 N. W. 628; Smith *v.* Garey, 22 N. C. 42; Cook *v.* Bidwell, 8 Fed. 452.

87. Controversy between assignor and assignee.—Morey *v.* Forsyth, Walk. (Mich.) 465; Miller *v.* Bear, 3 Paige (N. Y.) 466.

88. Remaining liability on part of assignor. — See Stafford *v.* Blum, 7 Tex. Civ. App. 283, 27 S. W. 12.

Where a vendor of land assigns the bonds given for the purchase-money of the land, his assignee, in an action to enforce a vendor's lien on the land for the purchase-money, must make the vendor a party. Betton *v.* Williams, 4 Fla. 11; Miller *v.* Bear, 3 Paige (N. Y.) 466.

89. Suit by assignor.— Hopkins *v.* Roseclare Lead Co., 72 Ill. 373; Coale *v.* Mildred, 3 Harr. & J. (Md.) 278; Hood *v.* Hood, 85 N. Y. 561.

Claim assigned as collateral security.— Ridgway *v.* Bacon, 72 Hun (N. Y.) 211, 25 N. Y. Suppl. 651, 55 N. Y. St. 345.

Where, pending a bill in equity, complainant transfers his interest in the subject-matter of the litigation, the action does not abate, nor can this be pleaded in bar, but the assignee may become a party complainant by a supplemental bill (Wright *v.* Meek, 3 Greene (Iowa) 472; De Minckwitz *v.* Udney, 16 Ves. Jr. 466), and defendant may require him to be made a party to the proceeding (Garr *v.* Gomez, 9 Wend. (N. Y.) 649; Sedgwick *v.* Cleveland, 7 Paige (N. Y.) 287; De Minckwitz *v.* Udney, 16 Ves. Jr. 466; Williams *v.* Kinder, 4 Ves. Jr. 387).

The assignee of part of a claim in litigation may file an intervening bill or petition. Phillips *v.* Edsall, 127 Ill. 535, 20 N. E. 801.

90. Suit against assignor.— Johnson *v.* Kirby, 65 Cal. 482, 4 Pac. 458; McCormick *v.* McCormick, 9 Ky. L. Rep. 519, 5 S. W. 573; Mahr *v.* Norwich Union F. Ins. Soc., 127 N. Y. 452, 28 N. E. 391, 40 N. Y. St. 218.

91. Triplett *v.* Cox, 7 T. B. Mon. (Ky.) 190 (bill for a set-off); Chase *v.* Chase, 1 Paige (N. Y.) 198 (bill to stay proceedings on judgment). See also Brockway *v.* Copp, 3 Paige (N. Y.) 539.

92. See also, generally, Pleading.

93. *Arkansas.*— In an action by assignee of agreement to pay certain sums against assignor on his covenant that the debtor would pay, an allegation that the agreement was presented to the debtor, who refused to pay, is insufficient where it did not state by whom it was presented, or whether before or after the assignment. Sabin *v.* Hamilton, 2 Ark. 485.

2. OF PLAINTIFF — a. In General. Where an action is brought by the assignee of a chose in action, he should plead all the facts necessary to constitute a cause of action in him — not only those facts which show a cause of action on the chose in action,[94] but also those facts which show a right in him to maintain the action.[95]

Colorado.— In an action by payee of an order on a particular fund to become due drawer for certain work, accepted by drawee, it is a sufficient averment of liability of drawee, in an action against him, to state that there was due on account of the particular work mentioned in the order more money than was sufficient to pay the order, and the assignee need not allege full compliance by the assignor with the terms of his contract. Welch *v.* Mayer, 4 Colo. App. 441, 36 Pac. 613.

Indiana.— Plaintiff's petition alleged he had purchased brass checks issued by defendant which represented money due from defendant to his employees, but the petition contained no statement showing the work done by such employees, and gave no reason for not making them parties defendant. It was held not to state a cause of action on an assigned account for work performed by the employees. Naglebaugh *v.* Harder, etc., Coal Min. Co., 21 Ind. App. 551, 51 N. E. 427.

New York.— Where one sued as assignee of a non-negotiable note, alleging an assignment from executor of payee, the declaration should aver the death of the payee. Seeley *v.* Seeley, 2 Hill (N. Y.) 496. See also Janes *v.* Saunders, 19 N. Y. App. Div. 538, 46 N. Y. Suppl. 574.

Pennsylvania.—Heckscher *v.* American Tube, etc., Co., 137 Pa. St. 421, 20 Atl. 804.

Texas.— In an action by assignee of a policy of insurance against assignor, the former alleged that he took the policy under the representations that it was a valid claim and had been adjusted and would be paid in sixty days, that it had not been paid, but did not allege the representations to have been false. It was held the petition did not show any liability aside from that created by the assignment itself. Gooch *v.* Parker, 16 Tex. Civ. App. 256, 41 S. W. 662.

Vermont.— In an action by payee against drawees of an order the declaration was held sufficient where it alleged that drawees were indebted to drawer, the drawing of the order, its conditional acceptance by drawees, and the happening of the contingency on which the acceptance became absolute. Goss *v.* Barker, 22 Vt. 520.

See also *infra*, VIII, C, 2, 3.

Where complaint stated a sale of goods by a certain firm to defendant, and the assignment of the claim to plaintiff, such allegations were held sufficient to allow proof of a sale by an assignor competent to contract, and the complaint was not demurrable though no partnership was alleged nor a specification made of persons competent to contract. Crinnian *v.* Knauth, 29 Misc. (N. Y.) 523, 61 N. Y. Suppl. 976. But see S. C. Herbst Importing Co. *v.* Hogan, 16 Mont. 384, 41 Pac. 135, where a complaint in an action on a claim assigned by a certain company to plaintiff was held to be defective because it failed to allege the legal existence of such company and the character of such existence.

94. Palmer *v.* Smedley, 28 Barb. (N. Y.) 468. See also *supra*, VIII, C, 1.

As to particular allegations see *infra*, VIII, C, 2, b.

95. **Must show right to maintain action.**— St. Anthony Mill Co. *v.* Vandall, 1 Minn. 246. Where a declaration stated an assignment of a bond by one of two assignees thereof on behalf of himself and the other assignee to plaintiff, but did not state the authority of the one assignee to assign on behalf of the other, it was held to be bad. Stevens *v.* Bowers, 16 N. J. L. 16. The essential fact being the change of interest, it is sufficient to allege that fact, without stating all facts going to make that change effectual. Horner *v.* Wood, 15 Barb. (N. Y.) 371. If it be necessary, in an action brought upon an assigned chose in action, that the interest of the person for whose benefit the suit is brought should appear in the pleadings, it is sufficient if it appear in any part of the pleadings. Canby *v.* Ridgway, 1 Binn. (Pa.) 496; Moffett *v.* Bolmer, 2 Pa. St. 712.

Particular allegations held sufficient as showing title in plaintiff as assignee may be found in the following cases:

California.— See Moore *v.* Waddle, 34 Cal. 145.

Florida.—Jordan *v.* John Ryan Co., 35 Fla. 259, 17 So. 73.

Kansas.— Polster *v.* Rucker, 16 Kan. 115.

Kentucky.— It is not sufficient to state that the chose was assigned to plaintiff, or that he is the owner thereof; but it should be alleged by whom it was assigned. Maynard *v.* Cassady, 4 Ky. L. Rep. 836.

Michigan.— Morrill *v.* Bissell, 99 Mich. 409, 58 N. W. 324.

Missouri.— Boyer *v.* Hamilton, 21 Mo. App. 520.

New York.— Crinnian *v.* Knauth, 29 Misc. (N. Y.) 523, 61 N. Y. Suppl. 976; H. C. Miner Lithograph Co. *v.* Canary, 20 Misc. (N. Y.) 664, 46 N. Y. Suppl. 256; King *v.* King, 68 N. Y. Suppl. 1089.

Texas.— It is not necessary, however, to aver the evidence of one's right to property, or the manner of acquiring it. Allegations of ownership are sufficient to let in proof of the assignment. Thomas *v.* Chapman, 62 Tex. 193.

Washington.— Latimer *v.* Baker, (Wash. 1901) 64 Pac. 899. But *compare* Seattle Nat. Bank *v.* School Dist. No. 40, 20 Wash. 368, 55 Pac. 317.

Wisconsin.— River Falls Bank *v.* German American Ins. Co., 72 Wis. 535, 40 N. W. 506; Burnham *v.* Milwaukee, 69 Wis. 379, 34 N. W. 389.

Mere conclusions should not be pleaded.[96] A mere statement that plaintiff is the owner or holder of the chose in action sued on is insufficient, being a mere conclusion.[97] The plaintiff suing as assignee of a chose in action must aver an assignment to himself.[98] Where plaintiff sues as a remote assignee of a chose in action, it has been held that he should specially state his title through the intermediate assignees.[99]

b. Particular Averments and Requisites — (I) *Pleading Statute.* The assignee of a chose in action need not, in his declaration, set out the statute authorizing him to sue in his own name.[1]

(II) *Manner of Assignment* — (A) *In General.* Where the right of an assignee to maintain the action in his own name depends on the manner of the assignment to him, it has been held that the manner of the assignment should be alleged.[2]

Canada.— Cousins *v.* Bullen, 6 Ont. Pr. 71.

Under statute authorizing the assignee of a bond to sue thereon in his own name, styling himself in the writ the assignee of the obligee, the declaration of an assignee of a bond payable to an unmarried woman, who afterward married and, with her husband, assigned the bond to plaintiff, which states that the bond was duly assigned to plaintiff, where plaintiff styles himself in the writ the assignee of the unmarried woman, was held sufficient. Frost *v.* Croft, 9 Rich. (S. C.) 285. But see Evans *v.* Secrest, 3 Ind. 541.

96. Mere conclusions should not be pleaded. — Where an assignor promised to reimburse his assignee if, with due diligence, he could not collect the assigned note, it was held not to be sufficient for the assignee to allege due diligence in general terms in his pleading in an action against the assignor, but he was bound to set up facts showing diligence. Leas *v.* White, 15 Iowa 187.

97. See Stearns *v.* Martin, 4 Cal. 227. Statement that plaintiff is the legal holder (Smith *v.* Dean, 19 Mo. 63), is the owner, without alleging an assignment to him (Gallup *v.* Lichter, 4 Colo. App. 296, 35 Pac. 985), or is the *bona fide* owner (White *v.* Brown, 14 How. Pr. (N. Y.) 282) has been held to be insufficient.

Under the code a statement that a note was sold and delivered to plaintiff for value is sufficient to show title in plaintiff. Billings *v.* Jane, 11 Barb. (N. Y.) 620.

98. Assignee must show assignment to himself.— *California.*— The statement should be of a positive transfer, and the character of it. Stearns *v.* Martin, 4 Cal. 227.

Indiana.—Naglebaugh *v.* Harder, etc., Min. Co., 21 Ind. App. 551, 51 N. E. 427.

Kentucky.— Miller *v.* Rice, 1 Bush (Ky.) 70.

Maryland.— Gable *v.* Scarlett, 56 Md. 169.

Michigan.— Cilley *v.* Van Patten, 58 Mich. 404, 25 N. W. 326; Rose *v.* Jackson, 40 Mich. 29; Blackwood *v.* Brown, 32 Mich. 104; Draper *v.* Fletcher, 26 Mich. 154. See also Peirce *v.* Closterhouse, 96 Mich. 124, 55 N. W. 663; Altman *v.* Fowler, 70 Mich. 57, 37 N. W. 708.

Missouri.— But *compare* Lamar Water, etc., Co. *v.* Lamar, 140 Mo. 145, 39 S. W. 768.

New Jersey.— A declaration on a bond, in a suit by one not the obligee thereof, which does not state a legal assignment thereof is demurrable even though it recites that plaintiff is an assignee. Lindsay *v.* McInerney, 62 N. J. L. 524, 41 Atl. 701.

New York.— An assignee suing on an assigned account must state and prove the assignment to him. Buffalo Ice Co. *v.* Cook, 9 Misc. (N. Y.) 434, 29 N. Y. Suppl. 1057, 61 N. Y. St. 731.

Ohio.—Lowther *v.* Lawrence, Wright (Ohio) 180.

Tennessee.— Stovall *v.* Bowers, 10 Humphr. (Tenn.) 560.

Virginia.— Lynchburg Iron Co. *v.* Tayloe, 79 Va. 671; Marietta Bank *v.* Pindall, 2 Rand. (Va.) 465; Gordon *v.* Browne, 3 Hen. & M. (Va.) 219.

Wisconsin.— Where it is alleged that a claim for insurance was assigned to plaintiff, a valid assignment is held to be meant. River Falls Bank *v.* German American Ins. Co., 72 Wis. 535, 40 N. W. 506.

United States.— Earhart *v.* Campbell, Hempst. (U. S.) 48, 8 Fed. Cas. No. 4,241*a*.

In an action by the assignee of a sealed bill against the maker thereof, it was held that the assignment should be set out. Stroud *v.* Howell, 3 N. J. L. 229.

99. Suit by remote assignee.— Williams *v.* Wetherbee, 1 Aik. (Vt.) 233. *Contra*, Tibbets *v.* Gerrish, 25 N. H. 41, 57 Am. Dec. 307, holding that a second assignee of a note, the first assignment being in blank, need not aver the several assignments through which he claims.

1. Gano *v.* Slaughter, Hard. (Ky.) 76.

2. Under a statute permitting assignee by indorsement to sue in his own name, but providing that, where the assignment is not by indorsement, the action must be brought in the name of assignor, an assignee suing in his own name should allege an indorsement to himself. Phillips *v.* Sellers, 42 Ala. 658; Skinner *v.* Bedell, 32 Ala. 44. But, where assignee sues in his own name, without alleging an assignment by indorsement, and defendant goes to trial without objection under the general issue, plaintiff can recover without proving the assignment by indorsement. Phillips *v.* Sellers, 42 Ala. 658.

Under the statute, unless the assignment is in writing indorsed on the instrument, assignor must be made a party defendant in an

(B) *Bona Fide Assignment.* Though, to entitle an assignee to sue in his own name on an assigned chose in action, the assignment under the statute must have been *bona fide*, it has been held that the declaration need not allege the assignment to have been *bona fide*.[3]

(C) *Conditional Assignment.* Where an assignment is conditional the condition should be set forth.[4]

(D) *Written Assignment.* Where a written assignment is necessary to vest the legal title in plaintiff, such an assignment should be alleged.[5]

(III) *Consideration.* In an action by an assignee against the debtor, he need not aver a consideration,[6] nor set out the consideration for the assignment.[7] But, where the assignee of a chose sues his assignor, a consideration for the assignment must be averred.[8]

(IV) *Demand on Debtor.* In an action by an assignee of an obligation against his assignor, a demand on the maker and notice to the assignor of nonpayment must be averred.[9]

(V) *Consent of Debtor.* Where the consent of the debtor was necessary to a partial assignment, an assignee of part of a claim suing the debtor must aver such consent.[10]

(VI) *Promise of Debtor.* Where the assignee of a chose in action is

action by assignee; and, where assignee sues in his own name without making assignor a party, he must allege the manner of assignment. Treadway *v.* Cobb, 18 Ind. 36; Stowe *v.* Weir, 15 Ind. 341; Barcus *v.* Evans, 14 Ind. 381; Garrison *v.* Clark, 11 Ind. 369. But where the legal title could not be transferred by writing, and assignor is made a party, the manner of assignment need not be stated. Buntin *v.* Weddle, 20 Ind. 449. Where the petition does not allege an assignment by indorsement in writing nor make the assignor a defendant, it is demurrable. Watson *v.* Conwell, 3 Ind. App. 518, 30 N. E. 5. A petition stating an assignment by agreement in writing is insufficient. Gordon *v.* Carter, 79 Ind. 386.

See also *infra*, VIII, C, 2, b, (II), (D).

3. Crawford *v.* Brooke, 4 Gill (Md.) 213; U. S. Bank *v.* Lyles, 10 Gill & J. (Md.) 326.

4. Hobart *v.* Andrews, 21 Pick. (Mass.) 526; Walburn *v.* Ingilby, Coop. t. Br. 270, 3 L. J. Ch. 21, 1 Myl. & K. 61, 7 Eng. Ch. 61.

5. Phillips *v.* Sellers, 42 Ala. 658. Otherwise the petition is demurrable. Foster *v.* Sutlive, 100 Ga. 297, 34 S. E. 1037. See also *supra*, VIII, C, 2, b, (II), (A). But see, *contra*, Rice *v.* Yakima, etc., R. Co., 4 Wash. 724, 31 Pac. 23; Gunderson *v.* Thomas, 87 Wis. 406, 58 N. W. 750; River Falls Bank *v.* German American Ins. Co., 72 Wis. 535, 40 N. W. 506.

A statement that the chose was "duly transferred" is insufficient, as a transfer by parol might be meant; but an averment that the chose in action was "duly assigned" is sufficient, as an assignment properly means a written assignment. Ragland *v.* Wood, 71 Ala. 145, 46 Am. Rep. 305.

6. Assignee suing debtor.— *Colorado.*— Welch *v.* Mayer, 4 Colo. App. 440, 36 Pac. 613.

Kentucky.— Holt *v.* Thompson, 1 Duv. (Ky.) 301. But it was held that where the consideration for an assignment was set out, it must be proved and be sufficient. Malone *v.* Adairville Bank, 6 Ky. L. Rep. 440.

Minnesota.— *Contra*, see Russell *v.* Minnesota Outfit, 1 Minn. 162.

New Jersey.— Gregory *v.* Freeman, 22 N. J. L. 405.

New York.— In the case of personal property. Vogel *v.* Badcock, 1 Abb. Pr. (N. Y.) 176. *Contra*, where the chose in action assigned is non-negotiable. De Forest *v.* Frary, 6 Cow. (N. Y.) 151.

Vermont.— In an action by the assignee of a chose in action on a special promise by the debtor to pay him, it is not necessary to allege a consideration for the assignment to plaintiff, defendant's promise not being affected by the character of the transfer to plaintiff as a gift or otherwise. Smilie *v.* Stevens, 41 Vt. 321. *Compare* Roberts *v.* Smith, 58 Vt. 492, 4 Atl. 709, 56 Am. Rep. 567, as to necessity of alleging consideration for the original obligation.

See 4 Cent. Dig. tit. "Assignments," § 222.

As to necessity for consideration see *supra*, III, B, 3.

7. In a statement in a confession of judgment on certain notes given by defendant in payment of the purchase-price of a debt owing by a third person, it was not necessary to the validity of the judgment, as to creditors of defendant, that the consideration of the debt purchased be stated. Kirby *v.* Fitzgerald, 31 N. Y. 417.

8. Assignee suing assignor.— Humphrey *v.* Hughes, 79 Ky. 487, 3 Ky. L. Rep. 273; Hall *v.* Smith, 3 Munf. (Va.) 550. See also Barksdale *v.* Fenwick, 4 Call (Va.) 492.

9. White *v.* Cannada, 25 Ark. 41; Anderson *v.* Yell, 15 Ark. 9.

As to necessity for demand on debtor see *supra*, VIII, A, 5.

10. Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423.

authorized by statute to sue, he need not allege a promise by the debtor to pay him.[11]

(VII) *NON-PAYMENT OR NON-PERFORMANCE.* In an action by or against the assignee of a debt or contract, non-payment to or non-performance by the assignor before the assignment should be alleged.[12] The assignee must also aver non-payment or non-performance to himself after the assignment.[13]

(VIII) *NOTICE OF ASSIGNMENT.* In an action brought in the name of an obligee of an instrument, but for the benefit of his assignee, where defendant pleads payment to the nominal plaintiff, in order to permit plaintiff to show an assignment of the instrument and notice of the assignment to the obligor before such payment to the nominal plaintiff, such assignment and notice should be alleged in the replication.[14]

(IX) *SETTING OUT OR FILING COPY OF ASSIGNMENT.* The assignment need not be set out in the declaration,[15] nor, except where required by statute,[16] need a copy thereof be filed with the declaration.[17]

c. Amendments. Amendments which do not change the cause of action will be allowed where they do not work injustice.[18]

d. Surplusage. The expressions "for the use of," or "assignee," and kindred phrases in the declaration may sometimes be disregarded as surplusage.[19]

As to necessity for consent or acceptance of debtor see *supra*, III, B, 5.

11. Crawford *v.* Brooke, 4 Gill (Md.) 213.

As to necessity of promise of debtor to pay see *supra*, III, B, 6.

12. Hubble *v.* Mullanphy, Hard. (Ky.) 294; Keeton *v.* Scantland, Hard. (Ky.) 149; Conn *v.* Jones, Hard. (Ky.) 8; Lynch *v.* Barr, Ky. Dec. 170; Gregory *v.* Freeman, 22 N. J. L. 405.

A declaration against assignee of reversion for breach of covenant of lessor to repair must aver that such repairs were not done before the assignment to defendant. Gerzebek *v.* Lord, 33 N. J. L. 240.

13. Whittier *v.* Whittier, 31 N. H. 452. A declaration by an assignee of a bond in an action against the obligor thereof should not only allege non-payment to the assignor before the assignment, but also non-payment to the assignee after the assignment. Gregory *v.* Freeman, 22 N. J. L. 405. A complaint alleging a failure to deliver goods to plaintiff or his assignor must allege a failure to deliver to plaintiff after the assignment, and notice thereof to defendant. Webrer *v.* Roddis, 22 Wis. 61. See also H. C. Miner Lithograph Co. *v.* Canary, 20 Misc. (N. Y.) 664, 46 N. Y. Suppl. 256.

14. Shriner *v.* Lamborn, 12 Md. 170.

As to the necessity for notice to debtor of the assignment see *supra*, III, B, 4.

15. McLott *v.* Savery, 11 Iowa 323. But see, *contra*, Stroud *v.* Howell, 3 N. J. L. 229, holding that, in an action by assignee of a sealed bill against the maker thereof, the declaration should set out the assignment.

16. National Shoe, etc., Bank *v.* Gooding, 87 Me. 337, 32 Atl. 967. But where a motion to dismiss for failure to file assignment, or copy thereof, was not made until the second term of court, the objection that the assignment, or copy thereof, had not been filed with the writ was deemed waived. Littlefield *v.* Pinkham, 72 Me. 369.

17. Copy need not be filed.— Stanford *v.* Broadway Sav., etc., Assoc., 122 Ind. 422, 24 N. E. 154; Keith *v.* Champer, 69 Ind. 477; Treadway *v.* Cobb, 18 Ind. 36 [*overruling* Connard *v.* Christie, 16 Ind. 427; Jones *v.* Dronberger, 15 Ind. 443]; Thayer *v.* Pressey, 175 Mass. 225, 56 N. E. 5. See also Hayes *v.* Mantua Hall Market Co., 12 Pa. Co. Ct. 441; Hummel *v.* Siddal, 11 Phila. (Pa.) 308, 33 Leg. Int. (Pa.) 426.

18. Illustrations of proper amendments see Wood *v.* Metropolitan L. Ins. Co., 96 Mich. 437, 56 N. W. 8; Read *v.* Jaudon, 35 How. Pr. (N. Y.) 303; Turquand *v.* Fearon, 4 Q. B. D. 280, 48 L. J. Q. B. 341, 40 L. T. Rep. N. S. 191, 27 Wkly. Rep. 396, under the Common-Law Procedure Act of 1852.

Where, however, defendant alleges in his plea that plaintiff is not the real party in interest, and that he had assigned his claim, plaintiff will not be permitted to amend by alleging a reassignment of the chose in action to him, made after the action was brought. Staunton *v.* Swann, 10 N. Y. Civ. Pro. 12.

Where an action is improperly brought in the name of the assignee instead of assignor, this may be remedied by amendment. Robertson *v.* Reed, 47 Pa. St. 115. *Contra*, Johnson *v.* Mayrant, 1 McCord (S. C.) 484.

Where an action was brought by an assignee in the name of assignor for the use of assignee, an amendment making assignee plaintiff will be allowed. Heard *v.* Lockett, 20 Tex. 162.

19. Blankenship *v.* Cressillas, 10 B. Mon. (Ky.) 434; Enley *v.* Nowlin, 1 Baxt. (Tenn.) 163.

In an action for conversion of goods by an assignee, the addition of the term "assignee" after plaintiff's name in the declaration does not authorize the conclusion that the suit is on a cause of action accruing to the assignor and transferred to the assignee. The term is to be regarded as *descriptio personæ* merely. Bloom *v.* Sexton, 33 Mich. 181.

3. Of Defendant — a. In General. The defect in plaintiff's title must be taken advantage of by a proper pleading and in proper time.[20]

b. Demurrer. Thus, demurrer is a proper method of raising the objection of failure to make profert of the assignment,[21] that assignor is not made a party to the action,[22] or that plaintiff's declaration does not refer to a copy of the account, and its assignment.[23]

c. Plea or Answer — (I) *Contesting the Assignment.* Where a defendant sued by the assignee of a chose in action wishes to contest the fact of the assignment he must, by a proper pleading, raise an issue on the allegation of the assignment.[24] The plea or answer of defendant should specially deny the assignment.[25]

(II) *Pleading Payment.* Where an action is brought by the assignee of a chose in action against the debtor, the plea of defendant of payment must allege to whom payment was made.[26]

D. Defenses. Where an assignment transfers the legal title, defendant can inquire no further into it.[27] It is no defense to an action by the assignee of a

20. Plea in abatement.—Thus, in an action by the assignee of a bond assigned by one of two executors of the obligee, the failure of the other executor to join in the assignment must be taken advantage of by plea in abatement, or it is waived. Chalfont *v.* Johnston, 3 Yeates (Pa.) 16.

See also *infra*, VIII, C, 3, b, c.

21. Objection of failure to make profert of the assignment must be raised by demurrer, and cannot be taken advantage of after judgment by default. So held in an action of debt on an assigned bond. Shields *v.* Barden, 6 Ark. 459.

22. Objection that assignor is not made a party to the action must be raised by demurrer or motion to bring him in, otherwise it is waived. Sykes *v.* Canton First Nat. Bank, 2 S. D. 242, 49 N. W. 1058. See also Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423, to the effect that such an objection must be raised by demurrer on the ground that proper parties are not joined, and not on the ground that sufficient facts are not stated.

23. Failure of a declaration to refer to a copy of the account and its assignment cannot be assigned as error on appeal, but should be taken advantage of by demurrer. Lassiter *v.* Jackman, 88 Ind. 118.

24. A mere averment that plaintiff is not the real party in interest, but that a third person is the owner of the chose, without denying the assignment which is set up by plaintiff, is not sufficient to put the assignment in issue. Fosdick *v.* Groff, 22 How. Pr. (N. Y.) 158.

A plea that the assignment was not the deed of assignor is not a proper plea, and may be stricken out, where plaintiff, suing upon a bond assigned to him, does not allege any manner of assignment. Richards *v.* Morris Canal, etc., Co., 18 N. J. L. 250.

25. A special plea denying the assignment has been held a good plea where the chose in action sued on was a sealed instrument (Gully *v.* Remy, 1 Blackf. (Ind.) 69; Smith *v.* Shields, 2 Bibb (Ky.) 328; Smithey *v.* Edmonson, 3 East 22; Smith *v.* Broomhead, 7 T. R. 300), though the contrary has been held where the chose was not a specialty (Scribner *v.* Bullitt, 1 Blackf. (Ind.) 112; Kincaid *v.* Higgins, 1 Bibb (Ky.) 396. But see McConnell *v.* Morrison, 1 Litt. (Ky.) 206).

A plea of non est factum, payment, and set-off does not put the assignment in issue in an action of debt, by an assignee of the debt, against the debtor. Ragland *v.* Ragland, 5 Mo. 54.

Where, in a suit on an assigned account, defendant pleads the general issue, he denies plaintiff's right of action but not his capacity to sue. Brown *v.* Curtis, 128 Cal. 193, 60 Pac. 773.

Verification.—In a number of states, in order to compel the assignee to prove the assignment to him, the denial of the assignment must be by a plea or answer, duly verified.

Alabama.— Bancroft *v.* Paine, 15 Ala. 834.

Arkansas.— School Dist. No. 7 *v.* Reeve, 56 Ark. 68, 19 S. W. 106, but the statute only covers assignments in writing.

Kansas.— School Dist. *v.* Carter, 11 Kan. 445, relating to written assignments.

Kentucky.— Burks *v.* Howard, 2 B. Mon. (Ky.) 66, relating to assignments of bonds.

Texas.— Carpenter *v.* Historical Pub. Co., (Tex. Civ. App. 1894) 24 S. W. 685, relating to assignments and indorsements of written instruments. But the statute only applies where the action is brought on the instrument assigned, and not where the instrument is used as title in an action of trespass. Park *v.* Glover, 23 Tex. 469.

See also, generally, Pleading.

26. Thus, where an action was brought by the assignee of a lease against the lessee, a plea that the latter did pay the lessor and the assigns and owner the sum of eight hundred dollars per year quarterly, is not good, as it does not show whether the payment was to the lessor or to his assignee. Willard *v.* Tillman, 19 Wend. (N. Y.) 358. See also, generally, Payment.

27. See Caulfield *v.* Sanders, 17 Cal. 569; Van Dyke *v.* Gardner, 22 Misc. (N. Y.) 113, 49 N. Y. Suppl. 328. See also Ege *v.* Kauffman, 1 Watts & S. (Pa.) 120; Evans *v.* Evans, 1 Phila. (Pa.) 113, 7 Leg. Int. (Pa.) 187. See also *supra*, VII, C, 2; VII, D.

When in writing and under seal and duly

debt that there was no consideration for the assignment.[28] But it has been held to be a good defense, where the statute requires actions to be brought by the real parties in interest, that plaintiff is not the real party in interest.[29]

E. Issues and Proof — 1. In General. The proof will be confined to the points in issue.[30]

2. Proof Under General Issue. Under a general denial, evidence in regard to the consideration paid for the assignment is inadmissible;[31] and a finding of fraud in an assignment is improper under such a denial, as being outside of the issues.[32]

3. Variance. The proof must support the allegations, and, where there is a material variance between the allegations in regard to an assignment and the proof offered, the action must fail.[33] Where plaintiff's recovery depends on an assignment which has been put in issue, he must prove it.[34]

acknowledged, defendant cannot question the validity of the assignment. Livingston *v.* Spero, 18 Misc. (N. Y.) 243, 41 N. Y. Suppl. 606, 75 N. Y. St. 999.

An accord and satisfaction between debtor and assignor, prior to notice of assignment, is a good defense against the assignee. Shade *v.* Creviston, 93 Ind. 591. See also, generally, Accord and Satisfaction, 1 Cyc. 305.

28. Want of consideration.—Glendale Fruit Co. *v.* Hirst, (Ariz. 1899) 59 Pac. 103; Caulfield *v.* Sanders, 17 Cal. 569; Robinson Reduction Co. v. Johnson, 10 Colo. App. 135, 50 Pac. 215; Toplitz *v.* King Bridge Co., 20 Misc. (N. Y.) 576, 46 N. Y. Suppl. 418, where rights of creditors are not involved. See also *supra*, III, B, 3, c.

29. That action is not brought by real party in interest.— Lawrence *v.* Long, 18 Ind. 301; Crum *v.* Stanley, 55 Nebr. 351, 75 N. W. 851; Henley *v.* Evans, 54 Nebr. 187, 74 N. W. 578. See also *supra*, VIII, A, 3, c.

30. See Barstow *v.* McLachlan, 99 Ill. 641; Crawford *v.* Duncan, 6 Ky. L. Rep. 734; Burke *v.* New York, 7 N. Y. App. Div. 128, 40 N. Y. Suppl. 81. See also General Electric Co. *v.* Black, 19 Mont. 110, 47 Pac. 639.

Where there is no plea denying the assignment, no evidence in regard to it is admissible. Wood *v.* Brewer, 66 Ala. 570.

Where an assignment is merely denied, proof that the assignment was invalid is inadmissible. Clark *v.* Geery, 40 N. Y. Super. Ct. 227. But defendant who denies an assignment alleged by plaintiff may disprove the title of plaintiff by showing a previous assignment. Donai *v.* Metropolitan El. R. Co., 14 N. Y. St. 264.

Where the ownership of a chose in action sued on is not put in issue, proof that the cause of action has been assigned is inadmissible. Gulf, etc., R. Co. *v.* Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829.

31. Consideration.— Jacobs *v.* Mitchell, 2 Colo. App. 456, 31 Pac. 235; Wolff *v.* Matthews, 39 Mo. App. 376.

32. Finding of fraud.— McKiernan *v.* Lenzen, 56 Cal. 61.

That assignment was without recourse may be shown by defendant under the general issue, in an action of assumpsit by assignee against assignor. McSmithee *v.* Feamster, 4 W. Va. 673.

In an action by an assignee against his immediate assignor after failure to recover of the obligor on the assigned obligation, the assignor could not, under the general issue, show that the assignee had given the obligor a new credit under an agreement to accept something else in lieu of a performance of the contract, and had refused to accept performance of the obligation on the day it fell due. Adam *v.* Hodgen, 1 T. B. Mon. (Ky.) 87.

33. Proof must support allegations.—Clark *v.* Mix, 15 Conn. 152; Hobart *v.* Andrews, 21 Pick. (Mass.) 526, holding that where a declaration alleges an absolute assignment and the proof shows that there is a condition, the performance of which plaintiff is bound to show, the variance is fatal. See Seeley *v.* Albrecht, 41 Mich. 525, 2 N. W. 667; Horne *v.* Hoyle, 28 Fed. 743.

But, where the variance is in an immaterial particular, the variance will not be fatal, as where the allegation was of an assignment, and the proof shows an absolute assignment (McLane *v.* Riddle, 19 Ala. 180), or where the complaint alleged an assignment by a corporation and the proof showed an assignment by its receivers (Toplitz *v.* King Bridge Co., 20 Misc. (N. Y.) 576, 46 N. Y. Suppl. 418).

The allegation as to the date of an assignment need not be proved as laid; it is sufficient if the proof shows an assignment before the commencement of the action by assignee. Canfield *v.* McIlwaine, 32 Md. 94; Haile *v.* Richardson, 2 Strobh. (S. C.) 114.

34. Must prove assignment, when.— *Illinois.*— See Hall *v.* Freeman, 59 Ill. 55.

Indiana.— But need not unless assignment put in issue by plea under oath. Lassiter *v.* Jackman, 88 Ind. 118. But see Arnold *v.* Sturges, 5 Blackf. (Ind.) 256.

Kentucky.— Walter *v.* Clark, 6 J. J. Marsh. (Ky.) 629.

Louisiana.— Wadsworth *v.* New Orleans, 46 La. Ann. 545, 15 So. 202; Terry *v.* Hennen, 4 La. Ann. 458.

Maryland.— But not necessary to prove formal assignment where debtor had recognized the ownership of the assignee and had paid part of debt to him. Lamar *v.* Manro, 10 Gill & J. (Md.) 50.

Missouri.— Turner *v.* Hayden, 33 Mo. App. 15.

New Jersey.— Nixon *v.* Dickey, 3 N. J. L. 252.

New York.— Vestner *v.* Findlay, 10 Misc.

F. Evidence[35]—**1. Presumptions**[36]— **a. As to Execution and Delivery.** It will be presumed, in the absence of evidence to the contrary, that an assignment was executed and delivered on the day of its date.[37] Where an officer of a corporation assigns an instrument, his authority to do so is presumed until the contrary is shown.[38]

b. As to Consideration. In an action by an assignee of a chose in action assigned to him by the surviving partner of a firm, the assignment will be presumed to have been made on a valid consideration in the course of winding up the partnership affairs.[39] Where an assignment is absolute it will, until the contrary is shown, be presumed to be upon a sufficient consideration.[40]

c. As to Compliance With Condition. Where an instrument was indorsed with a condition, without compliance with which plaintiff would not be entitled to the instrument, it will be presumed, from his possession of the instrument, that the condition was complied with.[41]

2. Burden of Proof — a. In General. The burden of proof on an issue of fraud in a prior assignment raised by a subsequent assignee is upon the subsequent assignee.[42] Where an assignment of a note is admitted, but the competency of the assignor to make it is denied, the burden is on the party alleging the incompetency.[43]

b. To Show Assignment. Where an assignment is put in issue, the party alleging the assignment has the burden of proof to establish it.[44]

c. To Show Notice to Debtor. Where the defense is payment to the assignor, the burden to prove notice to the debtor of the assignment before the payment is upon plaintiff.[45]

d. To Show Promise of Debtor to Pay. The burden of proving a promise of debtor to pay assignee is on the latter.[46]

(N. Y.) 410, 31 N. Y. Suppl. 138, 63 N. Y. St. 519; Buffalo Ice Co. *v.* Cook, 9 Misc. (N. Y.) 434, 29 N. Y. Suppl. 1057, 61 N. Y. St. 731.

Ohio.— Baltimore, etc., R. Co. *v.* Gibson, 41 Ohio St. 145.

Texas.— Childress *v.* Smith, (Tex. 1897) 40 S. W. 389.

See 4 Cent. Dig. tit. "Assignments," § 228.

But defendant may, by his admissions, render proof of the assignment unnecessary. Torrey *v.* Standish, 16 N. Y. Suppl. 5, 40 N. Y. St. 713.

Though a written assignment is necessary, if the opposite party alleges a transfer of a mortgage to a person, the latter need not prove a written transfer. Burgwyn Bros. Tobacco Co. *v.* Bentley, 90 Ga. 508, 16 S. E. 216. See also Harris *v.* Jaffray, 3 Harr. & J. (Md.) 543; Moses *v.* Hatfield, 27 S. C. 324, 3 S. E. 538; Tennent *v.* Pattons, 6 Leigh (Va.) 196.

35. See also, generally, Evidence.

36. See also *supra*, note 56, p. 29; note 69, p. 31; note 9, p. 65.

37. Date of execution and delivery.— Weire *v.* Davenport, 11 Iowa 49, 77 Am. Dec. 132; Bell *v.* Davis, 8 Barb. (N. Y.) 210.

38. Authority to execute.—Belden *v.* Meeker, 47 N. Y. 307; Vergennes Bank *v.* Warren, 7 Hill (N. Y.) 91.

39. Validity of consideration.— Willson *v.* Nicholson. 61 Ind. 241.

40. Sufficiency of consideration.—Belden *v.* Meeker, 47 N. Y. 307; Eno *v.* Crooke, 10 N. Y. 60.

41. Sprague *v.* Hosmer, 82 N. Y. 466.

Where, under a statute, claimants to land and their assignees were entitled to patents to the lands, and a person claiming under such a claimant obtained a patent in his own name, there being no evidence as to how he procured the patent in his own name, it was presumed that he had an assignment from the claimant. Rowland *v.* Crawford, 7 Harr. & J. (Md.) 52.

42. Fraud.— Daily *v.* Warren, 80 Va. 512.

43. Incompetency of assignor.— Wood *v.* Neely, 7 Baxt. (Tenn.) 586.

44. *Alabama.*— Jarrell *v.* Lillie, 40 Ala. 271.

Indiana.— Stair *v.* Richardson, 108 Ind. 429, 9 N. E. 300.

Iowa.— Hay *v.* Frazier, 49 Iowa 454.

Kentucky.— Domestic Sewing Mach. Co. *v.* Murphy, 15 Ky. L. Rep. 815.

New York.—See St. John *v.* Coates, 63 Hun (N. Y.) 460, 18 N. Y. Suppl. 419, 45 N. Y. St. 431 [*affirmed* in 140 N. Y. 634, 35 N. E. 891, 55 N. Y. St. 930].

United States.— *Compare* Tebbetts *v.* U. S., 5 Ct. Cl. 607.

45. Burritt *v.* Tidmarsh, 1 Ill. App. 571; Heermans *v.* Ellsworth, 64 N. Y. 159.

As to necessity for notice to debtor of the assignment see *supra*, III, B, 4.

So, where a set-off of a note, executed by assignor, is claimed by defendant, the burden is on plaintiff to show that the assignment to him was before the note of assignor fell due. Jervey *v.* Stauss, 11 Rich. (S. C.) 376.

46. Auerbach *v.* Pritchett, 58 Ala. 451.

3. Admissibility. Evidence which tends to support the issues made is admissible.[47] Judgments in actions on an assigned chose are not evidence against parties to the assignment who were not parties to the action in which the judgment was obtained.[48] Where an assignment is in writing parol evidence will not be admitted to show its contents in the absence of a showing that would permit the introduction of secondary evidence;[49] nor can the terms of an assignment be modified or enlarged by parol evidence.[50]

4. Sufficiency — a. To Establish an Assignment. Evidence of the assignment should be of a direct and positive character.[51] Consent to a partial assign-

As to the necessity of promise of debtor to pay see *supra*, III, B, 6.

47. *Illinois.*— Evidence of an agreement of an assignor to transfer property is admissible on an issue of assignment. Erickson *v.* Lyon, 26 Ill. App. 17.

Iowa.— Chicago University *v.* Emmert, 108 Iowa 500, 76 N. W. 285.

Michigan.— Cilley *v.* Van Patten, 68 Mich. 80, 35 N. W. 831.

Missouri.— Nanson *v.* Jacob, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531.

New York.— Green *v.* Hill, 5 N. Y. App. Div. 552, 39 N. Y. Suppl. 436; Staunton *v.* Swann, 10 N. Y. Civ. Proc. 12; Whitlock *v.* McKechnie, 14 N. Y. Super. Ct. 427; Carrere *v.* Dun, 55 N. Y. Suppl. 441.

Oregon.— Farmers', etc., Nat. Bank *v.* Hunter, 35 Oreg. 188, 57 Pac. 424.

Tennessee.— Evidence that a firm took charge of a store, and that there was a change in the possession, is competent on the issue of assignment. Ward *v.* Tennessee Coal, etc., R. Co., (Tenn. Ch. 1900) 57 S. W. 193.

Washington.— Latimer *v.* Baker, (Wash. 1901) 64 Pac. 899.

Admissions of the parties are admissible. — Mitander *v.* Sonneborn, 29 Hun (N. Y.) 407. Admissions of an assignor that he had assigned a claim competent evidence. Eagle *v.* Ross, 67 Ind. 110. Admissions made by an assignor before the assignment admissible against the assignee. Scott *v.* Coleman, 5 Litt. (Ky.) 349, 15 Am. Dec. 71.

Evidence in regard to consideration for the assignment has been held to be inadmissible in an action at law by assignee against the debtor. Wolff *v.* Matthews, 39 Mo. App. 376; Chapin *v.* Hollister, 7 Lans. (N. Y.) 456.

Evidence of circumstances surrounding the assignment is admissible. Renton *v.* Monnier, 77 Cal. 449, 19 Pac. 820.

48. Judgments.— Swepson *v.* Harvey, 69 N. C. 387.

In an action by an assignee against an assignor of a note a judgment rendered for defendant in an action by the assignee against the maker, where the defense was payment to the assignor before the assignment, is not evidence against the assignor, who was not a party to the former action. Gaines *v.* Patterson, 3 Dana (Ky.) 408; Morgan *v.* Simmons, 3 J. J. Marsh. (Ky.) 611; Maupin *v.* Compton, 3 Bibb (Ky.) 214. See also Samuel *v.* Hall, 9 B. Mon. (Ky.) 374.

49. Parol evidence to show contents.— Erickson *v.* Lyon, 26 Ill. App. 17.

50. Parol evidence to enlarge or modify.— Kuhn *v.* Schwartz, 33 Mo. App. 610; Beezley *v.* Crossen, 16 Oreg. 72, 17 Pac. 577. *Contra*, Foster *v.* Trenary, 65 Iowa 620, 22 N. W. 898.

A consideration, other than that recited in the assignment, cannot be shown by parol when the assignment is attacked for fraud. Turner *v.* Union Nat. Bank, 10 Utah 77, 37 Pac. 95; Turner *v.* Wells, 10 Utah 75, 37 Pac. 94; Turner *v.* Utah Title Ins., etc., Co., 10 Utah 61, 37 Pac. 91.

51. Direct and positive evidence.— *California.*— Gustafson *v.* Stockton, etc., R. Co., 132 Cal. 619, 64 Pac. 995.

Illinois.— See Woods *v.* Roberts, 185 Ill. 489, 57 N. E. 426 [*reversing*, in part, 82 Ill. App. 630].

Maine.— McNear *v.* Atwood, 17 Me. 434.

New Jersey.— See George *v.* George, (N. J. 1896) 35 Atl. 392.

New York.— Pottier, etc., Mfg. Co. *v.* Noel, 60 N. Y. Super. Ct. 207, 17 N. Y. Suppl. 366, 44 N. Y. St. 201 [*affirmed* in 138 N. Y. 606, 33 N. E. 1082, 51 N. Y. St. 932]; Paige *v.* New York, 11 N. Y. Suppl. 496, 33 N. Y. St. 844. *Compare* Robinson *v.* Chinese Charitable, etc., Assoc., 35 N. Y. App. Div. 439, 54 N. Y. Suppl. 858; Wolcott *v.* Merchants' Gargling Oil Co., 60 N. Y. Suppl. 862.

Oregon.— Beezley *v.* Crossen, 16 Oreg. 72, 17 Pac. 577.

United States.— But see Tebbetts *v.* U. S., 5 Ct. Cl. 607.

Assignor's admissions may be sufficient to establish an assignment. McLane *v.* Riddle, 19 Ala. 180 [*overruling* Moore *v.* Hubbard, 4 Ala. 187]; Heath *v.* Powers, 9 Mo. 774; Malone's Estate, 8 Wkly. Notes Cas. (Pa.) 179.

Bill of sale of an account, though duly signed and witnessed, is not sufficient proof of the assignment. Bush *v.* Meacham, 53 Mich. 574, 19 N. W. 192.

Evidence of the execution of an assignment, and its production by the assignee, are sufficient to establish the assignment. Hartley *v.* Cataract Steam Engine Co. No. 2, 19 N. Y. Suppl. 121, 46 N. Y. St. 374.

In an action of debt under a parol assignment, plaintiff must show a completed assignment. Seymour *v.* Aultman, 109 Iowa 297, 80 N. W. 401; Erickson *v.* Kelly, 9 N. D. 12, 81 N. W. 77.

Mere possession of a non-negotiable chose is not sufficient proof of title by assignee. School Dist. No. 7 *v.* Reeve, 56 Ark. 68, 19 S. W. 106; Turner *v.* Hayden, 33 Mo. App. 15 [but see Singleton *v.* Mann, 3 Mo. 464; Himes *v.* McKinney, 3 Mo. 382]; Rush *v.*

ment may be shown by facts and circumstances showing knowledge and acquiescence on the part of the debtor.[52]

b. To Show Notice of Assignment. In the absence of other proof, commencement of suit is notice of the assignment to plaintiff.[53]

G. Trial[54] — **1. In General.** Where the statute requires the assignor to be made a party to answer to his interest, the court may, after verdict, permit assignor to appear and disclaim interest in the chose.[55] Where a chose was so assigned that plaintiff acquired the legal title, but not the beneficial title, the court may, in furtherance of justice, on payment of costs, permit assignee to acquire the beneficial interest and proceed with the action.[56]

2. Questions of Law and Fact. What is a legal transfer is a question of law for the court.[57] Where an assignment depends on writings, the question as to the existence of an assignment is for the court.[58] Where the questions in issue depend on parol evidence the jury are to determine them.[59] Whether an assignment has been abandoned is a question of fact for the jury.[60]

H. Judgment. A joint judgment may be rendered in favor of an assignee against two assignors, who jointly assigned a bond for the conveyance of land, although they were unequally interested therein.[61]

Haggard, 68 Tex. 674, 5 S. W. 683; Hoffman *v.* Bignall, 1 Tex. App. Civ. Cas. § 706.

In a proceeding in equity where it appeared that a bond made to A, though not indorsed, had, for a long time, been in the possession of B without any claim thereto by A or his representative, it would be presumed that B was the owner of the bond. Tate *v.* Tate, 85 Va. 205, 7 S. E. 352.

52. Partial assignment.—Crawford *v.* Wolf, 29 Iowa 567.

53. Northern Bank *v.* Kyle, 7 How. (Miss.) 360. *Compare* Brady *v.* Loring, 70 Ill. App. 191.

As to the necessity for notice to debtor of the assignment see *supra*, III, B, 4.

54. See also, generally, Trial.

55. Disclaimer of interest after verdict.— Morrison *v.* Ross, 113 Ind. 186, 14 N. E. 479.

56. Acquisition of beneficial interest by plaintiff.— Hoagland *v.* Van Etten, 23 Nebr. 462, 36 N. W. 755.

57. Legality of assignment.—Myers *v.* King, 42 Md. 65; Wood *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1897) 40 S. W. 24.

58. Existence of written assignment.—Snyder *v.* Kurtz, 61 Iowa 593, 16 N. W. 722; Clark *v.* Edney, 28 N. C. 50; Wood *v.* Gulf, etc., R. Co., 15 Tex. Civ. App. 322, 40 S. W. 24.

59. Questions for jury.— *Georgia.*—Haas *v.* Old Nat. Bank, 91 Ga. 307, 18 S. E. 188.

Iowa.— Gary *v.* Northwestern Mut. Aid Assoc., 87 Iowa 25, 53 N. W. 1086, consideration.

New Hampshire.—Jordan *v.* Gillen, 44 N. H. 424.

New York.— Liberty Wall-Paper Co. *v.* Stoner Wall-Paper Mfg. Co., 59 N. Y. App. Div. 353, 69 N. Y. Suppl. 355.

Pennsylvania.— Schwartz *v.* Hersker, 140 Pa. St. 550, 21 Atl. 401.

Wisconsin.— See Blackman *v.* Dunkirk, 19 Wis. 183.

See *supra*, note 91, p. 35.

60. Abandonment of assignment.— Wilson *v.* Pearson, 20 Ill. 81.

61. Emmerson *v.* Claywell, 14 B. Mon. (Ky.) 15, 58 Am. Dec. 645. See, generally, Judgments.

ASSIGNMENTS FOR BENEFIT OF CREDITORS

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CROSS-REFERENCES

For Assignment For Benefit of Creditors:
Affecting Operation of Statute of Limitations, see LIMITATIONS OF ACTIONS.
Affecting Prior Attachment Lien, see ATTACHMENT.
As Act of Bankruptcy, see BANKRUPTCY.
As Ground of Attachment, see ATTACHMENT.
In Bankruptcy, see BANKRUPTCY.
In Insolvency, see INSOLVENCY.
To Receiver, see RECEIVERS.
Composition With Creditors, see COMPOSITIONS WITH CREDITORS.
Involuntary Assignment, see BANKRUPTCY; INSOLVENCY.

I. DEFINITIONS.

A. In General. An assignment for the benefit of creditors is well defined to be "a transfer[1] by a debtor[2] of some or all of his property[3] to an assignee in trust,[4] to apply the same, or the proceeds thereof, to the payment of some or all of his debts,[5] and to return the surplus, if any, to the debtor."[6]

1. As to the nature of the transfer see *infra*, II.
2. As to who may assign see *infra*, II, B.
3. As to property to be included see *infra*, II, C.
4. As to the appointment, qualification, and tenure of assignee see *infra*, XI.
As to the necessity for an assignee see *infra*, II, A, 3.
5. As to debts to be included see *infra*, II, D.
As to the administration of the assigned estate see *infra*, XII.
6. Bartlett *v.* Teah, 1 McCrary (U. S.) 176, 1 Fed. 768 [*quoting* Burrill Assignm. § 2].
For other definitions see Weber *v.* Mick, 131 Ill. 520, 23 N. E. 646; Blackman *v.* Metropolitan Dairy Co., 77 Ill. App. 609; Wiener *v.* Davis, 18 Pa. St. 331; Appolos *v.* Brady, 49 Fed. 401, 4 U. S. App. 209, 1 C. C. A. 299; Rapalje & L. L. Dict.
For the statutes of the several states relating to assignments for the benefit of creditors see:
Alabama.— Civ. Code (1896), c. 113.
Arizona.— Rev. Stat. (1901), tit. 5.
Arkansas.— Sandels & H. Dig. (1894), c. 8.
California.— Civ. Code (1899), § 3449 *et seq.*
Colorado.— Mills' Anno. Stat. (1891), c. 9.
Connecticut.— Gen. Stat (1888), c. 52.
Delaware.— Rev. Code (1893), c. 121.
Florida.—Rev. Stat. (1892), § 2307 *et seq.*; Dorr *v.* Schmidt, 38 Fla. 354, 21 So. 279.
Georgia.— 2 Code (1895), § 2697 *et seq.*
Idaho.— Rev. Stat. (1887), § 5875 *et seq.*
Illinois.— Rev. Stat. (1899), c. 10b.
Indiana.— Thornton's Stat. (1897), c. 13.

B. Unintentional or Constructive Assignments. While, under some statutes, it is necessary that there should be an actual intention on the part of the debtor to make an assignment for the benefit of his creditors,[7] under other statutes there results from the doing, or suffering to be done, by debtors in respect to their property, when such debtors are in failing circumstances, a species of conveyance known as a constructive assignment for the benefit of creditors. These conveyances may generally be defined to be assignments, which, resulting from acts not intended to so operate, the law lays hold on and construes to work an assignment for the benefit of creditors of the debtor, who does, or suffers the doing, of said acts.[8] The conveyances and the means whereby particular creditors

Iowa.— Code (1897), § 3071 *et seq.*
Kansas.— Gen. Stat. (1899), c. 6.
Kentucky.— Stat. (1899), c. 7.
Louisiana.—Merrick's Rev. Civ. Code (1900), art. 2170 *et seq.*
Maryland.— Pub. Gen. Laws (1888), arts. 16, 47.
Massachusetts.— Rev. Laws (1902), c. 147, § 21 *et seq.*
Michigan.— Comp. Laws (1897), tit. 15.
Minnesota.— Stat. (1894), § 4227 *et seq.*
Mississippi.—Anno. Code (1892), c. 8.
Missouri.— Rev. Stat. (1899), c. 2.
Montana.—Civ. Code (1895), § 4510 *et seq.*
Nebraska.— Comp. Laws (1901), c. 6.
Nevada.— Comp. Stat. (1900), § 3930½ *et seq.*
New Hampshire.— Pub. Stat. (1900), c. 201.
New Jersey.— Gen. Stat. (1895), p. 77 *et seq.*
New Mexico.— Comp. Laws (1897), § 2827 *et seq.*
New York.— Birdseye's Rev. Stat. (1901), p. 155 *et seq.*
North Carolina.—Acts (1893), c. 453.
North Dakota.— Rev. Codes (1899), § 6001 *et seq.*
Ohio.— Bates' Anno. Stat. (1900), § 6335 *et seq.*
Oklahoma.— Stat. (1893), c. 5.
Oregon.— Hill's Anno. Laws (1892), c. 28.
Pennsylvania.—Brightly's Purd. Dig. (1894), p. 139 *et seq.*
South Carolina.— Civ. Stat. (1893), c. 80.
South Dakota.—Comp. Laws (1887), § 4660 *et seq.*
Tennessee.— Code (1896), § 3523 *et seq.*
Texas.— Sayles' Civ. Stat. (1897), tit. 8.
Utah.— Rev. Stat. (1898), § 84 *et seq.*
Vermont.— Stat. (1894), c. 103.
Wisconsin.— Stat. (1898), c. 80.
Wyoming.— Rev. Stat. (1899), § 2458 *et seq.*

Compare also, generally, INSOLVENCY.

7. Intent to assign necessary.— See list of statutes cited *supra*, note 6, p. 120; and Roberts *v.* Press, 97 Iowa 475, 66 N. W. 756; Crow *v.* Beardsley, 68 Mo. 435; Drake *v.* Paulhamus, 66 Fed. 895, 29 U. S. App. 522, 14 C. C. A. 162; Mills *v.* Pessels, 55 Fed. 588, 13 U. S. App. 49, 5 C. C. A. 215.

8. *Alabama.*— Operating as an assignment. Lehman-Durr Co. *v.* Griel Bros. Co., (Ala. 1898) 24 So. 49; Fairfield Packing Co. *v.* Kentucky Jeans Clothing Co., 110 Ala. 536, 20 So. 63; Anniston Carriage Works *v.* Ward, 101 Ala. 670, 14 So. 417; Collier *v.* Wood, 85 Ala. 91, 4 So. 840; Warten *v.* Matthews, 80 Ala. 429; Ordway *v.* White, 80 Ala. 244; Danner *v.* Brewer, 69 Ala. 191; Shirley *v.* Teal, 67 Ala. 449; Du Bose *v.* Carlisle, 51 Ala. 590; Longmire *v.* Goode, 38 Ala. 577; Warren *v.* Lee, 32 Ala. 440; Holt *v.* Bancroft, 30 Ala. 153. Not operating as an assignment. Bell *v.* Goetter, 106 Ala. 462, 17 So. 709; Otis *v.* Maguire, 76 Ala. 295; Heyer *v.* Bromberg, 74 Ala. 524; Commercial Bank *v.* Brewer, 71 Ala. 574; Crawford *v.* Kirksey, 55 Ala. 282, 28 Am. Rep. 704; Harkins *v.* Bailey, 48 Ala. 376.

Arkansas.— Penzel Co. *v.* Jett, 54 Ark. 428, 16 S. W. 120; Box *v.* Goodbar, 54 Ark. 6, 14 S. W. 925; State *v.* Dupuy, 52 Ark. 48, 11 S. W. 964. But *compare* Robson *v.* Tomlinson, 54 Ark. 229, 15 S. W. 456; Richmond *v.* Mississippi Mills, 52 Ark. 30, 11 S. W. 960, 4 L. R. A. 413. Not operating as an assignment. Blass *v.* Goodbar, (Ark. 1898) 47 S. W. 630; Rice *v.* Wood, 61 Ark. 442, 33 S. W. 636, 31 L. R. A. 609; Wood *v.* Adler-Goldman Commission Co., 59 Ark. 270, 27 S. W. 490; Goodbar *v.* Locke, 56 Ark. 314, 19 S. W. 924; Fecheimer *v.* Robertson, 53 Ark. 101, 13 S. W. 423.

California.— Sabichi *v.* Chase, 108 Cal. 81, 41 Pac. 29; Saunderson *v.* Broadwell, 82 Cal. 132, 23 Pac. 36; Lawrence *v.* Neff, 41 Cal. 566; Wellington *v.* Sedgwick, 12 Cal. 469; Morgentham *v.* Harris, 12 Cal. 245; Dana *v.* Stanford, 10 Cal. 269.

Colorado.— Burchinell *v.* Koon, 25 Colo. 59, 52 Pac. 1100 [*affirming* 8 Colo. App. 463, 46 Pac. 932]; McDermith *v.* Voorhees, 16 Colo. 402, 27 Pac. 250, 25 Am. St. Rep. 286; Bailey *v.* American Nat. Bank, 12 Colo. App. 66, 54 Pac. 912; Jefferson County Bank *v.* Hummel, 11 Colo. App. 337, 53 Pac. 286; Burchinell *v.* Bennett, 10 Colo. App. 502, 52 Pac. 51; John V. Farwell Co. *v.* Sweetzer, 10 Colo. App. 421, 51 Pac. 1012; McCord-Bragdon Grocer Co. *v.* Garrison, 5 Colo. App. 60, 37 Pac. 31; Kellogg *v.* Thropp, 4 Colo. App. 470, 36 Pac. 447. See also May *v.* Tenney, 148 U. S. 60, 13 S. Ct. 491, 37 L. ed. 368 [*distinguishing* White *v.* Cotzhausen, 129 U. S. 329, 9 S. Ct. 309, 32 L. ed. 677], construing Colorado statute.

Connecticut.— De Wolf *v.* A. & W. Sprague Mfg. Co., 49 Conn. 282; Beers *v.* Lyon, 21 Conn. 604; Goodell *v.* Williams, 21 Conn. 419; Bates *v.* Coe, 10 Conn. 280.

Dakota.— Straw *v.* Jenks, 6 Dak. 414, 43 N. W. 941 [*overruled* in Cutter *v.* Pollock, 4

are given title to or liens upon a debtor's property and which the law converts into a general assignment for the benefit of creditors are regulated by the stat-

N. D. 205, 59 N. W. 1062, 50 Am. St. Rep. 644, 25 L. R. A. 377].

Delaware.— Stockley *v.* Horsey, 4 Houst. (Del.) 603; Tunnell *v.* Jefferson, 5 Harr. (Del.) 206; Waters *v.* Comly, 3 Harr. (Del.) 117; Newell *v.* Morgan, 2 Harr. (Del.) 225.

Georgia.— Johnson *v.* Adams, 92 Ga. 551, 17 S. E. 898; Hollingsworth *v.* Johns, 92 Ga. 428, 17 S. E. 621; Kiser *v.* Dannenberg, 88 Ga. 541, 15 S. E. 17; Stillwell *v.* Savannah Grocery Co., 88 Ga. 100, 13 S. E. 963; Powell *v.* Kelly, 82 Ga. 1, 9 S. E. 278, 3 L. R. A. 139; Coggins *v.* Stephens, 73 Ga. 414 [*followed* in Fechheimer *v.* Baum, 43 Fed. 719]; Watkins *v.* Pope, 38 Ga. 514; Watkins *v.* Jenks, 24 Ga. 431; Norton *v.* Cobb, 20 Ga. 44; Marshall *v.* Morris, 16 Ga. 368. See also Fulton *v.* Gibian, 98 Ga. 224, 25 S. E. 431.

Illinois.— Browne-Chapin Lumber Co. *v.* Union Nat. Bank, 159 Ill. 458, 42 N. E. 967; Wright *v.* Hutchinson, 156 Ill. 575, 41 N. E. 172 [*affirming* 54 Ill. App. 535; *distinguishing* Farwell *v.* Cohen, 138 Ill. 216, 28 N. E. 35, 32 N. E. 893, 18 L. R. A. 281]; Price *v.* Laing, 152 Ill. 380, 38 N. E. 921; Peterson *v.* Brabrook Tailoring Co., 150 Ill. 290, 37 N. E. 242; Walker *v.* Ross, 150 Ill. 50, 36 N. E. 986; Young *v.* Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372; Hanford *v.* Prouty, 133 Ill. 339, 24 N. E. 565; Farwell *v.* Nilsson, 133 Ill. 45, 24 N. E. 74; Weber *v.* Mick, 131 Ill. 520, 23 N. E. 646; Preston *v.* Spaulding, 120 Ill. 208, 10 N. E. 903; Roseboom *v.* Whittaker, 33 Ill. App. 442; Weir *v.* Dustin, 28 Ill. App. 605; White *v.* Cotzhausen, 129 U. S. 329, 9 S. Ct. 309, 32 L. ed. 677 [*distinguished* in May *v.* Tenney, 148 U. S. 60, 13 S. Ct. 491, 37 L. ed. 368], construing Illinois statute.

Indiana.— Dessar *v.* Field, 99 Ind. 548; Collins *v.* Kemp, 29 Ind. 281.

Indian Territory.— Hargadine-McKittrick Dry-Goods Co. *v.* Bradley, (Indian Terr. 1898) 43 S. W. 947.

Iowa.— Roberts *v.* Press, 97 Iowa 475, 66 N. W. 756; Butler *v.* Diddy, 83 Iowa 533, 49 N. W. 995 [*distinguishing* Burrows *v.* Lehndorff, 8 Iowa 96]; Letts *v.* McMaster, 83 Iowa 449, 49 N. W. 1035; King *v.* Gustafson, 80 Iowa 207, 45 N. W. 565; Wise *v.* Wilds, 77 Iowa 586, 42 N. W. 553; Van Patten *v.* Thompson, 73 Iowa 103, 34 N. W. 763; Aulman *v.* Aulman, 71 Iowa 124, 32 N. W. 240, 60 Am. Rep. 783; Garrett *v.* Burlington Plow Co., 70 Iowa 697, 29 N. W. 395, 69 Am. Rep. 461; Gage *v.* Parry, 69 Iowa 605, 29 N. W. 822; Carson *v.* Byers, 67 Iowa 606, 25 N. W. 826 [*following* Kohn *v.* Clement, 58 Iowa 589, 12 N. W. 550]; Cadwell's Bank *v.* Crittenden, 66 Iowa 237, 23 N. W. 646; Jaffray *v.* Greenbaum, 64 Iowa 492, 20 N. W. 775; Van Horn *v.* Smith, 59 Iowa 142, 12 N. W. 789; Farwell *v.* Howard, 26 Iowa 381; Davis *v.* Gibbon, 24 Iowa 257; Buell *v.* Buckingham, 16 Iowa 284, 85 Am. Dec. 516; Cowles *v.* Rickets, 1 Iowa 582. *Compare* Groetzinger *v.* Wyman, 105 Iowa 574, 75 N. W. 512. See also Davis *v.* Schwartz, 155 U. S. 631, 15 S. Ct. 237, 39 L. ed. 289; South Branch Lumber Co. *v.* Ott, 142 U. S. 622, 12 S. Ct. 318, 35 L. ed. 1136; Etheridge *v.* Sperry, 139 U. S. 266, 11 S. Ct. 565, 35 L. ed. 171; Younkin *v.* Collier, 47 Fed. 571, all construing Iowa statute.

Kentucky.— Ouerhacker *v.* Claflin, 96 Ky. 235, 16 Ky. L. Rep. 436, 28 S. W. 506; Darnell *v.* Lewis, 94 Ky. 455, 15 Ky. L. Rep. 222, 22 S. W. 843; Baker *v.* Kinnaird, 94 Ky. 5, 14 Ky. L. Rep. 695, 21 S. W. 237; Levis *v.* Zinn, 93 Ky. 628, 14 Ky. L. Rep. 867, 20 S. W. 1099; McCutcheon *v.* Caldwell, 90 Ky. 249, 12 Ky. L. Rep. 145, 13 S. W. 1072; Vinson *v.* McAlpin, 87 Ky. 357, 10 Ky. L. Rep. 182, 8 S. W. 872, 10 Ky. L. Rep. 349, 9 S. W. 165; Grimes *v.* Grimes, 86 Ky. 511, 9 Ky. L. Rep. 694, 6 S. W. 333; McCann *v.* Hill, 85 Ky. 574, 9 Ky. L. Rep. 137, 4 S. W. 337; Hoffman *v.* Brungs, 83 Ky. 400; McKee *v.* Scobee, 80 Ky. 124, 3 Ky. L. Rep. 680; Brooks *v.* Staton, 79 Ky. 174; Farmer *v.* Hawkins, 79 Ky. 182; King *v.* Moody, 79 Ky. 63; Taylor *v.* Taylor, 78 Ky. 470; Blincoe *v.* Lee, 12 Bush (Ky.) 358; Linthicum *v.* Fenley, 11 Bush (Ky.) 131; Thompson *v.* Heffner, 11 Bush (Ky.) 353; Elliott *v.* Harris, 9 Bush (Ky.) 237; Brewer *v.* Coshy, 8 Bush (Ky.) 388; Whitaker *v.* Garnett, 3 Bush (Ky.) 402; Oneil *v.* Miller, 2 Bush (Ky.) 289; Letcher *v.* Stayner, 2 Duv. (Ky.) 423; Given *v.* Gordon, 3 Metc. (Ky.) 538; Corn *v.* Sims, 3 Metc. (Ky.) 391; Hampton *v.* Morris, 2 Metc. (Ky.) 336; Terrill *v.* Jennings, 1 Metc. (Ky.) 450; Gunther *v.* Cary, 17 Ky. L. Rep. 1262, 34 S. W. 232; Traders Deposit Bank *v.* White, 16 Ky. L. Rep. 65, 26 S. W. 812; Citizens' Nat. Bank *v.* Renick, 13 Ky. L. Rep. 747, 18 S. W. 364; Besuden *v.* Anderson, 13 Ky. L. Rep. 370, 17 S. W. 196; First Nat. Bank *v.* Walker, 9 Ky. L. Rep. 999, 7 S. W. 890; James *v.* Zigler, 9 Ky. L. Rep. 869, 7 S. W. 632; Talbott *v.* Ewalt, 9 Ky. L. Rep. 908, 7 S. W. 630. *Compare* Cheek *v.* Grahn, (Ky. 1899) 51 S. W. 311; Bank of Commerce *v.* Windmuller, (Ky. 1899) 50 S. W. 548; Diamond Coal Co. *v.* Carter Dry-Goods Co., (Ky. 1899) 49 S. W. 438. See also Allen *v.* Dillingham, (Ky. 1898) 47 S. W. 1076; Laughlin *v.* First Nat. Bank, (Ky. 1898) 47 S. W. 623; Walker *v.* Davis, (Ky. 1897) 43 S. W. 406; Farmers Bank *v.* Rosenthal, (Ky. 1897) 42 S. W. 731; Trigg *v.* Ball, (Ky. 1897) 38 S. W. 701.

Massachusetts.— Henshaw *v.* Sumner, 23 Pick. (Mass.) 446.

Michigan.—Austin *v.* Kalamazoo First Nat. Bank, 100 Mich. 613, 59 N. W. 597; Oshkosh Nat. Bank *v.* Ironwood First Nat. Bank, 100 Mich. 485, 59 N. W. 231; Cluett *v.* Rosenthal, 100 Mich. 193, 58 N. W. 1009, 43 Am. St. Rep. 446; Weber *v.* Childs, 90 Mich. 498, 51 N. W. 543; Montreal Bank *v.* J. E. Potts Salt, etc., Co., 90 Mich. 345, 51 N. W. 512; Fitzgerald *v.* McCandlish, 89 Mich. 400, 50 N. W. 860; Warner *v.* Littlefield, 89 Mich.

utes of the several states; and where the case falls within the rule of construc-

329, 50 N. W. 721 [*approving* Walker *v.* White, 60 Mich. 427, 27 N. W. 554]; Bresson *v.* Musselman, 86 Mich. 186, 49 S. W. 39 [*following* Sheldon *v.* Mann, 85 Mich. 265, 48 N. W. 573]; Kendall *v.* Bishop, 76 Mich. 634, 43 N. W. 645; Dwight *v.* Scranton, etc., Lumber Co., 67 Mich. 507, 35 N. W. 94; Lyon *v.* Ballentine, 63 Mich. 97, 29 N. W. 837, 6 Am. St. Rep. 284; Root *v.* Potter, 59 Mich. 498, 26 N. W. 682; Neumann *v.* Calumet, etc., Min. Co., 57 Mich. 97, 23 N. W. 600; Rollins *v.* Van Baalen, 56 Mich. 610, 23 N. W. 332; Bay City State Bank *v.* Chapelle, 40 Mich. 447. See also Brown *v.* Grand Rapids Parlor Furniture Co., 58 Fed. 286, 16 U. S. App. 221, 7 C. C. A. 225, 22 L. R. A. 817, construing Michigan statute. *Compare* Chicago Lumbering Co. *v.* Powell, 120 Mich. 51, 78 N. W. 1022; Webber *v.* Hayes, 117 Mich. 256, 75 N. W. 622; Hill *v.* Mallory, 112 Mich. 387, 70 N. W. 1016.

Minnesota.— Truitt *v.* Caldwell, 3 Minn. 364, 74 Am. Dec. 764.

Missouri.— Calihan *v.* Powers, 133 Mo. 481, 34 S. W. 848; Western Mfg. Co. *v.* Woodson, 130 Mo. 119, 31 S. W. 1037; Jaffrey *v.* Mathews, 120 Mo. 317, 25 S. W. 187; Larrabee *v.* Franklin Bank, 114 Mo. 592, 21 S. W. 747, 35 Am. St. Rep. 774; Hargadine *v.* Henderson, 97 Mo. 375, 11 S. W. 218; Crow *v.* Beardsley, 68 Mo. 435; Splint *v.* Sullivan, 58 Mo. App. 582; Matter of Zwang, 39 Mo. App. 356; Rosenthal *v.* Green, 37 Mo. App. 272; Mills *v.* Williams, 31 Mo. App. 447. See also Chicago Union Nat. Bank *v.* Kansas City Bank, 136 U. S. 223, 10 S. Ct. 1013, 34 L. ed. 341; Kerbs *v.* Ewing, 22 Fed. 693; Martin *v.* Hausman, 14 Fed. 160, construing Missouri statute.

Montana.— Marshall *v.* Livingston Nat. Bank, 11 Mont. 351, 28 Pac. 312.

Nebraska.—Kilpatrick-Koch Dry Goods Co. *v.* Bremers, 44 Nebr. 863, 62 N. W. 1105; Davis *v.* Hilbourn, 41 Nebr. 35, 59 N. W. 379; Smith *v.* Phelan, 40 Nebr. 735, 59 N. W. 562; Jones *v.* Loree, 37 Nebr. 816, 56 N. W. 390 [*overruling* Stewart *v.* Stewart, 36 Nebr. 558, 54 N. W. 828; Costello *v.* Chamberlain, 36 Nebr. 45, 53 N. W. 1034; Hamilton *v.* Isaacs, 34 Nebr. 709, 52 N. W. 279; Brown *v.* Williams, 34 Nebr. 376, 51 N. W. 851; Hershiser *v.* Higman, 31 Nebr. 531, 48 N. W. 272, 28 Am. St. Rep. 527; Bonns *v.* Carter, 22 Nebr. 495, 35 N. W. 394, 20 Nebr. 566, 31 N. W. 381]; Davis *v.* Scott, 22 Nebr. 154, 34 N. W. 353; Grimes *v.* Farrington, 19 Nebr. 44, 26 N. W. 618. See also Allis *v.* Jones, 45 Fed. 148, construing Nebraska statute.

New Hampshire.— Kenefick *v.* Perry, 61 N. H. 362; Danforth *v.* Denny, 25 N. H. 155; Morse *v.* Powers, 17 N. H. 286; Barker *v.* Hall, 13 N. H. 298; Low *v.* Wyman, 8 N. H. 536.

New Jersey.—Muchmore *v.* Budd, 53 N. J. L. 369, 22 Atl. 518; Tillou *v.* Britton, 9 N. J. L. 120; Stites *v.* Champion, 49 N. J. Eq. 446, 24 Atl. 403; Livermore *v.* McNair, 34 N. J. Eq. 478; Brown *v.* Holcomb, 9 N. J. Eq. 297.

New York.—Tompkins *v.* Hunter, 149 N. Y. 117, 43 N. E. 532 [*following* Maass *v.* Falk, 146 N. Y. 34, 40 N. E. 504, 65 N. Y. St. 762, *affirming* 24 N. Y. Suppl. 448, 54 N. Y. St. 160]; Abegg *v.* Bishop, 142 N. Y. 286, 36 N. E. 1058, 58 N. Y. St. 788; Central Nat. Bank *v.* Seligman, 138 N. Y. 435, 34 N. E. 196, 53 N. Y. St. 14; Spelman *v.* Freedman, 130 N. Y. 421, 29 N. E. 765, 42 N. Y. St. 531; Manning *v.* Beck, 129 N. Y. 1, 29 N. E. 90, 41 N. Y. St. 199, 14 L. R. A. 198; Berger *v.* Varrelmann, 127 N. Y. 281, 27 N. E. 1065, 38 N. Y. St. 813, 12 L. R. A. 808; Hine *v.* Bowe, 114 N. Y. 350, 21 N. E. 733, 23 N. Y. St. 891 [*affirming* 46 Hun (N. Y.) 196]; Brown *v.* Guthrie, 110 N. Y. 435, 18 N. E. 254, 18 N. Y. St. 311 [*reversing* 39 Hun (N. Y.) 29]; Britton *v.* Lorenz, 45 N. Y. 51 [*affirming* 3 Daly (N. Y.) 23]; Curtis *v.* Leavitt, 15 N. Y. 9; Stein *v.* Levy, 55 Hun (N. Y.) 381, 8 N. Y. Suppl. 505, 29 N. Y. St. 94; Van Vleet *v.* Slauson, 45 Barb. (N. Y.) 317; Wynkoop *v.* Shardlow, 44 Barb. (N. Y.) 84, 29 How. Pr. (N. Y.) 368; Dillingham *v.* Flack, 17 N. Y. Suppl. 879, 43 N. Y. St. 810; Granger *v.* Lyman, 15 N. Y. Suppl. 735, 39 N. Y. St. 288; Boessneck *v.* Cohn, 7 N. Y. Suppl. 620, 26 N. Y. St. 969; Bowery Bank Case, 5 Abb. Pr. (N. Y.) 415, 16 How. Pr. (N. Y.) 56.

North Carolina.— National Bank *v.* Gilmer, 117 N. C. 416, 23 S. E. 333, 116 N. C. 684, 22 S. E. 2.

North Dakota.— Cutter *v.* Pollock, 4 N. D. 205, 59 N. W. 1062, 50 Am. St. Rep. 644, 25 L. R. A. 377 [*overruling* Straw *v.* Jenks, 6 Dak. 414, 43 N. W. 941].

Ohio.—Wambaugh *v.* Northwestern Mut. L. Ins. Co., 59 Ohio St. 228, 52 N. E. 839; Lee *v.* Hennick, 52 Ohio St. 177, 39 N. E. 473; Gashe *v.* Young, 51 Ohio St. 376, 38 N. E. 20; Pendery *v.* Allen, 50 Ohio St. 121, 33 N. E. 716, 19 L. R. A. 367; Cross *v.* Carstens, 49 Ohio St. 548, 31 N. E. 506; Rouse *v.* Merchants' Nat. Bank, 46 Ohio St. 493, 22 N. E. 293, 15 Am. St. Rep. 644, 5 L. R. A. 378; Jamison *v.* McNally, 21 Ohio St. 295; Fowler *v.* Trebein, 16 Ohio St. 493, 91 Am. Dec. 95; Stanton *v.* Keyes, 14 Ohio St. 443; Conrad *v.* Pancost, 11 Ohio St. 685; Justice *v.* Uhl, 10 Ohio St. 170; Floyd *v.* Smith, 9 Ohio St. 546; Bagaley *v.* Waters, 7 Ohio St. 360; Dickson *v.* Rawson, 5 Ohio St. 218; Harkrader *v.* Leiby, 4 Ohio St. 602; Bloom *v.* Noggle, 4 Ohio St. 45; Atkinson *v.* Tomlinson, 1 Ohio St. 237; Doremus *v.* O'Harra, 1 Ohio St. 45; Fassett *v.* Traber, 20 Ohio 540; Brown *v.* Webb, 20 Ohio 389; Wilcox *v.* Kellogg, 11 Ohio 394; Atkinson *v.* Jordan, 5 Ohio 293, 24 Am. Dec. 281; Farmers' Nat. Bank *v.* Miller, 9 Ohio Cir. Ct. 111; Canal Flour Feed Co. *v.* Shute, 10 Ohio Dec. (Reprint) 198, 19 Cinc. L. Bul. 180; Woodrow *v.* Sargent, 5 Ohio Dec. (Reprint) 209, 3 Am. L. Rec. 522; Philips *v.* Ammon-Stevens Co., 3 Ohio S. & C. Pl. Dec. 418, 2 Ohio N. P. 187; Roberts *v.* McWilliams, 3 Ohio Dec. (Reprint) 152, 4 Wkly. L. Gaz. 97. See also George T. Smith

tion, the statute will operate upon the transfer, whether it be a deed, mortgage,

Middlings Purifier Co. *v.* McGroarty, 136 U. S. 237, 10 S. Ct. 1017, 34 L. ed. 346; England *v.* Russell, 71 Fed. 818; Coolidge *v.* Curtis, 1 Bond (U. S.) 222, 6 Fed. Cas. No. 3,184, 7 Am. L. Reg. 334, construing Ohio statute.

Oregon.— Stout *v.* Watson, 19 Oreg. 251, 24 Pac. 230.

Pennsylvania.— Operating as an assignment. Mann *v.* Wakefield, 179 Pa. St. 398, 36 Atl. 244; Wallace *v.* Wainwright, 87 Pa. St. 263; Bittenbender *v.* Sunbury, etc., R. Co., 40 Pa. St. 269; Driesbach *v.* Becker, 34 Pa. St. 152; Lucas *v.* Sunbury, etc., R. Co., 32 Pa. St. 458; Blank *v.* German, 5 Watts & S. (Pa.) 36. Not operating as an assignment. Fox *v.* Curtis, 176 Pa. St. 52, 34 Atl. 952; Breneman's Estate, 150 Pa. St. 494, 24 Atl. 633; Lockhart *v.* Stevenson, 61 Pa. St. 64; Taylor *v.* Cornelius, 60 Pa. St. 187; Beans *v.* Bullitt, 57 Pa. St. 221; Vallance *v.* Miners' L. Ins., etc., Co., 42 Pa. St. 441; Gratz *v.* Pennsylvania R. Co., 41 Pa. St. 447; York County Bank *v.* Carter, 38 Pa. St. 446, 80 Am. Dec. 494; Griffin *v.* Rogers, 38 Pa. St. 382; Dubois' Appeal, 38 Pa. St. 231, 80 Am. Dec. 478; Henderson's Appeal, 31 Pa. St. 502; Guy *v.* McIlree, 26 Pa. St. 92; Chaffees *v.* Risk, 24 Pa. St. 432; Breading *v.* Boggs, 20 Pa. St. 33; Manufacturers', etc., Bank *v.* State Bank, 7 Watts & S. (Pa.) 335, 42 Am. Dec. 240; Blank *v.* German, 5 Watts & S. (Pa.) 36; *In re* Shafer's Estate, 8 Pa. Dist. 221; Reeves *v.* Reeves, 1 Chest. Co. Rep. (Pa.) 97; Ewing's Appeal, 1 Chest. Co. Rep. (Pa.) 34; Deer *v.* Sneathen, 34 Leg. Int. (Pa.) 290.

South Carolina.— Porter *v.* Stricker, 44 S. C. 183, 21 S. E. 635; Leake *v.* Anderson, 43 S. C. 448, 21 S. E. 439; Meinhard *v.* Youngblood, 41 S. C. 312, 19 S. E. 675; Mann *v.* Poole, 40 S. C. 1, 18 S. E. 145, 889; Monaghan Bay Co. *v.* Dickson, 39 S. C. 146, 17 S. E. 696, 39 Am. St. Rep. 704; McIntyre *v.* Legon, 38 S. C. 457, 17 S. E. 253; Archer *v.* Long, 38 S. C. 272, 16 S. E. 998; Putney *v.* Friesleben, 32 S. C. 492, 11 S. E. 337; Meinhard *v.* Strickland, 29 S. C. 491, 7 S. E. 838; Magovern *v.* Richard, 27 S. C. 272, 3 S. E. 340; Lamar *v.* Pool, 26 S. C. 441, 2 S. E. 322; Verner *v.* McGhee, 26 S. C. 248, 2 S. E. 113; Austin *v.* Morris, 23 S. C. 393; Wilks *v.* Walker, 22 S. C. 108, 53 Am. Rep. 706.

South Dakota.— Sandwich Mfg. Co. *v.* Max, 5 S. D. 125, 58 N. W. 14, 24 L. R. A. 524; Williams *v.* Harris, 4 S. D. 22, 54 N. W. 926, 46 Am. St. Rep. 753; Sandmeyer *v.* Dakota F. & M. Ins. Co., 2 S. D. 346, 50 N. W. 353. See also Wyman *v.* Mathews, 53 Fed. 678, construing South Dakota statute.

Texas.— Thaxton *v.* Smith, 90 Tex. 589, 40 S. W. 14; Tittle *v.* Vanleer, 89 Tex. 174, 29 S. W. 1065, 34 S. W. 715, 37 L. R. A. 337; Adams *v.* Bateman, 88 Tex. 130, 30 S. W. 855; Burnham *v.* Logan, 88 Tex. 1, 29 S. W. 1067; Ft. Worth City Bank *v.* Mechanics Nat. Bank, 87 Tex. 295, 28 S. W. 277 [*affirming* 7 Tex. Civ. App. 584, 27 S. W. 848]; Alliance Milling Co. *v.* Eaton, 86 Tex. 401, 25 S. W. 614, 24 L. R. A. 369; Laird *v.* Weiss, 85 Tex. 93, 23 S. W. 864; Bettes *v.* Weir Plow Co., 84 Tex. 543, 19 S. W. 705; Foreman *v.* Burnette, 81 Tex. 396, 18 S. W. 756; Preston *v.* Carter, 80 Tex. 388, 16 S. W. 17; Hudson *v.* C. Eisenmayer, Sr., Milling, etc., Co., 79 Tex. 401, 15 S. W. 385; Hart *v.* Blum, 76 Tex. 113, 13 S. W. 181; Johnson *v.* Robinson, 68 Tex. 399, 4 S. W. 625; Wallis *v.* Taylor, 67 Tex. 431, 3 S. W. 321; Scott *v.* McDaniel, 67 Tex. 315, 3 S. W. 291; Watterman *v.* Silberberg, 67 Tex. 100, 2 S. W. 578; Jackson *v.* Harby, 65 Tex. 710; National Bank *v.* Lovenberg, 63 Tex. 506; Stiles *v.* Hill, 62 Tex. 429; H. T. Simon-Gregory Dry Goods Co. *v.* Dean, (Tex. Civ. App. 1896) 35 S. W. 305; Willis *v.* Holland, 13 Tex. Civ. App. 689, 36 S. W. 329; Collins *v.* Sanger, 8 Tex. Civ. App. 69, 27 S. W. 500; Taylor *v.* Missouri Glass Co., 6 Tex. Civ. App. 337, 25 S. W. 466; Schneider *v.* Bagley, 6 Tex. Civ. App. 226, 24 S. W. 1116; Martin-Brown Co. *v.* Siebe, 6 Tex. Civ. App. 232, 26 S. W. 327; Whitehill *v.* Shaw, (Tex. Civ. App. 1896) 33 S. W. 886. See also Reagan *v.* Aiken, 138 U. S. 109, 11 S. Ct. 283, 34 L. ed. 892, construing Texas statute.

Vermont.— Kimhall *v.* Evans, 58 Vt. 655, 5 Atl. 523; Therasson *v.* Hickok, 37 Vt. 454; McGregor *v.* Chase, 37 Vt. 225; Stanley *v.* Robbins, 36 Vt. 422; Noyes *v.* Brown, 33 Vt. 431; Noyes *v.* Hickok, 27 Vt. 36; Peck *v.* Merrill, 26 Vt. 686; Mussey *v.* Noyes, 26 Vt. 462.

Washington.— Vietor *v.* Glover, 17 Wash. 37, 48 Pac. 788, 40 L. R. A. 297; Puget Sound Nat. Bank *v.* Levy, 10 Wash. 499, 39 Pac. 142, 45 Am. St. Rep. 803; Furth *v.* Snell, 6 Wash. 542, 33 Pac. 830; Samuel *v.* Kittenger, 6 Wash. 261, 33 Pac. 509; Benham *v.* Ham, 5 Wash. 128, 31 Pac. 459, 34 Am. St. Rep. 851; Ephraim *v.* Kelleher, 4 Wash. 243, 29 Pac. 985, 18 L. R. A. 604; Warren *v.* His Creditors, 3 Wash. 48, 28 Pac. 257; Turner *v.* Iowa Nat. Bank, 2 Wash. 192, 26 Pac. 256. See also Drake *v.* Paulhamus, 66 Fed. 895, 29 U. S. App. 522, 14 C. C. A. 162, construing Washington statute.

West Virginia.— Weigand *v.* Alliance Supply Co., 44 W. Va. 133, 28 S. E. 803.

Wisconsin.—Sweet *v.* Neff, 102 Wis. 482, 78 N. W. 745; Strong *v.* Kalk, 91 Wis. 29, 64 N. W. 295, 51 Am. St. Rep. 863 [*following* Winner *v.* Hoyt, 66 Wis. 227, 28 N. W. 380, 57 Am. Rep. 257]; Jameson *v.* Maxcy, 91 Wis. 563, 65 N. W. 492; Green *v.* Hadfield, 89 Wis. 138, 61 N. W. 310; Fuller *v.* McHenry, 83 Wis. 573, 53 N. W. 896, 18 L. R. A. 512; Michelstetter *v.* Weiner, 82 Wis. 298, 52 N. W. 435 [*distinguishing* Winner *v.* Hoyt, 66 Wis. 227, 28 N. W. 380, 57 Am. Rep. 257]; Maxwell *v.* Simonton, 81 Wis. 635, 51 N. W. 869; Cribb *v.* Hibbard, 77 Wis. 199, 46 N. W. 168; Minzesheimer *v.* Kennedy, 75 Wis. 411, 44 N. W. 508; Noyes *v.* Qvale, 70 Wis. 224, 35 N. W. 310; Landauer *v.* Vietor, 69 Wis. 434, 34 N. W. 229; Hoey *v.* Pierron, 67 Wis. 262, 30 N. W. 692; Carter *v.* Rewey, 62 Wis.

or confession of judgment, or whether the transfer be absolute in form or otherwise.[9]

II. General Requisites and Validity.

A. Nature of Transfer — 1. Considered as Unilateral Contract. An assignment for the benefit of creditors has been held to be a transaction unilateral in its nature and to which the assent of all parties is presumed.[10]

2. Divestiture of Title and Surrender of Control — a. Absolute Appropriation. There must be an absolute appropriation by the debtor of his property to raise a fund for the payment of his creditors.[11] Hence an assignment for the benefit of creditors cannot be considered as a mere transmission of custody and control over the property assigned,[12] nor as the creation of a lien[13] or

552, 22 N. W. 129; Gage *v.* Chesebro, 49 Wis. 486, 5 N. W. 881; Page *v.* Smith, 24 Wis. 368; Norton *v.* Kearney, 10 Wis. 443.

United States.— *Compare* Bush *v.* U. S., 14 Fed. 321, construing U. S. Rev. Stat. (1878), § 3466; State Nat. Bank *v.* Ellison, 75 Fed. 354.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 14.

9. See list of statutes cited *supra*, note 6, p. 120; and cases cited *supra*, note 8.

10. Kalkman *v.* McElderry, 16 Md. 56; Fallon's Appeal, 42 Pa. St. 235, 256 (where the court said: "It is a characteristic of assignments for the benefit of creditors that they are, substantially, like wills, unilateral arrangements in all their essential particulars, the assignor himself declaring the extent and conditions of the grant, so far as the law allows, and the assignees having no part in the matter, except the simple acceptance of the trust as created. . . " Where the grantees have bargained for every grant and stipulation in their favor, the matter is different); Sandmeyer *v.* Dakota F. & M. Ins. Co., 2 S. D. 346, 50 N. W. 353; Brashear *v.* West, 7 Pet. (U. S.) 608, 8 L. ed. 801.

As to the requisites of contracts, generally, see Contracts.

As to the necessity of assent of the parties see *infra*, II, E, F.

11. *Alabama.*— Gazzam *v.* Poyntz, 4 Ala. 374, 37 Am. Dec. 745.

Arkansas.—Fecheimer *v.* Robertson, 53 Ark. 101, 13 S. W. 423; Richmond *v.* Mississippi Mills, 52 Ark. 30, 11 S. W. 960, 4 L. R. A. 413.

California.— Sabichi *v.* Chase, 108 Cal. 81, 41 Pac. 29; Lawrence *v.* Neff, 41 Cal. 566.

Colorado.— McCord-Bragdon Grocer Co. *v.* Garrison, 5 Colo. App. 60, 37 Pac. 31.

Dakota.— Straw *v.* Jenks, 6 Dak. 414, 43 N. W. 941.

Illinois.— Browne-Chapin Lumber Co. *v.* Union Nat. Bank, 159 Ill. 458, 42 N. E. 967.

Iowa.— Bradley *v.* Hopkins, 98 Iowa 305, 67 N. W. 261; Cadwell's Bank *v.* Crittenden, 66 Iowa 237, 23 N. W. 646.

Maryland.— Malcolm *v.* Hall, 9 Gill (Md.) 177, 52 Am. Dec. 688.

Missouri.— Bascom *v.* Rainwater, 30 Mo. App. 483.

New Jersey.—Muchmore *v.* Budd, 53 N. J. L. 369, 22 Atl. 518.

Pennsylvania.— Lucas *v.* Sunbury, etc., R. Co., 32 Pa. St. 458.

South Dakota.— Sandmeyer *v.* Dakota F. & M. Ins. Co., 2 S. D. 346, 50 N. W. 353.

Texas.— Adams *v.* Bateman, 88 Tex. 130, 30 S. W. 855; Johnson *v.* Robinson, 68 Tex. 399, 4 S. W. 625.

United States.— May *v.* Tenney, 148 U. S. 60, 13 S. Ct. 491, 37 L. ed. 368; White *v.* Cotzhausen, 129 U. S. 329, 9 S. Ct. 309, 32 L. ed. 677; Appolos *v.* Bratly, 49 Fed. 401, 4 U. S. App. 209, 1 C. C. A. 299; Martin *v.* Hausman, 14 Fed. 160.

12. Not mere transmission of custody and control.— *Michigan.*— Austin *v.* Kalamazoo First Nat. Bank, 100 Mich. 613, 59 N. W. 597.

Missouri.—Jaffrey *v.* Mathews, 120 Mo. 317, 25 S. W. 187; Matter of Zwang, 39 Mo. App. 356; Bascom *v.* Rainwater, 30 Mo. App. 483.

New York.— Brown *v.* Guthrie, 110 N. Y. 435, 18 N. E. 254, 18 N. Y. St. 311.

Pennsylvania.— Beans *v.* Bullitt, 57 Pa. St. 221.

Texas.— Scott *v.* McDaniel, 67 Tex. 315, 3 S. W. 291; Stiles *v.* Hill, 62 Tex. 429.

Vermont.— McGregor *v.* Chase, 37 Vt. 225, holding that a provision that grantees are to have possession of real estate and fixtures to complete unfinished jobs and the manufacture of lumber have the effect of changing the conveyance into an assignment.

13. Not the creation of a lien.— *Alabama.* — Bell *v.* Goetter, 106 Ala. 462, 17 So. 709.

Arkansas.— Richmond *v.* Mississippi Mills, 52 Ark. 30, 11 S. W. 960, 4 L. R. A. 413; Bartlett *v.* Teah, 1 McCrary (U. S.) 176, 1 Fed. 768, construing Arkansas statute.

California.— Dana *v.* Stanford, 10 Cal. 269.

Missouri.— Hargadine *v.* Henderson, 97 Mo. 375, 11 S. W. 218.

New Jersey.— Stites *v.* Champion, 49 N. J. Eq. 446, 24 Atl. 403.

Pennsylvania.— Breading *v.* Boggs, 20 Pa. St. 33.

Texas.— Tittle *v.* Vanleer, 89 Tex. 174, 29 S. W. 1065, 34 S. W. 715, 37 L. R. A. 337.

United States.— Martin *v.* Hausman, 14 Fed. 160.

Distinguished from judgment.— In Bell *v.* Goetter, 106 Ala. 462, 472, 17 So. 709, it was held that: "The statutes secure to the judgment debtor, the right to redeem lands which may be sold under execution issuing on the judgment; and a like right is secured to judg-

the giving of security,[14] nor as the making of a power revocable by the grantor.[15]

b. Without Reservation. In such an assignment there can be reserved no right, nor equity of redemption,[16] nor of defeasance, express[17] or implied,[18] remaining in the debtor,[19] or any creditor[20] of his, that may be availed of by any process at law or in equity. It is a complete divesting[21] of title and a surrender

ment creditors. . . . A general assignment passes to the assignee an indefeasible title; there remains in the assignor no right, or equity of redemption; . . . We know not any process of reasoning by which it is possible to convert the judgment from its real nature, character and operation, into a general assignment. . . . The two have no common elements or characteristics — they bear to each other no legal relation." See also *In re* Pauksztis' Estate, 9 Pa. Dist. 80; *In re* Lee, 9 Kulp (Pa.) 430; and generally, JUDGMENTS.

14. Not mere security.—*Arkansas.*—Goodbar *v.* Locke, 56 Ark. 314, 19 S. W. 924; Riggan *v.* Wolf, 53 Ark. 537, 14 S. W. 922.

Illinois.— Chicago First Nat. Bank *v.* North Wisconsin Lumber Co., 41 Ill. App. 383.

Iowa.— Roberts *v.* Press, 97 Iowa 475, 66 N. W. 756; Garrett *v.* Burlington Plow Co., 70 Iowa 697, 29 N. W. 395, 59 Am. Rep. 461; Farwell *v.* Howard, 26 Iowa 381.

Kansas.— Tootle *v.* Coldwell, 30 Kan. 125, 1 Pac. 329.

Massachusetts.— Henshaw *v.* Sumner, 23 Pick. (Mass.) 446.

Michigan.— National Bank *v.* Ironwood First Nat. Bank, 100 Mich. 485, 59 N. W. 231; Bay City State Bank *v.* Chapelle, 40 Mich. 447.

Missouri.— Crow *v.* Beardsley, 68 Mo. 435.

Nebraska.— Hershiser *v.* Higman, 31 Nebr. 531, 48 N. W. 272, 28 Am. St. Rep. 527; Davis *v.* Scott, 22 Nebr. 154, 34 N. W. 353.

New Hampshire.— Morse *v.* Powers, 17 N. H. 286.

New York.— Brown *v.* Guthrie, 110 N. Y. 435, 18 N. E. 254, 18 N. Y. St. 311; Dunham *v.* Whitehead, 21 N. Y. 131.

North Dakota.— Cutter *v.* Pollock, 4 N. D. 205, 59 N. W. 1062, 50 Am. St. Rep. 644, 25 L. R. A. 377.

Ohio.— Bloom *v.* Noggle, 4 Ohio St. 45.

Pennsylvania.— Fallon's Appeal, 42 Pa. St. 235; Manufacturers', etc., Bank *v.* State Bank, 7 Watts & S. (Pa.) 335, 42 Am. Dec. 240.

South Carolina.— Lamar *v.* Pool, 26 S. C. 441, 2 S. E. 322.

Vermont.— McGregor *v.* Chase, 37 Vt. 225.

Wisconsin.— Menzesheimer *v.* Kennedy, 75 Wis. 411, 44 N. W. 508; Carter *v.* Rewey, 62 Wis. 552, 22 N. W. 129.

United States.— Reagan *v.* Aiken, 138 U. S. 109, 11 S. Ct. 283, 34 L. ed. 892; Chicago Union Nat. Bank *v.* Kansas City Bank, 136 U. S. 223, 10 S. Ct. 1013, 34 L. ed. 341; Brown *v.* Grand Rapids Parlor Furniture Co., 58 Fed. 286, 16 U. S. App. 221, 7 C. C. A. 225, 22 L. R. A. 817; Mills *v.* Pessels, 55 Fed. 588, 13 U. S. App. 49, 5 C. C. A. 215; Martin *v.* Hausman, 14 Fed. 160, holding that an assignment for the benefit of creditors is more than a security for payment.

15. Not a revocable power.— Banning *v.* Sibley, 3 Minn. 389; Muchmore *v.* Budd, 53 N. J. L. 369, 22 Atl. 518 (holding that voluntary assignments give to the trustee an irrevocable power to sell the property and distribute the proceeds and strip the debtor of all interest in the property); Fox *v.* Heath, 21 How. Pr. (N. Y.) 384; Beans *v.* Bullitt, 57 Pa. St. 221; Griffin *v.* Rogers, 38 Pa. St. 382. But see Watson *v.* Bagaley, 12 Pa. St. 164, 51 Am. Dec. 595, to the effect that a power of attorney to collect certain moneys and pay them to certain persons in a prescribed order of preference is virtually an assignment, for though such power was revocable before collection it was irrevocable after collection. And *compare* Murphy *v.* Caldwell, 50 Ala. 461; Hall *v.* Crane Bros. Mfg. Co., 87 Ill. 283; McHose *v.* Dutton, 55 Iowa 728, 8 N. W. 667.

16. No equity of redemption.— *Arkansas.* — Wood *v.* Adler-Goldman Commission Co., 59 Ark. 270, 27 S. W. 490; Robson *v.* Tomlinson, 54 Ark. 229, 15 S. W. 456.

Colorado.— McCord-Bragdon Grocer Co. *v.* Garrison, 5 Colo. App. 60, 37 Pac. 31.

Michigan.— Warner *v.* Littlefield, 89 Mich. 329, 50 N. W. 721.

Missouri.— Bascom *v.* Rainwater, 30 Mo. App. 483.

New Jersey.—Muchmore *v.* Budd, 53 N. J. L. 369, 22 Atl. 518.

South Carolina.— Stewart *v.* Kerrison, 3 S. C. 266.

17. No express defeasance.— Penzel Co. *v.* Jett, 54 Ark. 428, 16 S. W. 120; Dubuque Nat. Bank *v.* Weed, 57 Fed. 513.

18. No implied defeasance.—Jaffrey *v.* Mathews, 120 Mo. 317, 25 S. W. 187; Hargadine *v.* Henderson, 97 Mo. 375, 11 S. W. 218; Scott *v.* McDaniel, 67 Tex. 315, 3 S. W. 291.

The presence or absence of a defeasance clause is not a test whether an instrument is a deed of assignment or not. Hargadine *v.* Henderson, 97 Mo. 375, 11 S. W. 218; Bonns *v.* Carter, 20 Nebr. 566, 31 N. W. 381; Tittle *v.* Vanleer, 89 Tex. 174, 29 S. W. 1065, 34 S. W. 715, 37 L. R. A. 837; Reagan *v.* Aiken, 138 U. S. 109, 11 S. Ct. 283, 34 L. ed. 892.

19. No right remaining in debtor.— Buell *v.* Buckingham, 16 Iowa 284, 85 Am. Dec. 516.

20. Kinnard *v.* Thompson, 12 Ala. 487; Collier *v.* Davis, 47 Ark. 367, 1 S. W. 684, 58 Am. Rep. 758.

21. Complete divestiture.—Wood *v.* Adler-Goodman Commission Co., 59 Ark. 270, 27 S. W. 490; Bascom *v.* Rainwater, 30 Mo. App. 483; Hudson *v.* C. Eisenmayer, Sr., Milling, etc., Co., 79 Tex. 401, 15 S. W. 385.

It passes both the legal and the equitable title to the property absolutely beyond the

of all right and control[22] over the property appropriated, with a contingent interest in any surplus that may remain after payment of debts and expense of administering the assigned estate.[23]

3. NECESSITY OF ASSIGNEE AND CREATION OF TRUST. The presence of a trust is one of the essential elements of an assignment for the benefit of creditors. The beneficiaries of a deed of assignment are not ordinarily the immediate grantees, but take through the intervention of a trustee who is usually called an assignee.[24]

4. DISTINGUISHED FROM OTHER TRANSACTIONS. Such being the nature of the contract, the extent of the appropriation of the assignor's property, the divestiture of assignor's title and the surrender of his control thereof, assignments for the benefit of creditors are clearly distinguishable from other transactions and convey-

control of the assignor. Martin *v.* Hausman, 14 Fed. 160. See also *infra*, X, D, 1.

22. Surrender of control.—*Arkansas.—Ex p.* Conway, 4 Ark. 302.

Connecticut.— De Wolf *v.* A. & W. Sprague Mfg. Co., 47 Conn. 282.

Maryland.— Malcolm *v.* Hall, 9 Gill (Md.) 177, 52 Am. Dec. 688.

New Jersey.— North Ward Nat. Bank *v.* Conklin, 51 N. J. Eq. 7, 26 Atl. 678.

New York.— Kercheis *v.* Schloss, 49 How. Pr. (N. Y.) 284.

Pennsylvania.—Griffin *v.* Rogers, 38 Pa. St. 382.

United States.— Reed *v.* McIntyre, 98 U. S. 507, 25 L. ed. 171; Burd *v.* Smith, 4 Dall. (U. S.) 76, 1 L. ed. 748; Lawrence *v.* Norton, 4 Woods (U. S.) 406, 15 Fed. 853; Martin *v.* Hausman, 14 Fed. 160.

23. King *v.* Glass, 73 Iowa 205, 34 N. W. 820; Bascom *v.* Rainwater, 30 Mo. App. 483; Kenefick *v.* Perry, 61 N. H. 362; Hall *v.* Denison, 17 Vt. 310.

24. Hence conveyances directly to a creditor or creditors not upon trust cannot, as a rule, operate as a valid assignment for the benefit of creditors.

Alabama.— Harkins *v.* Bailey, 48 Ala. 376.

Arkansas.— Fecheimer *v.* Robertson, 53 Ark. 101, 13 S. W. 423 (wherein the court in substance said: The test is this: can other creditors call the grantee, to account for the proceeds of the property? If so, then the conveyance would constitute an assignment. If the grantees are not liable to account to other creditors, then there is no trustee and no assignment); Richmond *v.* Mississippi Mills, 52 Ark. 30, 11 S. W. 960, 4 L. R. A. 413.

California.— Wellington *v.* Sedgwick, 12 Cal. 469.

Illinois.— Beach *v.* Bestor, 47 Ill. 521; Chicago First Nat. Bank *v.* North Wisconsin Lumber Co., 41 Ill. App. 383. See also Moore *v.* Meyer, 47 Fed. 99, construing Illinois statute.

Indiana.— Keen *v.* Preston, 24 Ind. 395.

Iowa.— Johnson *v.* McGrew, 11 Iowa 151, 77 Am. Dec. 137; Cowles *v.* Rickets, 1 Iowa 582.

Kansas.— Tootle *v.* Coldwell, 30 Kan. 125, 1 Pac. 329.

Minnesota.— Banning *v.* Sibley, 3 Minn. 389.

Nebraska.— Costello *v.* Chamberlain, 36 Nebr. 45, 53 N. W. 1034.

New Jersey.— Fairchild *v.* Hunt, 14 N. J. Eq. 367. *Compare* Tillou *v.* Britton, 9 N. J. L. 120.

New York.— Van Buskirk *v.* Warren, 4 Abb. Dec. (N. Y.) 457.

Ohio.— Dickson *v.* Rawson, 5 Ohio St. 218.

Pennsylvania.— Claflin *v.* Maglaughlin, 65 Pa. St. 492; Beans *v.* Bullitt, 57 Pa. St. 221; Vallance *v.* Miners' L. Ins., etc., Co., 42 Pa. St. 441; Dubois' Appeal, 38 Pa. St. 231, 80 Am. Dec. 478; Lucas *v.* Sunbury, etc., R. Co., 32 Pa. St. 458; Henderson's Appeal, 31 Pa. St. 502; Chaffees *v.* Risk, 24 Pa. St. 432; Corn Exch. Nat. Bank *v.* Philadelphia Trust, etc., Co., 11 Phila. (Pa.) 510, 33 Leg. Int. (Pa.) 401.

Vermont.— Therasson *v.* Hickok, 37 Vt. 454; McGregor *v.* Chase, 37 Vt. 225; Stanley *v.* Robbins, 36 Vt. 422; Mussey *v.* Noyes, 26 Vt. 462; Peck *v.* Merrill, 26 Vt. 686.

Wisconsin.— Cribb *v.* Hibbard, 77 Wis. 199, 46 N. W. 168. But *compare* Northern Nat. Bank *v.* Weed, 86 Wis. 212, 56 N. W. 634.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 5.

Promise of the creditors, to whom the direct transfer is made, that they will pay the debt of the debtor has been held not to take the case without the rule. Saunderson *v.* Broadwell, 82 Cal. 132, 23 Pac. 36; Stillwell *v.* Savannah Grocery Co., 88 Ga. 100, 13 S. E. 963; Watkins *v.* Pope, 38 Ga. 514; Green *v.* Hadfield, 89 Wis. 138, 61 N. W. 310. *Contra*, Shubar *v.* Winding, Cheves (S. C.) 218; McNeil *v.* Morrow, Rich. Eq. Cas. (S. C.) 172. And *compare* Lehman *v.* Bentley, 60 N. Y. Super. Ct. 473, 18 N. Y. Suppl. 778, 46 N. Y. St. 249 [*affirmed* in 135 N. Y. 651, 32 N. E. 647, 48 N. Y. St. 932]; Smith *v.* Woodruff, 1 Hilt. (N. Y.) 462. In Montgomery *v.* Culton, 18 Tex. 736, it is held that the effect of an ordinary transfer of property from one person to another, with an agreement by the latter to pay the just demands against the former, is to raise a trust for the creditors of the assignor, though the transfer was made without their knowledge, and they may maintain their action against the assignee; and the principle is the same where the property is charged with a trust in favor of third persons, and the assignee contracts to save the assignor harmless against such claims.

Where, however, the transfer may operate as a trust for the benefit of all the creditors it seems that a conveyance directly to one or

ances.[25] Thus they are distinguishable from compositions by debtors with their creditors,[26] and from mortgages or conveyances in the nature of mortgages.[27]

more or all of the creditors may constitute a valid assignment. Cunningham *v.* Freeborn, 11 Wend. (N. Y.) 240; Lockhart *v.* Stevenson, 61 Pa. St. 64; Mussey *v.* Noyes, 26 Vt. 462; Tompkins *v.* Wheeler, 16 Pet. (U. S.) 106, 10 L. ed. 903; Adams *v.* Blodgett, 2 Woodb. & M. (U. S.) 233, 1 Fed. Cas. No. 46, 17 Hunt. Mer. Mag. 79, 10 Law Rep. 69. *Compare* Goodell *v.* Williams, 21 Conn. 419; Truitt *v.* Caldwell, 3 Minn. 364, 74 Am. Dec. 764. See also, *supra*, I, B.

25. Distinguished from other transactions. — *Alabama.*—Inman *v.* Schloss, 122 Ala. 461, 25 So. 739.

Arkansas.— Locke *v.* Haynes, (Ark. 1900) 59 S. W. 764; Henry *v.* Croom, 63 Ark. 612, 40 S. W. 83.

California.— Tuers *v.* Tuers, 131 Cal. 625, 63 Pac. 1008.

District of Columbia.— Droop *v.* Ridenour, 11 App. Cas. (D. C.) 224.

Illinois.— Binns *v.* La Forge, 191 Ill. 598, 61 N. E. 382; Deane *v.* Tolman Co., 83 Ill. App. 480.

Indian Territory.— Westchester Fire Ins. Co. *v.* Blackford, (Indian Terr. 1899) 51 S. W. 978.

Kentucky.—Louisville Trust Co. *v.* Columbia Finance & Trust Co., 22 Ky. L. Rep. 1086, 59 S. W. 867; People's Deposit Bank *v.* Campbell, 22 Ky. L. Rep. 983, 59 S. W. 22; Crouch *v.* Crouch, (Ky. 1900) 56 S. W. 804; Grable *v.* Renz, (Ky. 1900) 55 S. W. 922; Bottoms *v.* McFerran, (Ky. 1897) 43 S. W. 236.

Michigan.— McMorran *v.* Moore, 113 Mich. 101, 71 N. W. 505.

Missouri.— Kemper, etc., Dry-Goods Co. *v.* Kennard Grocer Co., 68 Mo. App. 290.

Ohio.— Coppock *v.* Kuhn, 2 Ohio Cir. Dec. 347; *In re* Jones, 5 Ohio N. P. 102.

Pennsylvania.— Miller *v.* Schriver, 197 Pa. St. 191, 46 Atl. 926; Penn Plate-Glass Co. *v.* Jones, 189 Pa. St. 290, 42 Atl. 189.

South Carolina.— *Ex p.* Neal Loan & Banking Co., 58 S. C. 269, 36 S. E. 584; Lanahan *v.* Bailey Liquor Co., 58 S. C. 269, 36 S. E. 585.

Vermont.— Hapgood *v.* Polley, 35 Vt. 649.

Wisconsin.— Kickbusch *v.* Corwith, 108 Wis. 634, 85 N. W. 148.

See also *infra*, IV, A, 2, a, (III).

Transfer to a receiver under an order of court is to be distinguished from an assignment for the benefit of creditors. Young *v.* Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372.

26. Distinguished from composition.—Robbins *v.* Magee, 76 Ind. 381.

27. Distinguished from mortgages.— Instruments operating as mortgages and not as assignments see:

Arkansas.— Smith *v.* Empire Lumber Co., 57 Ark. 222, 21 S. W. 225; Robson *v.* Tomlinson, 54 Ark. 229, 15 S. W. 456; Box *v.* Goodbar, 54 Ark. 6, 14 S. W. 925; Riggan *v.* Wolf, 53 Ark. 537, 14 S. W. 922. See also Apollos *v.* Staniforth, 3 Tex. Civ. App. 502, 22 S. W. 1060, interpreting law of Arkansas.

California.— Dana *v.* Stanford, 10 Cal. 269.

Colorado.— McCord-Bragdon Grocer Co. *v.* Garrison, 5 Colo. App. 60, 37 Pac. 31.

Connecticut.— De Wolf *v.* A. & W. Sprague Mfg. Co., 49 Conn. 282; Bates *v.* Coe, 10 Conn. 280.

Illinois.—Morriss *v.* Blackman, 179 Ill. 103, 53 N. E. 547 [*affirming* 77 Ill. App. 609]; Baer *v.* Farwell, 66 Ill. App. 397; O'Donnell *v.* Illinois Steel Co., 53 Ill. App. 314; Haines *v.* Chandler, 26 Ill. App. 400.

Iowa.— Grow *v.* Crittenden, 66 Iowa 277, 23 N. W. 667; Cadwell's Bank *v.* Crittenden, 66 Iowa 237, 23 N. W. 646.

Maryland.— Wilson *v.* Russell, 13 Md. 494, 71 Am. Dec. 645; Fouke *v.* Fleming, 13 Md. 392.

Michigan.—Austin *v.* Kalamazoo First Nat. Bank, 100 Mich. 613, 59 N. W. 597; Bay City State Bank *v.* Chapelle, 40 Mich. 447.

Minnesota.— Dyson *v.* St. Paul Nat. Bank, 74 Minn. 439, 77 N. W. 236, 73 Am. St. Rep. 358.

Missouri.— H. B. Claflin Co. *v.* Lubke, (Mo. 1901) 63 S. W. 407; Hargadine *v.* Henderson, 97 Mo. 375, 11 S. W. 218; Bascom *v.* Rainwater, 30 Mo. App. 483.

New Jersey.— Muchmore *v.* Budd, 53 N. J. L. 369, 22 Atl. 518.

Pennsylvania.— Johnson's Appeal, 103 Pa. St. 373; Fallon's Appeal, 42 Pa. St. 235; Chaffees *v.* Risk, 24 Pa. St. 432.

South Carolina.— Stewart *v.* Kerrison, 3 S. C. 266.

Tennessee.— Reed Fertilizer Co. *v.* Thomas, 97 Tenn. 478, 37 S. W. 220.

Texas.—Prouty *v.* Musquiz, (Tex. Civ. App. 1900) 59 S. W. 568; Adams *v.* Bateman, 88 Tex. 130, 30 S. W. 855 [*affirming* (Tex. Civ. App. 1895) 29 S. W. 1124]; Scott *v.* McDaniel, 67 Tex. 315, 3 S. W. 291; Stiles *v.* Hill, 62 Tex. 429; Rindskoff *v.* Vanleer, 14 Tex. Civ. App. 95, 36 S. W. 918; Willis *v.* Holland, 13 Tex. Civ. App. 689, 36 S. W. 329; Adoue *v.* Collins, (Tex. Civ. App. 1895) 36 S. W. 307; H. T. Simon-Gregory Dry Goods Co. *v.* Dean, (Tex. Civ. App. 1896) 35 S. W. 305; Collins *v.* Sanger, 8 Tex. Civ. App. 69, 27 S. W. 500.

Vermont.— McGregor *v.* Chase, 37 Vt. 225; Peck *v.* Merrill, 26 Vt. 686.

West Virginia.— Coaldale Min. & Mfg. Co. *v.* Clark, 43 W. Va. 84, 27 S. E. 294.

Wisconsin.— Cunningham *v.* Brictson, 101 Wis. 378, 77 N. W. 740; F. Dohmen Co. *v.* Vogel, 97 Wis. 121, 72 N. W. 380; Gage *v.* Chesebro, 49 Wis. 486, 5 N. W. 881.

United States.— Chicago Union Nat. Bank *v.* Kansas City Bank, 136 U. S. 223, 10 S. Ct. 1013, 34 L. ed. 341; O'Connell *v.* Central Bank, 78 Fed. 535.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 7.

They are also distinguishable from transactions and conveyances such as pledges,[28] and sales.[29]

B. Debtors Who May Assign — 1. At Common Law. The general right of an insolvent debtor to appropriate his property by assignment for the payment of

As to the requisites of mortgages, generally, see MORTGAGES.

Instruments operating as assignments and not as mortgages see:

Arkansas.— Penzel Co. *v.* Jett, 54 Ark. 428, 16 S. W. 120 [*followed* in Wolf *v.* Muldrow, (Ark. 1892) 18 S. W. 55].

Illinois.— Milligan *v.* O'Conor, 19 Ill. App. 487.

Maryland.—Bank of Commerce *v.* Lanahan, 45 Md. 396.

Michigan.— Conely *v.* Collins, 119 Mich. 519, 78 N. W. 555.

Nebraska.— Clendenning *v.* Perrine, 32 Nebr. 155, 49 N. W. 334.

Ohio.— Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637.

Texas.— Preston *v.* Carter. 80 Tex. 388, 16 S. W. 17; Lochte *v.* Blum, 10 Tex. Civ. App. 385, 30 S. W. 925; Padgitt *v.* Wood, (Tex. Civ. App. 1894) 24 S. W. 1108.

United States.— Martin *v.* Hausman, 14 Fed. 160; Bartlett *v.* Teah, 1 McCrary (U. S.) 176, 1 Fed. 768.

As to constructive assignments see *supra*, I, B.

Distinguished from chattel mortgages.— Instruments operating as chattel mortgages not as assignments see:

Arkansas.—Adler-Goldman Commission Co. *v.* Phillips, 63 Ark. 40, 37 S. W. 297; Marquese *v.* Falsenthal, 58 Ark. 293, 24 S. W. 493, holding that a mortgage contemplates a personal effort to pay a debt or at least restore the mortgagor's title; an assignment, on the other hand, denotes an absolute inability of the grantor to meet promptly his liabilities and implies a surrender of his property to his creditors without the hope of redeeming it.

Indian Territory.— Smith *v.* Moore, (Indian Terr. 1899) 48 S. W. 1025; Turner Hardware Co. *v.* Reynolds, (Indian Terr. 1898) 47 S. W. 307.

Iowa.— National State Bank *v.* Sweeney, (Iowa 1897) 73 N. W. 476; Bradley *v.* Hopkins, 98 Iowa 305, 67 N. W. 261.

Kansas.— Taylor *v.* Riggs, (Kan. App. 1899) 57 Pac. 44.

Michigan.— Belding-Hall Mfg. Co. *v.* Slayton, (Mich. 1900) 83 N. W. 1001. "The difference between a chattel mortgage and a common-law assignment is that one is a conditional transfer of property, and the other is an absolute transfer." Warner *v.* Littlefield, 89 Mich. 329, 340, 50 N. W. 721.

Missouri.— Jaffrey *v.* Matthews, 120 Mo. 317, 25 S. W. 187; Matter of Zwang, 39 Mo. App. 356.

Montana.— Noyes *v.* Ross, 23 Mont. 425, 59 Pac. 367.

Nebraska.— Skinner *v.* Pawnee City First Nat. Bank, 59 Nebr. 17, 80 N. W. 42; Sloan *v.* Thomas Mfg. Co., 58 Nebr. 713, 79 N. W. 728.

New York.— Dodge *v.* McKechnie, 156 N. Y. 514, 51 N. E. 268 [*affirming* 90 Hun (N. Y.) 605, 35 N. Y. Suppl. 1106]; Dunham *v.* Whitehead, 21 N. Y. 131; Curtis *v.* Leavitt, 15 N. Y. 9; Dearing *v.* McKinnon Dash & Hardware Co., 33 N. Y. App. Div. 31, 53 N. Y. Suppl. 513.

Oklahoma.—Nix *v.* Underhill, (Okla. 1899) 56 Pac. 959; Smith-McCord Dry-Goods Co. *v.* Farwell Co., (Okla. 1897) 50 Pac. 149.

Pennsylvania.— Beans *v.* Bullitt, 57 Pa. St. 221.

Texas.— Tittle *v.* Vanleer, 89 Tex. 174, 29 S. W. 1065, 34 S. W. 715, 37 L. R. A. 337 [*followed* in F. D. Seward Confectionery Co. *v.* Ullmann, (Tex. Civ. App. 1896) 35 S. W. 1072]; Jackson *v.* Harby, 65 Tex. 710; Stiles *v.* Hill, 62 Tex. 429; Taylor *v.* Missouri Glass Co., 6 Tex. Civ. App. 337, 25 S. W. 466; Martin-Brown Co. *v.* Siebe, 6 Tex. Civ. App. 232, 26 S. W. 327; Greer *v.* Richardson Drug Co., 1 Tex. Civ. App. 634, 20 S. W. 1127.

Wisconsin.— Cribb *v.* Hibbard, 77 Wis. 199, 46 N. W. 168.

United States.— W. B. Grimes Dry-Goods Co. *v.* Malcolm, 164 U. S. 483, 41 L. ed. 524, 17 S. Ct. 158; Reagan *v.* Aiken, 138 U. S. 109, 11 S. Ct. 283, 34 L. ed. 892; Mills *v.* Pessels, 55 Fed. 588, 13 U. S. App. 49, 5 C. C. A. 215; Rainwater-Boogher Hat Co. *v.* Malcolm, 51 Fed. 734, 10 U. S. App. 249, 2 C. C. A. 476.

As to the requisites of chattel mortgages, generally, see CHATTEL MORTGAGES.

Instruments operating as assignments not as chattel mortgages see State *v.* Dupuy, 52 Ark. 48, 11 S. W. 964; Union, etc., Bank *v.* Allen, 77 Miss. 442, 27 So. 631; Mills *v.* Williams, 31 Mo. App. 447; Hart *v.* Blum, 76 Tex. 113, 13 S. W. 181; Johnson *v.* Robinson, 68 Tex. 399, 4 S. W. 625. See also *supra*, I, B.

28. Distinguished from pledges.— Blass *v.* Goodbar, 65 Ark. 511, 47 S. W. 630; Danforth *v.* Denny, 25 N. H. 155; Low *v.* Wyman, 8 N. H. 536; Maass *v.* Falk, 24 N. Y. Suppl. 448, 54 N. Y. St. 160 [*affirmed* in 146 N. Y. 34, 40 N. E. 504, 65 N. Y. St. 762]; Hurst *v.* Jones, 10 Lea (Tenn.) 8; Hearing *v.* Hamilton, 107 Wis. 112, 82 N. W. 698.

As to the requisites of pledges, generally, see PLEDGES.

29. Distinguished from sales.—*Alabama.*— Heyer *v.* Bromberg, 74 Ala. 524; Eskridge *v.* Abrahams, 61 Ala. 134.

Arkansas.— Rice *v.* Wood, 61 Ark. 442, 23 S. W. 636, 31 L. R. A. 609.

California.— Saunderson *v.* Broadwell, 82 Cal. 132, 23 Pac. 36.

Georgia.— Powell *v.* Kelly, 82 Ga. 1, 9 S. E. 278, 3 L. R. A. 139 (absolute promise to pay other creditors); Watkins *v.* Pope, 38 Ga. 514.

Illinois.— Weir *v.* Dustin, 28 Ill. App. 605.

Indiana.— Dessar *v.* Field, 99 Ind. 548.

Iowa.— Davis *v.* Gibbon, 24 Iowa 257.

his creditors was deemed by the common law an incident to the right of ownership itself.[30]

2. Under Statutes — a. In General. The statutes variously describe the qualifications of the assignor in such terms as "insolvent debtor," a "debtor in failing circumstances or in contemplation of insolvency," and other terms indicating financial embarrassment,[31] such statutes being quite universally intended not to obstruct creditors in their ordinary remedies at law, except as they serve to promote equality in distribution of the estate, or, in case preferences are

Kansas.— Smith-McCord Dry-Goods Co. *v.* Carson, (Kan. 1898) 52 Pac. 880.

Michigan.— Canfield *v.* Gould, 115 Mich. 461, 73 N. W. 550.

Missouri.— Becker *v.* Rardin, 107 Mo. 111, 17 S. W. 892; Keiler *v.* Tutt, 31 Mo. 301, distinguishing conditional sale from an assignment.

Nebraska.— Kaufman *v.* Coburn, 30 Nebr. 672, 46 N. W. 1010.

New Hampshire.— Kenefick *v.* Perry, 61 N. H. 362 [*followed* in Hosmer *v.* Farley, 67 N. H. 590, 27 Atl. 223].

New Jersey.— Stokes *v.* Middleton, 28 N. J. L. 32.

New York.—Delaney *v.* Valentine, 154 N. Y. 692, 49 N. E. 65; Young *v.* Stone, 61 N. Y. App. Div. 364, 70 N. Y. Suppl. 558.

Pennsylvania.— Vallance *v.* Miners' L. Ins., etc., Co., 42 Pa. St. 441; York County Bank *v.* Carter, 38 Pa. St. 446, 80 Am. Dec. 494; Dubois' Appeal, 38 Pa. St. 231, 80 Am. Dec. 478.

South Dakota.— Sandwich Mfg. Co. *v.* Max, 5 S. D. 125, 58 N. W. 14, 24 L. R. A. 524.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 11.

As to the requisites of sales, generally, see Contracts; Deeds; Sales; Vendor and Purchaser.

Operating as an assignment see Truitt *v.* Caldwell, 3 Minn. 364, 74 Am. Dec. 764; Rosenthal *v.* Green, 37 Mo. App. 272; Blank *v.* German, 5 Watts & S. (Pa.) 36; Page *v.* Smith, 24 Wis. 368. See also *supra*, I, B.

The difference between an assignment and a sale cannot be disregarded without paralyzing the power of disposition over the property with scarcely less completeness than death itself. Harkins *v.* Bailey, 48 Ala. 376.

30. Right incident to ownership.— *Illinois.*—Walter Thompson Co. *v.* Whitehead, 185 Ill. 454, 56 N. E. 1106 [*affirming* 86 Ill. App. 76].

Kentucky.— Hull *v.* Evans, 22 Ky. L. Rep. 1118, 59 S. W. 851.

Maryland.— Malcolm *v.* Hall, 9 Gill (Md.) 132, 134, 52 Am. Dec. 688, wherein the court, referring to a common-law assignment, said: "Assignments . . are only questionable when they contravene the express provisions of the insolvent laws."

New York.— In Tompkins *v.* Hunter, 149 N. Y. 117, 122, 43 N. E. 532 [*affirming* 24 N. Y. Suppl. 8], it was said that the right to make an assignment "existed at common law as an incident to the right of property. It was as complete and perfect as the right to acquire and enjoy it. Indeed, it was upon the principle that a person might acquire, enjoy and dispose of his property that his right to make a general assignment rested." And in Fitzgerald *v.* Quann, 109 N. Y. 441, 17 N. E. 354, 16 N. Y. St. 395, it is said of a statute limiting this right, that as this statute changed the common law, as it existed, when it was passed, it will be held to abrogate, only so far as the clear import of the language absolutely requires.

Ohio.— Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637; Callahan *v.* Ice Co., 13 Ohio Cir. Ct. 479, 7 Ohio Dec. 349.

Vermont.— Hall *v.* Denison, 17 Vt. 310.

United States.—In Brashear *v.* West, 7 Pet. (U. S.) 608, 614, 8 L. ed. 801, Marshall, C. J., says: "That a general assignment of all a man's property is, *per se*, fraudulent, has never been alleged in this country. The right to make it results from that absolute ownership which every man claims over that which is his own. . . . Creditors have an equitable claim on all the property of their debtor; and it is his duty, as well as his right, to devote the whole of it to the satisfaction of their claims. The exercise of this right by the honest performance of his duty cannot be deemed a fraud. If transferring every part of his property, separately, to individual creditors in payment of their several debts would be not only fair but laudable, it cannot be fraudulent to transfer the whole to trustees for the benefit of all. In England such an assignment could not be supported, because it is by law an act of bankruptcy, and the law takes possession of a bankrupt's estate and disposes of it."

The only limitation upon the complete exercise of this right to assign was, for a long time, that afforded by the statutes as to fraudulent conveyances and the general equity powers of the courts respecting fraud. Crawford *v.* Kirksey, 55 Ala. 282, 28 Am. Rep. 704; Tompkins *v.* Hunter, 149 N. Y. 117, 43 N. E. 532 [*affirming* 24 N. Y. Suppl. 8].

The creditors of an insolvent debtor cannot compel him to make an assignment. Baer *v.* Farwell, 66 Ill. App. 397.

31. See list of statutes cited *supra*, note 6, p. 120.

As to who is to be deemed an insolvent see Bankruptcy; Insolvency.

Under Iowa Code (1873), § 2115, one who cannot pay his debts in due course of trade and cannot continue doing business without settling with his creditors has been held to be an insolvent debtor. McCandless *v.* Hazen, 98 Iowa 321, 67 N. W. 256.

Under N. Y. Laws (1860), c. 348, § 6, a **non-resident** was not excluded from the right

allowed,[32] to secure to a debtor, unable to pay in full, this privilege allowed by the common law, either purpose generally forbidding assignment by one who is solvent.[33]

b. Partnership. Where the statute does not specifically mention partnerships as having the right to make a voluntary assignment, they are, nevertheless, held to be embraced in the term debtor or person, and in some states one or a less number than the entire firm may validly assign with or without the consent of the others.[34]

to make an assignment of property within the state. Scott *v.* Guthrie, 10 Bosw. (N. Y.) 408.

32. As to preferences, generally, see *infra*, IV.

33. Where assignor is not insolvent.— *Illinois.*— Gardner *v.* Commercial Nat. Bank, 95 Ill. 298.

Indiana.— Keen *v.* Preston, 24 Ind. 395.

Kansas.— Holmberg *v.* Dean, 21 Kan. 73.

Kentucky.—Turley *v.* Alphin, 5 Ky. L. Rep. 770.

Minnesota.—Where admitted value of property assigned is two or three times that of the assignor's indebtedness the assignment is void. Burt *v.* McKinstry, 4 Minn. 204, 77 Am. Dec. 507.

Missouri.— Where assets of assignor are several times greater than his liabilities the deed is voidable, as tending to hinder, delay, and defraud creditors. Attleboro First Nat. Bank *v.* Hughes, 10 Mo. App. 7.

New York.— It is fraud in a debtor, having ample property to pay all his debts, to assign all his property to an assignee, and authorize him to employ the proceeds in defending suits to recover debts. Planck *v.* Schermerhorn, 3 Barb. Ch. (N. Y.) 644. But if the nominal value of assets exceeds, not very largely, the debts (Livermore *v.* Northrup, 44 N. Y. 107), or if the property is of uncertain value (Ogden *v.* Peters, 15 Barb. (N. Y.) 560 [*affirmed* in 21 N. Y. 23, 78 Am. Dec. 122]), the assignment, it seems, may be sustained. *Compare* also Rokenbaugh *v.* Hubbell, 5 Law Rep. N. S. (N. Y.) 95 [*cited* in Ogden *v.* Peters, 15 Barb. (N. Y.) 563].

South Dakota.—Williams *v.* Harris, 4 S. D. 22, 54 N. W. 926, 46 Am. St. Rep. 753.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 89.

Under some statutes a solvent debtor is allowed to assign.— *Colorado.*— Hunter *v.* Ferguson, 3 Colo. App. 287, 33 Pac. 82.

Iowa.— Savery *v.* Spaulding, 8 Iowa 239, 74 Am. Dec. 300, sustaining the assignment, where assignor honestly believed himself insolvent, though in fact he was not.

Maryland.— Sangston *v.* Gaither, 3 Md. 40.

Michigan.— Munson *v.* Ellis, 58 Mich. 331, 25 N. W. 305 (holding that there is no necessary conclusion that assignment is void simply because assets exceed liabilities); Angell *v.* Rosenbury, 12 Mich. 241 (in the absence of fraudulent intent).

Minnesota.— Guerin *v.* Hunt, 8 Minn. 477, to the effect that a mere excess of assets over liabilities will not invalidate assignment.

New York.— Ogden *v.* Peters, 21 N. Y. 23, 78 Am. Dec. 122, to the effect that assignment is not necessarily void because debtor's assets exceed his liabilities.

Ohio.— Mitchell *v.* Gazzam, 12 Ohio 315, made by solvent in contemplation of insolvency. In the absence of an express statute, an instrument which transfers property to a trustee in trust for creditors constitutes an assignment for the benefit of creditors, notwithstanding the assignor is solvent. Wambaugh *v.* Northwestern Mut. Life Ins. Co., 59 Ohio St. 228, 52 N. E. 839.

That insolvent debtors knew of their insolvency at the time of making payments to creditors will be presumed. Cheek *v.* Grahn, (Ky. 1899) 51 S. W. 311.

34. *Colorado.*— Campbell *v.* Colorado Coal, etc., Co., 9 Colo. 60, 10 Pac. 248.

Connecticut.— Coggill *v.* Botsford, 29 Conn. 439.

Florida.—Williams *v.* Crocker, 36 Fla. 61, 18 So. 52.

Georgia.— Drucker *v.* Wellhouse, 82 Ga. 129, 8 S. E. 40, 2 L. R. A. 328, even if all the partners as individuals are solvent.

Indiana.— *Ex p.* Hopkins, 104 Ind. 157, 2 N. E. 587.

Iowa.— Bradley *v.* Bischel, 81 Iowa 80, 46 N. W. 755.

Kansas.— McFarland *v.* Bate, 45 Kan. 1, 25 Pac. 238, 10 L. R. A. 521.

Maryland.— Riley *v.* Carter, 76 Md. 581, 25 Atl. 667, 35 Am. St. Rep. 443, 19 L. R. A. 489. But *compare* Maughlin *v.* Tyler, 47 Md. 545, where the partnership was only an ostensible one.

Massachusetts.— Wyles *v.* Beals, 1 Gray (Mass.) 233.

Minnesota.— Farwell *v.* Brooks, 65 Minn. 184, 68 N. W. 5.

Mississippi.— Goodbar *v.* Tatum, (Miss. 1892) 10 So. 578. See also Richardson *v.* Davis, 70 Miss. 219, 11 So. 790.

Missouri.— Blank, etc., Candy Co. *v.* Walker, 46 Mo. App. 482.

New Hampshire.— Fellows *v.* Greenleaf, 43 N. H. 421.

New York.— Kurtzcrook *v.* Rindskopf, 34 Hun (N. Y.) 457; Workum *v.* Caldwell, 27 Misc. (N. Y.) 72, 58 N. Y. Suppl. 175. See also Haynes *v.* Brooks, 42 Hun (N. Y.) 528, 4 N. Y. St. 587; Becker *v.* Leonard, 42 Hun (N. Y.) 221; Eyre *v.* Beebe, 28 How. Pr. (N. Y.) 333; Turner *v.* Jaycox, 40 Barb. (N. Y.) 164.

Pennsylvania.— Baker's Appeal, 21 Pa. St. 76, 59 Am. Dec. 752; Andress *v.* Miller, 15 Pa. St. 316.

c. Corporation. The same construction that embraces partnerships includes corporations,[35] and it is also held that a foreign corporation may exercise such privilege.[36]

C. Property to Be Included — 1. In General. The rule is to include in assignments all of the property of the debtor, real, personal, and choses in action, not exempt by law from execution and sale,[37] but unintentional omissions

South Carolina.— Armstrong *v.* Hurst, 39 S. C. 498, 18 S. E. 150.

Texas.— Still *v.* Focke, 66 Tex. 715, 2 S. W. 59; Bean *v.* Warden, (Tex. Civ. App. 1895) 31 S. W. 831. Each member of a partnership making an assignment must, under the Texas statute, be shown to be insolvent. Hudson *v.* C. Eisenmayer, Sr., Milling, etc., Co., 79 Tex. 401, 15 S. W. 385. *Compare* Windham *v.* Patty, 62 Tex. 490, where the assignment was upheld when made by one purporting to be a partner when in fact he was not.

United States.— Tracy *v.* Tuffly, 134 U. S. 206, 10 S. Ct. 527, 33 L. ed. 879.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 92.

As to authority of one partner to assign see PARTNERSHIP; and *infra*, III, A, 1, c.

As to authority of surviving partner to assign see PARTNERSHIP.

35. *Alabama.*— Pope *v.* Brandon, 2 Stew. (Ala.) 401, 20 Am. Dec. 49.

Arkansas.— Ringo *v.* Biscoe, 13 Ark. 563.

Georgia.— McCallie *v.* Walton, 37 Ga. 611, 95 Am. Dec. 369.

Indiana.— De Camp *v.* Alward, 52 Ind. 468, holding that express authority of the stockholders is not necessary.

Maryland.— State *v.* Maryland Bank, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561.

Michigan.— Bank Com'rs *v.* Brest Bank, 1 Harr. (Mich.) 106.

Minnesota.— Tripp *v.* Northwestern Nat. Bank, 41 Minn. 400, 43 N. W. 60.

Mississippi.— Robins *v.* Embry, Sm. & M. Ch. (Miss.) 207.

Missouri.— Shockley *v.* Fisher, 75 Mo. 498.

New Hampshire.— Flint *v.* Clinton Co., 12 N. H. 430.

New Jersey.— In American Ice Mach. Co. *v.* Paterson Fire Engine, etc., Co., 22 N. J. Eq. 72, the right to assign was denied under a statute declaring that the "directors of a company when insolvent, or in contemplation of insolvency, shall not make any sale, transfer, or assignment of its property."

New York.— Bowery Bank Case, 5 Abb. Pr. (N. Y.) 415, 16 How. Pr. (N. Y.) 56; De Ruyter *v.* St. Peter's Church, 3 Barb. Ch. (N. Y.) 119 [*affirmed* in 3 N. Y. 238], in the absence of charter restrictions or other legal provisions to the contrary. In Loring *v.* U. S. Vulcanized Gutta Percha Belting, etc., Co., 30 Barb. (N. Y.) 644, and in Sibell *v.* Remsen, 33 N. Y. 95, it was held that a manufacturing corporation could not assign in New York. See also Harris *v.* Thompson, 15 Barb. (N. Y.) 62, construing 1 N. Y. Rev. Stat. p. 603, § 4.

Pennsylvania.— In the absence of legal provisions forbidding assignment by the corporation. Ardesco Oil Co. *v.* North American Oil, etc., Co., 66 Pa. St. 375; Dana *v.* U. S. Bank, 5 Watts & S. (Pa.) 223; Inland Ins., etc., Co. *v.* Good, 8 Lanc. Bar (Pa.) 117. See also U. S. *v.* U. S. Bank, 8 Rob. (La.) 262, construing Pennsylvania statute.

Tennessee.— Hopkins *v.* Gallatin Turnpike Co., 4 Humphr. (Tenn.) 402.

West Virginia.— Farmers' Bank *v.* Willis, 7 W. Va. 31.

Wisconsin.— Goetz *v.* Knie, 103 Wis. 366, 79 N. W. 401.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 94.

As to the powers of corporations, generally, see CORPORATIONS.

Banking companies are included within this rule.

Indiana.— Wright *v.* Rogers, 26 Ind. 218.

Maryland.— Union Bank *v.* Ellicott, 6 Gill & J. (Md.) 363.

Mississippi.— Grand Gulf R., etc., Co. *v.* State, 10 Sm. & M. (Miss.) 428; Arthur *v.* Commercial, etc., Bank, 9 Sm. & M. (Miss.) 394, 48 Am. Dec. 719; Montgomery *v.* Commercial Bank, Sm. & M. Ch. (Miss.) 632.

Ohio.— Rossman *v.* McFarland, 9 Ohio St. 369, holding, however, that the assignment must not conflict with the duties enjoined upon the bank commissioners.

Pennsylvania.— *In re* Miners' Bank, 13 Wkly. Notes Cas. (Pa.) 370, excepting banks of issue.

United States.— Peters *v.* Bain, 133 U. S. 670, 10 S. Ct. 354, 33 L. ed. 696, an assignment by directors and shareholders of a national bank.

As to the powers of banks, generally, see BANKS AND BANKING.

A bank could make a valid common-law assignment for the benefit of creditors. Town *v.* River Raisin Bank, 2 Dougl. (Mich.) 530. See also Farmers' Bank *v.* Willis, 7 W. Va. 31.

36. If a foreign corporation has such right under the laws of its domicile, it may assign in New York where it is doing business, notwithstanding the New York statute declaring void every transfer or assignment by a corporation, in contemplation of insolvency, as this refers only to domestic corporations. Vanderpoel *v.* Gorman, 140 N. Y. 563, 35 N. E. 932, 56 N. Y. St. 503, 37 Am. St. Rep. 601, 24 L. R. A. 548 [*reversing* 3 Misc. (N. Y.) 57, 22 N. Y. Suppl. 541, 51 N. Y. St. 862.

In Pennsylvania it is ruled that a foreign corporation could there assign, notwithstanding the laws of its own state prohibited insolvent corporations from so doing. Borton *v.* Brines-Chase Co., 175 Pa. St. 209, 34 Atl. 597; Benevolent Order Active Workers *v.* Sanders, 28 Wkly. Notes Cas. (Pa.) 321.

37. All property not exempt should be included.— *California.*— Aylesworth *v.* Dean, (Cal. 1886) 12 Pac. 241.

from the instrument of assignment or schedule annexed thereto do not invalidate.[38]

2. In Partnership Assignments. In partnerships this rule is met by the partners assigning all the firm property,[39] though in some states the separate property of the individual members of the partnership is to be included[40] in the assign-

Georgia.— Stultz *v.* Fleming, 83 Ga. 14, 9 S. E. 1067, holding that unexpired portion of non-assignable lease and money in bank drawn against need not be included.

Iowa.— Meeker *v.* Sanders, 6 Iowa 61.

Kentucky.— Calloway *v.* Calloway, (Ky. 1897) 39 S. W. 241; Vernon *v.* Morton, 8 Dana (Ky.) 247, to the effect that property in sheriff's hands subject to release may be included.

Maryland.— Bridges *v.* Hindes, 16 Md. 101; Barnitz *v.* Rice, 14 Md. 24, 74 Am. Dec. 513; Rosenberg *v.* Moore, 11 Md. 376; Keighler *v.* Nicholson, 4 Md. Ch. 86. *Compare* Price *v.* De Ford, 18 Md. 489.

Michigan.— Smith *v.* Mitchell, 12 Mich. 180.

Mississippi.— Thompson *v.* Preston, 73 Miss. 587, 19 So. 347, holding that fraudulent acts in disposing of property prior to assignment does not prevent assignment of what remains.

New York.— Wilson *v.* Forsyth, 24 Barb. (N. Y.) 105, 128, holding that a mere failure to "deliver" all the property conveyed does not render the assignment void, the court saying: "There is no case, in which it was ever thought of being held, that an assignor's failing to empty his pockets, (whether of $5, or $500;) or his not delivering his watch, or his breast-pin, or his penknife, made void a general assignment, otherwise good." Should include property levied upon subject to lien of execution. Mumper *v.* Rushmore, 79 N. Y. 19 [*affirming* 14 Hun (N. Y.) 591].

Pennsylvania.— Bittenbender *v.* Sunbury, etc., R. Co., 40 Pa. St. 269, any property of which assignor has the actual or potential possession.

South Carolina.— Adler *v.* Cloud, 42 S. C. 272, 20 S. E. 393, holding that assignment is not invalidated where notes taken for property, the sale of which was invalid against creditors, were not embraced in the assignment, but instead the property itself was.

Texas.— Keating *v.* Vaughn, 61 Tex. 518. Under the statute the entire property passes to assignees whether specifically mentioned or not. Wetzel *v.* Simon, 87 Tex. 403, 28 S. W. 274, 942; McIlhenny *v.* Miller, 68 Tex. 356, 4 S. W. 614. But see Eicks *v.* Copeland, 53 Tex. 581, 37 Am. Rep. 760.

Vermont.— Stanley *v.* Robbins, 36 Vt. 422.

Virginia.— Brown *v.* Putney, 90 Va. 447, 18 S. E. 883 (must include property nominally in trust but really the assignor's own, but may omit property nominally assignor's own, but really in trust); Paul *v.* Baugh, 85 Va. 955, 9 S. E. 329.

Compare Dahlman *v.* Greenwood, 99 Wis. 163, 74 N. W. 215.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 107.

As to reservations see *infra*, V.

As to constructive assignments see *supra*, I, B.

38. Unimportant omissions.— Meeker *v.* Sanders, 6 Iowa 61; McNaney *v.* Hall, 86 Hun (N. Y.) 415, 33 N. Y. Suppl. 518, 67 Am. St. Rep. 174; U. S. *v.* Clark, 1 Paine (U. S.) 629, 25 Fed. Cas. No. 14,807. This rule has been applied to omissions of worthless property (Pittsfield Nat. Bank *v.* Bayne, 19 N. Y. Suppl. 937, 47 N. Y. St. 318 [*affirmed* in 137 N. Y. 557, 33 N. E. 339, 50 N. Y. St. 932]); property of trifling value (Grug *v.* McGilliard, 76 Ind. 28); property encumbered beyond its value (Fassit *v.* Phillips, 4 Whart. (Pa.) 399.

But where the property is of considerable value there is required the strongest and clearest evidence to prove that it was an honest mistake. Pittsfield Nat. Bank *v.* Bayne, 19 N. Y. Suppl. 937, 47 N. Y. St. 318 [*affirmed* in 137 N. Y. 557, 33 N. E. 339, 50 N. Y. St. 932]. And an honest mistake will save the assignment. Van Bergen *v.* Lehmaier, 72 Hun (N. Y.) 304, 25 N. Y. Suppl. 356, 55 N. Y. St. 532.

39. All the firm property.— *Georgia.*— Drucker *v.* Wellhouse, 82 Ga. 129, 8 S. E. 40, 2 L. R. A. 328.

Indiana.— *Ex p.* Hopkins, 104 Ind. 157, 2 N. E. 587; Garnor *v.* Frederick, 18 Ind. 507; Blake *v.* Faulkner, 18 Ind. 47. *Contra*, Henderson *v.* Bliss, 8 Ind. 100.

Kansas.— McFarland *v.* Bate, 45 Kan. 1, 25 Pac. 238, 10 L. R. A. 521.

Mississippi.— Goodbar *v.* Tatum, (Miss. 1892) 10 So. 578. *Compare* Union, etc., Bank *v.* Allen, 77 Miss. 442, 27 So. 631.

New Jersey.— Johnston *v.* Dunn, (N. J. 1894) 29 Atl. 361.

South Carolina.— Armstrong *v.* Hurst, 39 S. C. 498, 18 S. E. 150; Trumbo *v.* Hamel, 29 S. C. 520, 8 S. E. 83.

Wisconsin.— Auley *v.* Osterman, 65 Wis. 118, 25 N. W. 657, 26 N. W. 568.

United States.— Kennedy *v.* McKee, 142 U. S. 606, 12 S. Ct. 303, 35 L. ed. 1131.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 112.

40. Rule that separate property must be included.— *Florida.*— Sheppard *v.* Reeves, 39 Fla. 53, 21 So. 774; Williams *v.* Crocker, 36 Fla. 61, 18 So. 52.

Maryland.—Maughlin *v.* Tyler, 47 Md. 545; Citizens' F., etc., Ins. Co. *v.* Wallis, 23 Md. 173.

Massachusetts.— Wyles *v.* Beals, 1 Gray (Mass.) 233.

Minnesota.— Farwell *v.* Brooks, 65 Minn. 184, 68 N. W. 5; Matter of Allen, 41 Minn. 430, 43 N. W. 382; May *v.* Walker, 35 Minn. 194, 28 N. W. 252.

ment, especially if releases are exacted as a condition to participation in the benefits.[41]

D. Debts to Be Included — 1. In General. The creditors for whose benefit an assignment is made are those between whom and the assignor there is any existing liability directly due.[42] Obligations to sureties,[43] obligations to grow due,[44] and debts secured and unsecured,[45] should also be included in the debts to be paid out of the proceeds of the property assigned.

2. In Partnership Assignments. The rule just stated applies to all such debts due by a copartnership; but it is not necessary to include the debts of the partners as individuals,[46] unless the individual property of the partners is assigned.[47]

New Hampshire.— Fellows *v.* Greenleaf, 43 N. H. 421.

Pennsylvania.—Matter of Wilson, 4 Pa. St. 430, 45 Am. Dec. 701.

Texas.— Focke *v.* Blum, 82 Tex. 436, 17 S. W. 770.

Wyoming.— McCord-Brady Co. *v.* Mills, (Wyo. 1899) 56 Pac. 1003; Swofford Bros. Dry-Goods Co. *v.* Mills, 86 Fed. 556.

Compare Louisville Trust Co. *v.* Columbia, etc., Trust Co., (Ky. 1900) 60 S. W. 1, 59 S. W. 867.

But if there was in fact no individual property of the members the assignment not void for failing to recite this fact. Hamilton-Brown Shoe Co. *v.* Mayo, 8 Tex. Civ. App. 164, 27 S. W. 781.

41. If releases are exacted.— Wyles *v.* Beales, 1 Gray (Mass.) 233; Matter of Allen, 41 Minn. 430, 43 N. W. 382. *Contra*, Armstrong *v.* Hurst, 39 S. C. 498, 18 S. E. 150.

42. Existing liabilities directly due.—Canal Bank *v.* Cox, 6 Me. 395; Cushing *v.* Gore, 15 Mass. 69; Hendricks *v.* Robinson, 2 Johns. Ch. (N. Y.) 283.

43. A person contingently liable as surety is so far a creditor of his principal as to justify his being named as such. Canal Bank *v.* Cox, 6 Me. 395; Duvall *v.* Raisin, 7 Mo. 449; Webb *v.* Thomas, 21 N. Y. Suppl. 69, 49 N. Y. St. 462 [*affirmed* in 37 N. E. 564, 60 N. Y. St. 866]; Loeschigk *v.* Jacobson, 26 How. Pr. (N. Y.) 526; Cunningham *v.* Freeborn, 11 Wend. (N. Y.) 240 [*affirming* 3 Paige (N. Y.) 557 (*affirming* 1 Edw. (N. Y.) 256)].

44. Obligations to grow due.— A general assignment for creditors is valid for future liabilities, as well as for debts due, if the parties so intend. Silver Creek Bank *v.* Talcott, 22 Barb. (N. Y.) 550; Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 11 Fed. Cas. No. 5,964. But a provision for the payment of debts and liabilities due or to grow due, if intended to secure debts or claims not then in existence but which are afterward to be created, would be void. Brainerd *v.* Dunning, 30 N. Y. 211. So also a clause to indemnify one who should afterward enter bail for stay of execution in judgments that might be obtained against his assignor makes the assignment bad. Whallon *v.* Scott, 10 Watts (Pa.) 237.

Future advances and contingent debts may be included, and the only question that properly arises in such case is the *bona fides* of the transaction. McGavock *v.* Deery, 1 Coldw. (Tenn.) 265.

45. Omitting creditors secured by collaterals, or otherwise, has been held to be fatal to validity. Bickham *v.* Lake, 51 Fed. 892. But it has also been held that an assignment providing for equal distribution among all creditors, except those secured by mortgages or other liens which are to be first paid, does not invalidate. Bryce *v.* Foot, 25 S. C. 467.

46. Individual debts need not be included. — *Iowa.*— Bradley *v.* Bischel, 81 Iowa 80, 46 N. W. 755.

Maryland.— Riley *v.* Carter, 76 Md. 581, 25 Atl. 667, 35 Am. St. Rep. 443, 19 L. R. A. 489.

New York.— Haggerty *v.* Granger, 15 How. Pr. (N. Y.) 243.

South Carolina.— Blair *v.* Black, 31 S. C. 346, 9 S. E. 1033, 17 Am. St. Rep. 30.

Vermont.— Goddard *v.* Bridgman, 25 Vt. 351, 60 Am. Dec. 272.

Wisconsin.— Willis *v.* Bremner, 60 Wis. 622, 19 N. W. 403; Vernon *v.* Upson, 60 Wis. 418, 19 N. W. 400.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 99.

Note signed by all partners, though not otherwise a partnership debt, may be classed as such in an assignment. Citizens' Bank *v.* Williams, 128 N. Y. 77, 28 N. E. 33, 38 N. Y. St. 834, 26 Am. St. Rep. 454 [*reversing* 12 N. Y. Suppl. 678, 35 N. Y. St. 542].

47. Where individual property is included. — Heckman *v.* Messinger, 49 Pa. St. 465; Andress *v.* Miller, 15 Pa. St. 316; Hollister *v.* Loud, 2 Mich. 309, holding, that it cannot be objected to an assignment of copartners, that it provides for private creditors of the individual members of the firm, where the individual property exceeds the amount of each partner's individual debts.

In Missouri assignment is not invalid for benefit of all creditors, instead of partnership creditors alone, as the statute will work out the equities. Hartzler *v.* Tootle, 85 Mo. 23.

No evasion of the rule to assign partnership assets for the benefit of partnership creditors will be allowed. Thus where one of two insolvent creditors transfers his interest in partnership assets to his copartner, an assignment on the same day by the copartner must be for partnership creditors. Collier *v.* Hanna, 71 Md. 253, 17 Atl. 1017. And an attempt to convey partnership property for the payment of both firm and individual debts, without providing firm debts shall be paid first, is conclusive proof of the debtor's intent to de-

Under statutes, however, permitting preferences, illegal provisions for the payment of individual debts out of partnership assets may invalidate,[48] though individual property may be appropriated, it is sometimes ruled, to pay partnership debts.[49] It renders void an assignment to provide for the payment of a debt due a partner out of the firm property.[50]

E. Assent or Acceptance by Assignee — 1. Necessity and Presumption of. The general rule of equity is, that a trust shall never fail for want of a trustee,[51] and, therefore, the acceptance by an assignee named in a deed of assignment is not necessary to its validity.[52] Also his assent to the deed of assignment will be

fraud. Friend *v.* Michaelis, 15 Abb. N. Cas. (N. Y.) 354.

48. Where individual assets are sufficient for private debts.— Haggerty *v.* Granger, 15 How. Pr. (N. Y.) 243; Knauth *v.* Bassett, 34 Barb. (N. Y.) 31, to the effect that such an assignment is not necessarily void, where it purports to assign the individual property, it not appearing that the individual property will be insufficient to pay individual debts; but that if it appears that the individual debts are to be paid directly out of the partnership assets the assignment is absolutely void. See also Schiele *v.* Healy, 61 How. Pr. (N. Y.) 73. And *compare* Richardson *v.* Davis, 70 Miss. 219, 11 So. 790; Eyre *v.* Beebe, 28 How. Pr. (N. Y.) 333.

As to illegal preferences see *infra*, IV.

Deed of assignment is per se fraudulent which appropriates partnership property to payment of individual debts. Keith *v.* Fink, 47 Ill. 272; Fou th Nat. Bank *v.* Burger, 15 N. Y. St. 101.

Payment of individual debts out of individual property and partnership debts out of partnership property should be directed in an assignment of both partnership and individual property. Field *v.* Romero, 7 N. M. 630, 41 Pac. 517.

Preferred creditors cannot, however, take advantage of a defect of this character. Scott *v.* Guthrie, 25 How. Pr. (N. Y.) 481; National Bank *v.* Cohn, 42 Hun (N. Y.) 381.

Firm creditors cannot complain that the individual creditors are to be paid out of firm assets after first paying firm debts. Crook *v.* Rindskopf, 105 N. Y. 476, 12 N. E. 174.

Assignment of one member of firm conveying all personal effects of the firm for benefit of its creditors is not absolutely void, because debts of individual partner were embraced therein, but this part of the assignment has no effect in the way of interference with payment of firm debts. Lasell *v.* Tucker, 5 Sneed (Tenn.) 33.

49. Partnership debt out of individual property.— Newman *v.* Bagley, 16 Pick. (Mass.) 570; Haynes *v.* Brooks, 42 Hun (N. Y.) 528, 4 N. Y. St. 587; Becker *v.* Leonard, 42 Hun (N. Y.) 241; Van Rossum *v.* Walker, 11 Barb. (N. Y.) 237. *Compare* Wooldridge *v.* Irving, 23 Fed. 676.

Where liabilities of partners are unequal. — Partnership and individual property cannot be appropriated first to pay partnership debts and residue to individual debts of the partners, and, if insufficient, to pay individual debts *pro rata*. O'Neil *v.* Salmon, 25 How. Pr. (N. Y.) 246. And a partnership creditor may object to this, notwithstanding it did not operate to defraud him but only to hinder. Kurtzerook *v.* Rindskopf, 34 Hun (N. Y.) 457.

50. Payment of debt due partner.— Mills *v.* Argall, 6 Paige (N. Y.) 577, applying the rule as well to a special partner as to a general partner.

Where one is partner of an assigning firm and of another firm which is a preferred creditor under the assignment, it invalidates if he derives any advantage from such preference. Welsh *v.* Britton, 55 Tex. 118.

51. See, generally, Trusts.

52. Not necessary.— *Delaware.*— Lore *v.* Hill, 3 Harr. (Del.) 530.

Georgia.— Jones *v.* Dougherty, 10 Ga. 273.

Iowa.— Price *v.* Parker, 11 Iowa 144.

Michigan.— Pierson *v.* Manning, 2 Mich. 445, to the effect, however, that before acceptance by assignee an attachment against the assigned estate is good.

New Hampshire.— See Flint *v.* Clinton Co., 12 N. H. 430.

New Jersey.— Scull *v.* Reeves, 3 N. J. Eq. 84, 29 Am. Dec. 694.

New York.— Crosby *v.* Hillyer, 24 Wend. (N. Y.) 280, to the effect, however, that before acceptance by assignee an execution levy was superior to the assignment.

North Carolina.— Frank *v.* Heiner, 117 N. C. 79, 23 S. E. 42.

Pennsylvania.— Marks' Appeal, 85 Pa. St. 231; Gray *v.* Hill, 10 Serg. & R. (Pa.) 436; Wilt *v.* Franklin, 1 Binn. (Pa.) 502, 2 Am. Dec. 474.

South Carolina.— Cohen *v.* Gibbes, 1 Hill (S. C.) 206.

Tennessee.— Brevard *v.* Neely, 2 Sneed (Tenn.) 164; Turman *v.* Fisher, 4 Coldw. (Tenn.) 626, 94 Am. Dec. 210; Young *v.* Cardwell, 6 Lea (Tenn.) 168; Field *v.* Arrowsmith, 3 Humphr. (Tenn.) 442, 39 Am. Dec. 185.

Virginia.— Reynolds *v.* State Bank, 6 Gratt. (Va.) 174.

But see Lawrence *v.* Davis, 3 McLean (U. S.) 177, 15 Fed. Cas. No. 8,137, holding assent on the part of the assignee to be necessary. And *compare* MacVeagh *v.* Chase, 67 Ill. App. 160.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 165; and also, generally, Trusts.

As to the effect of acceptance by assignee as consideration to support a deed of assignment see *infra*, note 95.

Assignee may renounce the trust and re-

presumed so that the trust created thereby may begin to have immediate operation.[53]

2. SUFFICIENCY. When, however, assent or acceptance on the part of the assignee is considered necessary, under statutory provision to that effect or otherwise,[54] it seems that it is not essential that the assignee should actually sign the instrument of assignment,[55] or even that he should consent in writing,[56] it being sufficient if, by any act or conduct on his part, the assignee indicates that he has accepted the trust imposed upon him.[57]

F. Assent or Acceptance by Creditors —1. NECESSITY AND PRESUMPTION OF. The English doctrine[58] and the rule as enunciated in many decisions of the American courts is that assent of some character on the part of the creditors is essential[59] to the validity of an assignment for the benefit of creditors, unless such

store the property without becoming individually liable for its value; but such renunciation does not affect the right of a creditor to have the character of the transfer judicially determined and the property administered as a trust for the benefit of all the creditors under the insolvency laws of the state. Robertson *v.* Desmond, 62 Ohio St. 487, 57 N. E. 335.

53. Assent presumed.—Rowland *v.* Hewitt, 19 Ill. App. 450; Wilt *v.* Franklin, 1 Binn. (Pa.) 502, 2 Am. Dec. 474; Brevard *v.* Neely, 2 Sneed (Tenn.) 164. See also Gordon *v.* Coolidge, 1 Sumn. (U. S.) 537, 10 Fed. Cas. No. 5,606, where, after an assignment had been made to a law firm and one member thereof had assented, the assent of the other was presumed.

This presumption may be rebutted, however, by proof showing an actual repudiation of the trust. Jackson *v.* Bodle, 20 Johns. (N. Y.) 184.

54. Thomas *v.* Clark, 65 Me. 296; Quincy *v.* Hall, 1 Pick. (Mass.) 357, 11 Am. Dec. 198. See also cases cited *infra,* notes 55–57.

55. Signature unnecessary.—Shearer *v.* Loftin, 26 Ala. 703; Dewoody *v.* Hubbard, 1 Stew. & P. (Ala.) 9 (assignment of personal property regularly executed and recorded); Morrison *v.* Shuster, 1 Mackey (D. C.) 190; State *v.* Benoist, 37 Mo. 500; Flint *v.* Clinton Co., 12 N. H. 430.

56. Consent in writing unnecessary.—Scull *v.* Reeves, 3 N. J. Eq. 84, 29 Am. Dec. 694.

But if the statute requires acceptance in writing and describes the manner and sufficiency of such acceptance the consent in writing must conform to the statutory requirement. Franey *v.* Smith, 125 N. Y. 44, 25 N. E. 1079, 34 N. Y. St. 469 [*reversing* 47 Hun (N. Y.) 119; *disapproving* Schwartz *v.* Soutter, 41 Hun (N. Y.) 323]; Royer Wheel Co. *v.* Fielding, 101 N. Y. 504, 5 N. E. 431; Scott *v.* Mills, 115 N. Y. 376, 22 N. E. 156, 26 N. Y. St. 124 [*affirming* 45 Hun (N. Y.) 263]; Rennie *v.* Bean, 24 Hun (N. Y.) 123; Noyes *v.* Wernberg, 15 Abb. N. Cas. (N. Y.) 164; Smedley *v.* Smith, 15 Daly (N. Y.) 421, 8 N. Y. Suppl. 100, 28 N. Y. St. 414 [*affirmed* in 126 N. Y. 637, 27 N. E. 411, 37 N. Y. St. 962]. See also Hanson *v.* Dunn, 76 Wis. 455, 45 N. W. 319; Clark *v.* Lamoreux, 70 Wis. 508, 36 N. W. 393; Fuhrman *v.* Jones, 68 Wis. 497, 32 N. W. 547; Scott *v.* Seaver, 52 Wis. 175, 8 N. W. 811.

57. Acts fairly implying a consent are sufficient. Scull *v.* Reeves, 3 N. J. Eq. 84, 29 Am. Dec. 694.

Conditional acceptance has been held to be insufficient. True *v.* Congdon, 44 N. H. 48.

One of two or more assignees may accept the trust and the others repudiate it, without invalidating the assignment as to the assignees' acceptance. Douglass *v.* Cissna, 17 Mo. App. 44; Scull *v.* Reeves, 3 N. J. Eq. 84, 29 Am. Dec. 694; Gordon *v.* Coolidge, 1 Sumn. (U. S.) 537, 10 Fed. Cas. No. 5,606.

Oral consent is not necessary. Scull *v.* Reeves, 3 N. J. Eq. 84, 29 Am. Dec. 694. Oral acceptance may, however, be sufficient. Singer *v.* Armstrong, 77 Iowa 397, 42 N. W. 332.

Proceeding to execute the trust imposed may constitute acceptance. Flint *v.* Clinton Co., 12 N. H. 430; Cunningham *v.* Freeborn, 1 Edw. (N. Y.) 256 [*affirmed* in 3 Paige (N. Y.) 557 (*affirmed* in 11 Wend. (N. Y.) 240)].

Taking possession of the property assigned constitutes acceptance. Price *v.* Parker, 11 Iowa 144.

Time of acceptance.— Assignee may accept even after levy upon the property assigned. Rowland *v.* Hewitt, 19 Ill. App. 450.

58. English doctrine.— Biron *v.* Mount, 24 Beav. 642, 4 Jur. N. S. 43, 27 L. J. Ch. 191; Watson *v.* Knight, 19 Beav. 369; Brady *v.* Sheil, 1 Campb. 147; Smith *v.* Keating, 6 C. B. 136, 60 E. C. L. 136; Collins *v.* Reece, 1 Coll. 675, 28 Eng. Ch. 675; Acton *v.* Woodgate, 3 L. J. Ch. 83, 2 Myl. & K. 492, 7 Eng. Ch. 492; Whitmore *v.* Turquand, 3 De G. F. & J. 107, 7 Jur. N. S. 377, 30 L. J. Ch. 345, 4 L. T. Rep. N. S. 38, 9 Wkly. Rep. 488, 64 Eng. Ch. 84; Siggers *v.* Ev ns, 5 E. & B. 367, 3 C. L. R. 1209, 24 L. J. Q. B. 305, 1 Jur. N. S. 851, 85 E. C. L. 367; Forbes *v.* Limond, 4 De G. M. & G. 298, 18 Jur. 33, 2 Wkly. Rep. 262, 53 Eng. Ch. 231; Raworth *v.* Parker, 2 Kay & J. 163, 25 L. J. Ch. 117, 4 Wkly. Rep. 273; *In re* Baber, L. R. 10 Eq. 554, 40 L. J. Ch. 144, 18 Wkly. Rep. 1131; Wallwyn *v.* Coutts, 3 Meriv. 707, 3 Sim. 14, 17 Rev. Rep. 173, 6 Eng. Ch. 14; Garrard *v.* Lauderdale, 3 Sim. 1, 6 Eng. Ch. 1; Dunch *v.* Kent, 1 Vern. 319.

59. Better American doctrine.— Without regard to the status of voluntary assignments

creditors are actual parties to the deed of assignment, or unless, by virtue of the statute under which the assignment is made, such assent becomes unnecessary.

"with preferences," if any distinction in this regard is to be drawn, and independently of statutory provisions, classifying them as assignments requiring assent at the time of making the deed or subsequently, either expressly or by acquiescence, the cases holding assent of the creditors to be necessary are as follows:

Alabama.— Shearer *v.* Loftin, 26 Ala. 703; Kinnard *v.* Thompson, 12 Ala. 487; Wiswall *v.* Ross, 4 Port. (Ala.) 321. See also England *v.* Reynolds, 38 Ala. 370; Rankin *v.* Lodor, 21 Ala. 380; Nelson *v.* Dunn, 15 Ala. 501; Mauldin *v.* Armistead, 14 Ala. 702; Hodge *v.* Wyatt, 10 Ala. 271; Lockhart *v.* Wyatt, 10 Ala. 231, 44 Am. Dec. 481; Smith *v.* Leavitts, 10 Ala. 92; Elmes *v.* Sutherland, 7 Ala. 262; Richards *v.* Hazzard, 1 Stew. & P. (Ala.) 139; Pope *v.* Brandon, 2 Stew. (Ala.) 401, 20 Am. Dec. 49.

Arkansas.— McCain *v.* Pickens, 32 Ark. 399; Hempstead *v.* Johnston, 18 Ark. 123, 65 Am. Dec. 458; Rapley *v.* Cummins, 11 Ark. 689.

California.— Forbes *v.* Scannell, 13 Cal. 242.

Colorado.— Elliott *v.* Hobbs, 2 Colo. App. 169, 30 Pac. 54.

Connecticut.— Greene *v.* A. & W. Sprague Mfg. Co., 52 Conn. 330; Merrills *v.* Swift, 18 Conn. 257, 46 Am. Dec. 315; Naylor *v.* Fosdick, 4 Day (Conn.) 146, 4 Am. Dec. 187. See also Hovey *v.* Clark, *cited* in Brown *v.* Burrel, 1 Root (Conn.) 252.

Delaware.— *Compare* Waters *v.* Comly, 3 Harr. (Del.) 117.

District of Columbia.— Webster *v.* Harkness, 3 Mackey (D. C.) 220.

Illinois.— Gibson *v.* Rees, 50 Ill. 383; Hulick *v.* Scovil, 9 Ill. 159. See also Condict *v.* Flower, 106 Ill. 105.

Indiana.— Paul *v.* Logansport Nat. Bank, 60 Ind. 199. But *compare* Anderson *v.* Smith, 5 Blackf. (Ind.) 395.

Iowa.— Van Winkle *v.* Iowa Iron, etc., Fence Co., 56 Iowa 245, 9 N. W. 211; Price *v.* Parker, 11 Iowa 144. But *compare* Williams *v.* Gartrell, 4 Greene (Iowa) 287, construing Iowa code.

Kansas.— Emporia First Nat. Bank *v.* Ridenour, 46 Kan. 707, 27 Pac. 150.

Kentucky.— Stewart *v.* Hall, 3 B. Mon. (Ky.) 218. See also McKinley *v.* Combs, 1 T. B. Mon. (Ky.) 105; Pitts *v.* Viley, 4 Bibb (Ky.) 446.

Louisiana.— Hart *v.* Bates, 33 La. Ann. 473. But *compare* Kentucky Northern Bank *v.* Squires, 8 La. Ann. 318, 58 Am. Dec. 682.

Maine.— Copeland *v.* Weld, 8 Me. 411. See also Whitney *v.* Kelley, 67 Me. 377; Page *v.* Weymouth, 47 Me. 238; Haughton *v.* Davis, 23 Me. 28; Deering *v.* Cox, 6 Me. 404.

Maryland.—Lanahan *v.* Latrobe, 7 Md. 268; Farmers' Bank *v.* Thomas, 46 Md. 43, 37 Md. 246. See also Barnes *v.* Dodge, 7 Gill (Md.) 109.

Massachusetts.— Faulkner *v.* Hyman, 142 Mass. 53, 6 N. E. 846; Swan *v.* Crafts, 124 Mass. 453; Marston *v.* Coburn, 17 Mass. 454; Widgery *v.* Haskell, 5 Mass. 144, 4 Am. Dec. 41; Edwards *v.* Mitchell, 1 Gray (Mass.) 239; Russell *v.* Woodward, 10 Pick. (Mass.) 408. See also Nutter *v.* King, 152 Mass. 355, 25 N. E. 617; National Union Bank *v.* Copeland, 141 Mass. 257, 4 N. E. 794; Hastings *v.* Baldwin, 17 Mass. 552; Hatch *v.* Smith, 5 Mass. 42; Zipcey *v.* Thompson, 1 Gray (Mass.) 243; Fall River Iron-Works Co. *v.* Croade, 15 Pick. (Mass.) 11; American Bank *v.* Doolittle, 14 Pick. (Mass.) 123. But *compare* National Mechanics', etc., Bank *v.* Eagle Sugar Refinery, 109 Mass. 38; Everett *v.* Walcott, 15 Pick. (Mass.) 94; Foster *v.* Saco Mfg. Co., 12 Pick. (Mass.) 451.

Mississippi.— See Schoolfield *v.* Hirsh, 71 Miss. 55, 14 So. 528, 42 Am. St. Rep. 450, acceptance by assignee creditor for himself and all other creditors.

Missouri.— Valentine *v.* Decker, 43 Mo. 583; Hulse *v.* Marshall, 9 Mo. App. 148. See also Bradley *v.* Ames, 50 Mo. 387; Major *v.* Hill, 13 Mo. 247; Swearingen *v.* Slicer, 5 Mo. 241.

Nevada.— Gibson *v.* Chedic, 1 Nev. 497, 90 Am. Dec. 503.

New Hampshire.— Fellows *v.* Greenleaf, 43 N. H. 421; Hurd *v.* Silsby, 10 N. H. 108, 34 Am. Dec. 142. See also Haven *v.* Richardson, 5 N. H. 113.

New Jersey.— But see Scull *v.* Reeves, 3 N. J. Eq. 84, 29 Am. Dec. 694.

New York.—Martin *v.* Funk, 75 N. Y. 134, 31 Am. Rep. 446; Sheldon *v.* Dodge, 4 Den. (N. Y.) 217. But see Hastings *v.* Belknap, 1 Den. (N. Y.) 190; Austin *v.* Bell, 20 Johns. (N. Y.) 442, 11 Am. Dec. 297, where a judgment creditor refused to become a party to the deed of assignment.

North Carolina.— Ingram *v.* Kirkpatrick, 41 N. C. 463, 51 Am. Dec. 428.

Ohio.— Hyde *v.* Olds, 12 Ohio St. 591.

Pennsylvania.—Smith *v.* Washington Bank, 5 Serg. & R. (Pa.) 318. See also Sheerer *v.* Lautzerheizer, 6 Watts (Pa.) 543; McAllister *v.* Marshall, 6 Binn. (Pa.) 338, 6 Am. Dec. 458; Wilt *v.* Franklin, 1 Binn. (Pa.) 502, 2 Am. Dec. 474.

Rhode Island.— Smith *v.* Millett, 11 R. I. 528; Sadlier *v.* Fallon, 4 R. I. 490.

South Carolina.— See McCreery *v.* Garvin, 39 S. C. 375, 17 S. E. 828.

South Dakota.— See Cannon *v.* Deming, 3 S. D. 421, 53 N. W. 863, as to assent by agent.

Tennessee.— Furman *v.* Fisher, 4 Coldw. (Tenn.) 626, 94 Am. Dec. 210.

Texas.— Tittle *v.* Vanleer, 89 Tex. 174, 29 S. W. 1065, 34 S. W. 715, 37 L. R. A. 337; Baldwin *v.* Peet, 22 Tex. 708, 75 Am. Dec. 806; Hamilton-Brown Shoe Co. *v.* Mayo, 8 Tex. Civ. App. 164, 27 S. W. 781; Murphy *v.* Arkansas City Milling Co., (Tex. Civ. App.

It has been well said[60] that "the great weight of American authority makes assent of some of the creditors essential to the validity of assignment for their benefit,[61] and recognizes the rule, that such assent may be presumed in the absence of evidence to the contrary, if the instrument entitles all to share pro rata, and imposes no terms which will deprive creditors of some material right."[62] In fact

1894) 26 S. W. 853. *Compare* Alliance Milling Co. *v.* Eaton, 86 Tex. 401, 25 S. W. 614, 24 L. R. A. 369 [*reversing* 1 Tex. Civ. App. 704, 23 S. W. 246]. But see White *v.* Sterzing, 11 Tex. Civ. App. 553, 32 S. W. 909; Martin-Brown Co. *v.* Henderson, 9 Tex. Civ. App. 130, 28 S. W. 695.

Vermont.— Hall *v.* Denison, 17 Vt. 310.

Virginia.— *Compare* Spencer *v.* Ford, 1 Rob. (Va.) 684, where neither trustees nor *cestuis que trustent* assented. See also Skipwith *v.* Cunningham, 8 Leigh (Va.) 271, 31 Am. Dec. 642.

United States.— Tompkins *v.* Wheeler, 16 Pet. (U. S.) 106, 10 L. ed. 903; Marbury *v.* Brooks, 7 Wheat. (U. S.) 556, 5 L. ed. 522. See also Burd *v.* Smith, 4 Dall. (U. S.) 76, 1 L. ed. 748; Bodley *v.* Goodrich, 7 How. (U. S.) 276, 12 L. ed. 699. But see Adams *v.* Blodgett, 2 Woodb. & M. (U. S.) 233, 1 Fed. Cas. No. 46, 17 Hunt. Mer. Mag. 79, 10 Law Rep. 69.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 174.

As to preferences see *infra*, IV.

60. Per Stayton, C. J., in Alliance Milling Co. *v.* Eaton, 86 Tex. 401, 408, 25 S. W. 614, 24 L. R. A. 369.

61. The principle underlying the cases which lay down the contrary rule is that title vests in the trustee or assignee *eo instanti*.

Alabama.— Lanier *v.* Driver, 24 Ala. 149; Abercrombie *v.* Bradford, 16 Ala. 560.

Florida.— Brown *v.* Chamberlain, 9 Fla. 464.

Georgia.— Jones *v.* Dougherty, 10 Ga. 273. *Compare* McFerran *v.* Davis, 70 Ga. 661.

Kentucky.— Stewart *v.* Hall, 3 B. Mon. (Ky.) 218.

Maryland.—See Kalkman *v.* McElderry, 16 Md. 56 [*citing* Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 11 Fed. Cas. No. 5,964].

Michigan.— Suydam *v.* Dequindre, Harr. (Mich.) 347.

Missouri.— Valentine *v.* Decker, 43 Mo. 583.

New York.— Cunningham *v.* Freeborn, 11 Wend. (N. Y.) 240 [*affirming* 3 Paige (N. Y.) 557 (*affirming* 1 Edw. (N. Y.) 256)]; Nicoll *v.* Mumford, 4 Johns. Ch. (N. Y.) 522.

Ohio.— See Hyde *v.* Olds, 12 Ohio St. 591.

South Carolina.— Tennant *v.* Stoney, 1 Rich. Eq. (S. C.) 222, 44 Am. Dec. 213.

Tennessee.— Farquharson *v.* McDonald, 2 Heisk. (Tenn.) 404; Mills *v.* Haines, 3 Head (Tenn.) 331; Galt *v.* Dibrell, 10 Yerg. (Tenn.) 146.

Texas.— Thomas *v.* Chapman, 62 Tex. 193.

Utah.— Billings *v.* Parsons, 17 Utah 22, 53 Pac. 730.

Virginia.— Dance *v.* Seaman, 11 Gratt. (Va.) 778.

United States.— Brashear *v.* West, 7 Pet. (U. S.) 608, 8 L. ed. 801; Brooks *v.* Marbury, 11 Wheat. (U. S.) 78, 6 L. ed. 423; Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 11 Fed. Cas. No. 5,964; Wheeler *v.* Sumner, 4 Mason (U. S.) 183, 29 Fed. Cas. No. 17,501.

62. Assent presumed.— *Alabama.*— Lanier *v.* Driver, 24 Ala. 149; Brown *v.* Lyon, 17 Ala. 659 (preferred creditor); Governor *v.* Campbell, 17 Ala. 566; Lockwood *v.* Nelson, 16 Ala. 294. But see Shearer *v.* Loftin, 26 Ala. 703.

Arizona.— Cullum *v.* Paul, (Ariz. 1885) 8 Pac. 187.

Arkansas.— Ewing *v.* Walker, 60 Ark. 503, 31 S. W. 45; Hempstead *v.* Johnston, 18 Ark. 123, 65 Am. Dec. 458.

California.— Forbes *v.* Scannell, 13 Cal. 242.

Colorado.— Thatcher *v.* Valentine, 22 Colo. 201, 43 Pac. 1031; Spangler *v.* West, 7 Colo. App. 102, 43 Pac. 905.

Connecticut.— De Forest *v.* Bacon, 2 Conn. 633, preferred creditor. But see Waterman *v.* A. & W. Sprague Mfg. Co., 55 Conn. 554, 12 Atl. 240, where deed was declared fraudulent as to non-assenting creditors.

District of Columbia.— Smith *v.* Herrell, 11 App. Cas. (D. C.) 425; Webster *v.* Harkness, 3 Mackey (D. C.) 220.

Florida.— Brown *v.* Chamberlain, 9 Fla. 464.

Georgia.— McFerran *v.* Davis, 70 Ga. 661; Jones *v.* Dougherty, 10 Ga. 273.

Illinois.— Beach *v.* Bestor, 45 Ill. 341; Juillard *v.* Walker, 54 Ill. App. 517.

Iowa.— Van Winkle *v.* Iowa Iron, etc., Fence Co., 56 Iowa 245, 9 N. W. 211; Price *v.* Parker, 11 Iowa 144.

Kentucky.— Reinhard *v.* State Bank, 6 B. Mon. (Ky.) 252 (preferred creditor); U. S. Bank *v.* Huth, 4 B. Mon. (Ky.) 423; Stewart *v.* Hall, 3 B. Mon. (Ky.) 218; Scott *v.* Baldwin, 6 Ky. L. Rep. 214.

Louisiana.— Oliver *v.* Lake, 3 La. Ann. 78; Fellows *v.* Commercial, etc., Bank, 6 Rob. (La.) 246.

Maine.— Copeland *v.* Weld, 8 Me. 411 (preferred creditor).

Maryland.—Kalkman *v.* McElderry, 16 Md. 56; Houston *v.* Nowland, 7 Gill & J. (Md.) 480.

Massachusetts.— New England Bank *v.* Lewis, 8 Pick. (Mass.) 113 (preferred creditor); Ward *v.* Lewis, 4 Pick. (Mass.) 518 (preferred creditor). *Contra*, Faulkner *v.* Hyman, 142 Mass. 53, 6 N. E. 846; Russell *v.* Woodward, 10 Pick. (Mass.) 408.

Michigan.— Suydam *v.* Dequindre, Harr. (Mich.) 347.

Missouri.— Kingman *v.* Cornell-Tebbetts, etc., Co., (Mo. 1899) 51 S. W. 727; Feary *v.* O'Neill, 149 Mo. 467, 50 S. W. 918; Gale *v.*

in all the cases holding that assent by creditors is necessary, and that the assent of creditors may be presumed, the prevailing doctrine is that this presumption can be indulged only in respect of assignments in trust for the benefit of creditors, which unreservedly devote assigned property to payment of creditors, with or without preferences.[63] And where assent or acceptance by the creditors is con-

Mensing, 20 Mo. 461, 64 Am. Dec. 197; Major *v.* Hill, 13 Mo. 247; Duvall *v.* Raisin, 7 Mo. 449.

New Hampshire.— When assignment is made in conformity to statute. Frink *v.* Buss, 45 N. H. 325; Brown *v.* Warren, 43 N. H. 430. *Aliter,* when not in conformity to statute. Johnson *v.* Farley, 45 N. H. 505; Derry Bank *v.* Davis, 44 N. H. 548; Spinney *v.* Portsmouth Hosiery Co., 25 N. H. 9.

New York.— Cunningham *v.* Freeborn, 11 Wend. (N. Y.) 240 [*affirming* 3 Paige (N. Y.) 557]; Nicoll *v.* Mumford, 4 Johns. Ch. (N. Y.) 522. See also Morrison *v.* Brand, 5 Daly (N. Y.) 40 [*affirmed* in 56 N. Y. 657]; Mills *v.* Argall, 6 Paige (N. Y.) 577, an assignment by a limited partnership purporting to be for the benefit of a special partner.

North Carolina.— Moore *v.* McDuffy, 10 N. C. 578.

Ohio.— Fleming *v.* Stiefel, 8 Ohio Dec. (Reprint) 779, 9 Cinc. L. Bul. 350.

Pennsylvania.— Klapp *v.* Shirk, 13 Pa. St. 589; North *v.* Turner, 9 Serg. & R. (Pa.) 244, preferred creditor.

Rhode Island.— Smith *v.* Millett, 11 R. I. 528.

South Carolina.— *Compare* Beall *v.* Lowndes, 4 S. C. 258, holding that a creditor for whose benefit a trust has been created will not be presumed to have renounced his benefits thereunder.

Tennessee.— Washington *v.* Ryan, 5 Baxt. (Tenn.) 622; Farquharson *v.* McDonald, 2 Heisk. (Tenn.) 404; Shyer *v.* Lockhard, 2 Tenn. Ch. 365. But all formalities must have been complied with. Brevard *v.* Neely, 2 Sneed (Tenn.) 164.

Texas.—Wm. W. Kendall Boot, etc., Co. *v.* Johnston, (Tex. Civ. App. 1893) 24 S. W. 583; Swearingen *v.* Hendley, 1 Tex. Unrep. Cas. 639.

Vermont.— Hall *v.* Denison, 17 Vt. 310.

Virginia.— Dance *v.* Seaman, 11 Gratt. (Va.) 778; Phippen *v.* Durham, 8 Gratt. (Va.) 457; McCullough *v.* Sommerville, 8 Leigh (Va.) 415; Skipwith *v.* Cunningham, 8 Leigh (Va.) 271, 31 Am. Dec. 642.

United States.— Brooks *v.* Marbury, 11 Wheat. (U. S.) 78, 6 L. ed. 423, 7 Wheat. (U. S.) 556, 5 L. ed. 522 (where deed was made directly to creditors); Tompkins *v.* Wheeler, 16 Pet. (U. S.) 106, 10 L. ed. 903; Brashear *v.* West, 7 Pet. (U. S.) 608, 8 L. ed. 801; Wheeler *v.* Sumner, 4 Mason (U. S.) 183, 29 Fed. Cas. No. 17,501 (preferred creditor); Gordon *v.* Coolidge, 1 Sumn. (U. S.) 537, 10 Fed. Cas. No. 5,606; Adams *v.* Blodgett, 2 Woodb. & M. (U. S.) 233, 1 Fed. Cas. No. 46, 17 Hunt. Mer. Mag. 79, 10 Law Rep. 69.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 188.

The common law presumes an acceptance by creditors of assignments in trust purely for their benefit, so far that other creditors cannot acquire an adverse lien by execution or attachment. Oliver *v.* Lake, 3 La. Ann. 78; Gonzales *v.* Batts, (Tex. Civ. App. 1899) 50 S. W. 403.

Presumption is rebuttable.— *Colorado.*— Thatcher *v.* Valentine, 22 Colo. 201, 43 Pac. 1031.

Illinois.— Gibson *v.* Rees, 50 Ill. 383; Juillard *v.* Walker, 54 Ill. App. 517.

New Hampshire.— Frink *v.* Buss, 45 N. H. 325; Fellows *v.* Greenleaf, 43 N. H. 421.

New York.— Mills *v.* Argall, 6 Paige (N. Y.) 577.

South Carolina.—Beall *v.* Lowndes, 4 S. C. 258.

Tennessee.— Washington *v.* Ryan, 5 Baxt. (Tenn.) 622; Shyer *v.* Lockhard, 2 Tenn. Ch. 365.

Texas.— Wm. W. Kendall Boot, etc., Co. *v.* Johnston, (Tex. Civ. App. 1893) 24 S. W. 583.

United States.— Adams *v.* Blodgett, 2 Woodb. & M. (U. S.) 233, 1 Fed. Cas. No. 46, 17 Hunt. Mer. Mag. 79, 10 Law Rep. 69. See also Marbury *v.* Brooks, 11 Wheat. (U. S.) 78, 6 L. ed. 423, 7 Wheat. (U. S.) 556, 5 L. ed. 522.

63. Objections militating against the presumption of assent are given in the following cases:

Alabama.—Imposing conditions prejudicial to creditors. Abercrombie *v.* Bradford, 16 Ala. 560; Mauldin *v.* Armistead, 14 Ala. 702. Made to delay, hinder, or defraud creditors. Ashley *v.* Robinson, 29 Ala. 112, 65 Am. Dec. 387; Benning *v.* Nelson, 23 Ala. 801; Townsend *v.* Harwell, 18 Ala. 301. Postponing time of payment of debts. Rankin *v.* Lodor, 21 Ala. 380; Elmes *v.* Sutherland, 7 Ala. 262; Kemp *v.* Porter, 7 Ala. 138. Reservation made for assignor's support. Richards *v.* Hazzard, 1 Stew. & P. (Ala.) 139.

Arkansas.—McReynolds *v.* Dedman, 47 Ark. 347, 1 S. W. 552 (surplus reserved to debtor); McCain *v.* Pickens, 32 Ark. 399 (exacting release).

Delaware.— Where there is contrivance to prefer creditors, preferences being forbidden by statute. Waters *v.* Comly, 3 Harr. (Del.) 117.

Georgia.— Where creditors were required to file claim and release debtor within specified time. McBride *v.* Bohanan, 50 Ga. 527; Miller *v.* Conklin, 17 Ga. 430, 63 Am. Dec. 248.

Iowa.— Where there is a conditional assignment, the statute forbidding such. Williams *v.* Gartrell, 4 Greene (Iowa) 287.

Kansas.— Emporia First Nat. Bank *v.* Ridenour, 46 Kan. 707, 27 Pac. 150, made to hinder, delay, or defraud creditors.

Maine.— Whitney *v.* Kelley, 67 Me. 377

sidered essential to the taking effect and completion of the assignment the assignment may be revoked at any time prior to such assent or acceptance.[64]

2. By Whom Made — a. Agent, Attorney, or Trustee. It has been held that the necessary assent or acceptance on behalf of the creditors may be made by the agent or attorney of such creditors.[65] So, too, it has been held in some cases that the assent or acceptance by the assignee or trustee on behalf of and for the creditors may suffice.[66]

b. Part Only of Creditors. Under the rule heretofore stated requiring the assent of creditors,[67] in the absence of a statutory provision,[68] or of a provision in the instrument of assignment,[69] or of some controlling circumstances arising from

(distributing assets other than as provided by statute); Todd *v.* Buckman, 11 Me. 41 (stipulating for extension upon payment of dividend upon claim).

Massachusetts.— *Compare* Widgery *v.* Haskell, 5 Mass. 144, 4 Am. Dec. 41.

Missouri.— Where a condition of release is imposed. Drake *v.* Rogers, 6 Mo. 317; Swearingen *v.* Slicer, 5 Mo. 241.

New Hampshire.— Brown *v.* Warren 43 N. H. 430 (limiting trustee's responsibility); Fellows *v.* Greenleaf, 43 N. H. 421 (containing conditions unfavorable to creditors); Spinney *v.* Portsmouth Hosiery Co., 25 N. H. 9 (limiting responsibility of trustee); Hurd *v.* Silsby, 10 N. H. 108, 34 Am. Dec. 142 (exacting release).

New York.—Where creditors, sharing any surplus over certain preferences, were required to release the debtor. Wakeman *v.* Grover, 4 Paige (N. Y.) 23.

Pennsylvania.— Sheerer *v.* Lautzerheizer, 6 Watts (Pa.) 543 (extending statutory period in which to execute trust); McAllister *v.* Marshall, 6 Binn. (Pa.) 338, 6 Am. Dec. 458 (reserving portion of property to use of assignor's family).

Rhode Island.— Where releases exacted. Smith *v.* Millett, 11 R. I. 528; Sadlier *v.* Fallon, 4 R. I. 490.

Texas.— Tittle *v.* Vanleer, 89 Tex. 174, 29 S. W. 1065, 34 S. W. 715, 37 L. R. A. 337 (failing to comply with statutory provisions as to disposal of surplus); Alliance Milling Co. *v.* Eaton, 86 Tex. 401, 25 S. W. 614, 24 L. R. A. 369 (providing for sale of partnership property in usual course of trade); Green *v.* Banks, 24 Tex. 508 (fraudulent intent known to trustee); Baldwin *v.* Peet, 22 Tex. 708, 75 Am. Dec. 806 (participation of trustee in assignor's fraud).

Vermont.—Towne *v.* Rublee, 51 Vt. 62 (limiting creditors' total demands as to amount); Hall *v.* Denison, 17 Vt. 310 (exacting release).

United States.—Bodley *v.* Goodrich, 7 How. (U. S.) 276, 12 L. ed. 699 (providing for continuance of business and satisfaction of creditors by payment of dividends *pro rata*); Burd *v.* Smith, 4 Dall. (U. S.) 76, 1 L. ed. 748 (reserving surplus over to creditors who should not accept in reasonable time); Seale *v.* Vaiden, 4 Woods (U. S.) 659, 10 Fed. 831 (stipulating for releases); Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 11 Fed. Cas. No. 5,964 (exacting release); Lawrence *v.* Davis, 3 McLean (U. S.) 177, 15 Fed. Cas. No. 8,137 (requiring majority of creditors to sanction assignment before it should take effect).

64. Right to revoke.— Ashley *v.* Robinson, 29 Ala. 112, 65 Am. Dec. 387; Jones *v.* Dougherty, 10 Ga. 273; Gibson *v.* Chedic, 1 Nev. 497, 90 Am. Dec. 503; Mills *v.* Haines, 3 Head (Tenn.) 331; Brevard *v.* Neely, 2 Sneed (Tenn.) 104. *Compare* Union, etc., Bank *v.* Allen, 77 Miss. 442, 27 So. 631.

As to right to revoke, generally, see *infra*, X, B, 2.

When an assignment gives creditors a certain time for consideration and acceptance, the assignor cannot, before the expiration of such time, revoke the assignment. Smith *v.* Millett, 11 R. I. 528.

By attorney.— Hatch *v.* Smith, 5 Mass. 42; Vernon *v.* Morton, 8 Dana (Ky.) 247; Johnson *v.* Ogilby, 3 P. Wms. 277; Parrot *v.* Wells, 2 Vern. 127.

65. By agent.— Cannon *v.* Deming, 3 S. D. 421, 53 N. W. 863; Feary *v.* O'Neill, 149 Mo. 467, 50 S. W. 918.

66. By assignee.—Brown *v.* Chamberlain, 9 Fla. 464; Schoolfield *v.* Hirsh, 71 Miss. 55, 14 So. 528, 42 Am. St. Rep. 450; Scull *v.* Reeves, 3 N. J. Eq. 84, 29 Am. Dec. 694; California Bank *v.* Marshall, 1 Tex. Civ. App. 704, 23 S. W. 246 [*followed* in Alliance Milling Co. *v.* Eaton, (Tex. Civ. App. 1893) 23 S. W. 455]. See also Reinhard *v.* State Bank, 6 B. Mon. (Ky.) 252; Scott *v.* Baldwin, 6 Ky. L. Rep. 214. And *compare* Solinsky *v.* Lincoln Sav. Bank, 85 Tenn. 368, 4 S. W. 836, to the effect that fraud of assignee will prevent his acceptance from being treated as the acceptance by creditors. But see Brown *v.* Warren, 43 N. H. 430; Baldwin *v.* Peet, 22 Tex. 708, 75 Am. Dec. 806.

Where the assignee is also a creditor, and is to share as such in the proceeds of the property his signature will be taken as that of an assignee, and of a creditor also. Hastings *v.* Baldwin, 17 Mass. 552; Everett *v.* Walcott, 15 Pick. (Mass.) 94; Harris *v.* Sumner, 2 Pick. (Mass.) 129.

67. See *supra*, II, F, 1.

68. See list of statutes cited *supra*, note 6, p. 120.

69. Fellows *v.* Commercial, etc., Bank, 6 Rob. (La.) 246. But the rights of creditors under a general assignment of the debtor preferring certain creditors are in no way affected by a general recital in the assignment that "the creditors have assented to the terms herein stated," where it does not appear that

the nature of the transaction itself,[70] which requires that all the creditors should give their assent,[71] it is not essential to the validity of an assignment for the benefit of creditors that each and every one of the creditors should give his assent thereto.[72]

3. SUFFICIENCY. It seems that any act, conduct, or declaration on the part of a creditor, indicating that he has consented to the assignment made for his benefit, will constitute a sufficient acceptance;[73] and it has been repeatedly held that

any of the creditors were present at the making of the assignment, or actually assented to its terms. Lehman *v.* Tallassee Mfg. Co., 64 Ala. 567. See also *infra*, VII.

Where assignment itself requires that the majority of the creditors shall assent before it takes effect, such assent must be proved affirmatively. Lawrence *v.* Davis, 3 McLean (U. S.) 177, 15 Fed. Cas. No. 8,137.

70. **Assent of all creditors.**—Pitts *v.* Viley, 4 Bibb (Ky.) 446; Quincy *v.* Hall, 1 Pick. (Mass.) 357, 11 Am. Dec. 198; Seale *v.* Vaiden, 4 Woods (U. S.) 659, 10 Fed. 831.

This rule has been applied where assignment is conditional. Williams *v.* Gartrell, 4 Greene (Iowa) 287. Where assignment is of partnership property, not according to the provisions of the statute. Derry Bank *v.* Davis, 44 N. H. 548. Where debtor sought to postpone the payment of his debts by conveying property in trust to secure or pay them. Rankin *v.* Lodor, 21 Ala. 380. Where deed provided that assignor shall have use of property for a certain time after its execution. Hodge *v.* Wyatt, 10 Ala. 271; Lockhart *v.* Wyatt, 10 Ala. 231, 44 Am. Dec. 481. Where instrument provided for distribution of property in a manner other than that provided by law. Whitney *v.* Kelley, 67 Me. 377. See also Tittle *v.* Vanleer, 89 Tex. 174, 29 S. W. 1065, 34 S. W. 715, 37 L. R. A. 337. Where part of property is conveyed for use of assignor's family. McAllister *v.* Marshall, 6 Binn. (Pa.) 338, 6 Am. Dec. 458.

71. **Acceptance by every creditor but one** cannot be considered as an acceptance by all the creditors. Naylor *v.* Fosdick, 4 Day (Conn.) 146, 4 Am. Dec. 187. But such a non-assenting creditor may be estopped to deny his assent to the assignment. Condict *v.* Flower, 106 Ill. 105. See also Adams *v.* Blodgett, 2 Woodb. & M. (U. S.) 233, 1 Fed. Cas. No. 46, 17 Hunt. Mer. Mag. 79, 10 Law Rep. 69.

72. **Assent of every creditor unnecessary.** — Rankin *v.* Lodor, 21 Ala. 380; Naylor *v.* Fosdick, 4 Day (Conn.) 146, 4 Am. Dec. 187; Hastings *v.* Belknap, 1 Den. (N. Y.) 190; Lynch *v.* Payne, (Tex. Civ. App. 1899) 49 S. W. 406; White *v.* Sterzing, 11 Tex. Civ. App. 553, 32 S. W. 909; Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 11 Fed. Cas. No. 5,964; Adams *v.* Blodgett, 2 Woodb. & M. (U. S.) 233, 1 Fed. Cas. No. 46, 17 Hunt. Mer. Mag. 79, 10 Law Rep. 69. *Contra*, Bradley *v.* Ames, 50 Mo. 387.

Acceptance by part only of the creditors is sufficient to validate the trust as to them. Mauldin *v.* Armistead, 14 Ala. 702; Hodge *v.* Wyatt, 10 Ala. 271; Hastings *v.* Baldwin, 17 Mass. 552; Edwards *v.* Mitchell, 1 Gray (Mass.) 239; Spinney *v.* Portsmouth Hosiery Co., 25 N. H. 9; McAllister *v.* Marshall, 6 Binn. (Pa.) 338; Martin-Brown Co. *v.* Henderson, 9 Tex. Civ. App. 130, 28 S. W. 695; Hamilton-Brown Shoe Co. *v.* Mayo, 8 Tex. Civ. App. 164, 27 S. W. 781. Even though other creditors refuse to participate in the deed. Mauldin *v.* Armistead, 14 Ala. 702.

73. *Connecticut.*— Greene *v.* A. & W. Sprague Mfg. Co., 52 Conn. 330.

Illinois.— Beach *v.* Bestor, 45 Ill. 341.

Iowa.—Van Winkle *v.* Iowa Iron, etc., Fence Co., 56 Iowa 245, 9 N. W. 211.

Maine.— Haughton *v.* Davis, 23 Me. 28.

Massachusetts.— Nutter *v.* King, 152 Mass. 355, 25 N. E. 617.

New York.— Morrison *v.* Brand, 5 Daly (N. Y.) 40 [*affirmed* in 56 N. Y. 657].

South Dakota.— Cannon *v.* Deming, 3 S. D. 421, 53 N. W. 863.

Texas.— Barber *v.* Hutchins, 66 Tex. 319, 1 S. W. 275.

But see as to what is not sufficient acceptance, Fall River Iron Works Co. *v.* Croade, 15 Pick. (Mass.) 11; McCreery *v.* Garvin, 39 S. C. 375, 17 S. E. 828.

Assent by a creditor corporation may be sufficient, notwithstanding the fact that the board which voted in favor of the assent was illegally elected; or that the corporation had suspended payment, if no receiver for it had been appointed. Greene *v.* A. & W. Sprague Mfg. Co., 52 Conn. 330.

Assent may be express or implied. Nelson *v.* Dunn, 15 Ala. 501; Nutter *v.* King, 152 Mass. 355, 25 N. E. 617; Guiterman *v.* Landis, 2 Pearson (Pa.) 188 [*reversed* in 1 Wkly. Notes Cas. (Pa.) 622]; Murphy *v.* Arkansas City Milling Co., (Tex. Civ. App. 1894) 26 S. W. 853.

Formal assent is not required.— Reinhard *v.* State Bank, 6 B. Mon. (Ky.) 252; Haskell *v.* Hill, 169 Mass. 124, 47 N. E. 586; Cunningham *v.* Freeborn, 1 Edw. (N. Y.) 256 [*affirmed* in 3 Paige (N. Y.) 557 (*affirmed* in 11 Wend. (N. Y.) 240)]; Tompkins *v.* Wheeler, 16 Pet. (U. S.) 106, 10 L. ed. 903.

Oral assent may be sufficient.— Wiley *v.* Collins, 11 Me. 193; Nutter *v.* King, 152 Mass. 355, 25 N. E. 617; Jones *v.* Tilton, 139 Mass. 418, 1 N. E. 741.

Partly oral and partly written assent may be sufficient. Adams *v.* Blodgett, 2 Woodb. & M. (U. S.) 233, 1 Fed. Cas. No. 46, 17 Hunt. Mer. Mag. 79, 10 Law Rep. 69.

Suit by a preferred creditor to have a receiver appointed after an assignee refused to qualify is an acceptance of the provisions of the deed of assignment, barring any remedies against the assignor, unless the deed is im-

it is not necessary that he should sign the instrument of assignment,[74] or that his consent should appear upon the face of the assignment,[75] or be otherwise reduced to writing,[76] and the assent of the creditors may, it seems, be conditional or qualified.[77]

4. TIME OF. Under the rule requiring assent[78] it is not necessary to the validity of an assignment for the benefit of creditors that the creditors should be technically parties to the deed,[79] or that they should have notice of the execution of the deed,[80] or that their assent should in any manner be given to the assignment at the time of the execution of the deed,[81] provided they afterward assent;[82] and this assent has been held to be sufficient if given before any attach-

peached for fraud. Ewing *v.* Walker, 60 Ark. 503, 31 S. W. 45.

Where three instruments of assignment, alike in all respects, were executed at the same time, and one was retained by the debtor, one by his assignee, and one by their attorney, it was held that the creditors signing the part taken by the attorney as well became parties to the assignment as those executing that in the hands of the assignee. Page *v.* Weymouth, 47 Me. 238.

Revoking assent.— A creditor who accepts the terms of a conveyance for the benefit of assenting creditors cannot rescind the consent because of danger that non-assenting creditors may cancel the conveyance. Greene *v.* A. & W. Sprague Mfg. Co., 52 Conn. 330. And *compare* Guiterman *v.* Landis, 2 Pearson (Pa.) 188 [*reversed* in 1 Wkly. Notes Cas. (Pa.) 622].

74. Signature unnecessary.— *Alabama.*— Shearer *v.* Loftin, 26 Ala. 703; Pope *v.* Brandon, 2 Stew. (Ala.) 401, 20 Am. Dec. 49.

Arkansas.—Hempstead *v.* Johnston, 18 Ark. 123, 42 Am. Dec. 458.

Maine.— Wiley *v.* Collins, 11 Me. 193.

Missouri.— Duvall *v.* Raisin, 7 Mo. 449. In a conveyance to trustees for the benefit of creditors it was required that the creditors should sign it, in order to receive any benefit from it, but none signed it. It was held that this did not render the conveyance void as matter of law. Gale *v.* Mensing, 20 Mo. 461, 64 Am. Dec. 197.

North Carolina. — Moore *v.* Hinnant, 89 N. C. 455.

South Carolina.—Tennant *v.* Stoney, 1 Rich. Eq. (S. C.) 222, 44 Am. Dec. 213.

Texas.—Although an assignment evidently contemplates that it shall be signed by creditors, they may accept its provisions without signing it; and such assignment, providing that it shall be accepted or acceded to by creditors, is valid. Windham *v.* Patty, 62 Tex. 490.

Vermont.—Where an agreement was made whereby a debtor was to convey property to a trustee for the benefit of creditors named in a schedule contained therein, the same to be signed by all the creditors, in order to be binding, it was held that, if one of said creditors refused to sign, the purchase of his claim by another of said creditors, and the signing of the agreement by him, would be equally effective. Towne *v.* Rublee, 51 Vt. 62.

75. Need not appear upon face of assignment.—*Alabama.*— Shackelford *v.* Planters', etc., Bank, 22 Ala. 238.

Georgia.— Jones *v.* Dougherty, 10 Ga. 273.

Kentucky.—Stewart *v.* Hall, 3 B. Mon. (Ky.) 218.

Louisiana.— Layson *v.* Rowan, 7 Rob. (La.) 1.

New York.— Nicoll *v.* Mumford, 4 Johns. Ch. (N. Y.) 522.

West Virginia.— Zell Guano Co. *v.* Heatherly, 38 W. Va. 409, 18 S. E. 611.

United States.— Brashera *v.* West, 7 Pet. (U. S.) 608, 8 L. ed. 801; Wheeler *v.* Sumner, 4 Mason (U. S.) 183, 29 Fed. Cas. No. 17,501.

Contra, Widgery *v.* Haskell, 5 Mass. 144, 4 Am. Dec. 41.

76. Assent in writing.—Sanborn *v.* Norton, 59 Tex. 308. *Aliter* where written consent is required by the provisions of the deed (Brewer *v.* Pitkin, 11 Pick. (Mass.) 298; McCreery *v.* Garvin, 39 S. C. 375, 17 S. E. 828), or by statute (Haynie *v.* Blum, (Tex. Civ. App. 1894) 28 S. W. 368).

77. Conditional or qualified assent.— Rapley *v.* Cummins, 11 Ark. 689; Deering *v.* Cox, 6 Me. 404; American Bank *v.* Doolittle, 14 Pick. (Mass.) 123.

78. See *supra,* II, F, 1.

79. Parties to deed.— Wheeler *v.* Sumner, 4 Mason (U. S.) 183, 29 Fed. Cas. No. 17,501; Brown *v.* Minturn, 2 Gall. (U. S.) 557, 4 Fed. Cas. No. 2,021.

80. Notice of execution of deed.— Marbury *v.* Brooks, 7 Wheat. (U. S.) 556, 5 L. ed. 522.

Creditor may disclaim it within a reasonable time after the fact comes to his knowledge. Major *v.* Hill, 13 Mo. 247.

81. Need not assent at time of execution of deed.— Wheeler *v.* Sumner, 4 Mason (U. S.) 183, 29 Fed. Cas. No. 17,501.

But where a conveyance is made directly to creditors by an insolvent debtor, their assent must be given at the time of the assignment. Jones *v.* Dougherty, 10 Ga. 273. And *compare* Nicoll *v.* Mumford, 4 Johns. Ch. (N. Y.) 522; Cunningham *v.* Freeborn, 11 Wend. (N. Y.) 240 [*affirming* 3 Paige (N. Y.) 557 (*affirming* 1 Edw. (N. Y.) 256)].

82. Subsequent assent.—McKinley *v.* Combs, 1 T. B. Mon. (Ky.) 105; Marbury *v.* Brooks, 7 Wheat. (U. S.) 556, 5 L. ed. 522.

Within reasonable time.— The beneficiaries named in a deed of trust are entitled to a reasonable time after its execution to assent

ment of the property included in the assignment,[83] or at any time within the period allowed by the deed [84] or by statute, if any, for giving such assent.[85]

5. What Effect Upon Proceedings by Attachment, etc. Where the assent of all creditors is necessary,[86] in the absence of, or prior to, such assent, the property is subject to attachment, execution, or garnishment at the suit of any creditor of the assignor.[87] But, where assent of part only of the creditors is required to validate the assignment,[88] a non-assenting creditor may attach the property under attachment, execution, or garnishment process, and will thereby gain priority over such creditors as subsequently assent or become parties to the assignment,[89] but not over those creditors who have assented or become parties to the assignment prior to the attachment of the property.[90] So under any rule requiring assent, whether of some or of all of the creditors, if an attachment is made or trustee

to, or dissent from, the same. Wm. W. Kendall Boot, etc., Co. *v.* Johnston, (Tex. Civ. App. 1893) 24 S. W. 583.

83. Prior to attachment.—Spinney *v.* Portsmouth Hosiery Co., 25 N. H. 9; Brown *v.* Minturn, 2 Gall. (U. S.) 557, 4 Fed. Cas. No. 2,021; Wheeler *v.* Sumner, 4 Mason (U. S.) 183, 29 Fed. Cas. No. 17,501. *Contra*, under Mass. Stat. (1836), c. 298, Shattuck *v.* Freeman, 1 Metc. (Mass.) 10. But *compare* Skipwith *v.* Cunningham, 8 Leigh (Va.) 271, 31 Am. Dec. 642, holding that where an assignment for the benefit of creditors has been executed before the lien on a judgment against the grantor attaches, it will prevail against the judgment, both at law and in equity, although not assented to by the beneficiaries in the deed of assignment until after the judgment was rendered.

84. Where a deed provides that creditors may become parties thereto by executing the same within sixty days from its date, or within such further time, if any, as the trustees may allow in writing, the trustees may, in their discretion, make several extensions to enable creditors to come in. National Union Bank *v.* Copeland, 141 Mass. 257, 4 N. E. 794. But where, in a conveyance for the benefit of creditors, terms are prescribed for their acceptance, but no time is fixed within which they are to accept, if they have never dissented they may at any time accept before the fund is distributed, provided they have not thereby placed other persons in a worse condition than they would have been in if the acceptance had been given earlier. Tennant *v.* Stoney, 1 Rich. Eq. (S. C.) 222, 44 Am. Dec. 213.

Before record of deed.— Where an assignment provides for the payment of the debts of such creditors as shall, within a certain time, assent to the terms of the conveyance, there is no reason why creditors must assent before the assignment is recorded. Haven *v.* Richardson, 5 N. H. 113.

85. Within statutory period.—Page *v.* Weymouth, 47 Me. 238; McElwee *v.* McGill, 57 S. C. 6, 35 S. E. 401; Moody *v.* Templeman, 23 Tex. Civ. App. 374, 56 S. W. 588.

A deed giving trustees more than the statutory period of one year in which to execute the trust is void as against those creditors who did not join in and accept it. Sheerer *v.* Lautzerheizer, 6 Watts (Pa.) 543.

86. See *supra*, II, F, 2, b.

Where assent of creditors is not necessary to the validity of the assignment [see *supra*, II, F, 2, b] a subsequent attachment by a creditor of the assignor will not hold the property assigned. England *v.* Reynolds, 38 Ala. 370; Webster *v.* Harkness, 3 Mackey (D. C.) 220. See also Adams *v.* Blodgett, 2 Woodb. & M. (U. S.) 233, 1 Fed. Cas. No. 46, 17 Hunt. Mer. Mag. 79, 10 Law Rep. 69.

87. When property may be attached.— Hart *v.* Bates, 33 La. Ann. 473; Vincent *v.* Gandolfo, 12 La. Ann. 526; Austin *v.* Bell, 20 Johns. (N. Y.) 442, 11 Am. Dec. 297; McAllister *v.* Marshall, 6 Binn. (Pa.) 338, 6 Am. Dec. 458.

88. See *supra*, II, F, 2, b.

89. Priority of non-assenting attaching creditor.— *Connecticut.*— Waterman *v.* A. & W. Sprague Mfg. Co., 55 Conn. 554, 12 Atl. 240.

Maine.— Copeland *v.* Weld, 8 Me. 411; Jewett *v.* Barnard, 6 Me. 381.

Massachusetts.— Douglas *v.* Simpson, 121 Mass. 281; Stanfield *v.* Simmons, 12 Gray (Mass.) 442; Boyden *v.* Moore, 11 Pick. (Mass.) 362; Bradford *v.* Tappan, 11 Pick. (Mass.) 76; Quincy *v.* Hall, 1 Pick. (Mass.) 357, 11 Am. Dec. 198. But where a debtor assigned property to creditors whose claims, including those for expense and compensation in executing the trust, would absorb the whole of the property, such property is protected by such assignment from the subsequent attachment of a dissenting creditor. Everett *v.* Walcott, 15 Pick. (Mass.) 94; Foster *v.* Saco Mfg. Co., 12 Pick. (Mass.) 451.

Texas.— Willis *v.* Murphy, (Tex. Civ. App. 1894) 28 S. W. 362; Murphy *v.* Arkansas City Milling Co., (Tex. Civ. App. 1894) 26 S. W. 853; Schneider *v.* McCoulsky, 6 Tex. Civ. App. 501, 26 S. W. 170.

Vermont.— Bellows Falls Bank *v.* Deming, 17 Vt. 366.

Contra, Rankin *v.* Lodor, 21 Ala. 380; Adams *v.* Blodgett, 2 Woodb. & M. (U. S.) 233, 1 Fed. Cas. No. 46, 17 Hunt. Mer. Mag. 79, 10 Law Rep. 69; Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 11 Fed. Cas. No. 5,964.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 196.

90. No priority over creditors who have assented.— Spinney *v.* Portsmouth Hosiery

process instituted before any creditor has become a party to the assignment, the attachment or trustee process will hold.[91]

G. Validity —1. In General. Where the language of an assignment for the benefit of creditors can be abundantly satisfied by a construction which will support the instrument such construction should be given.[92] Except in cases where general assignments are prohibited by statute,[93] it seems that a general assignment by a debtor of all of his property for the benefit of all his creditors may sometimes operate, at least as a common-law assignment, though not valid as a statutory assignment;[94] still, when the assignment purports to be an assignment under

Co., 25 N. H. 9; Faulkner *v.* Hyman, 142 Mass. 53, 6 N. E. 846; Jones *v.* Tilton, 139 Mass. 418, 1 N. E. 741; Wallace *v.* Bagley, 6 Tex. Civ. App. 484, 26 S. W. 519; Wheeler *v.* Sumner, 4 Mason (U. S.) 183, 29 Fed. Cas. No. 17,501. See also Guiterman *v.* Landis, 2 Pearson (Pa.) 188 [*reversed* in 1 Wkly. Notes Cas. (Pa.) 622].

91. Where no creditor has assented.—*Colorado.*— Elliott *v.* Hobbs, 2 Colo. App. 169, 30 Pac. 54.

Delaware.— Elliott *v.* Montell, 7 Houst. (Del.) 194, 30 Atl. 854.

Maine.— Carr *v.* Dole, 17 Me. 358.

Maryland.—Kalkman *v.* McElderry, 16 Md. 56.

Massachusetts.—Brewer *v.* Pitkin, 11 Pick. (Mass.) 298; Hooper *v.* Hills, 9 Pick. (Mass.) 435; Viall *v.* Bliss, 9 Pick. (Mass.) 13; Ward *v.* Lamson, 6 Pick. (Mass.) 358; Ingraham *v.* Geyer, 13 Mass. 146, 7 Am. Dec. 132; Stevens *v.* Bell, 6 Mass. 339; Widgery *v.* Haskell, 5 Mass. 144, 4 Am. Dec. 41.

Missouri.— Drake *v.* Rogers, 6 Mo. 317.

Texas.— Leeper Hardware Co. *v.* Spencer, (Tex. Civ. App. 1894) 29 S. W. 45.

Virginia.— Spencer *v.* Ford, 1 Rob. (Va.) 684.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 174.

The vendor's lien will prevail against a voluntary conveyance of land made by the vendee in trust for the benefit of his creditors, in consideration of preëxisting debts, where a bill has been brought to enforce such lien before the creditors have signified their acceptance of the assignment by some distinct, affirmative act, indicating their election to claim or take benefit under the deed. Green *v.* Demoss, 10 Humphr. (Tenn.) 371.

92. Construction in favor of validity.— Ringen Stove Co. *v.* Bowers, 109 Iowa 175, 80 N. W. 318; Hull *v.* Evans, (Ky. 1900) 59 S. W. 851; Benedict *v.* Huntington, 32 N. Y. 219; Norton *v.* Kearney, 10 Wis. 443; Hahn *v.* Salmon, 20 Fed. 801. In giving effect to the language of an assignment for the benefit of creditors, the same intendments are to be made in support of the instrument, the same presumption is to prevail in favor of good faith, and the same rules of construction are to be applied as in the case of ordinary contracts and conveyances. Townsend *v.* Stearns, 32 N. Y. 209; Read *v.* Worthington, 9 Bosw. (N. Y.) 617. See also *infra*, X, A.

Evidence to establish the validity of an assignment is subject to the usual rules as to admissibility and sufficiency of evidence, including presumptions and parol evidence.

California.—Morgentham *v.* Harris, 12 Cal. 245.

Illinois.— Price *v.* Laing, 152 Ill. 380, 38 N. E. 921 [*affirming* 50 Ill. App. 324].

Maryland.— Inloes *v.* American Exchange Bank, 11 Md. 173, 69 Am. Dec. 190.

New York.— Britton *v.* Lorenz, 45 N. Y. 51 [*affirming* 3 Daly (N. Y.) 23]; Renard *v.* Maydore, 25 How. Pr. (N. Y.) 178.

Tennessee.— Steedman *v.* Dobbins, 93 Tenn. 397, 24 S. W. 1133.

Texas.— Foreman *v.* Burnette, 83 Tex. 396, 18 S. W. 756; Davis *v.* Bingham, (Tex. Civ. App. 1895) 33 S. W. 1035; Adams *v.* Bateman, (Tex. Civ. App. 1895) 29 S. W. 1124; Hamilton-Brown Shoe Co. *v.* Mayo, 8 Tex. Civ. App. 164, 27 S. W. 781.

United States.— Appolos *v.* Brady, 49 Fed. 401, 4 U. S. App. 209, 1 C. C. A. 299.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 208.

Presumption of legality and validity may be indulged to sustain an assignment not void upon its face. Fenton *v.* Edwards, 126 Cal. 43, 58 Pac. 320, 46 L. R. A. 832; Minzesheimer *v.* Mayer, 66 How. Pr. (N. Y.) 484.

93. General assignments prohibited.—Stetson *v.* Miller, 36 Ala. 642; Morgentham *v.* Harris, 12 Cal. 245; Hopkins *v.* Ray, 1 Metc. (Mass.) 79; Therasson *v.* Hickok, 37 Vt. 454; Bishop *v.* Catlin, 28 Vt. 71; Noyes *v.* Hickok, 27 Vt. 36; Mussey *v.* Noyes, 26 Vt. 462.

Question for jury.— Whether the property of a debtor omitted from an assignment was sufficient and of a character to make the assignment partial is a question of fact for the jury. Mussey *v.* Noyes, 26 Vt. 462.

94. Good as common-law assignment.— *Kansas.*— Case *v.* Ingersoll, 7 Kan. 367.

Maryland.— Malcolm *v.* Hall, 9 Gill (Md.) 177, 52 Am. Dec. 688.

New York.— Browning *v.* Hart, 6 Barb. (N. Y.) 91.

Texas.— Johnson *v.* Robinson, 68 Tex. 399, 4 S. W. 625; Tennent *v.* Davis, (Tex. Civ. App. 1895) 31 S. W. 251.

Vermont.— Hall *v.* Denison, 17 Vt. 310.

United States.— Brashear *v.* West, 7 Pet. (U. S.) 608, 8 L. ed. 801.

But *compare* Downes *v.* Parshall, 3 Wyo. 425, 26 Pac. 994.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 33.

In Louisiana it has been held that no interest passes and no rights attach under a common-law assignment for the benefit of creditors executed in Louisiana. Cohn *v.* Canal Bank, 37 La. Ann. 202.

In New Mexico it has been held that an

the statute it should, in order to be valid and operative as such, comply with the statutory requirements.[95]

assignment for the benefit of certain preferred creditors, made without presenting a petition to any court or judge, without any schedule of debts or creditors, without the sentence of any court sanctioning the cession or surrender, and without any citation of creditors, is contrary to the Mexican law, and must be pronounced fraudulent in law as to creditors. Leitensdorfer *v.* Webb, 1 N. M. 34.

95. For a statutory assignment to be valid as to creditors, it must, independently of the question of fraud, be in conformity to statutory requirements, as to competency of parties and as respects form, contents, and mode of execution and delivery of the instrument. Some of the provisions of the statutes are mandatory, and non-observance works invalidity, *per se*, unless the statute otherwise declares, and others are deemed advisory and taken as badges of fraud along with the other circumstances of the transaction.

Illinois.— Milligan *v.* O'Conor, 19 Ill. App. 487.

Kentucky.— Hampton *v.* Morris, 2 Metc. (Ky.) 336.

Massachusetts.— Hopkins *v.* Ray, 1 Metc. (Mass.) 79.

New York.— Rockwell *v.* McGovern, 69 N. Y. 294 [*affirming* 40 N. Y. Super. Ct. 118].

Vermont.—Therasson *v.* Hickok, 37 Vt. 454.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 33.

Validity of assignment as affected by: Assent or acceptance by assignee see *supra*, II, E. Assent or acceptance by creditors see *supra*, II, F. Debts included see *supra*, II, D. Nature of transfer see *supra*, II, A. Preferences see *infra*, IV. Property included see *supra*, II, C. Reservations see *infra*, V. Stipulations as to powers of assignees see *infra*, VI. Stipulations imposing conditions upon creditors see *infra*, VII.

The word "void" in the Vermont act of 1843 prohibiting general assignments, and declaring them void as to creditors, means "voidable" by creditors. Merrill *v.* Englesby, 28 Vt. 150.

Mere failure to deliver possession of the property to the assignee will not as a rule in the absence of a statute requiring delivery invalidate an assignment otherwise regular and valid.

Connecticut.— Strong *v.* Carrier, 17 Conn. 319.

Indiana.— Pitman *v.* Marquardt, 20 Ind. App. 431, 50 N. E. 894.

Kentucky.— Lyons *v.* Field, 17 B. Mon. (Ky.) 543.

Missouri.— State *v.* Benoist, 37 Mo. 500. But see Hughes *v.* Ellison, 5 Mo. 463, as to personalty.

New York.—Mumper *v.* Rushmore, 79 N. Y. 19 [*affirming* 14 Hun (N. Y.) 591]; Wilson *v.* Forsyth, 24 Barb. (N. Y.) 105. But see *contra*, especially in case of personalty, South Danvers Nat. Bank *v.* Stevens, 5 N. Y. App. Div. 392, 39 N. Y. Suppl. 298; Adams *v.* Davidson, 10 N. Y. 309; Einstein *v.* Chapman, 42 N. Y. Super. Ct. 144; Wilson *v.* Ferguson, 10 How. Pr. (N. Y.) 175.

Ohio.— But *compare* Davenport *v.* Dana, 1 Ohio Dec. 59, holding that where the assignee never took possession, allowing the assignor to act as if no assignment had been made.

Pennsylvania.— Klapp *v.* Shirk, 13 Pa. St. 589; Mitchell *v.* Willock, 2 Watts & S. (Pa.) 253. But see Hower *v.* Geesaman, 17 Serg. & R. (Pa.) 251; Cunningham *v.* Neville, 10 Serg. & R. (Pa.) 201.

Texas.— Willis *v.* Thompson, 85 Tex. 301, 20 S. W. 155.

Vermont.— Moore *v.* Smith, 35 Vt. 644.

United States.— Brashear *v.* West, 7 Pet. (U. S.) 608, 8 L. ed. 801.

Compare, however, as to the necessity of delivery of possession, Ray *v.* Reynolds, 8 Colo. 467, 9 Pac. 15; Warner *v.* Hedly, 1 R. I. 357.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 198.

As to the requisites of the instrument of transfer see *infra*, III.

As to the retention of possession by assignor as evidence of fraud see *infra*, IX, B, 4.

As to the right of assignee to possession see *infra*, XII, C, 1.

Sufficiency of change of possession.— For instances of sufficient delivery of possession, under the rule requiring such delivery, see:

Connecticut.—Ingraham *v.* Wheeler, 6 Conn. 277. But *compare* Beers *v.* Lyon, 21 Conn. 604.

Illinois.— Feltenstein *v.* Stein, 157 Ill. 19, 45 N. E. 502.

Indiana.— Hall *v.* Wheeler, 13 Ind. 371; Pitman *v.* Marquardt, 20 Ind. App. 431, 50 N. E. 894.

Massachusetts.— Legg *v.* Willard, 17 Pick. (Mass.) 140, 28 Am. Dec. 282; Gardner *v.* Howland, 2 Pick. (Mass.) 599.

Mississippi.— Goodbar *v.* Tatum, (Miss. 1892) 10 So. 578; Ingraham *v.* Grigg, 13 Sm. & M. (Miss.) 22.

Nebraska.— Sullivan *v.* Smith, 15 Nebr. 476, 19 N. W. 620, 48 Am. Rep. 354.

New York.—Ryder *v.* Duffy, 73 Hun (N. Y.) 605, 26 N. Y. Suppl. 369; Ogden *v.* Peters, 15 Barb. (N. Y.) 560; Parker *v.* Jervis, 3 Abb. Dec. (N. Y.) 449. See Stedman *v.* Batchelor, 54 Hun (N. Y.) 638, 8 N. Y. Suppl. 37, to the effect that the question of sufficiency of delivery is one for the jury.

Pennsylvania.— Wilt *v.* Franklin, 1 Binn. (Pa.) 502, 2 Am. Dec. 474.

Rhode Island.— *In re* Daniels, 14 R. I. 500.

South Dakota.— Wright *v.* Lee, 10 S. D. 263, 72 N. W. 895.

Vermont.— Rice *v.* Courtis, 32 Vt. 460, 78 Am. Dec. 597.

United States.— Wheeler *v.* Sumner, 4 Mason (U. S.) 183, 29 Fed. Cas. No. 17,501.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 201.

2. As to Parties, Privies, and Creditors. An assignment bad against creditors may nevertheless be good as to the parties and all persons except the creditors,[96] and this rule includes the assignor,[97] the assignee,[98] and privies of the parties

In Arkansas and Indian Territory there is a statute regulating the giving of possession to assignee, under which he is not entitled to possession until he has acquired the right by filing an inventory and bond. Excelsior Mfg. Co. *v.* Owens, 58 Ark. 556, 25 S. W. 868; Smith *v.* Patterson, 57 Ark. 537, 22 S. W. 342; Lincoln *v.* Field, 54 Ark. 471, 16 S. W. 288; Gilkerson-Sloss Commission Co. *v.* London, 53 Ark. 88, 13 S. W. 513; Clayton *v.* Johnson, 36 Ark. 406, 38 Am. Rep. 40; Fowler *v.* Blosser, (Indian Terr. 1896) 35 S. W. 247; Sanger *v.* Flow, 48 Fed. 152, 4 U. S. App. 32, 1 C. C. A. 56; Aaronson *v.* Deutsch, 24 Fed. 465; Rice *v.* Frayser, 24 Fed. 460; Bartlett *v.* Teah, 1 Fed. 768; Gilkerson *v.* Hamilton, 10 Fed. Cas. No. 5,424*a*.

The true consideration of an assignment of the property of a debtor for the benefit of his creditors is the agreement of the assignee to perform the trusts imposed upon him by the assignment; and that, in contemplation of law, constitutes a full and complete consideration. Thomas *v.* Clark, 65 Me. 296. To the same effect see Gates *v.* Labeaume, 19 Mo. 17; First Nat. Bank *v.* Hughes, 10 Mo. App. 7; Marsalis *v.* Oglesby, 1 Tex. App. Civ. Cas. § 256; Hall *v.* Denison, 17 Vt. 310; Lawrence *v.* Davis, 3 McLean (U. S.) 177, 5 Fed. Cas. No. 8,137.

For assignments or instruments in the nature of assignments held to be valid against the objection of want of sufficient consideration see:

Alabama.— Griffin *v.* Doe, 12 Ala. 783.

Connecticut.— Drakeley *v.* Deforest, 3 Conn. 272.

Georgia.— Jones *v.* Dougherty, 10 Ga. 273.

Illinois.— Whited *v.* J. Walter Thompson Co., 81 Ill. App. 76 [*affirmed* in 185 Ill. 454, 56 N. E. 1106].

Indiana.— Nutter *v.* Harris, 9 Ind. 88.

Iowa.— Meeker *v.* Sanders, 6 Iowa 61.

Maryland.— State *v.* Bank of Maryland, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561; Union Bank *v.* Ellicott, 6 Gill & J. (Md.) 363.

Minnesota.— *Compare* Caldwell *v.* Bruggerman, 4 Minn. 270.

Nevada.— Sadler *v.* Immel, 15 Nev. 265.

New Hampshire.— Roberts *v.* Norcross, 69 N. H. 533, 45 Atl. 560.

New York.— Kellogg *v.* Slawson, 15 Barb. (N. Y.) 56; Cunningham *v.* Freeborn, 1 Edw. (N. Y.) 256 [*affirmed* in 3 Paige (N. Y.) 557 (*affirmed* in 11 Wend. (N. Y.) 240)].

North Carolina.— Barber *v.* Buffaloe, 122 N. C. 128, 29 S. E. 336.

Rhode Island.— Sadlier *v.* Fallon, 4 R. I. 490.

United States.— Adams *v.* Blodgett, 2 Woodb. & M. (U. S.) 233, 1 Fed. Cas. No. 46.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 64.

In Massachusetts, however, it is held that acceptance by the assignee is not of itself a sufficient consideration to support the deed. Faulkner *v.* Hyman, 142 Mass. 53, 6 N. E. 46; Nat. Union Bank *v.* Copeland, 141 Mass. 257; Pierce *v.* O'Brien, 129 Mass. 314, 37 Am. Rep. 360; Swan *v.* Crafts, 124 Mass. 453; May *v.* Wannemacher, 111 Mass. 202; Grocer Bank *v.* Simmons, 12 Gray (Mass.) 440; Edwards *v.* Mitchell, 1 Gray (Mass.) 239; King *v.* Moore, 18 Pick. (Mass.) 376; Osborn *v.* Adams, 18 Pick. (Mass.) 245; Daniels *v.* Williard, 16 Pick. (Mass.) 36; Brewer *v.* Pitkin, 11 Pick. (Mass.) 298; Russell *v.* Woodward, 10 Pick. (Mass.) 408; Widgery *v.* Haskell, 5 Mass. 144, 4 Am. Dec. 41.

96. Valid as between parties.— *Connecticut.*— Clark *v.* Mix, 15 Conn. 152. See also Greene *v.* A. & W. Sprague Mfg. Co., 52 Conn. 330.

Florida.— Bellamy *v.* Jackson County, 6 Fla. 62.

Georgia.— Jones *v.* Dougherty, 10 Ga. 273.

Illinois.— Finley *v.* McConnell, 60 Ill. 259; Conkling *v.* Carson, 11 Ill. 503.

Kentucky.— Stewart *v.* Hall, 3 B. Mon. (Ky.) 218.

Maryland.— Schuman *v.* Peddicord, 50 Md. 560.

Missouri.— Major *v.* Hill, 13 Mo. 247.

New York.— Gates *v.* Andrews, 37 N. Y. 657, 5 Transcr. App. (N. Y.) 176, 97 Am. Dec. 764; Rapalee *v.* Stewart, 27 N. Y. 310; Ogden *v.* Peters, 21 N. Y. 23, 78 Am. Dec. 122; Ogden *v.* Prentice, 33 Barb. (N. Y.) 160; Matter of Ward, 10 Daly (N. Y.) 66; Cavanagh *v.* Morrow, 67 How. Pr. (N. Y.) 241; Haggerty *v.* Granger, 15 How. Pr. (N. Y.) 243; Cunningham *v.* Freeborn, 11 Wend. (N. Y.) 240 [*affirming* 3 Paige (N. Y.) 557]. A general assignment, which has not been impeached by any creditor for fraud, nor set aside at the suit of the assignee, is valid, although the assignor, assignee, and creditors may have chosen to regard it as null and void. Matter of Backer, 2 Abb. N. Cas. (N. Y.) 379.

North Carolina.— Moore *v.* Hinnant, 89 N. C. 455.

Vermont.— Therasson *v.* Hickok, 37 Vt. 454.

Wisconsin.— Rumery *v.* McCulloch, 54 Wis. 565, 12 N. W. 65.

Contra, Ashley *v.* Robinson, 29 Ala. 112, 65 Am. Dec. 387; Hart *v.* Bates, 33 La. Ann. 473.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 34.

Estoppel by deed is the principle underlying this rule. Finley *v.* McConnell, 60 Ill. 259; Therasson *v.* Hickok, 37 Vt. 454.

97. Assignor.— Ogden *v.* Prentice, 33 Barb. (N. Y.) 160, and cases cited *supra,* note 96.

98. Assignee.— Conkling *v.* Carson, 11 Ill. 503; Ogden *v.* Prentice, 33 Barb. (N. Y.) 160, and cases cited *supra,* note 96. See also Matter of Ward, 10 Daly (N. Y.) 66, holding that an assignee cannot show that the assignment was executed in fraud of creditors.

whether in estate or in interest.[99] This rule has also been applied to subsequent creditors,[1] and to existing creditors privy to any fraud in the making of the assignment,[2] as well as to creditors who assent to or subsequently ratify the assignment.[3]

3. Partial Invalidity. While it has been broadly stated that if an assignment for the benefit of creditors is void in part because of fraud it is void *in toto*,[4] it

99. **Privies.**— Finley *v.* McConnell, 60 Ill. 259; Gates *v.* Andrews, 37 N. Y. 657, 5 Transcr. App. (N. Y.) 176, 97 Am. Dec. 764; Ogden *v.* Prentice, 33 Barb. (N. Y.) 160.

1. **Subsequent creditors.**— *Arkansas.*—Cunningham *v.* Williams, 42 Ark. 170.

Illinois.— See McCune *v.* Hartman Steel Co., 87 Ill. App. 162.

Pennsylvania.— Phillips *v.* Zerbe Run, etc., Imp. Co., 25 Pa. St. 56.

South Dakota.— Cannon *v.* Deming, 3 S. D. 421, 53 N. W. 863.

Tennessee.— Gordonsville Milling Co. *v.* Jones, (Tenn. Ch. 1900) 57 S. W. 630.

Texas.— Martin-Brown Co. *v.* Henderson, 9 Tex. Civ. App. 130, 28 S. W. 695.

Vermont.—Therasson *v.* Hickok, 37 Vt. 454.

Virginia.— To avoid a trust deed at the suit of a subsequent creditor, actual fraud must be shown. Johnston *v.* Zane, 11 Gratt. (Va.) 552.

United States.— Horbach *v.* Hill, 112 U. S. 144, 5 S. Ct. 81, 28 L. ed. 670; Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 11 Fed. Cas. No. 5,964.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 34.

2. **Existing creditors privy to fraud.**— *Alabama.*— Adler *v.* Bell, 110 Ala. 357, 20 So. 83.

Arkansas.— Martin *v.* Taylor, 52 Ark. 389, 12 S. W. 1011.

Kentucky.— Bank of Commerce *v.* Payne, 86 Ky. 446, 10 Ky. L. Rep. 43, 8 S. W. 856.

Louisiana.— Wallace *v.* Cumming, 27 La. Ann. 631.

Maryland.— Moale *v.* Buchanan, 11 Gill & J. (Md.) 314.

Michigan.—Matter of George T. Smith Middlings Purifier Co., 86 Mich. 149, 48 N. W. 864.

Minnesota.— Richards *v.* White, 7 Minn. 345; Scott *v.* Edes, 3 Minn. 377.

Missouri.— Moline Plow Co. *v.* Wenger, 95 Mo. 207, 8 S. W. 404.

New York.— Groves *v.* Rice, 148 N. Y. 227, 42 N. E. 664; Kennedy *v.* Thorp, 51 N. Y. 174.

Washington.— Cerf *v.* Wallace, 14 Wash. 249, 44 Pac. 264.

United States.— Johnson *v.* Rogers, 13 Fed. Cas. No. 7,408, 14 Alb. L. J. 427, 5 Am. L. Rec. 536, 15 Nat. Bankr. Reg. 1.

3. **Assenting and ratifying creditors.**— *Alabama.*— Sampson *v.* Jackson, 103 Ala. 550, 15 So. 893; White *v.* Banks, 21 Ala. 705, 56 Am. Dec. 283.

Illinois.— Condict *v.* Flower, 106 Ill. 105.

Maine.— Chafee *v.* New York Fourth Nat. Bank, 71 Me. 514, 36 Am. Rep. 345.

Massachusetts.— Jones *v.* Tilton, 139 Mass. 418, 1 N. E. 741; Bigelow *v.* Baldwin, 1 Gray (Mass.) 245.

Minnesota.—Aberle *v.* Schlichenmeir, 51 Minn. 1, 52 N. W. 972.

Missouri.— Martin *v.* Maddox, 24 Mo. 575.

New Hampshire.— Derry Bank *v.* Davis, 44 N. H. 548, assent by all creditors.

New York.—Levy *v.* James, 49 Hun (N. Y.) 161, 1 N. Y. Suppl. 504, 16 N. Y. St. 762; Pratt *v.* Adams, 7 Paige (N. Y.) 615.

Pennsylvania.— McAllister *v.* Marshall, 6 Binn. (Pa.) 338, 6 Am. Dec. 458; Sheerer *v.* Lautzerheizer, 6 Watts (Pa.) 543.

United States.— Frelinghuysen *v.* Nugent, 36 Fed. 229.

But see Caldwell *v.* Williams, 1 Ind. 405 (holding that where an assignment is fraudulent and void the fact that some of the creditors have assented thereto in good faith will not purge the contract of fraud); McCart *v.* Maddox, 68 Tex. 456, 5 S. W. 150 (holding that if an assignment for the benefit of creditors is invalid the assent of a proportion of the creditors, however large, cannot validate it); Geisse *v.* Beall, 3 Wis. 367 (holding that the creditors must treat such an assignment either as altogether valid or altogether void; it cannot be treated as void in part and good in part, or be recognized and acted upon at first as valid and afterward repudiated and declared void).

Subsequent verbal assurance of a creditor to the assignees, without any consideration, that he would never trouble them is not binding on such creditor. Eden *v.* Everson, 65 Ind. 113.

4. **Void in part void in toto.**— *Colorado.*— Salisbury *v.* Ellison, 8 Colo. 157, 6 Pac. 217.

Indian Territory.— Hargadine-McKittrick Dry-Goods Co. *v.* Bradley, (Indian Terr. 1898) 43 S. W. 947.

Maryland.—Albert *v.* Winn, 7 Gill (Md.) 446.

Michigan.— Kirby *v.* Ingersoll, Harr. (Mich.) 172.

Minnesota.— Greenleaf *v.* Edes, 2 Minn. 264. See also Davies *v.* Dow, 80 Minn. 223, 83 N. W. 50.

New York.— Goodrich *v.* Downs, 6 Hill (N. Y.) 438; Grover *v.* Wakeman, 11 Wend. (N. Y.) 187, 25 Am. Dec. 624; Hyslop *v.* Clarke, 14 Johns. (N. Y.) 458; Lentilhon *v.* Moffat, 1 Edw. (N. Y.) 451; Mackie *v.* Cairns, Hopk. (N. Y.) 373.

North Carolina.— Stone *v.* Marshall, 52 N. C. 300.

South Carolina.— Jacot *v.* Corbett, Cheves Eq. (S. C.) 71.

West Virginia.— Landeman *v.* Wilson, 29 W. Va. 702, 2 S. E. 203.

United States.—An assignment for the benefit of creditors which is void as to the individual estate of the non-signing members of

has been held that where the assignment is made in good faith,[5] or where the fraud is not such as to taint the whole transaction[6] the assignment is not wholly void, but may be operative as to its valid parts and inoperative as to its invalid parts.

4. Subsequent Acts or Transactions — a. In General. Neither the subsequent unauthorized acts or admissions of the assignor,[7] nor the subsequent misconduct or negligence of the assignee can affect the validity of the deed or defeat the rights of the creditors unless the creditors themselves contributed to the wrongful acts or omissions of the assignee.[8]

b. Curing Defective or Invalid Assignment. Subsequent acts, agreements, or instruments executed by or between the parties may operate to validate a defective or invalid deed of assignment for the benefit of creditors;[9] but it has been

a firm is also void as to firm property. *In re* Bear, 2 Fed. Cas. No. 1,177.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 73.

5. Made in good faith.— Matter of Gordon, 49 Hun 370, 3 N. Y. Suppl. 589. *Contra,* Albert *v.* Winn, 7 Gill (Md.) 446.

6. Operative as to valid part.— *Massachusetts.*— Prince *v.* Shepard, 9 Pick. (Mass.) 176.

New York.— Scott *v.* Guthrie, 10 Bosw. (N. Y.) 408, 25 How. Pr. (N. Y.) 481; Rogers *v.* De Forest, 7 Paige (N. Y.) 272.

Texas.—Boyd *v.* Haynie, 83 Tex. 7, 18 S. W. 156; Moody *v.* Carroll, 71 Tex. 143, 8 S. W. 510, 10 Am. St. Rep. 734; Bloch *v.* Sprnance, 12 Tex. Civ. App. 309, 33 S. W. 1002.

West Virginia.— Ruffner *v.* Welton Coal, etc., Co., 36 W. Va. 244, 15 S. E. 48.

Wisconsin.— Boynton Furnace Co. *v.* Sorensen, 80 Wis. 594, 50 N. W. 773.

United States.—Denny *v.* Bennett, 128 U. S. 489, 9 S. Ct. 134, 32 L. ed. 491.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 73.

Including bona fide debts.— A deed of assignment may be valid as to *bona fide* debts which it secures and void as to fictitious and fraudulent debts attempted to be secured thereby. Market Nat. Bank *v.* Hofheimer, 23 Fed. 13. *Contra,* Stone *v.* Marshall, 52 N. C. 300.

7. Acts of assignor.—*Alabama.*—Governor *v.* Campbell, 17 Ala. 566.

Maine.— Howe *v.* Newbegin, 34 Me. 15.

Missouri.—Adler *v.* Lange, 21 Mo. App. 516; Douglass *v.* Cissna, 17 Mo. App. 44.

New York.— Sutherland *v.* Bradner, 116 N. Y. 410, 22 N. E. 554, 26 N. Y. St. 854 [*affirming* 39 Hun (N. Y.) 134].

Texas.— Leon *v.* Welborne, 58 Tex. 157.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 65.

The rule that a deed valid in its inception will not be rendered invalid by any subsequent fraudulent or illegal act of the parties has no application to a deed of assignment for benefit of creditors under the Arkansas statute if the parties to the deed agree at the time of the execution that the assignee shall take possession of the property before he has given bond and filed an inventory, as required by law. In such case the illegal act is part of the original design, and the deed is void *ab initio.* Aaronson *v.* Deutsch, 24 Fed. 465.

8. Acts of assignee.—*Alabama.*— Governor *v.* Campbell, 17 Ala. 566; Pope *v.* Brandon, 2 Stew. (Ala.) 401, 20 Am. Dec. 49.

Indian Territory.— Simmons Clothing Co. *v.* Davis, (Indian Terr. 1900) 58 S. W. 653.

Iowa.— Bradley *v.* Bischel, 81 Iowa 80, 46 N. W. 755; Savery *v.* Spaulding, 8 Iowa 239, 74 Am. Dec. 300; Meeker *v.* Sanders, 6 Iowa 60.

Kentucky.— U. S. Bank *v.* Huth, 4 B. Mon. (Ky.) 423.

Massachusetts.— Shattuck *v.* Freeman, 1 Metc. (Mass.) 10.

Missouri.— Jeffries *v.* Bleckmann, 86 Mo. 350; Hardcastle *v.* Fisher, 24 Mo. 70; Adler *v.* Lange, 21 Mo. App. 516; Douglass *v.* Cissna, 17 Mo. App. 44.

New York.— Juliand *v.* Rathbone, 39 Barb. (N. Y.) 97; Mathews *v.* Poultney, 33 Barb. (N. Y.) 127; Troescher *v.* Cosgrove, 61 N. Y. Suppl. 1036.

Texas.—Willis *v.* Murphy, (Tex. Civ. App. 1894) 28 S. W. 362; Piggott *v.* Schram, 64 Tex. 447; Leon *v.* Welborne, 58 Tex. 157; Eicks *v.* Copeland. 53 Tex. 581, 37 Am. Rep. 760.

United States.— Olney *v.* Tanner, 10 Fed. 101.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 66.

A subsequent additional agreement to be valid must be with the consent of all the parties, including the creditors. Union Nat. Bank *v.* Bank of Commerce, 94 Ill. 271; Ramsdell *v.* Sigerson, 7 Ill. 78.

9. Validate voidable assignment.— *District of Columbia.*— Morrison *v.* Shuster, 1 Mackey (D. C.) 190. See also Cissell *v.* Johnston, 4 App. Cas. (D. C.) 335.

Illinois.— Pierce *v.* Brewster, 32 Ill. 268; Conkling *v.* Carson, 11 Ill. 503. See also *In re* Landfield, 80 Ill. 417.

Indian Territory.—Rainwater-Bradford Hat Co. *v.* McBride, (Indian Terr. 1901) 64 S. W. 556.

Iowa.— See Creglow *v.* Creglow, 100 Iowa 276, 69 N. W. 446; Elwell *v.* Kimball, 102 Iowa 720, 69 N. W. 286.

Massachusetts.— Foster *v.* Saco Mfg. Co., 12 Pick. (Mass.) 451.

Tennessee.— See Gordonsville Milling Co. *v.* Jones, (Tenn. Ch. 1900) 57 S. W. 630.

held that this rule does not apply where the original assignment is wholly void and inoperative.[10]

III. INSTRUMENTS OF TRANSFER.

A. The Deed or Conveyance — 1. Form and Execution — a. In General. The phraseology of statutes must be looked to as to form and contents of the deed, as well as to the manner of executing it,[11] but it may be said generally that conformity to the statute in this regard is necessary to validate; in the absence of controlling statutory provisions, the rules relating to the formal requisites of other conveyances of property apply.[12]

Vermont.— Merrill *v.* Englesby, 28 Vt. 150.

Wisconsin.— Hanson *v.* Dunn, 76 Wis. 455, 45 N. W. 319.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 68.

10. Void assignment cannot be validated. —Sutherland *v.* Bradner, 116 N. Y. 410, 22 N. E. 554, 26 N. Y. St. 854 [*affirming* 39 Hun (N. Y.) 134]; Porter *v.* Williams, 9 N. Y. 142, 59 Am. Dec. 519 [*affirming* 5 How. Pr. (N. Y.) 441]; Metcalf *v.* Van Brunt, 37 Barb. (N. Y.) 621; Averill *v.* Loucks, 6 Barb. (N. Y.) 470.

Valid second assignment made and executed by the parties to the first assignment is within the rules stated in the text.

District of Columbia.— Morrison *v.* Shuster, 1 Mackey (D. C.) 190.

New York.— Porter *v.* Williams, 9 N. Y. 142, 59 Am. Dec. 519 [*affirming* 5 How. Pr. (N. Y.) 441]; Hone *v.* Woolsey, 2 Edw. (N. Y.) 289.

South Carolina.—Brooks *v.* Brooks, 12 S. C. 422.

Vermont.— Merrill *v.* Englesby, 28 Vt. 150.

Wisconsin.—Rumery *v.* McCulloch, 54 Wis. 565, 12 N. W. 65; Brahe *v.* Eldridge, 17 Wis. 184.

United States.— Sumner *v.* Hicks, 2 Black (U. S.) 532, 17 L. ed. 355.

Where two assignments have been executed, one subsequent to the other, both of which are defective, they cannot be coupled together so as to make one good assignment. Bridges *v.* Hindes, 16 Md. 101. See also Lewis *v.* Barry, 72 Pa. St. 18.

11. See list of statutes cited *supra*, note 6, p. 120. *Compare* Jordan *v.* Newsome, 126 N. C. 553, 36 S. E. 154.

The word "**execution**" as used in Nebr. Comp. Stat. c. 6, § 6, which provides that an assignment for benefit of creditors shall be executed and acknowledged as a conveyance of real estate, in order to entitle it to be recorded, and that it must be filed within twenty-four hours after its "execution," includes the delivery and surrender of control over it. Wells *v.* Lamb, 19 Nebr. 355, 27 N. W. 229.

Parol assignment may be operative. Muir *v.* Samuels, (Ky. 1901) 62 S. W. 481. *Aliter* under statute requiring writing. Krauskop *v.* Krauskop, 95 Wis. 296, 70 N. W. 475. See also *infra*, note 12.

12. *Alabama.*—Globe Iron Roofing, etc., Co. *v.* Thacher, 87 Ala. 458, 6 So. 366 (failure to fix time within which to execute trust will not invalidate); Shackelford *v.* Planters', etc., Bank, 22 Ala. 238 (neither a statement of good reasons, which induced assignor to make the assignment, nor a failure to designate mode of notice to creditors will invalidate).

Arkansas.—Thornton *v.* Simon, (Ark. 1890) 13 S. W. 739 (need not direct that to be done which the law requires to be done); Wolf *v.* Gray, 53 Ark. 75, 13 S. W. 512 (failure to give directions to notify creditors as to preferences will not invalidate); Collier *v.* Davis, 47 Ark. 367, 1 S. W. 684, 58 Am. Rep. 758 (must specify time within which creditors shall accept).

California.— Forbes *v.* Scannell, 13 Cal. 242, holding the assignment good as against objection that it was too uncertain; also that an assignment to a firm as trustee, by the firm name, is good.

Connecticut.— Harvey *v.* Mix, 24 Conn. 406 (mere technical informalities will not vitiate); Wright *v.* Pond, 10 Conn. 255 (deed void for uncertainty in the designation of the assignees). *Compare* Whitaker *v.* Williams, 20 Conn. 98.

Georgia.—Anthony *v.* Price, 92 Ga. 170, 17 S. E. 1024 (not invalidated by failure to provide for that which is provided for by law); Stultz *v.* Fleming, 83 Ga. 14, 9 S. E. 1067 (holding that, while the naming of an unreasonable compensation for the assignee may not invalidate, such fact may be considered by the jury as tending to show the fraudulent intent of the assignor).

Illinois.— Carey-Lombard Lumber Co. *v.* Chicago Title, etc., Co., 51 Ill. App. 239.

Indiana.— New Albany, etc., R. Co. *v.* Huff, 19 Ind. 444, not invalidated by failure to provide for the doing of what the law requires to be done, such as limiting the time for the execution of the trust. But *compare* Henderson *v.* Bliss, 8 Ind. 100. See also Taylor *v.* Bruner, 130 Ind. 482, 30 N. E. 635, as to the effect of wife's failure to join husband in deed.

Iowa.— Buck Reiner Co. *v.* Chase, 85 Iowa 296, 52 N. W. 196 (not invalidated by failure to provide for notice or time within which claims should be filed); Schee *v.* La Grange, 78 Iowa 101, 42 N. W. 616 (informality consisting in the designation of the grantees as "trustees" instead of "assignee." will not vitiate); Meeker *v.* Sanders, 6 Iowa 60 (deed not void for uncertainty).

Kansas.— Brigham *v.* Jones, 48 Kan. 162, 29 Pac. 308, 30 Pac. 113, deed containing provisions which were regarded as surplusage.

b. By Agent or Attorney. An assignment for benefit of creditors may be

Kentucky.— Reinhard *v.* State Bank, 6 B. Mon. (Ky.) 252 (effect of a false recital upon the rights of preferred creditors); Ward *v.* Trotter, 3 T. B. Mon. (Ky.) 1 (deed invalid for recital of a fraudulent reason inducing assignor to make the assignment); Pitt *v.* Viley, 4 Bibb (Ky.) 446 (must contain authority to assignee to dispose of property assigned).

Maine.— Page *v.* Weymouth, 47 Me. 238 (statutes prescribing no particular form; any conveyance, the provisions of which will render effectual the purposes of the law, is sufficient); Fiske *v.* Carr, 20 Me. 301 (need not direct the doing of what the law requires to be done).

Maryland.— Pfaff *v.* Prag, 79 Md. 369, 29 Atl. 824 (inadvertent use of "sufficient" for "insufficient"); Farquharson *v.* Eichelberger, 15 Md. 63 (not invalidated by failure to require notice to be given to creditors as to preferences); Barnitz *v.* Rice, 14 Md. 24, 74 Am. Dec. 513 (any apt words which will convey all the debtor's property, and negative any presumption that there is other property, are sufficient). See also Maennel *v.* Murdock, 13 Md. 163.

Massachusetts.— Stevens *v.* Bell, 6 Mass. 339, not invalidated by failure to impose duties imposed by law. See also Avery *v.* Monroe, 172 Mass. 132, 51 N. E. 452, 70 Am. St. Rep. 250.

Michigan.— Farrington *v.* Sexton, 43 Mich. 454, 5 N. W. 654 (invalid for failure to authorize assignee to set aside fraudulent conveyances); Hollister *v.* Loud, 2 Mich. 309 (not invalidated by failure to limit time for closing the trust).

Minnesota.—Yanish *v.* Pioneer Fuel Co., 64 Minn. 175, 66 N. W. 198 (not vitiated by omission of "*bona fide*" in an assignment of exempt property for the benefit of all creditors filing releases); Langdon *v.* Thompson, 25 Minn. 509 (the words "successors in trust," in the granting and habendum clauses, are not objectionable); Conrad *v.* Marcotte, 23 Minn. 55 (as to necessity of an assignment of personalty being in writing). *Compare* Smith *v.* Bean, 46 Minn. 138, 48 N. W. 687 (where deed was executed by a non-resident assignor who had been doing business within the state); Lanpher *v.* Burns, 77 Minn. 407, 80 N. W. 361.

Mississippi.— Baum *v.* Pearce, 67 Miss. 700, 7 So. 548 (not void for ambiguity); Robins *v.* Embry, Sm. & M. Ch. (Miss.) 207 (void unless all the uses are explicitly and clearly declared).

Nebraska.— Deere *v.* Losey, 48 Nebr. 622, 67 N. W. 462 (not void for ambiguity); Heelan *v.* Hoagland, 10 Nebr. 511, 7 N. W. 282.

New York.— Crook *v.* Rindskopf, 105 N. Y. 476, 12 N. E. 174 (not invalid for failure to properly provide for the payment of debts and the distribution of the surplus); Flagler *v.* Schoeffel, 40 Hun (N. Y.) 178 (general assignment not invalid because it conveys the property to the assignee, "his heirs, executors, administrators and assigns"); Kellogg *v.* Slawson, 15 Barb. (N. Y.) 56 [*affirmed* in 11 N. Y. 302, as to sufficiency of recital of assignor's insolvency]; Royer Wheel Co. *v.* Frost, 13 Daly (N. Y.) 233 (partial assignment need not be executed with the formalities required in the case of general assignments); Britton *v.* Lorenz, 3 Daly (N. Y.) 23 (as to the necessity of a written assignment); Smith *v.* Bellows, 3 N. Y. St. 305 (mere clerical error will not vitiate); Hess *v.* Blakeslee, 2 N. Y. St. 309 (assignment made to B, "his successors and assigns," is not fraudulent as to creditors by the use of the word "assigns"); Wakeman *v.* Grover, 4 Paige (N. Y.) 23 (must specify time within which creditors are to come in). N. Y. Laws (1888), c. 294, is directory only, and an assignment which fails to state the kind or place of business, but gives the residence of the assignor, who is readily identified, is valid. Dutchess County Mut. Ins. Co. *v.* Van Wagonen, 132 N. Y. 398, 30 N. E. 971, 44 N. Y. St. 441 [*affirming* 18 N. Y. Suppl. 256; *following* Boak *v.* Blair, 10 N. Y. Suppl. 898, 32 N. Y. St. 911; Mullen *v.* Sisson, 10 N. Y. Suppl. 301, 31 N. Y. St. 210; Strickland *v.* Laraway, 9 N. Y. Suppl. 761, 29 N. Y. St. 873; Taggart *v.* Herrick, 55 Hun (N. Y.) 569, 9 N. Y. Suppl. 758, 29 N. Y. St. 424; *overruling* Bloomingdale *v.* Seligman, 22 Abb. N. Cas. (N. Y.) 98, 3 N. Y. Suppl. 243, 19 N. Y. St. 64]; Otis *v.* Hodgson, 18 N. Y. Suppl. 599, 45 N. Y. St. 92. Must follow form prescribed by statute. Kercheis *v.* Schloss, 49 How. Pr. (N. Y.) 284.

Pennsylvania.— Reamer *v.* Lamberton, 59 Pa. St. 462 (title does not pass by deed, though executed and acknowledged, until the assignee's name has been inserted in the blank left for that purpose); Hower *v.* Geesamen, 17 Serg. & R. (Pa.) 251 (not invalidated by failure to limit time for compliance with conditions of assignment).

South Carolina.—Adler *v.* Cloud, 42 S. C. 272, 20 S. E. 393 (not invalidated by failure to fix term within which preferred creditors must accept); Black *v.* Shooler, 2 McCord (S. C.) 293 (assignment under the prison bounds act, to B and other creditors, is good as to A, but void for uncertainty as to the others).

South Dakota.—Dawley *v.* Sherwin, 5 S. D. 594, 59 N. W. 1027, not void for failure to recite that assignor is the head of a family and insolvent, where the grantor seeks to reserve his statutory exemptions.

Tennessee.—Overton *v.* Holinshade, 5 Heisk. (Tenn.) 683, holding that failure to limit time for closing trust constitutes a badge of fraud.

Texas.— Johnson *v.* Robinson, 68 Tex. 399, 4 S. W. 625 (under the Texas act of 1879 deed must show on its face that assignor is either insolvent or contemplates insolvency, but may operate as a partial assignment although not valid as a general assignment);

executed by an agent or an attorney in fact especially authorized thereto,[13] but the power must, in express terms, grant the authority.[14]

c. By Partner For Firm. One partner has no authority to make an assignment for the firm without express authority[15] from his copartners. It has

McIlhenny Co. *v.* Miller, 68 Tex. 356, 4 S. W. 614 (under the Texas statute need not specify the proportion of debt which must be paid before the debtor shall be entitled to a release); McWilliams *v.* Cornelius, 66 Tex. 301, 17 S. W. 767 (in the alternative void under the Texas statute); Jones *v.* Patty, (Tex. 1886) 1 S. W. 633 (not void merely because made by two persons, where one of them has no interest in the property assigned); Fechheimer *v.* Ball, 1 Tex. App. Civ. Cas. § 766 (must require security to insure faithful execution of the trust). See also Wetzel *v.* Simon, 87 Tex. 403, 28 S. W. 274, 942, relating to assignment of community property.

Wisconsin.— Hammel *v.* Schuster, 65 Wis. 669, 27 N. W. 620 (not vitiated because papers were drawn by the county judge); Bates *v.* Simmons, 62 Wis. 69, 22 N. W. 335 (not invalid because made to the assignee, "his heirs, executors, administrators, and assigns," instead of running to his successors and assigns); Lindsay *v.* Guy, 57 Wis. 200, 15 N. W. 181 (not invalidated by failure to direct performance of duties imposed by law).

United States.— Cunningham *v.* Norton, 125 U. S. 77, 8 S. Ct. 804, 31 L. ed. 624 (construing Texas statute as to necessity of reciting assignor's insolvency); Bickham *v.* Lake, 51 Fed. 892 (not invalidated by failure to fix time within which omitted creditors must file claims). A conveyance to an assignee for the benefit of creditors is properly made to him and his successors and assigns, and not to him and his heirs. Bradley Fertilizer Co. *v.* Pace, 80 Fed. 862.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 212 *et seq.*; and, generally, ASSIGNMENTS, *ante*, p. 1; CONTRACTS; DEEDS; TRUSTS.

Consideration need not be recited in the deed. Block *v.* Peter, 63 Ga. 260; Cunningham *v.* Freeborn, 11 Wend. (N. Y.) 240 [*affirming* 3 Paige (N. Y.) 557 (*affirming* 1 Edw. (N. Y.) 256)].

13. Gouldy *v.* Metcalf, 75 Tex. 455, 12 S. W. 830, 16 Am. St. Rep. 912. See also National Bank *v.* Sackett, 2 Abb. Pr. N. S. (N. Y.) 286; Lowenstein *v.* Flauraud, 11 Hun (N. Y.) 399, 53 How. Pr. (N. Y.) 463; Darrow *v.* Bruff, 36 How. Pr. (N. Y.) 479, all three cases relating to partnership assignments.

Where assignor owns no real estate subject to forced sale, his agent, acting under verbal authority, can, under Tex. Acts (1879), c. 53, make for him a valid assignment. McGuffin *v.* Sowell, 1 Tex. Civ. App. 187, 20 S. W. 871.

14. Wood *v.* McCain, 7 Ala. 800, 42 Am. Dec. 612 (where agent exceeded his authority); Baker *v.* Freeman, 35 Me. 485 (where agent having only authority to sign also affixed seal); McGuffin *v.* Sowell, 1 Tex. Civ. App. 187, 20 S. W. 871. *Compare* Wetzel *v.* Simon, 87 Tex. 403, 28 S. W. 274, 942 [*reversing* (Tex. Civ. App. 1894) 25 S. W. 792].

15. *Maryland.*— Maennel *v.* Murdock, 13 Md. 163.

Minnesota.— Thompson *v.* Winona Harvester Works, 41 Minn. 434, 43 N. W. 383; Williams *v.* Frost, 27 Minn. 255, 6 N. W. 793. *Compare* Farwell *v.* Brooks, 65 Minn. 184, 68 N. W. 5, holding that an assignment executed as follows: "Brooks & Co., by W. M. Brooks. Ai Brooks," did not pass the separate property of W. M. Brooks.

New York.— Sherman *v.* Jenkins, 70 Hun (N. Y.) 593, 24 N. Y. Suppl. 186, 53 N. Y. St. 780; Klumpp *v.* Gardener, 15 N. Y. St. 100; Hooper *v.* Beecher, 4 N. Y. St. 473, 25 N. Y. Wkly. Dig. 505. See Beste *v.* Burger, 17 Abb. N. Cas. (N. Y.) 162, where assignment was made and executed by a surviving partner with the assent of deceased partner's personal representative. But *compare* St. Nicholas Bank *v.* De Rivera, 3 N. Y. Suppl. 666, holding that a partner who had retired from the firm before its assignment, though after a debt on which a judgment was obtained against them was contracted, is not a necessary party to the assignment, where the title to the firm property vested in the remaining members on his retirement. In Adee *v.* Cornell, 93 N. Y. 572, it was held that a deed was sufficient against the objection that it was not signed by an alleged partner, when it appeared that he assented to the assignment and disclaimed any interest in the property assigned.

Ohio.— *In re* Roberg, 7 Ohio N. P. 446, 5 Ohio S. & C. Pl. Dec. 585.

Texas.— Turner *v.* Douglass, 77 Tex. 619, 14 S. W. 221; McGuffin *v.* Sowell, 1 Tex. Civ. App. 187, 20 S. W. 871.

Utah.— Wilson *v.* Sullivan, 17 Utah 341, 53 Pac. 994.

United States.— Wooldridge *v.* Irving, 23 Fed. 676; *In re* Bear, 2 Fed. Cas. No. 1,177.

Compare Gordon *v.* Cannon, 18 Gratt. (Va.) 387; Rumery *v.* McCulloch, 54 Wis. 565, 12 N. W. 65.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 252.

See also, generally, PARTNERSHIP.

Where one consents in writing as an individual to a firm's assignment of property for creditors, and at the same time disclaims any interest in the property as a partner, his consent will nevertheless be regarded as a partnership consent, if he was in fact a partner. Tait *v.* Carey, (Indian Terr. 1899) 49 S. W. 50.

Wife of a member of a firm, though considered a member thereof, need not join in the execution of a trust deed of the firm property. Willis *v.* Murphy, (Tex. Civ. App. 1894) 28 S. W. 362.

been held, however, that one partner may assign for the firm if his copartners are non-resident.[16]

d. Description of Liabilities. Debts to be included in the assignment[17] should be described with sufficient certainty for identification and for administration of the estate, as well as to enable beneficiaries to seek the aid of the courts in the enforcement of the trust,[18] and so long as fictitious debts are not included the assignment is not vitiated,[19] even though there may be misdescription from honest mistake,[20] or an omission, not fraudulent, to state the amount.[21]

Where the partners assigned both firm and individual assets, including property of two other firms of which the assignors were also members, separate creditors cannot complain that the deed was not signed by their copartner in the last-mentioned firm. Maennel *v.* Murdock, 13 Md. 163. *Contra*, Hooper *v.* Baillie, 118 N. Y. 413, 23 N. E. 569, 29 N. Y. St. 52.

16. Darrow *v.* Bruff, 36 How. Pr. (N. Y.) 479; National Bank *v.* Sackett, 2 Abb. Pr. N. S. (N. Y.) 286 (one partner having absconded); Lowenstein *v.* Flauraud, 11 Hun (N. Y.) 399, 53 How. Pr. (N. Y.) 463; *In re* Grant, 106 Fed. 496.

A joint debtor cannot execute a valid assignment of joint property. Gates *v.* Andrews, 37 N. Y. 657, 5 Transcr. App. (N. Y.) 176, 97 Am. Dec. 764.

17. As to debts to be included see *supra*, II, D.

As to the necessity of designating preferred creditors either in the deed or in the accompanying schedule see *infra*, III, B, 1, b.

18. **Certainty of description required.**— *Alabama.*— Perry Ins., etc., Co. *v.* Foster, 58 Ala. 502, 29 Am. Rep. 779 (not vitiated by a wrong description or introduction of debts to which the creditor is not privy, nor by the fact that he has other security not stated therein); England *v.* Reynolds, 38 Ala. 370 (failing to name all the creditors or the amounts due to each is not void for uncertainty); Robinson *v.* Rapelye, 2 Stew. (Ala.) 86 (not necessarily void because it does not sufficiently describe the debts).

California.— Barroilhet *v.* Fisch, 63 Cal. 462.

Delaware.—See Comly *v.* Waters, 2 Del. Ch. 72.

Indiana.— See Hall *v.* Wheeler, 13 Ind. 371, for a description of the debts held not to render assignment invalid *per s*

Louisiana.— Layson *v.* Rowan, 7 Rob. (La.) 1.

Missouri.— Scott *v.* Bailey, 23 Mo. 140.

New Hampshire.— See also Beard *v.* Kimball, 11 N. H. 471, wherein it is held that an assignment by a debtor of all his property, to be paid out to the several persons named in the annexed schedule, which did not contain the names of all the creditors, is invalid.

New York.— Silver Creek Bank *v.* Talcott, 22 Barb. (N. Y.) 550, to pay the operatives of the assignors residing at a certain place the amounts due them respectively is sufficient. See also Roberts *v.* Vietor, 54 Hun (N. Y.) 461, 7 N. Y. Suppl. 777, 28 N. Y. St. 100 (where uncertainty in failing to give the name of a principal in a note was considered immaterial); Maack *v.* Maack, 49 Hun (N. Y.) 507, 2 N. Y. Suppl. 506, 18 N. Y. St. 121 (where the description was not deemed too indefinite as to the identification of a preferred debt).

Tennessee.—Young *v.* Gillespie, 12 Heisk. (Tenn.) 239.

Texas.— Kellogg *v.* Muller, 68 Tex. 182, 185, 4 S. W. 361 (deed giving list of creditors preferred and unpreferred which adds, "should the said party of the second part have omitted or forgotten any creditor, and his claim is just and correct, he shall share alike with those in schedule B, class 2, not preferred," is sufficient); Nave *v.* Britton, 61 Tex. 572 (failure to state nature of creditors' claims).

United States.— Sanger *v.* Flow, 48 Fed. 152, 4 U. S. App. 32, 1 C. C. A. 56 (where deed prefers certain creditors and provides for the remainder to be paid to all remaining creditors *pro rata*, it is not necessary to give, either in deed or in any schedule attached, the names of the unpreferred creditors, or amounts due them); Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 11 Fed. Cas. No. 5,964 (not fully enumerating all the debts).

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 237.

19. **Error in computation,** where no fraud was intended. Barroilhet *v.* Fisch, 63 Cal. 462. A debt may be saved by the principle of "Id certum est, quod certum reddi potest." Layson *v.* Rowan, 7 Rob. (La.) 1.

20. **As for example a mistake in misdescribing** the security, as by naming it a note while it is in fact a bond (Scott *v.* Bailey, 23 Mo. 140), in describing a liability as absolute where it is only contingent (Bernheimer *v.* Rindskopf, 116 N. Y. 428, 22 N. E. 1074, 27 N. Y. St. 648, 15 Am. St. Rep. 414). So an assignment executed by a husband and wife and given to secure community debts is valid, though the debts are described as those of the wife. Hayden Saddlery Hardware Co. *v.* Ramsay, 14 Tex. Civ. App. 185, 36 S. W. 595. In Graham *v.* Lockhart, 8 Ala. 9, it was held that a deed of assignment including notes was not invalid because it contained a misdescription of the names of the sureties, dates, or sums. See also Miles *v.* Bacon, 4 J. J. Marsh. (Ky.) 457.

21. **Failure to state amount.**— Willey *v.* Reynolds, (Indian Terr. 1899) 51 S. W. 972; Roberts *v.* Buckley, 145 N. Y. 215, 39 N. E. 966, 64 N. Y. St. 600; Barcroft *v.* Snodgrass, 1 Coldw. (Tenn.) 430; Nave *v.* Britton, 61 Tex. 572; Van Hook *v.* Walton, 28 Tex. 59; Simon *v.* Ash, 1 Tex. Civ. App. 202, 20 S. W.

e. Description of Property — (i) *In General.* A description of property assigned[22] may be very general in the body of the instrument, especially if an inventory of assets is required, and there is not the same particularity as is required in an ordinary deed to realty or in a bill of sale to personalty, where title does not pass by delivery of possession.[23]

719. But see Caton *v.* Mosely, 25 Tex. 374 (holding that an indebtedness described as being to "sundry persons," specifying no amount and giving assignee the power to hold assigned property and dispose of it to the best advantage of the creditors generally, makes assignment invalid); Young *v.* Gillespie, 12 Heisk. (Tenn.) 239 (holding that describing the debts as "all other debts we owe for borrowed money" provided to be paid before the remainder of the estate shall be paid *pro rata* makes the assignment void).

Parol evidence is admissible to show the true amount of the debts. Platt *v.* Hedge, 8 Iowa 386; Silsby *v.* Strong, 38 Oreg. 36, 62 Pac. 633.

22. As to property to be included see *supra*, II, C.

23. *Alabama.*— Clark *v.* Few, 62 Ala. 243 (parol evidence may aid description otherwise insufficient); England *v.* Reynolds, 38 Ala. 370; Brown *v.* Lyon, 17 Ala. 659 (failure to specify property may be a circumstance to be considered by the jury in determining the question of fraudulent intent); Tarver *v.* Roffe, 7 Ala. 873 (imperfect description of some of the chattels conveyed does not invalidate); McCain *v.* Wood, 4 Ala. 258 (deed assigning all debts due grantor of persons in the state of Alabama for medical services not void for uncertainty); Robinson *v.* Rapelye, 2 Stew. (Ala.) 86.

Arkansas.— But see Barkman *v.* Simmons, 23 Ark. 1, holding that where a deed purports to convey all the assignor's property and refers to a schedule as being attached, but which is omitted, parol evidence is not admissible to show what articles were intended to be conveyed. And *compare* Mansur, etc., Imp. Co. *v.* Wood, 63 Ark. 362, 38 S. W. 898.

Colorado.— But see Burchinell *v.* Mosconi, 4 Colo. App. 401, 36 Pac. 307, for an insufficient description for failure to designate location of goods assigned. And *compare* Graham Paper Co. *v.* Sanderson, 8 Colo. App. 427, 47 Pac. 904.

Connecticut.— Clark *v.* Mix, 15 Conn. 152. *Compare* De Wolf *v.* A. & W. Sprague Mfg. Co., 49 Conn. 282, for an insufficient description.

Florida.— Dorr *v.* Schmidt, 38 Fla. 354, 21 So. 279.

Kansas.— Walker *v.* Newlin, 22 Kan. 106.

Maryland.— Keighler *v.* Nicholson, 4 Md. Ch. 86, should purport to convey all assignor's property, but may be valid on proof that he had no other property.

Massachusetts.— Pingree *v.* Comstock, 18 Pick. (Mass.) 46 ("all his lands, tenements, and hereditaments," is sufficient); Hatch *v.* Smith, 5 Mass. 42.

Michigan.— But see Price *v.* Haynes, 37 Mich. 487, where "goods, chattels, stock, promissory notes, debts, choses in action, evidences of debt, claims, demands, property and effects of every description, . . . wherever the same may be situated, to-wit: all the goods, chattels and property now in the store lately occupied by" the assignor, was held to be insufficient to include real estate, especially as instrument was not acknowledged or witnessed so as to entitle it to be recorded as a conveyance of real property. See also Ryerson *v.* Eldred, 18 Mich. 12, for description too uncertain.

Missouri.— State *v.* Cooper, 79 Mo. 464; Attleboro First Nat. Bank *v.* Hughes, 10 Mo. App. 7.

Montana.— McCulloh *v.* Price, 14 Mont. 320, 36 Pac. 194, 43 Am. St. Rep. 637.

Nebraska.— Lininger *v.* Raymond, 9 Nebr. 40, 2 N. W. 359.

New Hampshire.— Beard *v.* Kimball, 11 N. H. 471, invalid, under act of July, 1834, unless it shows an assignment of all of assignor's property.

New York.— Chautauque County Bank *v.* White, 6 N. Y. 236, 57 Am. Dec. 442; Moore *v.* Battin, 14 N. Y. St. 191.

North Carolina.— See Carter *v.* Cocke, 64 N. C. 239.

Rhode Island.— Nightingale *v.* Harris, 6 R. I. 321, with preferences conditioned on releases, is not invalid, though it does not purport to convey all of assignor's property not exempt from attachment.

South Carolina.— See also Adler *v.* Cloud, 42 S. C. 272, 20 S. E. 393, as to variance between deed and inventory.

Tennessee.— But see Powers *v.* Goins, (Tenn. Ch. 1895) 35 S. W. 902, for insufficient description of notes and accounts. *Compare* Overton *v.* Hollinshade, 5 Heisk. (Tenn.) 683 (as to when a general description may be considered as a badge of fraud); Fonshee *v.* Willis, 101 Tenn. 450, 47 S. W. 703.

Texas.— McCart *v.* Maddox, 68 Tex. 456, 5 S. W. 150 (not invalid under act of 1879 because it fails to state specifically that all the debtor's property is thereby conveyed); Nave *v.* Britton, 61 Tex. 572 (description may be supplemented by parol evidence). But see Baldwin *v.* Peet, 22 Tex. 708, 75 Am. Dec. 806. And *compare* Hayden Saddlery Hardware Co. *v.* Ramsay, 14 Tex. Civ. App. 185, 36 S. W. 595 (as to describing community property); Gonzales *v.* Batts, (Tex. Civ. App. 1899) 50 S. W. 403.

Utah.— Snyder *v.* Murdock, 20 Utah 407, 59 Pac. 88.

Virginia.— Transfer of the whole of the debtor's property need not appear on the face of the deed. Gordon *v.* Cannon, 18 Gratt. (Va.) 387. And *compare* Long *v.* Meriden Britannia Co., 94 Va. 594, 27 S. E. 499.

United States.— Halsey *v.* Fairbanks, 4

(II) *EXEMPT PROPERTY.* The failure to specify exempted property, so as to identify it from the mass of property assigned, does not invalidate the assignment itself,[24] but is rather construed to make void the claim of exemption, unless the law specifically describes the exempt portion,[25] or allows a subsequent selection.[26]

f. Acknowledgment[27]— (I) *NECESSITY.* Where the statute prescribes that acknowledgment, or affidavit of good faith, shall accompany the execution of the assignment, such provision is generally held to be mandatory,[28] unless it

Mason (U. S.) 206, 11 Fed. Cas. No. 5,964; Pearpoint *v.* Graham, 4 Wash. (U. S.) 232, 19 Fed. Cas. No. 10,877.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 230.

24. *Alabama.*— Frank *v.* Myers, 97 Ala. 437, 11 So. 832 [*overruling* Myers *v.* Conway, 90 Ala. 109, 7 So. 639; Block *v.* Maas, 65 Ala. 211].

Connecticut.— See Strong *v.* Carrier, 17 Conn. 319.

Florida.— Parker *v.* Cleveland, 37 Fla. 39, 19 So. 344, holding that a general exception of exempt property does not *ipso facto* avoid assignment for uncertainty.

Indiana.— Garnor *v.* Frederick, 18 Ind. 507.

Iowa.— Bradley *v.* Bischel, 81 Iowa 80, 46 N. W. 755; Perry *v.* Vezina, 63 Iowa 25, 18 N. W. 657, "except such as the law excepts" does not invalidate.

Kentucky.— Moore *v.* Stege, 93 Ky. 27, 13 Ky. L. Rep. 948, 18 S. W. 1019; Grinstead *v.* Richardson, 12 Ky. L. Rep. 798.

Maryland.— *Compare* Muhr *v.* Pinover, 67 Md. 480, 10 Atl. 289.

Michigan.— Brooks *v.* Nichols, 17 Mich. 38; Smith *v.* Mitchell, 12 Mich. 180

Minnesota.— But *compare* Tarbox *v.* Stevenson, 56 Minn. 510, 58 N. W. 157, holding an assignment invalid which did not locate the state in which the exempt property was situated.

Mississippi.— Richardson *v.* Marqueze, 59 Miss. 80, 42 Am. Rep. 353.

Missouri.— Hartzler *v.* Tootle, 85 Mo. 23.

Montana.— McCulloh *v.* Price, 14 Mont. 320, 36 Pac. 194, 43 Am. St. Rep. 637.

North Carolina.— Eigenbrun *v.* Smith, 98 N. C. 207, 4 S. E. 122.

North Dakota.— Bangs *v.* Fadden, 5 N. D. 92, 64 N. W. 78.

Tennessee.— McCord *v.* Moore, 5 Heisk. (Tenn.) 734. But see Sugg *v.* Tillman, 2 Swan (Tenn.) 208.

Wisconsin.— German Bank *v.* Peterson, 69 Wis. 561, 35 N. W. 47; Bates *v.* Simmons, 62 Wis. 69, 22 N. W. 335.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 231.

25. An Alabama case, following the statute of Kentucky where a resident of that state made an assignment in Alabama, held that as Kentucky laws exempted only specific classes of property the assignment did not have to specify the property exempt. Southern Suspender Co. *v.* Van Borries, 91 Ala. 507, 8 So. 367. See also Grinstead *v.* Richardson, 12 Ky. L. Rep. 798; Moore *v.* Stege, 93 Ky. 27, 13 Ky. L. Rep. 948, 18 S. W. 1019. See also cases cited *supra*, note 24.

No exemption against partnership debts.— It was held in Wisconsin, in an assignment by partnership of partnership property, that a clause reserving "such property as is exempt from levy and sale under execution" is inoperative, because a firm, as such, not being entitled to any exemption whatever, the insertion of such a clause had no effect. McNair *v.* Rewey, 62 Wis. 167, 22 N. W. 339; Goll *v.* Hubbell, 61 Wis. 293, 20 N. W. 674, 21 N. W. 288; Madison First Nat. Bank *v.* Hackett, 61 Wis. 335, 21 N. W. 280.

26. Subsequent selection.— In Michigan it is held that where an assignment for the benefit of creditors excepts exempt property without specifying it, a *bona fide* selection is as practicable as under a levy. Smith *v.* Mitchell, 12 Mich. 180. See also Richardson *v.* Marqueze, 59 Miss. 80, 42 Am. Rep. 353. But *compare* Goll *v.* Hubbell, 61 Wis. 293, 20 N. W. 674, 21 N. W. 288.

27. As to the necessity and sufficiency of acknowledgments, generally, see ACKNOWLEDGMENTS, 1 Cyc. 566.

28. Statutory provisions mandatory.— *Illinois.*— Cohen *v.* Farwell, 29 Ill. App. 277 [*reversed* in 138 Ill. 216, 28 N. E. 35, 32 N. E. 893, 18 L. R. A. 281].

Maryland.— But see Mackintosh *v.* Comer, 33 Md. 598; Hoopes *v.* Knell, 31 Md. 550, to the effect that an affidavit by the trustee that the consideration is *bona fide* need not be appended to the deed.

Minnesota.— Bennett *v.* Knowles, 66 Minn. 4, 68 N. W. 111.

Missouri.—Rosenthal *v.* Green, 37 Mo. App. 272, holding, however, that, as between the parties and those having actual notice, the deed may be valid without acknowledgment and record.

New Jersey.— But see Scull *v.* Reeves, 3 N. J. Eq. 84, 29 Am. Dec. 694, wherein it was held by the court that the deed being signed, sealed, and delivered to one of the assignees named therein and by him accepted, was valid to pass the debtor's estate and vest the same in the assignees, although the deed was not acknowledged by the assignor.

New York.— Rogers *v.* Pell, 154 N. Y. 518, 49 N. E. 75 [*reversing* 89 Hun (N. Y.) 159, 35 N. Y. Suppl. 17]; Britton *v.* Lorenz, 45 N. Y. 51; Hardmann *v.* Bowen, 39 N. Y. 196, 6 Transcr. App. (N. Y.) 323, 5 Abb. Pr. N. S. (N. Y.) 332 (holding that an unacknowledged deed does not pass title as against attaching creditors); Schwartz *v.* Sontter, 41 Hun (N. Y.) 323; Fairchild *v.* Gwynne, 16 Abb. Pr. (N. Y.) 23; Smedley *v.* Smith, 15 Daly (N. Y.) 421, 8 N. Y. Suppl. 100, 28 N. Y. St. 414; Britton *v.* Lorenz, 3 Daly (N. Y.) 23. But

may be where personal property only is assigned and possession is taken by the assignee.[29]

(11) *Sufficiency.* What is a sufficient acknowledgment depends upon the exigency of the statute,[30] but when it is fatally defective it cannot be cured so as to defeat intervening rights.[31]

g. Attestation and Oath. Also it may be said that strict compliance is necessary where attestation[32] and oath[33] are prescribed, but the form of the oath is not indispensable, if the substance is preserved.[34]

2. Delivery — a. Necessity. To become finally effective and operative there

see Randall *v.* Dusenbury, 39 N. Y. Super. Ct. 174, stating that under N. Y. Laws (1860), art. 1, § 348, an assignment could not be attacked on the ground that it had not been acknowledged prior to its delivery. *Compare,* however, Royer Wheel Co. *v.* Fielding, 101 N. Y. 504, 5 N. E. 431, to the effect that N. Y. Laws (1877), c. 466, § 2, relating to acknowledgments of conveyances, etc., does not apply to assignments of specific property for the benefit of specified creditors.

Ohio.— Kingman *v.* Loyer, 40 Ohio St. 109; Pfeiffer *v.* Cook, 9 Ohio Dec. (Reprint) 290, 12 Cinc. L. Bul. 53.

Texas.— But see Tittle *v.* Vanleer, (Tex. Civ. App. 1894) 27 S. W. 736, holding such a statutory requirement to be merely directory.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 261.

Where a creditor has actual knowledge of the terms of an assignment for the benefit of creditors, and the assignee is in possession of all the property assigned, the assignment is not void because of lack of acknowledgment. Smith *v.* Cullen, 18 Wash. 398, 51 Pac. 1040.

29. In case of assignment of personalty.— Meeker *v.* Sanders, 6 Iowa 60; Kingman *v.* Loyer, 40 Ohio St. 109.

Separate acknowledgment of schedule annexed to the deed is unnecessary. Scott *v.* Guthrie, 10 Bosw. (N. Y.) 408, 25 How. Pr. (N. Y.) 481.

30. Instances of sufficient acknowledgments may be found in the following cases:

Illinois.— Zimmerman *v.* Willard, 114 Ill. 364, 2 N. E. 70 [*distinguished* in Farwell *v.* Cohen, 138 Ill. 216, 28 N. E. 35, 32 N. E. 883].

Massachusetts.— Brown *v.* Foster, 2 Metc. (Mass.) 152, as to the indorsement of the certificate of acknowledgment upon the assignment.

Minnesota.— Hanson *v.* Metcalf, 46 Minn. 25, 48 N. W. 441.

Missouri.— Eppright *v.* Nickerson, 78 Mo. 482, acknowledgment of corporation.

New York.— Klumpp *v.* Gardner, 114 N. Y. 153, 21 N. E. 99, 22 N. Y. St. 672 (partnership acknowledgment); Smith *v.* Boyd, 101 N. Y. 472, 5 N. E. 319; Linderman *v.* Axford, 38 N. Y. App. Div. 488, 56 N. Y. Suppl. 456; Lowenstein *v.* Flauraud, 82 N. Y. 494 [*affirming* 11 Hun (N. Y.) 399, 53 How. Pr. (N. Y.) 463, acknowledgment by attorney]; National Bank *v.* Scriven, 63 Hun (N. Y.) 375, 18 N. Y. Suppl. 277, 44 N. Y. St. 331 (partnership acknowledgment); Claflin *v.* Smith, 35 Hun (N. Y.) 372, 15 Abb. N. Cas. (N. Y.) 241. *Compare* Jones *v.* Howard Ins. Co., 10 N. Y. St. 120, as to effect of defect in notary's certificate upon assignor's debtor when sued by assignee.

United States.—Brown *v.* Parker, 97 Fed. 446, 38 C. C. A. 261.

Instances of insufficient acknowledgments may be found in the following cases:

Michigan.— Ryerson *v.* Eldred, 18 Mich. 12.

Minnesota.— Bennett *v.* Knowles, 66 Minn. 4, 68 N. W. 111; De Graw *v.* King, 28 Minn. 118, 9 N. W. 636, want of seal of notary.

Missouri.— Descombes *v.* Wood, 91 Mo. 196, 4 S. W. 82, 60 Am. Rep. 239.

New York.— Tim *v.* Smith, 14 Abb. N. Cas. (N. Y.) 447 [but see Smith *v.* Tim, 13 Abb. N. Cas. (N. Y.) 31]; Adams *v.* Houghton, 3 Abb. Pr. N. S. (N. Y.) 46 (not acknowledged by debtor in person); Cook *v.* Kelly, 14 Abb. Pr. (N. Y.) 466, 12 Abb. Pr. (N. Y.) 35 (not acknowledged by debtor in person); Treadwell *v.* Sackett, 50 Barb. (N. Y.) 440 (partnership acknowledgment); Smith *v.* Boyle, 67 How. Pr. (N. Y.) 351.

South Dakota.—Cannon *v.* Deming, 3 S. D. 421, 53 N. W. 863.

Tennessee.— Powers *v.* Goins, (Tenn. Ch. 1895) 35 S. W. 902.

United States.— Matter of Lawrence, 5 Fed. 349.

31. Smith *v.* Boyd, 10 Daly (N. Y.) 149. Otherwise, it seems, defects in the certificate may be corrected. Camp *v.* Buxton, 34 Hun (N. Y.) 511.

32. Attestation of witnesses.— Sager *v.* Summers, 49 Nebr. 459, 68 N. W. 614; Barker *v.* Bean, 25 N. H. 412; Tittle *v.* Vanleer, (Tex. Civ. App. 1894) 27 S. W. 736; Summers *v.* White, 71 Fed. 106, 36 U. S. App. 395, 17 C. C. A. 631. But see Deere *v.* Losey, 48 Nebr. 622, 67 N. W. 462, holding that, in an action to hold liable the garnishee of the assignee of an insolvent firm, it is immaterial whether or not the deed of assignment was witnessed.

33. Oath of assignor.—Williams *v.* Crocker, 36 Fla. 61, 18 So. 52; Thomas *v.* Clark, 65 Me. 296; Flint *v.* Clinton Co., 12 N. H. 430. *Compare* Woodward *v.* Marshall, 22 Pick. (Mass.) 468, construing Mass. Stat. (1836), c. 238.

34. Form of oath.— Thomas *v.* Clark, 65 Me. 296; Flint *v.* Clinton Co., 12 N. H. 430; Boutwell *v.* Bartlett, 11 N. H. 418, 35 Am. Dec. 503.

must be a delivery of the deed of assignment to the assignee named therein.[35]

b. What Constitutes. What is sufficient delivery largely depends upon the statute,[36] but it may sometimes be presumed where only personal property is assigned.[37] Filing for registration is generally held to constitute delivery.[38]

3. Recording — a. Necessity — (i) *In General.* Under the provisions of the statutes[39] in some states the instrument of assignment must be registered or recorded in order to make the assignment valid as against creditors;[40] in other

35. *California.*—Forbes *v.* Scannell, 13 Cal. 242, otherwise, it seems, where only personalty is assigned.

Indiana.— Woolson *v.* Pipher, 100 Ind. 306.

Iowa.— Singer *v.* Armstrong, 77 Iowa 397, 42 N. W. 332.

Louisiana.— Ramsey *v.* Stevenson, 5 Mart. (La.) 23, 12 Am. Dec. 468.

Massachusetts.— Marston *v.* Coburn, 17 Mass. 454.

Michigan.— Stamp *v.* Case, 41 Mich. 267, 2 N. W. 27, 32 Am. Rep. 156.

New Hampshire.— Hill *v.* Rolfe, 61 N. H. 351.

New York.— McIlhargy *v.* Chambers, 117 N. Y. 532, 23 N. E. 561, 27 N. Y. St. 921; South Danvers Nat. Bank *v.* Stevens, 5 N. Y. App. Div. 392, 39 N. Y. Suppl. 298.

Pennsylvania.— McKinney *v.* Rhoads, 5 Watts (Pa.) 343; Burd *v.* Smith, 4 Dall. (Pa.) 76, 1 L. ed. 748; Davis *v.* Wollerton, 2 Wkly. Notes Cas. (Pa.) 428. *Contra*, Wilt *v.* Franklin, 1 Binn. (Pa.) 502, 2 Am. Dec. 474.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 257.

36. Depends largely upon statute.— The following cases show that placing deed of assignment in the hands of another so it is beyond the power of the assignor to demand its return will suffice, though complete delivery may not be effected until registration. Singer *v.* Armstrong, 77 Iowa 397, 42 N. W. 332; American *v.* Frank, 62 Iowa 202, 17 N. W. 464; Ward *v.* Lewis, 4 Pick. (Mass.) 518; Stamp *v.* Case, 41 Mich. 267, 2 N. W. 27, 32 Am. Rep. 156; Hodenpuhl *v.* Hines, 160 Pa. St. 466, 28 Atl. 825. *Compare* Leeds *v.* Com., 83 Pa. St. 453, wherein it was said that the question of delivery is not affected by a subsequent fraudulent sale by the assignee.

Illustrations of insufficient delivery may be found in the following cases: McIlhargy *v.* Chambers, 117 N. Y. 532, 23 N. E. 561, 27 N. Y. St. 921 [*affirming* 51 Hun (N. Y.) 332, 4 N. Y. Suppl. 698, 21 N. Y. St. 211]; Kingston *v.* Koch, 57 Hun (N. Y.) 12, 10 N. Y. Suppl. 363, 32 N. Y. St. 24; Day *v.* Sines, 15 Wash. 525, 46 Pac. 1048.

37. Presumption of delivery.— Forbes *v.* Scannell, 13 Cal. 242. *Compare* Read *v.* Robinson, 6 Watts & S. (Pa.) 329.

38. Filing for record.— Ewing *v.* Walker, 60 Ark. 503, 31 S. W. 45; Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637; Tompkins *v.* Wheeler, 16 Pet. (U. S.) 106, 10 L. ed. 903.

As to filing and recording, generally, see *infra*, III, A, 3.

39. See list of statutes cited *supra*, note 6, p. 120.

40. Must be recorded.— *Alabama.*—Schloss *v.* Inman, (Ala. 1901) 30 So. 667; Cummings *v.* McCullough, 5 Ala. 324.

California.— Watkins *v.* Wilhoit, (Cal. 1894) 35 Pac. 646.

Dakota.— Farmer *v.* Cobban, 4 Dak. 425, 29 N. W. 12.

Illinois.—*Compare* Osborne *v.* Williams, 34 Ill. App. 421.

Indiana.— Fordyce *v.* Pipher, 84 Ind. 86; Eden *v.* Everson, 65 Ind. 113; Forkner *v.* Shafer, 56 Ind. 120; New *v.* Reissner, 56 Ind. 118.

North Carolina.—Perry *v.* Merchants Bank, 70 N. C. 309. See also Royster *v.* Stallings, 124 N. C. 55, 32 S. E. 384, to the effect that the fact that there was a race as between the assignee for preferred creditors to register his deed and the sheriff to levy an execution does not affect the validity of an assignment.

Ohio.— Wambaugh *v.* Northwestern Mut. L. Ins. Co., 59 Ohio St. 228, 52 N. E. 839.

Pennsylvania.— Huey *v.* Prince, 187 Pa. St. 151, 40 Atl. 982, 42 Wkly. Notes Cas. (Pa.) 441 [*reversing* 7 Pa. Dist. 110]; Wallace *v.* Wainwright, 87 Pa. St. 263; Driesbach *v.* Becker, 34 Pa. St. 152; Thomas *v.* Lowber, 14 Pa. St. 438; Watson *v.* Bagaley, 12 Pa. St. 164, 51 Am. Dec. 595; Stewart *v.* McMinn, 5 Watts & S. (Pa.) 100, 39 Am. Dec. 115; Flanagin *v.* Wetherill, 5 Whart. (Pa.) 280; Englebert *v.* Blanjot, 2 Whart. (Pa.) 240 [*reversing* 1 Miles (Pa.) 224]; Mitchell *v.* Gendell, 7 Phila. (Pa.) 107; Murphy's Assignment, 2 Pittsb. (Pa.) 271; Morris Canal, etc., Co. *v.* Reeder, 18 Leg. Int. (Pa.) 236. But *compare* McBroom's Appeal, 44 Pa. St. 92; Henderson's Appeal, 31 Pa. St. 502; Ridgway *v.* Stewart, 4 Watts & S. (Pa.) 383; Wilmarth *v.* Mountford, 8 Serg. & R. (Pa.) 124; Williamson *v.* Clark, 2 Miles (Pa.) 153.

South Carolina.— *In re* Dickson, 23 Pittsb. Leg. J. N. S. (Pa.) 421. See, however, Bush *v.* Waring, 1 Bay (S. C.) 90, holding that where the statute giving priority to a first recorded sale or mortgage was silent as to judgments, an assignment for the general benefit of creditors took priority over a subsequent judgment, though not recorded until the latter was obtained.

Tennessee.— Birdwell *v.* Cain, 1 Coldw. (Tenn.) 301. See also *infra*, note 41.

United States.— Shufeldt *v.* Jenkins, 22 Fed. 359, construing Virginia statute making preferential assignments void unless recorded. *Compare* Earle *v.* McCartney, 109 Fed. 13.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 262.

states such recording has been held not to be essential to the validity of the assignment.[41]

(II) *In Case of Actual Notice.* In some states it is held that actual notice will obviate the necessity of registration or recording.[42]

41. Need not be recorded.— *Arkansas.*— Moore *v.* Goodbar, 66 Ark. 161, 49 S. W. 571; Excelsior Mfg. Co. *v.* Owens, 58 Ark. 556, 25 S. W. 868 (as prerequisite to admissibility in evidence); Thatcher *v.* Franklin, 37 Ark. 64 (as against assignor and execution creditors who refuse to accept benefits of assignment).

Illinois.— Farwell *v.* Cohen, 138 Ill. 216, 28 N. E. 35, 32 N. E. 893, 18 L. R. A. 281 [*following* Mann *v.* Reed, 49 Ill. App. 406, holding the statute to be directory only]. See Marder *v.* Filkins, 51 Ill. App. 587 (wherein it is held that the creditors of a corporation who place execution on their judgment in the hands of the sheriff before an assignment by the corporation for the benefit of creditors is recorded are preferred creditors); Myer *v.* Fales, 12 Ill. App. 351 (as against one claiming under an execution levied after execution and delivery of property, but before the recording of the deed).

Iowa.— As against subsequent attaching creditors. Munson *v.* Frazer, 73 Iowa 177, 34 N. W. 804; American *v.* Frank, 62 Iowa 202, 17 N. W. 464.

Kentucky.— As against a subsequent attaching creditor. Covington First Nat. Bank *v.* D. Kiefer Milling Co., 95 Ky. 97, 15 Ky. L. Rep. 457, 23 S. W. 675; Proctor *v.* Wilson, 14 Ky. L. Rep. 480.

Louisiana.— Bastable *v.* Curry, 5 La. Ann. 411.

Massachusetts.— Howes *v.* Burt, 130 Mass. 368, construing Mass. Gen. Stat. c. 118, §§ 7, 43. *Compare* Guilford *v.* Childs, 22 Pick. (Mass.) 434, as to effect of newspaper notice given as required by law.

Michigan.— As against subsequent attaching creditor. Gott *v.* Hoschna, 57 Mich. 413, 24 N. W. 123; Palmer *v.* Mason, 42 Mich. 146, 3 N. W. 945.

Nebraska.— Failure to record in time does not *ipso facto* give a creditor a superior right to that of the assignor. Miller *v.* Waite, 59 Nebr. 319, 80 N. W. 907. Assignment of personalty, duly filed in the clerk's office as required by law, need not be recorded in the office of the register of deeds. Lancaster County Bank *v.* Horn, 34 Nebr. 742, 52 N. W. 562.

New York.— It has been held that a general assignment executed as prescribed by N. Y. Laws (1877), c. 466, as amended by N. Y. Laws (1878), c. 318, takes effect so far as property situate in the state is concerned, from the time of its delivery, and not from the time of its record; all requirements subsequent to the delivery are directory merely and an omission to obey any of them does not avoid the assignment. Nicoll *v.* Spowers, 105 N. Y. 1, 11 N. E. 138; Warner *v.* Jaffray, 96 N. Y. 248, 48 Am. Rep. 616 [*affirming* 30 Hun (N. Y.) 326]. But see McBlane *v.* Speelman, 6 N. Y. Civ. Proc. 401. In Van Nest *v.* Yoe, 1 Sandf. Ch. (N. Y.) 4, it was held that recording an assignment in trust for the payment of creditors, when there was no real estate to be affected by it, would not be notice to any one of the assignment.

Ohio.— Betz *v.* Snyder, 48 Ohio St. 492, 28 N. E. 234, 13 L. R. A. 235, takes effect as to all persons from time of delivery to the probate court of the county of assignor's residence.

Tennessee.— As against subsequent attaching creditor. Mayer *v.* Pulliam, 2 Head (Tenn.) 346. An assignment in trust of negotiable paper or choses in action need not be registered, under the law relating to the registration of mortgages and trusts of personalty. Duke *v.* Hall, 9 Baxt. (Tenn.) 282. See also *supra*, note 40.

Wisconsin.— Toepfer *v.* Lampert, 102 Wis. 465, 78 N. W. 779.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 462.

As between the parties thereto an unrecorded assignment is valid. Thompson *v.* Ellenz, 58 Minn. 301, 59 N. W. 1023.

Who may object.— The statutory requirement being for the benefit of the creditors they must take advantage of a failure to record the deed (Weber *v.* Samuel, 7 Pa. St. 499; Wharton *v.* Grant, 5 Pa. St. 39), and persons who deal with the assignee cannot take advantage of a want of record in a collateral proceeding (Maupin *v.* Everett, 8 Ky. L. Rep. 356). But an unrecorded assignment which is good as against a subsequent voluntary assignment has been held to be void as against execution creditors of the assignor. Huey *v.* Prince, 7 Pa. Dist. 110. But a creditor may estop himself from raising the objection. Crossman *v.* Rowland, 2 Wkly. Notes Cas. (Pa.) 259. So an assignment not filed within the statutory period will not be invalidated where it was agreed that it should only be recorded in case the assignor failed to secure an extension of time. Pierce Steam Heating Co. *v.* Ransom, 16 N. Y. App. Div. 258, 44 N. Y. Suppl. 623.

42. *Connecticut.*— See Strong *v.* Carrier, 17 Conn. 319.

Kentucky.—Ward *v.* Crotty, 4 Metc. (Ky.) 59; Forepaugh *v.* Appold, 17 B. Mon. (Ky.) 625; Hawkins *v.* Trapp, 12 Ky. L. Rep. 794.

Minnesota.— Thompson *v.* Ellenz, 58 Minn. 301, 59 N. W. 1023; Paulson *v.* Clough, 40 Minn. 494, 42 N. W. 398.

Missouri.— Rock Island Plow Co. *v.* Lang, 55 Mo. App. 349; Winn *v.* Madden, 18 Mo. App. 261.

Pennsylvania.— Follweiler *v.* Lutz, 102 Pa. St. 585. Applying the rule to foreign assignments not recorded in Pennsylvania. Evans *v.* Dunkelberger, 3 Grant (Pa.) 134; Wells *v.* Hotchkin, 23 Wkly. Notes Cas. (Pa.) 26. *Compare* Bacon *v.* Horne, 123 Pa. St.

(III) *IN CASE OF ACTUAL POSSESSION TAKEN.* It has been held that the recording of an assignment of personal property is not essential to its validity where actual possession accompanies the conveyance.[43]

b. Sufficiency — (I) *IN GENERAL.* While the statutory requirements[44] as to the time and manner of recording assignments should be complied with[45] it seems that strict compliance is not always necessary.[46]

(II) *PLACE OF RECORD.* The place of record, when recording is necessary, is generally designated by statute;[47] as a rule the deed should be recorded in the

452, 16 Atl. 794, 2 L. R. A. 355; Smith's Appeal, 14 Wkly. Notes Cas. (Pa.) 285.

Texas.— Van Hook *v.* Walton, 28 Tex. 59.

Utah.— Snyder *v.* Murdock, 20 Utah 407, 59 Pac. 88.

Contra, Dewey *v.* Littlejohn, 37 N. C. 495; Lookout Bank *v.* Noe, 86 Tenn. 21, 5 S. W. 433.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 473.

43. *Illinois.*— Feltenstein *v.* Stein, 157 Ill. 19, 45 N. E. 502; Myers *v.* McKinzie, 26 Ill. 36.

Iowa.— Meeker *v.* Sanders, 6 Iowa 60.

Missouri.— Wise *v.* Wimer, 23 Mo. 237, at least until a reasonable time be afforded for placing deed on record.

Nebraska.— Miller *v.* Waite, 59 Nebr. 319, 80 N. W. 907 [*modified* in 60 Nebr. 431, 83 N. W. 355]; Lancaster County Bank *v.* Horn, 34 Nebr. 742, 52 N. W. 562.

Oregon.— Dawson *v.* Crossen, 10 Oreg. 41.

Virginia.— Clark *v.* Ward, 12 Gratt. (Va.) 440.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 46.

44. See list of statutes cited *supra,* note 6, p. 120.

45. Requirements mandatory.— Grever *v.* Culver, 84 Wis. 295, 54 N. W. 585, relating to the commissioner's certificate to be indorsed upon the copy of the assignment. See also Stiefel *v.* Barton, 73 Md. 408, 21 Atl. 63; McCuaig *v.* City Sav. Bank, 111 Mich. 356, 69 N. W. 500; Miller *v.* Waite, 60 Nebr. 431, 83 N. W. 355 [*modifying* 59 Nebr. 319, 80 N. W. 907]; Johnson *v.* Herring, 46 Pa. St. 415.

46. Strict compliance not necessary.—*California.*— Watkins *v.* Wilhoit, 104 Cal. 395, 38 Pac. 53, as to the book in which assignment should be recorded.

Connecticut.— Strong *v.* Carrier, 17 Conn. 319, relating to delay in filing for record.

Illinois.—*Compare* Osborne *v.* Williams, 34 Ill. App. 421.

Indiana.— But see Switzer *v.* Miller, 58 Ind. 561.

Iowa.— Wooster *v.* Stanfield, 11 Iowa 128, relating to the book in which assignment should be recorded.

Kentucky.— Proctor *v.* Wilson, 14 Ky. L. Rep. 480.

Minnesota.— Holtoquist *v.* Clark, 59 Minn. 59, 60 N. W. 1077 (assignment left with assignee to be filed upon certain conditions); Perkins *v.* Zarracher, 32 Minn. 71, 19 N. W. 385 (relating to indorsement of time of filing and of record).

Nebraska.— Maul *v.* Drexel, 55 Nebr. 446, 76 N. W. 163; Lancaster County Bank *v.* Horn, 34 Nebr. 742, 52 N. W. 562; Wells *v.* Lamb, 19 Nebr. 355, 27 N. W. 229; Lininger *v.* Raymond, 12 Nebr. 19, 9 N. W. 550, 12 Nebr. 167, 10 N. W. 716 (relating to the book in which assignment should be recorded). See *supra,* note 45.

New Jersey.— Pemberton *v.* Klein, 43 N. J. Eq. 98, 10 Atl. 837, relating to foreign assignment not accompanied by a certificate required by statute.

New York.— Irving Nat. Bank *v.* Wilson Bros., etc., Toy Co., 34 N. Y. App. Div. 481, 54 N. Y. Suppl. 313; Pierce Steam Heating Co. *v.* Ransom, 16 N. Y. App. Div. 258, 44 N. Y. Suppl. 623.

Ohio.— Betz *v.* Snyder, 48 Obio St. 492, 28 N. E. 234, 13 L. R. A. 235.

Pennsylvania.— Read *v.* Robinson, 6 Watts & S. (Pa.) 329. See *supra,* note 45. And *compare* Colvin *v.* White, 200 Pa. St. 277, 49 Atl. 765.

Tennessee.— Birdwell *v.* Cain, 1 Coldw. (Tenn.) 301, relating to time of registration. And *compare* Chicago Sugar-Refinery Co. *v.* Jackson Brewing Co., (Tenn. Ch. 1898) 48 S. W. 275.

Texas.— Piggott *v.* Schram, 64 Tex. 447, relating to the effect of recording after issuance but before execution of attachment. See also Carter-Battle Grocer Co. *v.* Jackson, (Tex. Civ. App. 1898) 45 S. W. 615.

Virginia.— Paul *v.* Baugh, 85 Va. 955, 9 S. E. 329.

Wisconsin.— Jones *v.* Alford, 98 Wis. 245, 73 N. W. 1012; Western Twine Co. *v.* Teasdale, 97 Wis. 652, 73 N. W. 568.

United States.—Belfast Sav. Bank *v.* Stowe, 92 Fed. 100, 34 C. C. A. 229 [*affirming* 92 Fed. 90]. And *compare* Parker *v.* Brown, 85 Fed. 595, 29 C. C. A. 357.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 474 *et seq.*

Any person interested in the trust may present the deed for record. Read *v.* Robinson, 6 Watts & S. (Pa.) 329. Thus it has been held that the deed may be admitted to record by the clerk who is trustee therein, and acted as the counsel of the grantor in its preparation. Paul *v.* Baugh, 85 Va. 955, 9 S. E. 329.

Record relates back to time of acknowledgment, if the deed has been properly recorded within the statutory period. So held in Proctor *v.* Wilson, 14 Ky. L. Rep. 480. But see *contra,* Stiefel *v.* Barton, 73 Md. 408, 21 Atl. 63.

47. See list of statutes cited *supra,* note 6, p. 120.

county in which the assignor resides,[48] but where the assignor owns property situated in a county other than the county of his residence, either within or outside the state in which he resides, it is usually required that the deed be also registered in the county where such property is situated.[49]

B. The Inventory and Schedule — 1. Necessity — a. In General. It is generally provided by statute[50] that there shall be an inventory of assets and a

48. In county of assignor's residence.— Spangler *v.* West, 7 Colo. App. 102, 43 Pac. 905; Fidelity, etc., Co. *v.* Haines, 78 Md. 454, 28 Atl. 393, 23 L. R. A. 652; Schuylkill Bank *v.* Reigart, 4 Pa. St. 477. See also Maul *v.* Drexel, 55 Nebr. 446, 76 N. W. 163; Betz *v.* Snyder, 48 Ohio St. 492, 28 N. E. 234, 13 L. R. A. 235; Harrison *v.* Chatfield, 14 Ohio Cir. Ct. 599.

Assignment of personalty must be recorded in county of assignor's residence. Stiefel *v.* Barton, 73 Md. 408, 21 Atl. 63. And, in Maryland, where the trustee files his bond at the domicile of the assignor, it seems the deed need not be also recorded in another county where the personalty is actually situated. Fidelity, etc., Co. *v.* Haines, 78 Md. 454, 28 Atl. 393, 23 L. R. A. 652.

Assignment by non-resident should, under the provision of some statutes, be filed in the county where his principal place of business is. Spangler *v.* West, 7 Colo. App. 102, 43 Pac. 905.

49. In another county in same state.— *Alabama.*— Rogers *v.* Bailey, 121 Ala. 314, 25 So. 909. See also Reeves *v.* Estes, 124 Ala. 303, 26 So. 935.

Connecticut.— Coggill *v.* Botsford, 29 Conn. 439.

Indiana.— Switzer *v.* Miller, 58 Ind. 561.

Maryland.— Stiefel *v.* Barton, 73 Md. 408, 21 Atl. 63.

Ohio.— Eggleston *v.* Harrison, 61 Ohio St. 397, 55 N. E. 993 [*reversing* Harrison *v.* Chatfield, 14 Ohio Cir. Ct. 599].

Pennsylvania.— Lucas *v.* Sunbury, etc., R. Co., 32 Pa. St. 458; Dougherty *v.* Darrach, 15 Pa. St. 399.

Utah.— Snyder *v.* Murdock, 20 Utah 407, 59 Pac. 88.

Assignment by an individual, a member of a partnership, need not be recorded in a county where land belonging to the firm is situated, though such assignment carries his interest in the firm. Bradley Fertilizer Co. *v.* Pace, 80 Fed. 862, 52 U. S. App. 194, 26 C. C. A. 198.

Assignment of realty must be recorded in the county in which land lies. Stiefel *v.* Barton, 73 Md. 408, 21 Atl. 63.

Principal place of business of a corporation or partnership making an assignment sometimes controls as to the place of record. Spangler *v.* West, 7 Colo. App. 102, 43 Pac. 905; Coggill *v.* Botsford, 29 Conn. 439, where partners resided in one district and their principal place of business was in another. But see Lucas *v.* Sunbury, etc., R. Co., 32 Pa. St. 458, holding that where the principal office of the assignor is in Philadelphia, and its whole road is in Northumberland county, where all its business is conducted, the proper county for recording the assignment for the benefit of creditors is Northumberland.

Under Colo. Laws (1885), p. 43, § 6, providing that, where a deed of general assignment includes any interest in land, the assignee shall file a notice of the assignment in each county where the real estate is situated, and that the same shall be constructive notice to a purchaser or encumbrancer of the transfer of the property in that county, the mere recording of the deed, without filing the notice required by said act, is not constructive notice of the conveyance. Spangler *v.* West, 7 Colo. App. 102, 43 Pac. 905.

In another state.— Richmondville Mfg. Co. *v.* Prall, 9 Conn. 487; Scott *v.* Guthrie, 10 Bosw. (N. Y.) 408, 25 How. Pr. (N. Y.) 481; Smith's Appeal, 14 Wkly. Notes Cas. (Pa.) 285.

Foreign assignment not recorded in the state where some, or all of the property included is situate, if executed in conformity with the laws of the state where made, will, nevertheless, according to the weight of authority, prevail against attaching creditors suing in the state where the deed is not recorded. Wilson *v.* Carson, 12 Md. 54; Carter-Battle Grocer Co. *v.* Jackson, 18 Tex. Civ. App. 353, 45 S. W. 615; Gregg *v.* Sloan, 76 Va. 497. *Contra,* Fourth Nat. Bank *v.* Fleming, 8 Ohio Dec. (Reprint) 545, 8 Cinc. L. Bul. 309; Douglas *v.* Bank of Commerce, 97 Tenn. 133, 36 S. W. 874. And in Connecticut this rule has been applied even in the case of a non-resident attaching creditor. Atwood *v.* Protection Ins. Co., 14 Conn. 555. But in Pennsylvania a distinction has been made between non-resident attaching creditors and resident attaching creditors, the deed being considered as valid against the former (Bacon *v.* Horne, 123 Pa. St. 452, 16 Atl. 794, 2 L. R. A. 355 [*distinguishing* Chemical Nat. Bank *v.* Tuttle, 17 Wkly. Notes Cas. (Pa.) 415]), and invalid as against the latter (Steel *v.* Goodwin, 113 Pa. St. 288, 6 Atl. 49; Philson *v.* Barnes, 50 Pa. St. 230; Warner's Appeal, 13 Wkly. Notes Cas. (Pa.) 505). In Kansas an assignment made by a resident of another state is governed as to property located in the former by the laws of that state, prescribing the manner of registration and the effect thereof as notice. Parker *v.* Brown, 85 Fed. 595, 56 U. S. App. 341, 29 C. C. A. 357. *Compare* Houston *v.* Nowland, 7 Gill & J. (Md.) 480, as to the effect of a deed valid in Delaware to transfer balance of purchase-price of lands in Maryland, though not recorded in the latter state.

50. See list of statutes cited *supra,* note 6, p. 120.

schedule of liabilities,[51] either accompanying the deed of assignment, when filed,[52] or to be filed within a given time thereafter.[53] But unless specifically so provided by statute[54] the failure to file such inventory or schedule does not invalidate,[55]

51. Time of execution.— Dana *v.* U. S. Bank, 5 Watts & S. (Pa.) 223, holding that schedules referred to in the assignment as bearing even date therewith, but not dated, will be presumed to have been executed at the same time as the assignment.

Delivery.— *In re* Kimball, 14 Fed. Cas. No. 7,770, 16 Nat. Bankr. Reg. 188, holding that it is not necessary to the validity of an assignment for the benefit of creditors that the schedules should be delivered at the time it was made. See also Pratt *v.* Stevens, 94 N. Y. 387, as to the proper person to whom the inventory should be delivered.

52. Time of annexation need not be of the date of the execution of deed. Drucker *v.* Wellhouse, 82 Ga. 129, 8 S. E. 40, 2 L. R. A. 328; Hotop *v.* Neidig, 17 Abb. Pr. (N. Y.) 332. *Compare* Kercheis *v.* Schloss, 49 How. Pr. (N. Y.) 284; Averill *v.* Loucks, 6 Barb. (N. Y.) 470, where the assignments were considered void.

53. Time of filing.— Need not be filed at the time of making or filing the deed. Blair *v.* Anderson, 61 Kan. 376, 59 Pac. 644; Hartzler *v.* Tootle, 85 Mo. 23; Glanton *v.* Jacobs, 117 N. C. 427, 23 S. E. 335; Cribben *v.* Ellis, 69 Wis. 337, 34 N. W. 154; Mather *v.* McMillan, 60 Wis. 546, 19 N. W. 440; *In re* Croughwell, 9 Ben. (U. S.) 360, 6 Fed. Cas. No. 3,440, 17 Nat. Bankr. Reg. 337. But should be filed within the time designated by statute. Glanton *v.* Jacobs, 117 N. C. 427, 23 S. E. 335; Hockaday *v.* Drye, (Okla. 1898) 54 Pac. 475; Mather *v.* McMillan, 60 Wis. 546, 19 N. W. 440; Haben *v.* Harshaw, 59 Wis. 403, 18 N. W. 426; Wadleigh *v.* Merkle, 57 Wis. 517, 15 N. W. 838. *Contra*, Cribben *v.* Ellis, 69 Wis. 337, 34 N. W. 154, under Wis. Laws (1883), c. 240.

An order extending time to an assignee to file his schedule of assets will not be vacated where it does not appear that the applicant has any interest either in the estate or in making the application. *In re* United Press, 20 N. Y. App. Div. 625, 46 N. Y. Suppl. 840.

Under Wis. Rev. Stat. (1878), § 1697, the inventory of assets and list of creditors filed within ten days relate back to the time of the execution of the assignment and constitute a part of it. Conlee Lumber Co. *v.* Ripon Lumber, etc., Co., 66 Wis. 481, 29 N. W. 285.

54. The New York act of 1877 so provided. Pratt *v.* Stevens, 26 Hun (N. Y.) 229; Matter of Leahy, 8 Daly (N. Y.) 124; *In re* Croughwell, 9 Ben. (U. S.) 360, 6 Fed. Cas. No. 3,440, 17 Nat. Bankr. Reg. 337. Under the act of 1874 such defect did not invalidate. See *infra*, note 55. But see also *infra*, note 56, as to the rule under the act of 1860.

55. Failure to file will not invalidate.— *Alabama.*— See Flournoy *v.* Lyon, 62 Ala. 213; Shackelford *v.* Planters', etc., Bank, 22 Ala. 238.

Arizona.—Babbitt *v.* Mandell, (Ariz. 1898) 53 Pac. 577.

California.— Forbes *v.* Scannell, 13 Cal. 242.

Colorado.— Smith *v.* Stoker, 8 Colo. 286, 7 Pac. 10, where deed contains sufficient description.

Indiana.— Pitman *v.* Marquardt, 20 Ind. App. 431, 50 N. E. 894.

Indian Territory.— Martin-Brown Co. *v.* Morris, (Indian Terr. 1897) 42 S. W. 423.

Iowa.— *Compare* Meeker *v.* Sanders, 6 Iowa 60.

Massachusetts.— Stevens *v.* Bell, 6 Mass. 339, where deed provided for the making out of a schedule as soon as might be.

Michigan.— Coots *v.* Chamberlain, 39 Mich. 565 (where the deed was sufficient to clearly transfer title to all of the assignor's property); Hollister *v.* Loud, 2 Mich. 309. *Compare* Nye *v.* Van Husan, 6 Mich. 329, 74 Am. Dec. 690. Assignee cannot sue as such unless he has filed an inventory as required by statute. McCuaig *v.* City Sav. Bank, 111 Mich. 356, 69 N. W. 500.

Minnesota.— Swart *v.* Thomas, 26 Minn. 141. 1 N. W. 830.

Mississippi.— Robins *v.* Embry, Sm. & M. Ch. (Miss.) 207.

Missouri.— Hardcastle *v.* Fisher, 24 Mo. 70; Duvall *v.* Raisin, 7 Mo. 449; Deaver *v.* Savage, 3 Mo. 252, 25 Am. Dec. 437. See also Douglass *v.* Cissna, 17 Mo. App. 44.

Nebraska.— Maul *v.* Drexel, 55 Nebr. 446, 76 N. W. 163.

New Hampshire.— Howland's Appeal, 67 N. H. 575, 35 Atl. 943; Rundlett *v.* Dole, 10 N. H. 458.

New York.— Produce Bank *v.* Morton, 67 N. Y. 199; Smith *v.* Newell, 32 Hun (N. Y.) 501. *Compare* Van Vleet *v.* Slauson, 45 Barb. (N. Y.) 317; Mathews *v.* Poultney, 33 Barb. (N. Y.) 127; Ludington's Petition, 5 Abb. N. Cas. (N. Y.) 307; Fairchild *v.* Gwynne, 14 Abb. Pr. (N. Y.) 121; Evans *v.* Chapin, 12 Abb. Pr. (N. Y.) 161, 20 How. Pr. (N. Y.) 289; Cunningham *v.* Freeborn, 1 Edw. (N. Y.) 256 [*affirmed* in 3 Paige (N. Y.) 557 (*affirmed* in 11 Wend. (N. Y.) 240)]. For the rule under the act of 1877 see *supra*, note 54. For the rule under the act of 1860 see *infra*, note 56.

Pennsylvania.— Wilt *v.* Franklin, 1 Binn. (Pa.) 502, 2 Am. Dec. 474. See also U. S. *v.* U. S. Bank, 8 Rob. (La.) 262, construing Pennsylvania statute.

Texas.— *Compare* Marsalis *v.* Oglesby, 1 Tex. App. Civ. Cas. § 256.

Virginia.— Williams *v.* Lord, 75 Va. 390. See also to the same effect Gordon *v.* Cannon, 18 Gratt. (Va.) 387; Kevan *v.* Branch, 1 Gratt. (Va.) 274.

United States.— Means *v.* Montgomery, 23 Fed. 421 (construing North Carolina statute and stating the common-law rule to be that

though such a provision is by some of the states deemed mandatory.[56] Such failure is, however, ordinarily deemed a badge of fraud.[57]

b. In Case of Preferences. It is essential, however, that the names of preferred creditors should be given at the time of the filing of the deed of assignment, either in the body of the deed or in the accompanying schedule.[58]

2. Contents and Sufficiency — a. In General. The statutory requirements, if

where the deed itself contains a sufficient general description no schedule is necessary); Wright *v.* Thomas, 9 Biss. (U. S.) 244, 1 Fed. 716, construing Indiana statute.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 271.

Especially is the assignment not invalidated where the filing devolves upon the assignee and he omits to file an inventory and schedule. Barbour *v.* Everson, 16 Abb. Pr. (N. Y.) 366; Williams *v.* Lord, 75 Va. 390. See also Matter of Farnum, 14 Hun (N. Y.) 159.

56. Mandatory provisions.— Johnson *v.* Adams, 92 Ga. 551, 17 S. E. 898; Coggins *v.* Stephens, 73 Ga. 414; Cooper *v.* McKinnon, 122 N. C. 447, 29 S. E. 417; Landauer *v.* Conklin, 3 S. D. 462, 54 N. W. 322; Powers *v.* Goins, (Tenn. Ch. 1895) 35 S. W. 902; Fechheimer *v.* Baum, 43 Fed. 719. To the same effect Connor *v.* Omaha Nat. Bank, 42 Nebr. 602, 60 N. W. 911, construing Wyoming statute. And this was the rule in New York under the act of 1860. Juliand *v.* Rathbone, 39 N. Y. 369 [*reversing* 39 Barb. (N. Y.) 97]. But the act of 1874 abrogated this rule. Produce Bank *v.* Morton, 67 N. Y. 199; and cases cited *supra*, note 55. See *supra*, note 54, as to the rule under the act of 1877.

An assignment is good as to the assignor until attacked, although it may be voidable as to the creditors because of a defective accompanying schedule. Comer *v.* Tabler, 44 Fed. 467.

57. Fraud presumed from failure to file.— *California.*— Forbes *v.* Scannell, 13 Cal. 242.

Colorado.— Palmer *v.* McCarthy, 2 Colo. App. 422, 31 Pac. 241, where it appeared that no honest attempt was made to comply with the statute.

Massachusetts.— Stevens *v.* Bell, 6 Mass. 339.

Michigan.— Nye *v.* Van Husan, 6 Mich. 329, 74 Am. Dec. 690; Hollister *v.* Loud, 2 Mich. 309.

New Hampshire.— Haven *v.* Richardson, 5 N. H. 113.

New York.— Kellogg *v.* Slawson, 15 Barb. (N. Y.) 56; Cunningham *v.* Freeborn, 11 Wend. (N. Y.) 240 [*affirming* 3 Paige (N. Y.) 557 (*affirming* 1 Edw. (N. Y.) 256)]; Van Nest *v.* Yoe, 1 Sandf. Ch. (N. Y.) 4.

Pennsylvania.— Hower *v.* Geesaman, 17 Serg. & R. (Pa.) 251; Wilt *v.* Franklin, 1 Binn. (Pa.) 502, 2 Am. Dec. 474 (holding that a want of schedule is less suspicious where the property is conveyed for the benefit of all the creditors than where a part of it is conveyed for particular creditors); Burd *v.* Smith, 4 Dall. (Pa.) 76, 1 L. ed. 748.

Texas.— Linn *v.* Wright, 18 Tex. 317, 70 Am. Dec. 282, holding that such an omission is not necessarily a badge of fraud.

United States.— Gilkerson *v.* Hamilton, 10 Fed. Cas. No. 5,424*a*, 1 Am. L. Mag. 35. But *compare* Pearpoint *v.* Graham, 4 Wash. (U. S.) 232, 19 Fed. Cas. No. 10,877.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 272.

58. *Michigan.*— Wolf *v.* O'Conner, 88 Mich. 124, 50 N. W. 118, 13 L. R. A. 693.

Missouri.— Seger *v.* Thomas, 107 Mo. 635, 18 S. W. 33, delegating power to third person to make preferences insufficient.

New York.— Averill *v.* Loucks, 6 Barb. (N. Y.) 470. See Kercheis *v.* Schloss, 49 How. Pr. (N. Y.) 284 (holding that an assignment which contemplates that the schedule of creditors be annexed at some future time is fraudulent upon its face, as it in effect reserves to the debtor the right thereafter to designate the persons who shall be preferred in the distribution of the assigned property and assets); Webb *v.* Daggett, 2 Barb. (N. Y.) 9 (where the preference was of a fictitious debt). *Compare* Franey *v.* Smith, 125 N. Y. 44, 25 N. E. 1079, 34 N. Y. St. 469 [*reversing* 47 Hun (N. Y.) 119, *disapproving* Schwartz *v.* Soutter, 41 Hun (N. Y.) 323]; Hotop *v.* Neidig, 17 Abb. Pr. (N. Y.) 332.

North Carolina.— Glanton *v.* Jacobs, 117 N. C. 427, 23 S. E. 335; National Bank *v.* Gilmer, 117 N. C. 416, 23 S. E. 333. See also Blair *v.* Brown, 116 N. C. 631, 21 S. E. 434, preferring fictitious debt.

Pennsylvania.— See Irwin *v.* Keen, 3 Whart. (Pa.) 347, preferring fictitious debt.

Texas.— Dansby *v.* Frieberg, 76 Tex. 463, 13 S. W. 331, holding that secret promise of preferences renders assignment void. See also Moody *v.* Paschal, 60 Tex. 483, holding that an attempt to give assignee power to make future preferences will render the assignment void.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 274.

But see and *compare* Berry *v.* Cutts, 42 Me. 445 (holding, however, that where the preferences do not appear in the assignment itself the fact may be shown by proof *aliunde*); Hiller *v.* Ellis, 72 Miss. 701, 18 So. 95, 41 L. R. A. 707; Memphis Grocery Co. *v.* Leach, 71 Miss. 959, 15 So. 113; Coblentz *v.* Driver Mercantile Co., 10 Utah 96, 37 Pac. 242 (preferring fictitious debt).

The failure to state the amount of indebtedness to each preferred creditor mentioned in the deed will not, of itself, invalidate the assignment. Willey *v.* Reynolds, (Indian Terr. 1899) 51 S. W. 972.

any, control the contents and sufficiency of the inventory and schedule[59] but substantial compliance with the statute seems to be all that is necessary.[60]

b. Description of Assets and Debts — (I) *In General.* The insufficiency of description as to assets[61] or debts[62] does not as a rule avoid the assignment; and even where the statute is deemed mandatory a reasonable compliance is all that is required,[63] but a defect of substance invalidates.[64] Ordinarily, however, valuations are not required to be fixed.[65]

(II) *Omissions as Badges of Fraud.* Omissions either from the inventory of assets or schedule of debts may constitute badges of fraud,[66] but do not

59. Controlled by statute.— August *v.* Calloway, 35 Fed. 381; *In re* Bear, 12 Fed. Cas. No. 1,177. See also cases cited *infra*, note 60 *et seq.*

60. Substantial compliance sufficient.— *Arkansas.*— *Ex p.* Conway, 4 Ark. 302.

Kansas.— See Goodin *v.* Newcomb, 6 Kan. App. 431, 49 Pac. 821.

New York.— Read *v.* Worthington, 9 Bosw. (N. Y.) 617; Scott *v.* Guthrie, 10 Bosw. (N. Y.) 408, 25 How. Pr. (N. Y.) 481.

South Dakota.— Landauer *v.* Conklin, 3 S. D. 462, 54 N. W. 322.

Texas.— Swearingen *v.* Hendley, 1 Tex. Unrep. Cas. 639.

Wisconsin.— Smith *v.* Bowen, 61 Wis. 258, 20 N. W. 917; Ball *v.* Bowe, 49 Wis. 495, 5 N. W. 909.

United States.— Tennessee Bank *v.* Horn, 17 How. (U. S.) 157, 15 L. ed. 70; Sanger *v.* Flow. 48 Fed. 152, 4 U. S. App. 32, 1 C. C. A. 56; Comer *v.* Tabler, 44 Fed. 467; Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 11 Fed. Cas. No. 5,964. See also cases cited *infra*, note 61 *et seq.*

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 276.

May be amended.— Ellis *v.* Myers, 4 Silv. Supreme (N. Y.) 323, 8 N. Y. Suppl. 139, 28 N. Y. St. 120. See also Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 11 Fed. Cas. No. 5,964.

As to the effect of reserving right to amend see *infra*, V, A.

Substitution of new inventory may be made if it appear that such substitution was made in good faith, and effected no material change in the deed, but simply gave a more accurate statement of the values given the assets upon completion of the invoice. Smith *v.* Stoker, 8 Colo. 286, 7 Pac. 10.

61. Description of assets.— *Ex p.* Conway, 4 Ark. 302; Ely *v.* Hair, 16 B. Mon. (Ky.) 230; Tracy *v.* Tuffly, 134 U. S. 206, 10 S. Ct. 527, 33 L. ed. 879; Tennessee Bank *v.* Horn, 17 How. (U. S.) 157, 15 L. ed. 70.

62. Description of debts.— U. S. Bank *v.* Huth, 4 B. Mon. (Ky.) 423.

63. Reasonable compliance when statute is mandatory.— *Georgia.*— Claflin *v.* Vonderau, 97 Ga. 224, 22 S. E. 405; Stultz *v.* Fleming, 83 Ga. 14, 9 S. E. 1067.

Iowa.— King *v.* Glass, 73 Iowa 205, 34 N. W. 820.

New York.— Pratt *v.* Stevens, 94 N. Y. 387; McNaney *v.* Hall, 86 Hun (N. Y.) 415, 33 N. Y. Suppl. 518 [*affirmed* in 159 N. Y. 544, 54 N. E. 1093]; Eastern Nat. Bank *v.* Hulshizer, 2 N. Y. St. 93.

Pennsylvania.— Dana *v.* U. S. Bank, 5 Watts & S. (Pa.) 223.

South Dakota.— Wright *v.* Lee, 4 S. D. 237, 55 N. W. 931.

Tennessee.— Rosenbaum *v.* Moller, 85 Tenn. 653, 4 N. W. 10.

Texas.— Langham *v.* Lanier, 7 Tex. Civ. App. 4, 26 S. W. 255.

Wisconsin.— German Bank *v.* Peterson, 69 Wis. 561, 35 N. W. 47. *Compare* Batten *v.* Smith, 62 Wis. 92, 22 N. W. 342.

64. Defect in substance invalidates.—State *v.* Adler, 97 Mo. 413, 10 S. W. 824; Chamberlain *v.* Perkins, 51 N. H. 336; Forshee *v.* Willis, 101 Tenn. 450, 47 S. W. 703; Cookville Bank *v.* Brier, 95 Tenn. 331, 32 S. W. 205; Scheibler *v.* Mundinger, 86 Tenn. 674, 9 S. W. 33.

65. Valuations need not be fixed.— Anthony *v.* Price, 92 Ga. 170, 17 S. E. 1024; Haven *v.* Richardson, 5 N. H. 113; Adler *v.* Cloud, 42 S. C. 272, 20 S. E. 393. But it is held in Massachusetts that, to establish a valuable consideration for a deed of assignment for benefit of creditors, the schedule should show the value of the property conveyed, so as to make its adequacy apparent. Widgery *v.* Haskell, 5 Mass. 144, 4 Am. Dec. 41. *Compare* State *v.* Adler, 97 Mo. 413, 10 S. W. 824, under a statute requiring the filing with the deed a verified statement of the nature and value of the property assigned. But a schedule to a deed of assignment conveying goods, wares, and merchandise named and specified, "in a schedule and inventory to be hereafter filed," containing only the words, "amount of stock on hand, about $35,000," makes the assignment void. Palmer *v.* McCarthy, 2 Colo. App. 422, 31 Pac. 241.

66. May constitute badge of fraud.— Dibble *v.* Morris, 26 Conn. 416; Sabin *v.* Lebenbaum, 26 Oreg. 420, 38 Pac. 434. *Compare* Shultz *v.* Hoagland, 85 N. Y. 464, wherein it is said the omission, from the schedule of property assigned by a debtor for the benefit of his creditors, of a worthless item is not evidence of fraud; nor is an unintentional omission. But see De Camp *v.* Marshall, 2 Abb. Pr. N. S. (N. Y.) 373, to the effect that an assignment may be set aside as fraudulent if the schedule omits a part of the property, though only for the purpose of diminishing the amount of security to be required from the assignee.

Presumption of fraud is rebutted if there was no concealment and the property was omitted because assignor thought it was of

avoid the instrument of assignment[67] unless made with an intent to defraud creditors.[68]

e. **Verification.** Where the statute requires the assignor to verify the inventory of assets and schedule of debts as to completeness it is fatal not to do so,[69] but where it in general terms declares assignments void except as made under statute, this is held to refer to the deed and not to the schedule.[70]

3. **Recording.** A schedule is not a part of the deed of assignment and need not be recorded.[71]

IV. PREFERENCES.

A. Right to Make — 1. At Common Law. At the common law, both in England and in the United States, an insolvent debtor has the right to make an assignment in trust for the benefit of creditors, and he may give a preference to a certain *bona fide* creditor or class of *bona fide* creditors[72] and require that the pre-

little value. Sabin *v.* Lebenbaum, 26 Oreg. 420, 38 Pac. 434.

67. Does not invalidate.— Falk *v.* Liebes, 6 Colo. App. 473, 42 Pac. 46 [*distinguishing* Palmer *v.* McCarthy, 2 Colo. App. 422, 31 Pac. 241]; Ellis *v.* Myers, 4 Silv. Supreme (N. Y.) 323, 8 N. Y. Suppl. 139, 28 N. Y. St. 120; Van Ingen *v.* Feldt, 86 Wis. 345, 56 N. W. 923; Smith *v.* Bowen, 61 Wis. 258, 20 N. W. 917; Farwell *v.* Gundry, 52 Wis. 268, 9 N. W. 11; Norton *v.* Kearney, 10 Wis. 443. *Contra*, McMillan *v.* Knapp, 76 Ga. 171, 2 Am. St. Rep. 29; Turnipseed *v.* Schaefer, 76 Ga. 109, 2 Am. St. Rep. 15. See also Wood *v.* Haynes, 92 Ga. 180, 18 S. E. 47, wherein it is said omissions from and inaccuracies in the schedules of assets and of creditors attached to a voluntary assignment by an insolvent may or may not vitiate the assignment.

68. Omissions fraudulently made.—Beardsley *v.* Frame, 85 Cal. 134, 24 Pac. 721; Burchinell *v.* Mosconi, 4 Colo. App. 401, 36 Pac. 307; Mattison *v.* Demarest, 4 Rob. (N. Y.) 161.

69. Absence fatal.— Palmer *v.* McCarthy, 2 Colo. App. 422, 31 Pac. 241; Lookout Bank *v.* Noe, 86 Tenn. 21, 5 S. W. 433; Hill *v.* Alexander, 16 Lea (Tenn.) 496. *Contra*, Fant *v.* Elsbury, 68 Tex. 1, 2 S. W. 866.

Oath of one of the partners was held to be sufficient where the assignment was by a firm. Lookout Bank *v.* Noe, 86 Tenn. 21, 5 S. W. 433.

Verification by secretary was deemed sufficient in the case of an assignment made by a corporation under S. D. Comp. Laws, § 4668. Wright *v.* Lee, 4 S. D. 237, 55 N. W. 931.

Illustrations of sufficient verifications.— Falk *v.* Liebes, 6 Colo. App. 473, 42 Pac. 46; State *v.* Adler, 97 Mo. 413, 10 S. W. 824; Pratt *v.* Stevens, 94 N. Y. 387 [*reversing* 26 Hun (N. Y.) 229]; Friedenwald *v.* Sparger, 128 N. C. 446, 39 S. E. 64; Landauer *v.* Conklin, 3 S. D. 462, 54 N. W. 322 [*distinguishing* Farmer *v.* Cobban, 4 Dak. 425, 29 N. W. 12]; Wright *v.* Lee, 2 S. D. 596, 51 N. W. 706; Cribben *v.* Ellis, 69 Wis. 337, 34 N. W. 154; Bates *v.* Simmons, 62 Wis. 69, 22 N. W. 335; Ball *v.* Bowe, 49 Wis. 495, 5 N. W. 909; Hutchinson *v.* Brown, 33 Wis. 465.

Illustrations of insufficient verifications.— Farmer *v.* Cobban, 4 Dak. 425, 29 N. W. 12 [*distinguished* in Landauer *v.* Conklin, 3 S. D. 462, 54 N. W. 322]; Burns *v.* Beck, etc., Hardware Co., 83 Ga. 471, 10 S. E. 121; Fort *v.* Martin Tobacco Co., 77 Ga. 111, 1 S. E. 223; McMillan *v.* Knapp, 76 Ga. 171, 2 Am. St. Rep. 29; Produce Bank *v.* Baldwin, 49 How. Pr. (N. Y.) 277; Martin *v.* Buffaloe, 128 N. C. 305, 38 S. E. 902, 83 Am. St. Rep. 679; Scheibler *v.* Munsinger, 86 Tenn. 674, 9 S. W. 33; Lookout Bank *v.* Noe, 86 Tenn. 21, 5 S. W. 433; Powers *v.* Goins, (Tenn. Ch. 1895) 35 S. W. 902; McMillan *v.* Watauga Bank, (Tenn. Ch. 1895) 35 S. W. 765.

70. Absence not fatal.—Wright *v.* Thomas, 9 Biss. (U. S.) 244, 1 Fed. 716.

Assignee's certificate of correctness of the inventory is required by the Wisconsin statute. See list of statutes cited *supra*, note 6, p. 120. But strict compliance with the statute as to the time of filing does not seem to be necessary. Haben *v.* Harshaw, 59 Wis. 403, 18 N. W. 426; Steinlein *v.* Halstead, 52 Wis. 289, 8 N. W. 881.

71. Black *v.* Weathers, 26 Ind. 242; Strong *v.* Lynn, 38 Minn. 315, 37 N. W. 448; Burghard *v.* Sondheim, 50 N. Y. Super. Ct. 116; Dawson *v.* Crossen, 10 Oreg. 41.

Where there is no real estate to be affected by it, it has been held in Indiana and New York that the mere recording of the deed of assignment is not constructive notice to any one of the assignment. Switzer *v.* Miller, 58 Ind. 561; Van Nest *v.* Yoe, 1 Sandf. Ch. (N. Y.) 4.

72. Creditors in whose favor preferences may be made have been held to include the following persons:

Accommodation makers of notes. Marks *v.* Bradley, 69 Miss. 1, 10 So. 922.

Assignees in trust for creditors. Shultz *v.* Hoagland, 85 N. Y. 464; Benedict *v.* Huntington, 32 N. Y. 219; Loeschigk *v.* Jacobson, 2 Rob. (N. Y.) 645; Myers *v.* Fenn, 5 Wall. (U. S.) 205, 18 L. ed. 604. But see *contra*, under statutes forbidding preferences, Lancaster *v.* Wheeler, 62 N. H. 479; Clarke *v.* Baker, 36 S. C. 420, 15 S. E. 614. See also, generally, *infra*, IV, A, 2. In Kirk *v.* Chisholm, 26 Can. Supreme Ct. 111, it was held that an assignment is void, under the statute

ferred debt or debts[73] be paid in full, although, in consequence thereof, the other creditors may not receive anything.[74] Also as a debtor might at common

of Elizabeth, if it gives a first preference to a firm of which the assignee is a member and provides for allowance of interest on the claim to said firm until paid, and the assignor continues in the same control of the business as he had prior to such assignment.

Bail. Keteltas *v.* Wilson, 36 Barb. (N. Y.) 298.

Bona fide purchasers of claims against assignor. Low *v.* Graydon, 50 Barb. (N. Y.) 414; Powers *v.* Graydon, 10 Bosw. (N. Y.) 630.

Depositors. U. S. Bank *v.* Huth, 4 B. Mon. (Ky.) 423; Peters *v.* Bain, 133 U. S. 670, 10 S. Ct. 354, 33 L. ed. 696.

Employees and laborers. See *infra*, IV, A, 2, c.

Indorsers. South Branch Lumber Co. *v.* Ott, 142 U. S. 622, 12 S. Ct. 318, 35 L. ed. 1136.

Infants. Baer *v.* Rooks, 50 Fed. 898, 4 U. S. App. 399, 2 C. C. A. 76.

Relatives, including husband or wife. Phelps *v.* Wyler, 67 Ark. 97, 56 S. W. 632; Noble *v.* Worthy, (Indian Terr. 1897) 42 S. W. 431; McCandless *v.* Hazen, 98 Iowa 321, 67 N. W. 256; Reiff *v.* Horst, 55 Md. 42; Coots *v.* Chamberlain, 39 Mich. 565; Taylor *v.* Watkins, (Miss. 1893) 13 So. 811; Manning *v.* Beck, 129 N. Y. 1, 29 N. E. 90, 41 N. Y. St. 199, 14 L. R. A. 198 [*reversing* 13 N. Y. Suppl. 869, 35 N. Y. St. 978 (*affirming* 54 Hun (N. Y.) 102, 7 N. Y. Suppl. 215, 26 N. Y. St. 483)]; Buffalo Third Nat. Bank *v.* Guenther, 123 N. Y. 568, 25 N. E. 986, 34 N. Y. St. 478, 20 Am. St. Rep. 780 [*reversing* 1 N. Y. Suppl. 753]; Smith *v.* Perine, 121 N. Y. 376, 24 N. E. 804, 31 N. Y. St. 294 [*affirming* 49 Hun (N. Y.) 605, 1 N. Y. Suppl. 495, 17 N. Y. St. 226]; Shultz *v.* Hoagland, 85 N. Y. 464; Lyon *v.* Davis, 10 N. Y. Suppl. 182, 32 N. Y. St. 340 [*affirmed* in 127 N. Y. 679, 28 N. E. 256, 38 N. Y. St. 1017]; Romer *v.* Koch, 49 Hun (N. Y.) 483, 2 N. Y. Suppl. 540, 18 N. Y. St. 909; Jaycox *v.* Caldwell, 37 How. Pr. (N. Y.) 240 [*affirmed* in 51 N. Y. 395]; Sloan *v.* Gauhn, 12 N. Y. St. 717; Cohen *v.* Morehouse, 3 N. Y. Suppl. 313, 21 N. Y. St. 436 [*affirmed* in 127 N. Y. 669, 28 N. E. 255, 38 N. Y. St. 1015]; Jordan *v.* Newsome, 126 N. C. 553, 36 S. E. 154; Morehead Banking Co. *v.* Whitaker, 110 N. C. 345, 14 S. E. 920; Pettit *v.* Parsons, 9 Utah 223, 33 Pac. 1438; Stoneburner *v.* Motley, 95 Va. 784, 30 S. E. 364; Miller *v.* Crawford, 32 Gratt. (Va.) 277; South Branch Lumber Co. *v.* Ott, 142 U. S. 622, 12 S. Ct. 318, 35 L. ed. 1136; Estes *v.* Gunter, 122 U. S. 450, 7 St. Ct. 1275, 30 L. ed. 1228; Van Wyck *v.* Read, 43 Fed. 716; Farwell *v.* Maxwell, 34 Fed. 727; Lyon *v.* Zimmer, 30 Fed. 401. But see *contra*, under statute, Burnham *v.* Haskins, 79 Mich. 35, 44 N. W. 341. See also *infra*, IV, A, 2, a.

Sureties. McCandless *v.* Hazen, 98 Iowa 321, 67 N. W. 256; Keteltas *v.* Wilson, 36 Barb. (N. Y.) 298; Loeschigk *v.* Jacobson, 2 Rob. (N. Y.) 645; Means *v.* Montgomery, 23 Fed. 421.

73. As to claims which may, and claims which may not, be preferred see *infra*, IV, C, 2.

74. Right exists.— *Alabama.*— Hatton *v.* Jordan, 29 Ala. 266; Rankin *v.* Lodor, 21 Ala. 380; Robinson *v.* Rapelye, 2 Stew. (Ala.) 86; Richards *v.* Hazzard, 1 Stew. & P. (Ala.) 139.

California.— Billings *v.* Billings, 2 Cal. 107, 56 Am. Dec. 319.

Colorado.— Eversman *v.* Clemons, 6 Colo. App. 224, 40 Pac. 575. But *compare* Stevens *v.* Mosconi, 5 Colo. App. 484, 39 Pac. 348.

Connecticut.— Ingraham *v.* Wheeler, 6 Conn. 277; Hempstead *v.* Starr, 3 Day (Conn.) 340.

Florida.— Bellamy *v.* Sheriff, Jackson County, 6 Fla. 62; Holbrook *v.* Allen, 4 Fla. 87.

Georgia.— Embry *v.* Clapp, 38 Ga. 245.

Illinois.— Farwell *v.* Nilsson, 133 Ill. 45, 24 N. E. 74; Ramsdell *v.* Sigerson, 7 Ill. 78; Howell *v.* Edgar, 4 Ill. 417; Cross *v.* Bryant, 3 Ill. 36; Blackman *v.* Metropolitan Dairy Co., 77 Ill. App. 609.

Indiana.— Anderson *v.* Smith, 5 Blackf. (Ind.) 395. See New Albany, etc., R. Co. *v.* Huff, 19 Ind. 444.

Iowa.— Petrikin *v.* Davis, Morr. (Iowa) 296.

Kentucky.— Reinhard *v.* State Bank, 6 B. Mon. (Ky.) 252; U. S. Bank *v.* Huth, 4 B. Mon. (Ky.) 423; Pearson *v.* Rockhill, 4 B. Mon. (Ky.) 296. *Compare* Whitehead *v.* Woodruff, 11 Bush (Ky.) 209, construing a statute.

Louisiana.— Fellows *v.* Commercial, etc., Bank, 6 Rob. (La.) 246.

Maryland.— Strauss *v.* Rose, 59 Md. 525; Coakley *v.* Weil, 47 Md. 277; Foley *v.* Bitter, 34 Md. 646; McColgan *v.* Hopkins, 17 Md. 395; Maennel *v.* Murdock, 13 Md. 163; American Exch. Bank *v.* Inloes, 7 Md. 380; Beatty *v.* Davis, 9 Gill (Md.) 211; McCall *v.* Hinkley, 4 Gill (Md.) 128.

Massachusetts.— Stevens *v.* Bell, 6 Mass. 339; Widgery *v.* Haskell, 5 Mass. 144, 4 Am. Dec. 41.

Michigan.— How *v.* Camp, Walk. (Mich.) 427.

Minnesota.— Mackellar *v.* Pillsbury, 48 Minn. 396, 51 N. W. 222.

Mississippi.—Richardson *v.* Davis, 70 Miss. 219, 11 So. 790; Richardson *v.* Marqueze, 59 Miss. 80, 42 Am. Rep. 353; Ingraham *v.* Grigg, 13 Sm. & M. (Miss.) 22. See also Layson *v.* Rowan, 7 Rob. (La.) 1, stating the rule in Mississippi.

Missouri.— Bell *v.* Thompson, 3 Mo. 84. *Compare* Johnson *v.* McAllister, 30 Mo. 327.

New Hampshire.— Haven *v.* Richardson, 5 N. H. 113. *Compare* Danforth *v.* Denny, 25 N. H. 155.

New Jersey.— Tillou *v.* Britton, 9 N. J. L. 120.

law give preference, he had the correlative right to assign for the purpose of preventing particular creditors from securing liens or payment out of his prop-

New York.— Bostwick *v.* Burnett, 74 N. Y. 317; Spaulding *v.* Strang, 38 N. Y. 9, 37 N. Y. 135, 4 Transcr. App. (N. Y.) 80; Jacobs *v.* Remsen, 36 N. Y. 668, 3 Transcr. App. (N. Y.) 129; Wilson *v.* Forsyth, 24 Barb. (N. Y.) 105; Ogden *v.* Peters, 15 Barb. (N. Y.) 560; Servis *v.* Holwede, 11 N. Y. Suppl. 406, 33 N. Y. St. 773; Grover *v.* Wakeman, 11 Wend. (N. Y.) 187, 25 Am. Dec. 624: Austin *v.* Bell, 20 Johns. (N. Y.) 442, 11 Am. Dec. 297; Murray *v.* Riggs, 15 Johns. (N. Y.) 571. Further as to assignor's right to prefer creditors see Bellows *v.* Patridge, 19 Barb. (N. Y.) 176; Brigham *v.* Tillinghast, 15 Barb. (N. Y.) 618; Read *v.* Worthington, 9 Bosw. (N. Y.) 617; Renard *v.* Maydore, 25 How. Pr. (N. Y.) 178; Winchester *v.* Crandall, 1 Clarke (N. Y.) 371; Ward *v.* Tingley, 4 Sandf. Ch. (N. Y.) 476; Nicholson *v.* Leavitt, 4 Sandf. (N. Y.) 252. In Egberts *v.* Wood, 3 Paige (N. Y.) 517, 24 Am. Dec. 236, it is said that the only restraint upon the giving of a preference to one creditor over another is the provision in the statutes which deprives the insolvent debtor who gives such preference of the benefit of the insolvent laws.

North Carolina.— Norfolk City Nat. Bank *v.* Bridgers, 128 N. C. 322, 38 S. E. 888; Royster *v.* Stallings, 124 N. C. 55, 32 S. E. 384; Rouse *v.* Bowers, 111 N. C. 360, 16 S. E. 684; Barber *v.* Buffaloe, 111 N. C. 206, 16 S. E. 386; Hafner *v.* Irwin, 23 N. C. 490.

Ohio.— Hull *v.* Jeffrey, 8 Ohio 390; Stevenson *v.* Agry, 7 Ohio, pt. II, 247. *Compare* Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637. But see Atkinson *v.* Jordan, 5 Ohio 293, 24 Am. Dec. 281.

Pennsylvania.— Heilner *v.* Imbrie, 6 Serg. & R. (Pa.) 401; Wilt *v.* Franklin, 1 Binn. (Pa.) 502, 2 Am. Dec. 474; Burd *v.* Smith, 4 Dall. (Pa.) 76, 1 L. ed. 748. See also U. S. *v.* U. S. Bank, 8 Rob. (La.) 262, stating rule in Pennsylvania.

Rhode Island.— Nightingale *v.* Harris, 6 R. I. 321; Dockray *v.* Dockray, 2 R. I. 547.

South Carolina.— Wiesenfeld *v.* Stevens, 15 S. C. 554; Smith *v.* Campbell, 1 Rice (S. C.) 352; Smith *v.* Henry, 1 Hill (S. C.) 16; Huntingdon *v.* Spann, 1 McCord Eq. (S. C.) 167.

Tennessee.— Rindskoff *v.* Guggenheim, 3 Coldw. (Tenn.) 284; Galt *v.* Dibrell, 10 Yerg. (Tenn.) 146. *Compare* Hefner *v.* Metcalf, 1 Head (Tenn.) 577.

Texas.— La Belle Wagon Works *v.* Tidball, 59 Tex. 291; McQuinnay *v.* Hitchcock, 8 Tex. 33; Swearingen *v.* Hendley, 1 Tex. Unrep. Cas. § 639.

Virginia.— Long *v.* Meriden Britannia Co., 94 Va. 594, 27 S. E. 499; Dance *v.* Seaman, 11 Gratt. (Va.) 778; McCullough *v.* Sommerville, 8 Leigh (Va.) 415.

Wisconsin.— Bates *v.* Simmons, 62 Wis. 69, 22 N. W. 335; Ball *v.* Bowe, 49 Wis. 495, 5 N. W. 909; Kneeland *v.* Cowles, 3 Pinn. (Wis.) 316, 4 Chandl. (Wis.) 46.

United States.— Peters *v.* Bain, 133 U. S. 670, 10 S. Ct. 354, 33 L. ed. 696; Estes *v.* Gunter, 122 U. S. 450, 7 S. Ct. 1275, 30 L. ed. 1228; Tompkins *v.* Wheeler, 16 Pet. (U. S.) 106, 10 L. ed. 903; Brashear *v.* West, 7 Pet. (U. S.) 608, 8 L. ed. 801; Talley *v.* Curtain, 54 Fed. 43, 8 U. S. App. 347, 4 C. C. A. 177; Means *v.* Montgomery, 23 Fed. 421; J. M. Atherton Co. *v.* Ives, 20 Fed. 894; Coolidge *v.* Curtis, 1 Bond (U. S.) 222, 6 Fed. Cas. No. 3,184, 7 Am. L. Reg. 334; Lawrence *v.* Davis, 3 McLean (U. S.) 177, 15 Fed. Cas. No. 8,137; Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 11 Fed. Cas. No. 5,964; Pearpoint *v.* Graham, 4 Wash. (U. S.) 232, 19 Fed. Cas. No. 10,877; 2 Kent Comm. 689.

England.— Twyne's Case, 2 Coke 80*a*; Meux *v.* Howell, 4 East 1; Pickstock *v.* Lyster, 3 M. & S. 371, 16 Rev. Rep. 300; Cock *v.* Goodfellow, 10 Mod. 489; Small *v.* Oudley, 2 P. Wms. 427; Munn *v.* Wilsmore, 8 T. R. 521; Estwick *v.* Cailaud, 2 Anstr. 381, 5 T. R. 420.

Canada.— See Kirk *v.* Chisholm, 26 Can. Supreme Ct. 111.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 354.

Marshall, C. J., in Marbury *v.* Brooks, 7 Wheat. (U. S.) 575, 577, 5 L. ed. 522, said: "That a debtor has a right to prefer one creditor to another cannot be denied, and that his private motives for giving this preference, provided the preferred creditor has done nothing improper, cannot annul this right, is equally certain. On the other hand, it will be also admitted that any unlawful consideration moving from the preferred creditor to induce this preference, may avoid the deed which gives it."

Story, J., in Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 212, 11 Fed. Cas. No. 5,964, said: "A creditor may be defeated or delayed in the satisfaction of his debts by a *bona fide* conveyance of a debtor's property, either on a sale, or by a preference to another creditor. Such a conveyance is not rendered void by such effect, whether it be intentional or not. But there must be other ingredients in the case. There must be a fraudulent intent to defeat or delay creditors. Every conveyance, by which an insolvent debtor conveys his whole property to a few preferred creditors, not being more than sufficient to pay their debts, and they being parties to the deed, necessarily tends to delay and defeat all other creditors; but however strong the intention is, thereby to defeat or delay the latter, still it has never been supposed, that the conveyance was void on that account. The law allows such preference to any one creditor; and I am unable to perceive why it does not equally allow a like preference of the whole creditors to one."

erty at all.[75] In the absence of statutory regulations[76] a corporation[77] or partnership[78] comes within the rule and may, in a general assignment, prefer certain creditors. Likewise where there is only a partial assignment, where such an assignment can be made, a preference of one creditor to the exclusion of others has been upheld.[79] The common-law rule allowing an insolvent debtor to prefer one creditor to the postponement of another has, however, been the subject of severe criticism by the courts generally and has been condemned as repugnant to the principles of justice and equity.[80]

2. UNDER STATUTES — a. Forbidding Preferences — (1) *IN GENERAL.* The legislatures of many states have enacted laws forbidding such preferences.[81]

75. Correlative right to prevent preferences.— Chandler *v.* Caldwell, 17 Ind. 256; U. S. Bank *v.* Huth, 4 B. Mon. (Ky.) 423. And it has been held that an assignor may deceive a creditor into believing that he does not intend to make an assignment, if he may thereby prevent an attachment from being levied, the creditor proposing to attach, thereby securing a preference. Pike *v.* Bacon, 21 Me. 280, 38 Am. Dec. 259.

76. Insolvent corporations are forbidden by statutes in some states to make preferences. See list of statutes cited *supra*, note 6, p. 120; and Rouse *v.* Merchants' Nat. Bank, 46 Ohio St. 493, 22 N. E. 293, 15 Am. St. Rep. 644, 5 L. R. A. 378 [*reversing* 6 Ohio Dec. (Reprint) 1237, 14 Am. L. Rec. 425]. In New Jersey an insolvent corporation may make a preference except when effected by means of a confessed judgment. Vail *v.* Jameson, 41 N. J. Eq. 648, 7 Atl. 520. In Pennsylvania it has been held that an insolvent corporation may prefer particular creditors (Dana *v.* U. S. Bank, 5 Watts & S. (Pa.) 223), and a preference by a confession of judgment will be upheld (Lake Shore Banking Co. *v.* Fuller, 110 Pa. St. 156, 1 Atl. 731).

Limited partnerships have been denied this right in some states. See list of statutes cited *supra*, note 6, p. 120; and Schwartz *v.* Soutter, 103 N. Y. 683, 9 N. E. 448.

77. Corporation.— Gottlieb *v.* Miller, 154 Ill. 44, 39 N. E. 992; Lake Shore Banking Co. *v.* Fuller, 110 Pa. St. 156, 1 Atl. 731; Dana *v.* U. S. Bank, 5 Watts & S. (Pa.) 223; Fogg *v.* Blair, 133 U. S. 534, 10 S. Ct. 338, 33 L. ed. 721. See also, generally, CORPORATIONS.

Where a foreign corporation is not prohibited by its charter from making a preference of certain creditors, the passage of a general statute forbidding such preferences by the legislature of the state in which it is incorporated can have no extraterritorial effect. Ellsworth *v.* St. Louis, etc., R. Co., 98 N. Y. 553; Pairpoint Mfg. Co. *v.* Philadelphia Optical, etc., Co., 161 Pa. St. 17, 28 Atl. 1003.

78. Partnership.— Smith *v.* Howard, 1 Sheld. (N. Y.) 5, 20 How. Pr. (N. Y.) 121; Lord *v.* Devendorf, 54 Wis. 491, 11 N. W. 903, 41 Am. Rep. 58. See also *infra*, IV, A, 3; and, generally, PARTNERSHIP.

79. In case of a partial assignment.— Grubbs *v.* Morris, 103 Ind. 166, 2 N. E. 579; New Albany, etc., R. Co. *v.* Huff, 19 Ind. 444; Gray *v.* McCallister, 50 Iowa 497; Cole *v.* Dealham, 13 Iowa 551; Burrows *v.* Lehndorff, 8 Iowa 96; U. S. *v.* U. S. Bank, 8 Rob. (La.) 262; Wilson *v.* Forsyth, 24 Barb. (N. Y.) 105. But *compare* McClelland *v.* Remsen, 36 Barb. (N. Y.) 622, 14 Abb. Pr. (N. Y.) 331, 23 How. Pr. (N. Y.) 175. And see *contra*, under statutes, Johnson *v.* McAllister, 30 Mo. 327; Miners' Nat. Bank's Appeal, 57 Pa. St. 193. See also list of statutes cited *supra*, note 6, p. 120.

80. Common-law rule criticized.— Beers *v.* Lyon, 21 Conn. 604; Pingree *v.* Comstock, 18 Pick. (Mass.) 46; Barney *v.* Griffin, 2 N. Y. 365; McClelland *v.* Remsen, 36 Barb. (N. Y.) 622, 14 Abb. Pr. (N. Y.) 331, 23 How. Pr. (N. Y.) 175; Brigham *v.* Tillinghast, 15 Barb. (N. Y.) 618; Webb *v.* Daggett, 2 Barb. (N. Y.) 9; Nicholson *v.* Leavitt, 4 Sandf. (N. Y.) 252; Goodrich *v.* Downs, 6 Hill (N. Y.) 438; Grover *v.* Wakeman, 11 Wend. (N. Y.) 187, 25 Am. Dec. 624; Burd *v.* Smith, 4 Dall. (Pa.) 76, 1 L. ed. 748. See also cases cited *supra*, note 74.

Chancellor Kent, in Riggs *v.* Murray, 2 Johns. Ch. (N. Y.) 565, 578, said: "I do not question the legality, however I may doubt the policy, of the rule which sanctions such partialities. It has been long established. . . . I mean, however, to be understood, that the application of the rule is always to be watched with jealousy, and that we are not required, by any reasons of expediency or justice, to enlarge the rule by giving it a new and dangerous facility. We ought to require of the insolvent, when he undertakes to make preferences, by assignments in favor of a class of honorary or privileged creditors, that he should do it absolutely and definitively, and not make the assignment to depend upon his future will and pleasure."

Chancellor Walworth, in Boardman *v.* Halliday, 10 Paige (N. Y.) 223, 229, said: "Many of our most enlightened judges have regretted that the principle of permitting an insolvent to make a voluntary assignment of his property, and to give preferences in any way, should ever have been adopted."

81. See list of statutes cited *supra*, note 6, p. 120; and cases cited *infra*, note 82 *et seq.*

The federal courts will follow the decisions of the state supreme courts in construing state law relating to preferences of creditors in assignments for benefit of creditors in cases arising in such states. Bamberger *v.* Schoolfield, 160 U. S. 149, 16 S. Ct. 225, 40 L. ed. 374; and federal cases cited *infra*, note 82.

U. S. Rev. Stat. (1878), § 3466, providing

(II) *IN INSTRUMENT OF ASSIGNMENT.* When the deed or document creating the assignment contains preferences prohibited by law, the rule is that the assignment itself is not invalid, but that the instrument, whatever be its provisions, operates as a general assignment equally for the benefit of all the creditors, the preferences only being considered void and of no effect.[82] But the application of this rule may be limited by statutory provision; thus, where the statute in terms provided that in such cases the assignment itself shall be void, the transfer will be void *in toto* or at least will be voidable.[83]

(III) *PREFERENCES IN SEPARATE INSTRUMENT* — (A) *Where Also Formal Assignment* — (1) IN GENERAL. On the other hand, when the alleged preference is not contained in the instrument of assignment, but in another and separate instrument, the better doctrine seems to be that there is not such a preference made as is prohibited by statute,[84] except when such separate instrument is made

for the preference or priority of claims in favor of the United States, has been applied to voluntary assignments by insolvent debtors for the benefit of creditors. McLain *v.* Rankin, 3 Johns. (N. Y.) 369; Dias *v.* Bouchand, 10 Paige (N. Y.) 445; U. S. *v.* Howland, 4 Wheat. (U. S.) 108, 4 L. ed. 526; U. S. *v.* Mott, 1 Paine (U. S.) 188, 27 Fed. Cas. No. 15,826. See also, generally, BANKRUPTCY.

82. Operating as a general assignment.— *Alabama.*— Gay *v.* Strickland, 112 Ala. 567, 20 So. 919; Murphy *v.* Caldwell, 50 Ala. 461; Price *v.* Mazange, 31 Ala. 701.

Arizona.— See Ford *v.* Hayes, 1 Ariz. 229, 25 Pac. 649.

Illinois.— J. Walter Thompson *v.* Whitehead, 185 Ill. 454, 56 N. E. 1106 [*affirming* 86 Ill. App. 76]; Farwell *v.* Nilsson, 133 Ill. 45, 24 N. E. 74.

Indiana.— Grubbs *v.* King, 117 Ind. 243, 20 N. E. 142; Schwab *v.* Lemon, 111 Ind. 54, 12 N. E. 87; Redpath *v.* Tutwiler, 109 Ind. 248, 9 N. E. 911; Henderson *v.* Pierce, 108 Ind. 462, 9 N. E. 449. *Compare* Grubbs *v.* Morris, 103 Ind. 166, 2 N. E. 579; Thompson *v.* Parker, 83 Ind. 96.

Missouri.— Crow *v.* Beardsley, 68 Mo. 435; Ring *v.* Ring, 12 Mo. App. 88.

New York.— See Central Nat. Bank *v.* Seligman, 138 N. Y. 435, 34 N. E. 196, 53 N. Y. St. 14; Kemp *v.* Carnley, 3 Duer (N. Y.) 1.

Ohio.— Hyde *v.* Olds, 12 Ohio St. 591; Floyd *v.* Smith, 9 Ohio St. 546; Dickson *v.* Rawson, 5 Ohio St. 218.

Pennsylvania.— Hodenpuhl *v.* Hines, 160 Pa. St. 466, 28 Atl. 825; Wiener *v.* Davis, 18 Pa. St. 331; Law *v.* Mills, 18 Pa. St. 185.

Texas.— Foreman *v.* Burnette, 83 Tex. 396, 18 S. W. 756; Fant *v.* Elsbury, 68 Tex. 1, 2 S. W. 866.

United States.—Woonsocket Rubber Co. *v.* Falley, 30 Fed. 808; Freund *v.* Yaegerman, 26 Fed. 812; J. M. Atherton Co. *v.* Ives, 20 Fed. 894. *Compare* Comer *v.* Tabler, 44 Fed. 467, for the rule under Tennessee statute.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 354.

A previous agreement to make an unlawful preference in the deed of assignment does not make the preference valid. Goldthwaite *v.* Ellison, 99 Ala. 497, 12 So. 812; Cole *v.* Dealham, 13 Iowa 551; National Park Bank *v.* Whitmore, 40 Hun (N. Y.) 499; Clark *v.* Andrews, 19 N. Y. Suppl. 211.

83. Void in toto or voidable.— *Arizona.*— Ford *v.* Hayes, 1 Ariz. 229, 25 Pac. 649.

Georgia.— Norton *v.* Cobb, 20 Ga. 44. See also, under the Georgia act of 1818, Dawson *v.* Figueiro, 16 Ga. 610.

Iowa.— Moore *v.* Church, 70 Iowa 208, 30 N. W. 855, 59 Am. Rep. 439; Van Horn *v.* Smith, 59 Iowa 142, 12 N. W. 789; Cole *v.* Dealham, 13 Iowa 551; Burrows *v.* Lehndorff, 8 Iowa 96; Williams *v.* Gartrell, 4 Greene (Iowa) 287.

Kansas.— Reese *v.* Platt, 4 Kan. App. 801, 44 Pac. 31.

Louisiana.— Underhill *v.* Townsend, 17 La. 517; Townsend *v.* Louisiana State M. & F. Ins. Co., 13 La. 551.

Maine.— Berry *v.* Cutts, 42 Me. 445.

New Jersey.— Varnum *v.* Camp, 13 N. J. L. 326, 25 Am. Dec. 476; North Ward Nat. Bank *v.* Conklin, 51 N. J. Eq. 7, 26 Atl. 678; Livermore *v.* McNair, 34 N. J. Eq. 478. See also Elwell *v.* Coon, (N. J. Ch. 1900) 46 Atl. 580.

Oklahoma.— See Smith *v.* Baker, 5 Okla. 326, 49 Pac. 61.

South Carolina.—Wilks *v.* Walker, 22 S. C. 108, 53 Am. Rep. 706.

Utah.— Smith *v.* Sipperley, 9 Utah 267, 34 Pac. 54.

United States.— Crawford *v.* Neal, 144 U. S. 585, 12 S. Ct. 759, 36 L. ed. 552; Comer *v.* Tabler, 44 Fed. 467.

84. Only preferences in the assignment are governed by the statute; not those by separate instrument.

Alabama.— Gay *v.* Strickland, 112 Ala. 567, 20 So. 919; Ellison *v.* Moses, 95 Ala. 221, 11 So. 347. See also H. B. Claflin Co. *v.* Muscogee Mfg. Co., 127 Ala. 376, 30 So. 555; Comer *v.* Constantine, 86 Ala. 492, 5 So. 773; Otis *v.* Maguire, 76 Ala. 295; Danner *v.* Brewer, 69 Ala. 191.

Arkansas.— Worthen *v.* Griffith, 59 Ark. 562, 28 S. W. 286, 43 Am. St. Rep. 50.

Colorado.— Bailey *v.* American Nat. Bank, 12 Colo. App. 66, 54 Pac. 912. See Campbell *v.* Colorado Coal, etc., Co., 9 Colo. 60, 10 Pac. 248.

Connecticut.— Bates *v.* Coe, 10 Conn. 280.

in contemplation of the assignment, and for that reason may be regarded as

District of Columbia.— Strasburger *v.* Dodge, 12 App. Cas. (D. C.) 37.

Illinois.— Friedlander *v.* Fenton, 180 Ill. 312, 54 N. E. 329, 72 Am. St. Rep. 207 [*affirming* 79 Ill. App. 357]; Glanz *v.* Smith, 177 Ill. 156, 52 N. E. 486 [*affirming* 76 Ill. App. 630]; Schwartz *v.* Messinger, 167 Ill. 474, 47 N. E. 719 [*affirming* 64 Ill. App. 495]; Hanford *v.* Prouty, 133 Ill. 339, 24 N. E. 565; Farwell *v.* Nilsson, 133 Ill. 45, 24 N. E. 74; Yates *v.* Dodge, 123 Ill. 50, 13 N. E. 847 [*affirming* 23 Ill. App. 338]; Grafe *v.* Schoenhofen Brewing Co., 78 Ill. App. 570; Plume, etc., Mfg. Co. *v.* Caldwell, 35 Ill. App. 492 [*affirmed* in 136 Ill. 163, 26 N. E. 599, 29 Am. St. Rep. 305].

Indiana.— Carnahan *v.* Schwab, 127 Ind. 507, 26 N. E. 67. *Compare* Nathan *v.* Lee, 152 Ind. 232, 52 N. E. 987, 43 L. R. A. 820.

Iowa.— Diemer *v.* Guernsey, 112 Iowa 393, 83 N. W. 1047; Manton *v.* Seiberling, 107 Iowa 534, 78 N. W. 194; Latrobe First Nat. Bank *v.* Garretson, 107 Iowa 196, 77 N. W. 856; Creglow *v.* Eichorn, (Iowa 1898) 77 N. W. 526; McCandless *v.* Hazen, 98 Iowa 321, 67 N. W. 256; *In re* Weber, 91 Iowa 122, 58 N. W. 1079; Le Moyne *v.* Braden, 87 Iowa 739, 55 N. W. 14; Farwell *v.* Cunningham, 86 Iowa 67, 52 N. W. 1126; Clement *v.* Johnson, 85 Iowa 566, 52 N. W. 502; Rock Island Plow Co. *v.* Breese, 83 Iowa 553, 49 N. W. 1026; Loomis *v.* Stewart, 75 Iowa 387, 39 N. W. 660; Bolles *v.* Creighton, 73 Iowa 199, 34 N. W. 815; Gage *v.* Parry, 69 Iowa 605, 29 N. W. 822; Farwell *v.* Jones, 63 Iowa 316, 19 N. W. 241; Perry *v.* Vezina, 63 Iowa 25, 18 N. W. 657; Lampson *v.* Arnold, 19 Iowa 479.

Kansas.— Sturtevant *v.* Sarbach, 58 Kan. 410, 49 Pac. 522; De Ford *v.* Nye, 40 Kan. 665, 20 Pac. 481; Doggett *v.* Bell, 32 Kan. 298, 4 Pac. 292; Bailey *v.* Kansas Mfg. Co., 32 Kan. 73, 3 Pac. 756; Dodd *v.* Hills, 21 Kan. 707.

Kentucky.— Rubel *v.* Louisville Banking Co., 10 Ky. L. Rep. 1021. *Compare* Diamond Coal Co. *v.* Carter Dry Goods Co., 20 Ky. L. Rep. 1444, 49 S. W. 438.

Maryland.— Farrall *v.* Farnan, 67 Md. 76, 8 Atl. 819.

Massachusetts.— Brown *v.* Foster, 2 Metc. (Mass.) 152; Fairbanks *v.* Haynes, 23 Pick. (Mass.) 323.

Michigan.— Root *v.* Potter, 59 Mich. 498, 26 N. W. 682; Coots *v.* Chamberlain, 39 Mich. 565.

Minnesota.— See Pattridge *v.* Jessup, 69 Minn. 33, 71 N. W. 916.

Mississippi.— Pollock *v.* Sykes, 74 Miss. 700, 21 So. 780; Sells *v.* Rosedale Grocery, etc., Co., 72 Miss. 590, 17 So. 236; Mayer *v.* McRae, (Miss. 1895) 16 So. 875; Taylor *v.* Watkins, (Miss. 1893) 13 So. 811; Marks *v.* Bradley, 69 Miss. 1, 10 So. 922.

Missouri.— Calihan *v.* Powers, 133 Mo. 481, 34 S. W. 848; Johnson *v.* McAllister, 30 Mo. 327; Gummersell *v.* Hanbloom, 19 Mo. App. 274.

Nebraska.— Bierbower *v.* Polk, 17 Nebr. 268, 22 N. W. 698; Lininger *v.* Raymond, 12 Nebr. 19, 9 N. W. 550. *Compare* Blair State Bank *v.* Stewart, 57 Nebr. 64, 77 N. W. 372.

New Hampshire.— Moody *v.* Downs, 63 N. H. 50. *Compare* Rundlett *v.* Dole, 10 N. H. 458.

New Jersey.— Garretson *v.* Brown, 26 N. J. L. 425.

New York.— Manning *v.* Beck, 129 N. Y. 1, 29 N. E. 90, 41 N. Y. St. 199, 14 L. R. A. 198 [*reversing* 13 N. Y. Suppl. 869, 35 N. Y. St. 978 (*affirming* 54 Hun (N. Y.) 102, 7 N. Y. Suppl. 215, 26 N. Y. St. 483)]; Smith *v.* Perine, 121 N. Y. 376, 24 N. E. 804, 31 N. Y. St. 294 [*affirming* 1 N. Y. Suppl. 495, 17 N. Y. St. 226]; Zimmer *v.* Hays, 8 N. Y. App. Div. 34, 40 N. Y. Suppl. 397; Johnson *v.* Rapalyea, 1 N. Y. App. Div. 463, 37 N. Y. Suppl. 540, 73 N. Y. St. 156; Roberts *v.* Vietor, 54 Hun (N. Y.) 461, 7 N. Y. Suppl. 777, 28 N. Y. St. 100; Renard *v.* Graydon, 39 Barb. (N. Y.) 548; Loeschigk *v.* Baldwin, 1 Rob. (N. Y.) 377; Thalheimer *v.* Klapetzky, 12 N. Y. Suppl. 941, 36 N. Y. St. 116 [*affirmed* in 129 N. Y. 647, 29 N. E. 1031, 41 N. Y. St. 948]; Abegg *v.* Schwab, 7 N. Y. Suppl. 46, 24 N. Y. St. 986. 23 Abb. N. Cas. (N. Y.) 7; Renard *v.* Maydore, 25 How. Pr. (N. Y.) 178.

Ohio.— Cross *v.* Carstens, 49 Ohio St. 548, 31 N. E. 506; *In re* Winchell Mfg. Co., 1 Ohio S. & C. Pl. Dec. 310; Merchants' Nat. Bank *v.* Nottingham Co., 6 Ohio Dec. (Reprint) 1237, 14 Am. L. Rec. 425 [*reversed* on another point in 46 Ohio St. 493, 22 N. E. 293, 15 Am. St. Rep. 644, 5 L. R. A. 378].

Oklahoma.— Smith *v.* Baker, 5 Okla. 326, 49 Pac. 61. See also Hockaday *v.* Drye, (Okla. 1898) 54 Pac. 475.

Oregon.— See Sabin *v.* Wilkins, 31 Oreg. 450, 48 Pac. 425, 37 L. R. A. 465; Inman *v.* Sprague, 30 Oreg. 321, 47 Pac. 826.

Pennsylvania.—Gallagher's Appeal, 114 Pa. St. 353, 7 Atl. 237, 60 Am. Rep. 350; Lake Shore Banking Co. *v.* Fuller, 110 Pa. St. 157, 1 Atl. 731.

South Carolina.— Haynes *v.* Hoffman, 46 S. C. 157, 24 S. E. 103; Durham Fertilizer Co. *v.* Hemphill, 45 S. C. 621, 24 S. E. 85; Adler *v.* Cloud, 42 S. C. 272, 20 S. E. 393; Armstrong *v.* Hurst, 39 S. C. 498, 18 S. E. 150. *Compare* Finley *v.* Cartwright, 55 S. C. 198, 33 S. E. 359.

Texas.— Schneider *v.* Bullard, 1 Tex. App. Civ. Cas. § 1186.

Washington.— Benham *v.* Ham, 5 Wash. 128, 31 Pac. 459, 34 Am. St. Rep. 851.

Wisconsin.— Case *v.* James, 90 Wis. 320, 63 N. W. 237; Peterson *v.* Baker, 68 Wis. 451, 32 N. W. 527; Dubuque First Nat. Bank *v.* Baker, 68 Wis. 442, 32 N. W. 523.

United States.— Bamberger *v.* Schoolfield, 160 U. S. 149, 16 S. Ct. 225, 40 L. ed. 374;

essentially a part of the general assignment transaction.[85] Before assignment made or contemplated, therefore, a debtor may, unless expressly prohibited by

South Branch Lumber Co. *v.* Ott, 142 U. S. 622, 12 S. Ct. 318, 35 L. ed. 1136; Estes *v.* Gunter, 122 U. S. 450, 7 S. Ct. 1275, 30 L. ed. 1228; Myers *v.* Fenn, 5 Wall. (U. S.) 205, 18 L. ed. 604; National Wall-Paper Co. *v.* Davis, 98 Fed. 472; Hill *v.* Ryan Grocery Co., 78 Fed. 21, 41 U. S. App. 714, 23 C. C. A. 624; Ottenberg *v.* Corner, 76 Fed. 263, 40 U. S. App. 320, 22 C. C. A. 163, 34 L. R. A. 620; Beall *v.* Cowan, 75 Fed. 139, 43 U. S. App. 505, 21 C. C. A. 267; Rothschild *v.* Hasbrouck, 72 Fed. 813; Baer *v.* Rooks, 50 Fed. 898, 4 U. S. App. 399, 2 C. C. A. 76; Fechheimer *v.* Baum, 43 Fed. 719 [*distinguishing* White *v.* Cotzhausen, 129 U. S. 329, 9 S. Ct. 309, 32 L. ed. 677]; Farwell *v.* Maxwell, 34 Fed. 727; Woonsocket Rubber Co. *v.* Falley, 30 Fed. 808.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 337.

85. Instruments made in contemplation of assignment.— When instruments are thus considered parts of the same transaction the rule heretofore stated [see *supra*, IV, A, 2, a, (II)] will apply, and, as the case may be, render the assignment void or invalidate the preference and cause the whole transaction to operate as a valid general assignment.

Alabama.— Barrett *v.* Pollak, 108 Ala. 390, 18 So. 615, 54 Am. St. Rep. 172. *Compare* Lehman-Durr Co. *v.* Griel Bros. Co., 119 Ala. 262, 24 So. 49; Holt *v.* Bancroft, 30 Ala. 193. But see Alabama cases cited *supra*, note 84.

Colorado.— See Campbell *v.* Colorado Coal, etc., Co., 9 Colo. 60, 10 Pac. 248.

Florida.— Armstrong *v.* Holland, 35 Fla. 160, 17 So. 366.

Illinois.— Friedlander *v.* Fenton, 180 Ill. 312, 54 N. E. 329, 72 Am. St. Rep. 207; Feltenstein *v.* Stein, 157 Ill. 19, 45 N. E. 502; Heathman *v.* Rogers, 153 Ill. 143, 38 N. E. 577; Preston *v.* Spaulding, 120 Ill. 208, 10 N. E. 903 (explaining at length the principle underlying the rule); Podolski *v.* Stone, 86 Ill. App. 62; Ahlgren *v.* Huntington, 85 Ill. App. 639; Oakford *v.* Fischer, 75 Ill. App. 544.

Indiana.— Grubbs *v.* King, 117 Ind. 243, 20 N. E. 142.

Iowa.— Bradley *v.* Bailey, 95 Iowa 745, 64 N. W. 758; Gage *v.* Parry, 69 Iowa 605, 29 N. W. 822; Van Patten *v.* Burr, 52 Iowa 518, 3 N. W. 524 [*distinguishing* Lampson *v.* Arnold, 19 Iowa 479]; Cole *v.* Dealham, 13 Iowa 551. But see Manton *v.* Seiberling, 107 Iowa 534, 78 N. W. 194.

Kansas.— Marlin *v.* Teichgraeber, (Kan. 1901) 66 Pac. 234; Goodman *v.* Kendall, 56 Kan. 439, 43 Pac. 687; Jones *v.* Kellogg, 51 Kan. 263, 33 Pac. 997, 37 Am. St. Rep. 278; Douglas County Nat. Bank *v.* Sands, 47 Kan. 596, 28 Pac. 620; Watkins Nat. Bank *v.* Sands, 47 Kan. 591, 28 Pac. 618; Wyeth Hardware Co. *v.* Standard Implement Co., 47 Kan. 423, 28 Pac. 171.

Maine.— Berry *v.* Cutts, 42 Me. 445.

Massachusetts.— Perry *v.* Holden, 22 Pick. (Mass.) 269. *Compare* Chick *v.* Nute, 176 Mass. 57, 57 N. E. 219.

Michigan.— Burnham *v.* Haskins, 79 Mich. 35, 44 N. W. 341; Heineman *v.* Hart, 55 Mich. 64, 20 N. W. 792.

Missouri.— Larrabee *v.* Franklin Bank, 114 Mo. 592, 21 S. W. 747, 35 Am. St. Rep. 774. But *compare* Gummersell *v.* Hanbloom, 19 Mo. App. 274, holding that a distinct and special transfer by a debtor before he has surrendered all dominion over his property, even though in contemplation of a general assignment, is valid.

New Hampshire.— Moody *v.* Downs, 63 N. H. 50; Rundlett *v.* Dale, 10 N. H. 458. To same effect see Lancaster *v.* Wheeler, 62 N. H. 479.

New York.— Andreae *v.* Bourke, 33 N. Y. App. Div. 638, 53 N. Y. Suppl. 885; Hardt *v.* Schwab, 72 Hun (N. Y.) 109, 25 N. Y. Suppl. 402, 55 N. Y. St. 205 [*affirmed* in 150 N. Y. 579, 44 N. E. 1124; *following* Abegg *v.* Schwab, 9 N. Y. Suppl. 681, 31 N. Y. St. 139 (*affirming* 7 N. Y. Suppl. 46, 24 N. Y. St. 986, 23 Abb. N. Cas. (N. Y.) 7)]; Jersey City First Nat. Bank *v.* Bard, 59 Hun (N. Y.) 529, 13 N. Y. Suppl. 688, 37 N. Y. St. 275; Muller *v.* Scandinavian, etc., Emigrant Co., 38 N. Y. Suppl. 175, 1 N. Y. Annot. Cas. 397; Kemp *v.* Carnley, 3 Duer (N. Y.) 1. See also Pierce Steam Heating Co. *v.* Ransom, 16 N. Y. App. Div. 258, 44 N. Y. Suppl. 623.

Ohio.— Floyd *v.* Smith, 9 Ohio St. 546. See also Benedict *v.* Market Nat. Bank, 19 Ohio Cir. Ct. 408, 10 Ohio Cir. Dec. 505; Turner *v.* Reed, 2 Ohio Cir. Dec. 384; Commercial Nat. Bank *v.* Cincinnati Nat. Bank, 2 Ohio Cir. Dec. 295.

Oregon.— Fleischner *v.* McMinnville Bank, 36 Oreg. 553, 60 Pac. 603; Standard Shoe Co. *v.* Thompson, 32 Oreg. 30, 51 Pac. 444. *Compare* O'Connell *v.* Hansen, 29 Oreg. 173, 44 Pac. 387, where assignment was invalid although preference was upheld.

Pennsylvania.— Dickson's Estate, 166 Pa. St. 134, 30 Atl. 1032.

South Carolina.— Durham Fertilizer Co. *v.* Hemphill, 45 S. C. 621, 24 S. E. 85; Mann *v.* Poole, 40 S. C. 1, 18 S. E. 145, 889.

Washington.— Hyman *v.* Barmon, 6 Wash. 516, 33 Pac. 1076.

Wisconsin.— Backhaus *v.* Sleeper, 66 Wis. 68, 27 N. W. 409.

United States.— South Branch Lumber Co. *v.* Ott, 142 U. S. 622, 12 S. Ct. 318, 35 L. ed. 1136; White *v.* Cotzhausen, 129 U. S. 329, 9 S. Ct. 309, 32 L. ed. 677; Hill *v.* Woodberry, 49 Fed. 138, 4 U. S. App. 68, 1 C. C. A. 206; Missouri *v.* Morse, 27 Fed. 261; Freund *v.* Yaegerman, 26 Fed. 812; Kellogg *v.* Root, 23 Fed. 525; Hahn *v.* Salmon, 20 Fed. 801; Doggett, etc., Co. *v.* Herman, 5 McCrary (U. S.) 269, 16 Fed. 812. But *compare* Estes *v.* Gunter, 122 U. S. 450, 7 S. Ct. 1275, 30 L. ed. 1228.

Compare Taylor *v.* Evans, (Tex. Civ. App. 1897) 41 S. W. 877.

statute,[86] prefer creditors either by the transfer of certain property to be applied toward the satisfaction of the debt intended to be preferred, or by other legitimate means resulting in the payment or discharge of a *bona fide* debt.[87] This is usually done by direct conveyance,[88] mortgage,[89] deed of trust,[90] confession of judgment,[91]

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 337.

86. See list of statutes cited *supra*, note 6, p. 120; and *infra*, IV, A, 2, a, (III), (A), (2).

87. Prior bona fide agreements or previous promises to pay or secure the debts do not affect the right to make such preferences. McCandless *v.* Hazen, 98 Iowa 321, 67 N. W. 256; Le Moyne *v.* Braden, 87 Iowa 739, 55 N. W. 14; Dodd *v.* Hills, 21 Kan. 707; Farwell *v.* Maxwell, 34 Fed. 727. See also cases cited *supra*, note 84.

88. By direct conveyance.— McCandless *v.* Hazen, 98 Iowa 321, 67 N. W. 256; Loomis *v.* Stewart, 75 Iowa 387, 39 N. W. 660; Lampson *v.* Arnold, 19 Iowa 479; Doggett *v.* Bell, 32 Kan. 298, 4 Pac. 292; Coots *v.* Chamberlain, 39 Mich. 565; Schneider *v.* Bullard, 1 Tex. App. Civ. Cas. § 1185. See also, generally, cases cited *supra*, note 84.

By bill of sale.— Bolles *v.* Creighton, 73 Iowa 199, 34 N. W. 815; Sells *v.* Rosedale Grocery, etc., Co., 72 Miss. 590, 17 So. 236; Mayer *v.* McRae, (Miss. 1895) 16 So. 875; Manning *v.* Beck, 129 N. Y. 1, 29 N. E. 90, 41 N. Y. St. 199, 14 L. R. A. 198 [*reversing* 13 N. Y. Suppl. 869, 35 N. Y. St. 978 (*affirming* 54 Hun (N. Y.) 102, 7 N. Y. Suppl. 215, 26 N. Y. St. 483)]; Adler *v.* Cloud, 42 S. C. 272, 20 S. E. 393. And *compare* Loeschigk *v.* Baldwin, 1 Rob. (N. Y.) 277.

By composition deed.— Renard *v.* Graydon, 39 Barb. (N. Y.) 548; Renard *v.* Maydore, 25 How. Pr. (N. Y.) 178.

89. By mortgage.— *Connecticut.*— Bates *v.* Coe, 10 Conn. 280.

Iowa.—Manton *v.* Seiberling, 107 Iowa 534, 78 N. W. 194; *In re* Weber, 91 Iowa 122, 58 N. W. 1079; Farwell *v.* Cunningham, 86 Iowa 67, 52 N. W. 1126; Clement *v.* Johnson, 85 Iowa 566, 52 N. W. 502; Rock Island Plow Co. *v.* Breese, 83 Iowa 553, 49 N. W. 1026; Gage *v.* Parry, 69 Iowa 605, 29 N. W. 822; Farwell *v.* Jones, 63 Iowa 316, 19 N. W. 241; Perry *v.* Vezina, 63 Iowa 25, 18 N. W. 657.

Kansas.— Sturtevant *v.* Sarbach, 58 Kan. 410, 49 Pac. 522; De Ford *v.* Nye, 40 Kan. 665, 20 Pac. 481; Bailey *v.* Kansas Mfg. Co., 32 Kan. 73, 3 Pac. 756; Dodd *v.* Hills, 21 Kan. 707.

Massachusetts.— Fairbanks *v.* Haynes, 23 Pick. (Mass.) 323.

Michigan.— Root *v.* Potter, 59 Mich. 498, 26 N. W. 682. But see Burnham *v.* Haskins, 79 Mich. 35, 44 N. W. 341, where the assignment was considered invalid.

Missouri.— Calihan *v.* Powers, 133 Mo. 481, 34 S. W. 848; Gummersell *v.* Hanbloom, 19 Mo. App. 274.

Nebraska.— Bierhower *v.* Polk, 17 Nebr. 268, 22 N. W. 698.

New Hampshire.— Moody *v.* Downs, 63 N. H. 50; Rundlett *v.* Dole, 10 N. H. 458.

New Jersey.— Garretson *v.* Brown, 26 N. J. L. 425.

New York.— Smith *v.* Perine, 121 N. Y. 376, 24 N. E. 804, 31 N. Y. St. 294 [*affirming* 1 N. Y. Suppl. 495, 17 N. Y. St. 226]; Zimmer *v.* Hays, 8 N. Y. App. Div. 34, 40 N. Y. Suppl. 397.

Ohio.— Cross *v.* Carstens, 49 Ohio St. 548, 31 N. E. 506.

South Carolina.—*Compare* Durham Fertilizer Co. *v.* Hemphill, 45 S. C. 621, 24 S. E. 85; Mann *v.* Poole, 40 S. C. 1, 18 S. E. 145, 889.

Washington.— Benham *v.* Ham, 5 Wash. 128, 31 Pac. 459, 34 Am. St. Rep. 851.

Wisconsin.— Case *v.* James, 90 Wis. 320, 63 N. W. 237, holding that even the delivery of mortgaged property to mortgagee by assignee does not render assignment void as giving unlawful preferences.

United States.— South Branch Lumber Co. *v.* Ott, 142 U. S. 622, 12 S. Ct. 318, 35 L. ed. 1136; Ottenberg *v.* Corner, 76 Fed. 263, 40 U. S. App. 320, 22 C. C. A. 163, 34 L. R. A. 620; Beall *v.* Cowan, 75 Fed. 139, 43 U. S. App. 505, 21 C. C. A. 267; Rothschild *v.* Hasbrouck, 72 Fed. 813; Farwell *v.* Maxwell, 34 Fed. 727. See also Fechheimer *v.* Baum, 43 Fed. 719 [*distinguishing* White *v.* Cotzhausen, 129 U. S. 329, 9 S. Ct. 309, 32 L. ed. 677 and construing Georgia statute].

See also, generally, cases cited *supra*, note 84.

90. By deed of trust.— Hill *v.* Ryan Grocery Co., 78 Fed. 21, 41 U. S. App. 714, 23 C. C. A. 624; Baer *v.* Rooks, 50 Fed. 898, 4 U. S. App. 399, 2 C. C. A. 76.

91. By confession of judgment.—*Arkansas.* — See Worthen *v.* Griffith, 59 Ark. 562, 28 S. W. 286, 43 Am. St. Rep. 50.

Iowa.— Le Moyne *v.* Braden, 87 Iowa 739, 55 N. W. 14.

New Jersey.— Vail *v.* Jameson, 41 N. J. Eq. 648, 7 Atl. 520; Garretson *v.* Brown, 26 N. J. L. 425.

New York.— Roberts *v.* Vietor, 54 Hun (N. Y.) 461, 7 N. Y. Suppl. 777, 28 N. Y. St. 100; Thalheimer *v.* Klapetzky, 12 N. Y. Suppl. 941, 36 N. Y. St. 116 [*affirmed* in 129 N. Y. 647, 29 N. E. 1031, 41 N. Y. St. 948]; Wilcox *v.* Payne, 8 N. Y. Suppl. 407, 28 N. Y. St. 712. But see Central Nat. Bank *v.* Seligman, 138 N. Y. 435, 34 N. E. 196, 53 N. Y. St. 14, holding that a preference cannot be created by the confession of a judgment in favor of certain creditors entered into after the execution of an assignment and the rights of the assignee thereunder have become vested and perfect. In Hardt *v.* Schwab, 72 Hun (N. Y.) 109, 25 N. Y. Suppl. 402, 55 N. Y. St. 205 [*affirmed* in 150 N. Y. 579, 44 N. E. 1124; *following* Abegg *v.* Schwab, 9 N. Y. Suppl. 681, 31 N. Y. St. 139], it was held that the evidence warranted a finding that

or by either actually paying the debt[92] or delivering over property to secure its payment.[93]

(2) Time of Making, When Material. The common-law right of a failing debtor to prefer one *bona fide* creditor to another by an independent conveyance executed in good faith before the assignment,[94] is in nowise affected by the length of time intervening between the execution of such independent conveyance and the execution of the deed of assignment;[95] the date is only of evidential value on the question whether the assignment had been resolved on when the transaction took place or the conveyance was made; and preferences have been upheld as not being made in contemplation of assignment though executed shortly before.[96] Several states, however, have statutes avoiding

the assignment was fraudulent and void, and that the judgments were confessed, with intent to defraud the other creditors of the judgment debtor.

Oregon.— But see O'Connell *v.* Hansen, 29 Oreg. 173, 44 Pac. 387, where a confession of judgment in contemplation of an assignment defeated the assignment.

Pennsylvania.— Lake Shore Banking Co. *v.* Fuller, 110 Pa. St. 156, 1 Atl. 731; Sommers' Appeal, 16 Pa. St. 169.

South Carolina.— *Compare* Armstrong *v.* Hurst, 39 S. C. 498, 18 S. E. 150, holding that where, some time after the making of a general assignment by a partnership, one of the partners confessed a judgment in favor of an individual creditor which became a lien against his individual property, the validity of the assignment was not affected. See also Mann *v.* Poole, 40 S. C. 1, 18 S. E. 145, 889, where the assignment was considered invalid.

Washington.— Hyman *v.* Barmon, 6 Wash. 516, 33 Pac. 1076.

United States.— In Hahn *v.* Salmon, 20 Fed. 801, it was held that, where a confession of judgment and an assignment by the judgment debtor were parts of a common transaction by which certain creditors were to be preferred in the distribution of the insolvent debtor's property, the assignment was void.

See also cases cited *supra*, note 84.

92. Payment.—*Iowa.*—Lampson *v.* Arnold, 19 Iowa 479.

Kentucky.— Vinson *v.* McAlpin, 87 Ky. 357, 10 Ky. L. Rep. 182, 8 S. W. 872, 10 Ky. L. Rep. 349, 9 S. W. 165.

Maryland.— Farrall *v.* Farnan, 67 Md. 76, 8 Atl. 819.

Mississippi.— Marks *v.* Bradley, 69 Miss. 1, 10 So. 922.

Tennessee.— Ordway *v.* Montgomery, 10 Lea (Tenn.) 514; Comfort *v.* McTeer, 7 Lea (Tenn.) 652.

United States.— Estes *v.* Gunter, 122 U. S. 450, 7 S. Ct. 1275, 30 L. ed. 1228; Myers *v.* Fenn, 5 Wall. (U. S.) 205, 18 L. ed. 604. *Compare* South Branch Lumber Co. *v.* Ott, 142 U. S. 622, 12 S. Ct. 318, 35 L. ed. 1136, wherein it was held that while the payments operated to prefer creditors, and constituted such evidence as would probably sustain a finding by a jury that they were made with intent to evade the statute against preferences, yet they would not be held as a matter of law to render the assignment void.

93. Delivery over of property.— *Iowa.*— Lampson *v.* Arnold, 19 Iowa 479.

Massachusetts.— Brown *v.* Foster, 2 Metc. (Mass.) 152.

Mississippi.— Taylor *v.* Watkins, (Miss. 1893) 13 So. 811.

Nebraska.— Lininger *v.* Raymond, 12 Nebr. 19, 9 N. W. 550.

Wisconsin.— Peterson *v.* Baker, 68 Wis. 451, 32 N. W. 527; Dubuque First Nat. Bank *v.* Baker, 68 Wis. 442, 32 N. W. 523. In Case *v.* James, 90 Wis. 320, 63 N. W. 237, it was held that where an assignee, after having taken possession of property assigned and delivered to different mortgagees, parts of the property being covered by their several mortgages, such delivery did not constitute an unlawful preference to such creditors.

United States.— Farwell *v.* Maxwell, 34 Fed. 727. But *compare* Doggett, etc., Co. *v.* Herman, 5 McCrary (U. S.) 269, 16 Fed. 812, under the Colorado statute.

94. See *supra*, IV, A, 1; IV, A, 2, a, (III), (A), (1).

95. At common law.— *Illinois.*—Blackman *v.* Metropolitan Dairy Co., 77 Ill. App. 609.

Kansas.— De Ford *v.* Nye, 40 Kan. 665, 20 Pac. 481.

Maryland.— Farrall *v.* Farnan, 67 Md. 76, 8 Atl. 819.

Massachusetts.— Fairbanks *v.* Haynes, 23 Pick. (Mass.) 323.

Nebraska.— Blair State Bank *v.* Stewart, 57 Nebr. 58, 77 N. W. 370.

New Jersey.— Garretson *v.* Brown, 26 N. J. L. 425 [*citing* 4 Griffith Reg. 1235; Vanderveer *v.* Conover, 16 N. J. L. 487]; Peterson *v.* Baker, 68 Wis. 451, 32 N. W. 527; South Branch Lumber Co. *v.* Ott, 142 U. S. 622, 12 S. Ct. 318, 35 L. ed. 1136.

See also cases cited *supra*, notes 74, 84.

Even after assignment a preference of this character has, under justifying circumstances, been upheld. Peterson *v.* Baker, 68 Wis. 451, 32 N. W. 527; Dubuque First Nat. Bank *v.* Baker, 68 Wis. 442, 32 N. W. 523. *Contra*, Central Nat. Bank *v.* Seligman, 138 N. Y. 435, 34 N. E. 196, 53 N. Y. St. 14.

96. Evidential value of date.— *Illinois.*— Hier *v.* Kaufman, 134 Ill. 215, 25 N. E. 517; Home Nat. Bank *v.* Sanchez, 131 Ill. 330, 23 N. E. 405; Field *v.* Geohegan, 125 Ill. 68, 16

conveyances made within a definite time prior to the execution of the general assignment.[97]

(B) *Where No Formal Assignment.* Numerous decisions hold that the rule heretofore stated as to the operation of conveyances made in contemplation of a general assignment applies even in cases where there is no formal assignment, provided the debtor in one or more conveyances, or by one or more acts, under one connected plan, disposes of the bulk of his property.[98] On the contrary a

N. E. 912; Kaufman *v.* Schneider, 35 Ill. App. 256; Dunham *v.* Springfield Mar. Bank, 29 Ill. App. 45; Chicago Stamping Co. *v.* Hanchett, 25 Ill. App. 198.

Indiana.— Carnahan *v.* Schwab, 127 Ind. 507, 26 N. E. 67.

Iowa.— Roberts *v.* Press, 97 Iowa 475, 66 N. W. 756; Rock Island Plow Co. *v.* Breese, 83 Iowa 553, 49 N. W. 1026; Lyon *v.* McIlvaine, 24 Iowa 9.

Kansas.— De Ford *v.* Nye, 40 Kan. 665, 20 Pac. 481.

Kentucky.— Levis *v.* Zinn, 93 Ky. 628, 14 Ky. L. Rep. 867, 20 S. W. 1099.

Michigan.— Kalamazoo Spring, etc., Co. *v.* Winans, 106 Mich. 193, 64 N. W. 23; Root *v.* Harl, 62 Mich. 420, 29 N. W. 29.

Minnesota.— Bannon *v.* Bowler, 34 Minn. 416, 26 N. W. 237.

Nebraska.— Brown *v.* Farmers', etc., Banking Co., 36 Nebr. 434, 54 N. W. 671.

Washington.— Benham *v.* Ham, 5 Wash. 128, 31 Pac. 459, 34 Am. St. Rep. 851.

97. Statutory provisions.—See list of statutes cited *supra*, note 6, p. 120; and the following cases:

Minnesota.— Fairbanks *v.* Whitney, 36 Minn. 305, 30 N. W. 812. *Compare* Clark *v.* National Citizens' Bank, 74 Minn. 58, 76 N. W. 965.

Nebraska.— Brown *v.* Williams, 34 Nebr. 376, 51 N. W. 851. *Compare* Blair State Bank *v.* Stewart, 57 Nebr. 64, 77 N. W. 370.

New Hampshire.— Moseley *v.* Jenness, 66 N. H. 573, 23 Atl. 366.

Ohio.—*In re* Summers, 10 Ohio S. & C. Pl. Dec. 301.

Oregon.— Tichenor *v.* Coggins, 8 Oreg. 270.

Pennsylvania.— Dreisbach *v.* Mechanics' Nat. Bank, 113 Pa. St. 554, 6 Atl. 147.

South Carolina.— Haynes *v.* Hoffman, 46 S. C. 157, 24 S. E. 103; Durham Fertilizer Co. *v.* Hemphill, 45 S. C. 621, 24 S. E. 85; Akers *v.* Rowan, 33 S. C. 451, 12 S. E. 165, 10 L. R. A. 705. *Compare* Finley *v.* Cartwright, 55 S. C. 198, 33 S. E. 359.

Tennessee.—Ordway *v.* Montgomery, 10 Lea (Tenn.) 514. See also Jones *v.* Cullen, 100 Tenn. 1, 42 S. W. 873.

United States.— Shwartz *v.* H. B. Claflin Co., 60 Fed. 676, 13 U. S. App. 707, 9 C. C. A. 204.

Such statutes, it seems, should be strictly construed. Flash *v.* Wilkerson, 22 Fed. 689, 20 Fed. 257. *Compare* Ritzinger *v.* Eau Claire Nat. Bank, 103 Wis. 346, 79 N. W. 410; *In re* Ellis, 97 Wis. 88, 72 N. W. 387.

Beneficiary's knowledge of intent to assign. — In some cases such conveyances are void absolutely without reference to the beneficiary's knowledge of the intent to assign. Fairbanks *v.* Whitney, 36 Minn. 305, 30 N. W. 812; Moseley *v.* Jenness, 66 N. H. 573, 23 Atl. 366. Other statutes require the beneficiary to have reasonable cause to believe the assignor to be insolvent in order to void the conveyance. Akers *v.* Rowan, 33 S. C. 451, 12 S. E. 165, 10 L. R. A. 705; Brown *v.* Williams, 34 Nebr. 376, 51 N. W. 851. In Ordway *v.* Montgomery, 10 Lea (Tenn.) 514, where the language of the statute avoided a mortgage or deed of trust within a given time, it was held not to cover a case where an absolute deed had been given in payment of the debt.

98. Operating as an assignment.—Lehman-Durr Co. *v.* Griel Bros. Co., 119 Ala. 262, 24 So. 49; Hyde *v.* Olds, 12 Ohio St. 591; Floyd *v.* Smith, 9 Ohio St. 546; Dickson *v.* Rawson, 5 Ohio St. 218; Mitchell *v.* Gazzam, 12 Ohio 315; Hodenpuhl *v.* Hines, 160 Pa. St. 466, 28 Atl. 825; Miners' Nat. Bank's Appeal, 57 Pa. St. 193; Dahlman *v.* Greenwood, 99 Wis. 163, 74 N. W. 215; White *v.* Cotzhausen, 129 U. S. 329, 9 S. Ct. 309, 32 L. ed. 677; Freund *v.* Yaegerman, 26 Fed. 812; Clapp *v.* Dittman, 21 Fed. 15; Kellog *v.* Richardson, 19 Fed. 70; Dahlman *v.* Jacobs, 5 McCrary (U. S.) 230, 16 Fed. 614; Martin *v.* Hausman, 14 Fed. 160; Coolidge *v.* Curtis, 1 Bond (U. S.) 222, 6 Fed. Cas. No. 3,184, 7 Am. L. Reg. 334. In Lehman-Durr Co. *v.* Griel Bros. Co., 119 Ala. 262, 269, 24 So. 49, McClellan, J., says: "It is the fact that a preference has been attempted and not the knowledge or intent with which it was made or accepted that brings the statute into operation. And all this is as true where the transaction is not in form a general assignment, but involves two or more transfers to different creditors made under such circumstances as that the law holds them to constitute but one act. In such case it is not material what the transferees knew as to the debtor's purposes or what they intended as to the result of his acts, nor whether they combined or colluded one with another to induce the debtor to dispose of or incumber substantially all of his property to them severally. . . . And when it [the debtor's intent to put all of his property into the hands of preferred creditors] does so exist and is so attempted to be carried out, and these facts are made to appear, the statute converts all the conveyances and transfers into a general assignment for the equal benefit of all creditors, however ignorant the grantees or transferees may have been of the debtor's intent or the effect of his acts, and in whatever good faith each one of them may

line of authorities which assent to the proposition that a conveyance in contemplation of assignment comes within the rule above referred to deny the application of the principle where there is no formal assignment. Under these latter authorities the debtor is not prohibited from disposing of the bulk of his property as he pleases through confessions of judgment, mortgages, or any other forms, provided no technical assignment is made.[99]

b. "Two Thirds Act" — New York. A New York statute allows debtors in failing circumstances to make preferences to the extent of one third of their assets.[1]

c. Wages of Laborers. Claims for wages of employees and laborers are by statute expressly excepted from forbidden preferences in some states.[2]

3. Where Partnership Assigns — a. Preferring Individual Creditors. In an assignment by a partnership all the property of the firm must be surrendered unconditionally to the payment of firm debts, and a preference in favor of an individual debt of a partner out of the proceeds of the partnership property is fraudulent *per se* as to firm creditors.[3] And conversely it has been held that, in

have accepted the conveyance made to him. . . . If the separate transfers to any number, to the exclusion of other creditors, together cover all his property and they are all made under such circumstances as to show that all are referable to a purpose on his part to so dispose of all his property liable to execution, they fall within the operation of the statute and are to be considered a general assignment to be administered for all creditors alike."

Compare Northern Bank *v.* Farmers' Nat. Bank, (Ky. 1901) 63 N. W. 604.

As to what instruments operate as constructive assignments see *supra*, I, B.

99. **Contrary view.**— Sabichi *v.* Chase, 108 Cal. 81, 41 Pac. 29; Fuller, etc., Co. *v.* Mehl, 134 Ind. 60, 33 N. E. 733; Cadwell's Bank *v.* Crittenden, 66 Iowa 237, 23 N. W. 646; Calihan *v.* Powers, 133 Mo. 481, 34 S. W. 848; Blair State Bank *v.* Stewart, 57 Nebr. 64, 77 N. W. 370; Miller *v.* Schriver, 197 Pa. St. 191, 46 Atl. 926. See also Ontario Bank *v.* Hurst, 103 Fed. 231, 43 C. C. A. 193.

As to the distinction between assignments for the benefit of creditors and other conveyances see *supra*, II, A.

1. **To what extent may prefer.**— Maass *v.* Falk, 146 N. Y. 34, 40 N. E. 504, 65 N. Y. St. 762; Spelman *v.* Freedman, 130 N. Y. 421, 29 N. E. 765, 42 N. Y. St. 531; Otis *v.* Bertholf, 30 N. E. 66, 42 N. Y. St. 946; Smith *v.* Perine, 121 N. Y. 376, 24 N. E. 804, 31 N. Y. St. 294 [*affirming* 1 N. Y. Suppl. 495, 17 N. Y. St. 226]. See also *In re* Dauchy, 59 N. Y. App. Div. 383, 69 N. Y. Suppl. 827; *In re* Halsted, 42 N. Y. App. Div. 101, 58 N. Y. Suppl. 898; Eliassof *v.* De Wandalaer, 21 Misc. (N. Y.) 695, 47 N. Y. Suppl. 1048. See also New York cases cited *supra*, note 74, p. 165.

Made in deed of assignment or in separate instrument.— Formerly the preferences could only be made in the instrument of assignment [see *supra*, IV, A, 2, a, (II)]; but under later rulings the preferences can be made in separate instruments. Central Nat. Bank *v.* Seligman, 138 N. Y. 435, 84 N. E. 196, 53 N. Y. St. 14; Smith *v.* Perine, 121 N. Y. 376, 24 N. E. 804, 31 N. Y. St. 294 [*affirming* 1 N. Y. Suppl. 495, 17 N. Y. St. 226]; Otis *v.* Bertholf, 13 N. Y. Suppl. 445, 37 N. Y. St. 172; and *supra*, IV, A, 2, a, (III).

Liens prior to contemplation of assignment. — The statute does not apply to liens taken by creditors before the assignment was contemplated, and the creditors thus preferred can prove for the balance of their claim with the general creditors. Johnson *v.* Rapalyea, 1 N. Y. App. Div. 463, 37 N. Y. Suppl. 540, 73 N. Y. St. 156.

2. See list of statutes cited *supra*, note 6, p. 120; and Richardson *v.* Thurber, 104 N. Y. 606, 11 N. E. 133; Peterson *v.* Baker, 68 Wis. 451, 32 N. W. 527; Dubuque First Nat. Bank *v.* Baker, 68 Wis. 442, 32 N. W. 523; Campfield *v.* Lang, 25 Fed. 128. *Compare* Gordon *v.* Harley, 98 Wis. 458, 74 N. W. 110.

Laborers' claims are preferred only against general creditors, not against creditors holding valid liens. Schwartz *v.* Messinger, 167 Ill. 474, 47 N. E. 719 [*affirming* 64 Ill. App. 495].

Something more than a mere contractual relation must exist between the parties to bring the case within the operation of the statute. Clark *v.* Andrews, 19 N. Y. Suppl. 211; Lang *v.* Simmons, 64 Wis. 525, 25 N. W. 650; Campfield *v.* Lang, 25 Fed. 128.

The words "laborers, servants, and employees," for whose wages preference may be given in an assignment, under Wis. Laws (1883), c. 349, include even stockholders in a corporation who are engaged in the service of the corporation on a salary. Conlee Lumber Co. *v.* Ripon Lumber, etc., Co., 66 Wis. 481, 29 N. W. 285.

3. *Illinois.*— Atlas Nat. Bank *v.* More, 40 Ill. App. 336.

Maryland.— Lineweaver *v.* Slagle, 64 Md. 465, 2 Atl. 693, 54 Am. Rep. 775; Gable *v.* Williams, 59 Md. 46. See also Collier *v.* Hanna, 71 Md. 253, 17 Atl. 1017. And *compare* Price *v.* De Ford, 18 Md. 489.

Mississippi.— Marks *v.* Bradley, 69 Miss. 1, 10 So. 922.

New York.— Booss *v.* Marion, 129 N. Y.

an assignment by an insolvent debtor of his individual property, a preference in favor of creditors of a firm of which he is a member over his individual creditors will avoid the assignment.[4]

b. Preferring Member of Firm. And it seems equally well settled that an assignment by a partnership which makes preferences in favor of the separate partners for claims held by them against the firm, to the exclusion of other creditors, is invalid.[5]

536, 29 N. E. 832, 42 N. Y. St. 65 [*distinguishing* Crook *v.* Rindskopf, 105 N. Y. 476, 12 N. E. 174]; Hurlbert *v.* Dean, 2 Abb. Dec. (N. Y.) 428, 2 Keyes (N. Y.) 97; Kennedy *v.* Wood, 52 Hun (N. Y.) 46, 4 N. Y. Suppl. 758, 22 N. Y. St. 132; Burhans *v.* Kelly, 2 N. Y. Suppl. 175, 17 N. Y. St. 552; Windmuller *v.* Dodge, 67 How. Pr. (N. Y.) 253; Heye *v.* Bolles, 2 Daly (N. Y.) 231, 33 How. Pr. (N. Y.) 266; Lester *v.* Abbott, 28 How. Pr. (N. Y.) 488; Wilson *v.* Robertson, 19 How. Pr. 350 [*affirmed* in 21 N. Y. 587]; Nicholson *v.* Leavitt, 4 Sandf. (N. Y.) 252; Portchester First Nat. Bank *v.* Halsted, 20 Abb. N. Cas. (N. Y.) 155; Kirby *v.* Schoonmaker, 3 Barb. Ch. (N. Y.) 46, 49 Am. Dec. 160. See also Lester *v.* Pollock, 3 Rob. (N. Y.) 691. But see Bernheimer *v.* Rindskopf, 116 N. Y. 428, 22 N. E. 1074, 27 N. Y. St. 648, 15 Am. St. Rep. 414; Durfee *v.* Bump, 3 N. Y. Suppl. 505, 20 N. Y. St. 833; Cox *v.* Platt, 32 Barb. (N. Y.) 126. *Compare* Nordlinger *v.* Anderson, 123 N. Y. 544, 25 N. E. 992, 34 N. Y. St. 361 [*affirming* 5 N. Y. Suppl. 609, 2 Silv. Supreme (N. Y.) 334, 24 N. Y. St. 240]; Gorham *v.* Innis, 115 N. Y. 87, 21 N. E. 722, 23 N. Y. St. 615, wherein it is held that, where an assignor had for many years carried on business in a firm name, though as a matter of fact he had no partners, and in the assignment preferred certain creditors whose claims arose out of transactions with him in the firm name, a contention that the assignment preferred individual creditors could not be sustained.

Ohio.— Miller *v.* Estill, 5 Ohio St. 508, 67 Am. Dec. 305.

South Carolina.— Middleton *v.* Taber, 46 S. C. 337, 24 S. E. 282. See also Blair *v.* Black, 31 S. C. 346, 9 S. E. 1033, 17 Am. St. Rep. 30. And *compare* Armstrong *v.* Hurst, 39 S. C. 498, 18 S. E. 150.

Texas.— Wade *v.* Odie, 21 Tex. Civ. App. 656, 54 S. W. 786; Carter-Battle Grocer Co. *v.* Jackson, (Tex. Civ. App. 1898) 45 S. W. 615; Wiggins *v.* Blackshear, (Tex. Civ. App. 1893) 24 S. W. 918.

Wisconsin.— Willis *v.* Bremner, 60 Wis. 622, 19 N. W. 403; Vernon *v.* Upson, 60 Wis. 418, 19 N. W. 400. *Compare* Ford *v.* Clarke, 83 Wis. 45, 53 N. W. 31, where, under Wis. Rev. Stat. § 1693, an assignment containing preferences was upheld though it included partnership and individual property for the benefit of partnership and individual creditors.

United States.— Marsh *v.* Bennett, 5 McLean (U. S.) 117, 16 Fed. Cas. No. 9,110. *Compare* Peters *v.* Bain, 133 U. S. 670, 10 S. Ct. 354, 33 L. ed. 696.

Contra, Armstrong *v.* Carr, 116 N. C. 499, 21 S. E. 175.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 406; and Meyer-Marx Co. *v.* Masters, 119 Ala. 186, 24 So. 506; Adams *v.* Allen-West Commission Co., 64 Ark. 603, 44 S. W. 462; Bartlett *v.* Meyer-Schmidt Grocer Co., 65 Ark. 290, 45 S. W. 1063.

In Nye *v.* Van Husan, 6 Mich. 329, 74 Am. Dec. 690, it is said that, where there is no actual intent to defraud, a preference of individual debts in a copartnership assignment will not of itself render the assignment void.

4. O'Kane *v.* Hyde, 70 Cal. 6, 12 Pac. 124; Blow *v.* Gage, 44 Ill. 208; Hitchcock *v.* St. John, Hoffm. (N. Y.) 511; Jackson *v.* Cornell, 1 Sandf. Ch. (N. Y.) 348; Middleton *v.* Taber, 46 S. E. 337, 24 S. E. 282. But *compare* Collier *v.* Hanna, 71 Md. 253, 17 Atl. 1017.

Copartners may make an assignment of their respective interests in the partnership property to trustees, giving the preference in payment to the individual creditors of each copartner out of his share of the partnership funds. Kirby *v.* Schoonmaker, 3 Barb. Ch. (N. Y.) 46, 49 Am. Dec. 160. But in Heye *v.* Bolles, 2 Daly (N. Y.) 231, 33 How. Pr. (N. Y.) 266, it was held that an assignment made by a member of a copartnership is fraudulent as to judgment creditors of the firm, where it directs the assignee to pay out of the proceeds of the property assigned debts owing by the assignor individually, instead of applying such proceeds to the payment of the debts of the assignor due the judgment creditors.

One member of a firm may assign his individual property so as to prefer his individual creditors to the creditors of the firm. Lord *v.* Devendorf, 54 Wis. 491, 11 N. W. 903, 41 Am. Rep. 58; Messersmith *v.* Devendorf, 54 Wis. 498, 11 N. W. 906. So an insolvent debtor, in making an assignment of all his property, may devote his individual property primarily to the payment of his individual debt in preference to debts of the partnership to which he belongs. Evans *v.* Winston, 74 Ala. 349.

5. Champlain First Nat. Bank *v.* Wood, 45 Hun (N. Y.) 411; Welsh *v.* Britton, 55 Tex. 118; Goddard *v.* Bridgman, 25 Vt. 351, 60 Am. Dec. 272.

Limits of the rule.— An assignment made by a firm is not, in the absence of fraud, invalid because it prefers the indorser and not the holder of a valid, unpaid note, though such indorser is at the time a member of the firm. Webb *v.* Thomas, 21 N. Y. Suppl. 69, 49 N. Y. St. 462 [*affirmed* in 142 N. Y. 622,

c. Where Surviving Partner Makes the Assignment. It has been held that a surviving partner of an insolvent firm can make a valid preferential assignment of the firm property for the payment of firm debts[6] and the assent of the personal representatives of the deceased partner is not essential.[7]

B. How Made. No special form of deed is required, but the intention to give such preference must be manifested with reasonable certainty.[8] But it seems that the assignment need not in terms provide for the preference of wages, as the wages are preferred by the force of the statute itself.[9] In some cases it has been

37 N. E. 564, 60 N. Y. St. 867]. In Kennedy *v.* Wood, 52 Hun (N. Y.) 46, 4 N. Y. Suppl. 758, 22 N. Y. St. 132, it was held that the fact that money which had been loaned to the firm by one of the assignors as administrator of an estate was preferred in the first class did not render the assignment fraudulent, where there was no proof that such assignor had any interest in such estate. So an assignment by a firm, as such and as individuals, is not necessarily void because it prefers the estate of the father of one of the partners who, as his father's heir, had an interest in the estate; the partner can derive no advantage from such preference of his father because the assignment covered his individual assets. Brown *v.* Halsted, 17 Abb. N. Cas. (N. Y.) 197. In Stephens *v.* Dickinson, 19 Ky. L. Rep. 1223, 43 S. W. 212, it was held that the fact that a firm, prior to making an assignment, turned over to one of the partners certain property in payment of a loan made by him to the firm, and it was entered as settled in the books of the firm does not show fraud in the assignment, though it may constitute a preference subject to attack under the statute.

Another firm composed in part of some of the members of the assigning firm may be preferred in an assignment. Peckham *v.* Mattison, 15 Abb. N. Cas. (N. Y.) 367 note; Friend *v.* Michaelis, 15 Abb. N. Cas. (N. Y.) 354; Belmont *v.* Lane, 22 How. Pr. (N. Y.) 365.

Where a member of a partnership had sold out his interest to the remaining partners and took the obligation of the firm in payment thereof and the partnership subsequently assigned, a preference in favor of the retired partner to the amount of his debt will not *per se* vitiate the assignment. Blow *v.* Gage, 44 Ill. 208; Smith *v.* Howard, 1 Sheld. (N. Y.) 5, 20 How. Pr. (N. Y.) 121; Mattison *v.* Demarest, 4 Rob. (N. Y.) 161; Willis *v.* Murphy, (Tex. Civ. App. 1894) 28 S. W. 362. *Aliter*, where the firm was known to be insolvent. Cohen *v.* Irion, 7 N. Y. Suppl. 106, 26 N. Y. St. 1 [*reversed* in 126 N. Y. 665, 27 N. E. 853, 37 N. Y. St. 963].

6. **May make preferential assignment.**— Durant *v.* Pierson, 124 N. Y. 444, 26 N. E. 1095, 36 N. Y. St. 563, 21 Am. St. Rep. 686, 12 L. R. A. 146; Miller *v.* Pierson, (N. Y. 1891) 27 N. E. 413, 36 N. Y. St. 1016 [*reversing* 58 Hun (N. Y.) 190, 11 N. Y. Suppl. 842, 34 N. Y. St. 203]; Haynes *v.* Brooks, 116 N. Y. 487, 22 N. E. 1083, 27 N. Y. St. 478 [*affirming* 42 Hun (N. Y.) 528]; Williams *v.* Whedon, 109 N. Y. 333, 16 N. E. 365, 15 N. Y. St. 265, 4 Am. St. Rep. 460. *Contra*, Salsbury *v.* Ellison, 7 Colo. 303, 3 Pac. 485; Barcroft *v.* Snodgrass, 1 Coldw. (Tenn.) 430, 441, wherein it is said: "It seems to us that the doctrine which asserts such a power in the surviving partners is irreconcilable with the established rights, as declared by law, of the representatives of the deceased partner, as well as of the joint creditors of the firm, and consequently cannot be sound." *Compare* Gable *v.* Williams, 59 Md. 46 (as to the duty of surviving partner to prefer partnership creditors); and Bates *v.* McNulty, 4 N. Y. St. 646, 25 N. Y. Wkly. Dig. 528 (where surviving partner had purchased interest of his deceased partner).

Under the statutes of Georgia voluntary assignments containing preferences must be construed strictly as against the assignee, and an assignment by a surviving partner which does not show upon the face of the deed that both he and the partnership are insolvent is fraudulent and void. August *v.* Calloway, 35 Fed. 381.

Where the interest of a deceased partner has been purchased by the survivor from the administrator, such survivor may prefer creditors in a deed of assignment of all the property for the benefit of his creditors. Wilson *v.* Soper, 13 B. Mon. (Ky.) 411, 56 Am. Dec. 573.

7. **Assent of personal representatives unnecessary.**— Egberts *v.* Wood, 3 Paige (N. Y.) 517, 24 Am. Dec. 236.

8. **Intent to prefer must be manifest.**— Hanford *v.* Prouty, 133 Ill. 339, 24 N. E. 565; Farwell *v.* Nilsson, 133 Ill. 45, 24 N. E. 74; Meeker *v.* Sanders, 6 Iowa 61; Killman *v.* Gregory, 91 Wis. 478, 65 N. W. 53; Mack *v.* Meisen, 70 Wis. 234, 35 N. W. 291; Smith *v.* Bowen, 61 Wis. 258, 20 N. W. 917. *Compare* Danforth *v.* Denny, 25 N. H. 155; Taylor *v.* Lauer, 127 N. C. 157, 37 S. E. 197; Brown *v.* Nimocks, 124 N. C. 417, 32 S. E. 743; Hall *v.* Cottingham, 124 N. C. 402, 32 S. E. 745; Stoneburner *v.* Motley, 95 Va. 784, 30 S. E. 364.

Misdescription of a preference in instrument creating it will not necessarily invalidate the assignment. Strauss *v.* Rose, 59 Md. 525; H. Wetter Mfg. Co. *v.* Dinkins, 70 Miss. 835, 12 So. 584, 13 So. 226; Mattison *v.* Judd, 59 Miss. 99; Smith *v.* Smith, 136 N. Y. 313, 32 N. E. 761, 49 N. Y. St. 398 [*affirming* 14 N. Y. Suppl. 461, 39 N. Y. St. 46]; Roberts *v.* Vietor, 54 Hun (N. Y.) 461, 7 N. Y. Suppl. 777, 28 N. Y. St. 100; Smith *v.* Smith, 14 N. Y. Suppl. 461, 39 N. Y. St. 46.

9. **Preference as to wages.**— Roberts *v.* Tobias, 120 N. Y. 1, 23 N. E. 1105, 30 N. Y. St. 189 [*affirming* 9 N. Y. St. 59]; Richardson

held that a failing debtor may stipulate for a release as a condition of preference, but this right has been denied in other cases.[10]

C. Validity — 1. Assignor's Intent. To create a valid preference, when the law permits an assignor to prefer certain creditors, the assignor must act with an honest intent.[11] The private motives of a failing debtor for giving preferences to

v. Thurber, 104 N. Y. 606, 11 N. E. 133; Johnston *v.* Kelly, 43 Hun (N. Y.) 379; Burley *v.* Hartson, 40 Hun (N. Y.) 121; Richardson *v.* Herron, 39 Hun (N. Y.) 537. But *compare* Smith *v.* Hartwell, 55 N. Y. Super. Ct. 325, 14 N. Y. St. 754.

As to preferential payment of wages see *infra*, XIV, B, 4, c, (v).

10. Stipulating for release.— *Alabama.*— Rankin *v.* Lodor, 21 Ala. 380; Gazzam *v.* Poyntz, 4 Ala. 374, 37 Am. Dec. 745. *Compare* West *v.* Snodgrass, 17 Ala. 549.

Arkansas.— Wolf *v.* Gray, 53 Ark. 75, 13 S. W. 512; Collier *v.* Davis, 47 Ark. 367, 1 S. W. 684, 58 Am. Rep. 758.

Maryland.— McCall *v.* Hinkley, 4 Gill (Md.) 128.

New York.— Spaulding *v.* Strang, 38 N. Y. 9, 37 N. Y. 135, 4 Transcr. App. (N. Y.) 80 [*reversing* 36 Barb. (N. Y.) 310, *affirming* 32 Barb. (N. Y.) 235]; Powers *v.* Graydon, 10 Bosw. (N. Y.) 630.

Rhode Island.— Nightingale *v.* Harris, 6 R. I. 321.

United States.—Wickham *v.* Dillon, 29 Fed. Cas. No. 17,612, 2 West. L. Month. 511.

But see contra the following cases:

Connecticut.— Ingraham *v.* Wheeler, 6 Conn. 277.

Massachusetts.— Stanfield *v.* Simmons, 12 Gray (Mass.) 442; Grocers' Bank *v.* Simmons, 12 Gray (Mass.) 440; Bowles *v.* Graves, 4 Gray (Mass.) 117; Edwards *v.* Mitchell, 1 Gray (Mass.) 239; Wyles *v.* Beals, 1 Gray (Mass.) 233.

New York.— Spaulding *v.* Strang, 32 Barb. (N. Y.) 235 [*reversed* in 38 N. Y. 9, 37 N. Y. 135, 4 Transcr. App. (N. Y.) 80, *distinguished* in Haydock *v.* Coope, 53 N. Y. 68]; Grover *v.* Wakeman, 11 Wend. (N. Y.) 187, 25 Am. Dec. 624; Hyslop *v.* Clarke, 14 Johns. (N. Y.) 458; Mills *v.* Levy, 2 Edw. (N. Y.) 183.

North Carolina.— Palmer *v.* Giles, 58 N. C. 75.

Ohio.— Atkinson *v.* Jordan, 5 Ohio 293, 24 Am. Dec. 281.

11. Bona fide preferences only are permitted. A creditor cannot be preferred with a fraudulent intent.

Alabama.— Richards *v.* Hazzard, 1 Stew. & P. (Ala.) 139.

Colorado.— See Stevens *v.* Masconi, 5 Colo. App. 484, 39 Pac. 348, where assignment expressly excluded some of assignor's creditors.

Georgia.— See Dawson *v.* Figueiro, 16 Ga. 610, where the assignment excluded some creditors.

Iowa.— See Manton *v.* Seiberling, 107 Iowa 534, 78 N. W. 194; *In re* Weber, 91 Iowa 122, 58 N. W. 1079; Graves *v.* Alden, 13 Iowa 573.

Louisiana.— Underhill *v.* Townsend, 17 La. 517; Townsend *v.* Louisiana State M. & F. Ins. Co., 13 La. 551.

Mississippi.— Hiller *v.* Ellis, 72 Miss. 701, 18 So. 95, 41 L. R. A. 707; Craft *v.* Bloom, 59 Miss. 69, 42 Am. Rep. 351.

Missouri.— Johnson *v.* McAllister, 30 Mo. 327.

Nebraska.— See Lininger *v.* Raymond, 12 Nebr. 167, 10 N. W. 716.

New York.— Roberts *v.* Vietor, 130 N. Y. 585, 29 N. E. 1025, 42 N. Y. St. 729; Smith *v.* Perine, 121 N. Y. 376, 24 N. E. 804, 31 N. Y. St. 294; Elias *v.* Farley, 2 Abb. Dec. (N. Y.) 11, 3 Keyes (N. Y.) 398, 2 Transcr. App. (N. Y.) 116, 5 Abb. Pr. N. S. (N. Y.) 39; Hardt *v.* Schwab, 72 Hun (N. Y.) 109, 25 N. Y. Suppl. 402, 55 N. Y. St. 205 [*affirmed* in 150 N. Y. 579, 44 N. E. 1124; *following* Abegg *v.* Schwab, 9 N. Y. Suppl. 681, 31 N. Y. St. 139 (*affirming* 7 N. Y. Suppl. 46, 24 N. Y. St. 986, 23 Abb. N. Cas. (N. Y.) 7)]; Thalheimer *v.* Klapetzky, 12 N. Y. Suppl. 941, 36 N. Y. St. 116 [*affirmed* in 129 N. Y. 647, 29 N. E. 1031, 41 N. Y. St. 948]; Davis *v.* Harrington, 55 Hun (N. Y.) 109, 8 N. Y. Suppl. 218, 28 N. Y. St. 909; Keteltas *v.* Wilson, 36 Barb. (N. Y.) 298; Dimon *v.* Delmonico, 35 Barb. (N. Y.) 554; Renard *v.* Maydore, 25 How. Pr. (N. Y.) 178; Hyatt *v.* Dusenbury, 12 N. Y. Civ. Proc. 152.

Ohio.— Cross *v.* Carstens, 49 Ohio St. 548, 31 N. E. 506; Floyd *v.* Smith, 9 Ohio St. 546; Harshman *v.* Lowe, 9 Ohio 92; Stevenson *v.* Agry, 7 Ohio, pt. II, 247.

Oregon.—O'Connell *v.* Hansen, 29 Oreg. 173, 44 Pac. 387.

Pennsylvania.—*Compare* Matter of Bryden, 18 Phila. (Pa.) 625, 42 Leg. Int. (Pa.) 80.

South Carolina.— Durham Fertilizer Co. *v.* Hemphill, 45 S. C. 621, 24 S. E. 85; Adler *v.* Cloud, 42 S. C. 272, 20 S. E. 393; Smith *v.* Campbell, 1 Rice (S. C.) 352; Huntingdon *v.* Spann, 1 McCord Eq. (S. C.) 167.

Texas.— Baldwin *v.* Peet, 22 Tex. 708, 75 Am. Dec. 806.

Utah.— Coblentz *v.* Driver Mercantile Co., 10 Utah 96, 37 Pac. 242.

Washington.— Vietor *v.* Glover, 17 Wash. 37, 48 Pac. 788, 40 L. R. A. 297.

Wisconsin.— Bates *v.* Simmons, 62 Wis. 69, 22 N. W. 335; Vernon *v.* Upson, 60 Wis. 418, 19 N. W. 400.

United States.—Crawford *v.* Neal, 144 U. S. 585, 12 S. Ct. 759, 36 L. ed. 552; Waples-Platter Co. *v.* Low, 54 Fed. 93, 10 U. S. App. 704, 4 C. C. A. 205 [*distinguishing* Farwell *v.* Maxwell, 34 Fed. 727].

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors, § 373; and *infra*, IV, C, 2.

Fraudulent intent is ordinarily a question of fact for the jury and depends upon the attendant circumstances. Ball *v.* Bowe, 49 Wis. 495, 5 N. W. 909, and cases cited *supra*, this note.

certain creditors will not affect the exercise of the right, where no improper inducement has moved from the creditor to the debtor to secure it,[12] and where the assignee was not cognizant of and did not participate in the fraud.[13] The preferred creditor's knowledge of assignor's fraudulent intent is sometimes material;[14] but it has been held that such knowledge will not necessarily invalidate the assignment,[15] or prevent the enforcement of the preference.[16]

2. **BONA FIDE DEBT.** Likewise, to constitute a valid preference, the debt preferred must be a *bona fide* debt.[17] For example, it has been held that debts already paid,[18] debts for which the assignee cannot be held lia-

See also, generally, *infra*, IX, D.

12. Private motives.— *Iowa.*— Graves *v.* Alden, 13 Iowa 573.

Maryland.— Crawford *v.* Austin, 34 Md. 49.

Mississippi.— Craft *v.* Bloom, 59 Miss. 69, 42 Am. Rep. 351.

New York.— Elias *v.* Farley, 2 Abb. Dec. (N. Y.) 11, 3 Keyes (N. Y.) 398, 2 Transcr. App. (N. Y.) 116, 5 Abb. Pr. N. S. (N. Y.) 39.

Texas.—Baldwin *v.* Peet, 22 Tex. 708, 75 Am. Dec. 806.

Wisconsin.—An assignment with preferences is not void because made in anticipation of the immediate passage of a law prohibiting such an assignment. Bates *v.* Simmons, 62 Wis. 69, 22 N. W. 335.

United States.— Marbury *v.* Brooks, 7 Wheat. (U. S.) 556, 5 L. ed. 522. To same effect see Estes *v.* Gunter, 122 U. S. 450, 7 S. Ct. 1275, 30 L. ed. 1228.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 373.

13. Assignee not cognizant of fraud.— Keteltas *v.* Wilson, 36 Barb. (N. Y.) 298; Emerson *v.* Senter, 118 U. S. 3, 6 S. Ct. 981, 30 L. ed. 49; Baer *v.* Rooks, 50 Fed. 898, 4 U. S. App. 399, 2 C. C. A. 76; Sanger *v.* Flow, 48 Fed. 152, 4 U. S. App. 32, 1 C. C. A. 56. But see Floyd *v.* Smith, 9 Ohio St. 546 (holding that, under the statute, where a deed was made with fraudulent intent it was void as to preferences, although the fraudulent intent was confined to the assignor); Coblentz *v.* Driver Mercantile Co., 10 Utah 96, 37 Pac. 242 (holding that a voluntary deed of assignment, in which the assignee is fraudulently preferred to a large amount, is void, though he did not participate in the fraud); Waples-Platter Co. *v.* Low, 54 Fed. 93, 10 U. S. App. 704, 4 C. C. A. 205 (holding that where the lien of an attaching creditor becomes fixed upon the property of the debtor before the delivery and acceptance of an assignment preferring creditors, made by him with the fraudulent intent to cheat, hinder, or delay his creditors, in the trial of the assignee's right to the property under the assignment as against the lien of the attaching creditor, it is not material whether the assignee was aware of or participated in the debtor's fraud). And *compare* Shotwell *v.* Dixon, 163 N. Y. 43, 57 N. E. 178 [*affirming* 22 N. Y. App. Div. 258, 48 N. Y. Suppl. 984].

14. Creditor's knowledge of fraud.— Smith *v.* Sipperley, 9 Utah 267, 34 Pac. 54; Webb *v.* Armistead, 26 Fed. 70. See also Podolski *v.* Stone, 186 Ill. 540, 58 N. E. 340 [*affirming* 86 Ill. App. 62]. In Shufeldt *v.* Jenkins, 22 Fed. 359, it is held that where an insolvent prefers certain creditors by an assignment of his property for their benefit, in violation of his agreement with other creditors not to give preferences, the latter may, by a suit in equity, avoid the assignment (which had been made prior to the agreement, and had not been recorded) on the ground of fraud, whether the preferred creditors had knowledge of the fraud or not. *Compare* Wile *v.* Cauffman, 39 N. Y. App. Div. 206, 57 N. Y. Suppl. 240. See also *infra*, XIV, B, 4, c, (IV).

Under Hill's Anno. Laws, Oreg. § 3173, where a debtor, in contemplation of making an assignment, confessed judgment in favor of junior attaching creditors in order to give them a preference, and then made an assignment, it was held invalid and did not discharge senior attachments, though the junior attaching creditors were unaware that he contemplated an assignment. O'Connell *v.* Hansen, 29 Oreg. 173, 44 Pac. 387.

15. Hill *v.* Shrygley, 51 Ark. 56, 9 S. W. 845.

16. A creditor in good faith taking a mortgage without knowledge of debtor's contemplated assignment may enforce the same. Schwartz *v.* Messinger, 167 Ill. 474, 47 N. E. 719; Manton *v.* Seiberling, 107 Iowa 534, 78 N. W. 194.

The knowledge of a creditor who takes security that his debtor is insolvent, or even that he must fail, does not raise a presumption that he knew the debtor intended to, or would, make an assignment so as to render his security a preference. Johnson *v.* Rapalyea, 1 N. Y. App. Div. 463, 37 N. Y. Suppl. 540, 73 N. Y. St. 156.

17. Central Nat. Bank *v.* Seligman, 138 N. Y. 435, 34 N. E. 196, 53 N. Y. St. 14; Cohen *v.* Irion, (N. Y. 1891) 27 N. E. 853, 37 N. Y. St. 963; Webb *v.* Daggett, 2 Barb. (N. Y.) 9; Planck *v.* Schermerhorn, 3 Barb. Ch. (N. Y.) 644; Irwin *v.* Keen, 3 Whart. (Pa.) 347; W. P. Noble Mercantile Co. *v.* Mt. Pleasant Equitable Co-Operative Inst., 12 Utah 213, 42 Pac. 869. *Compare* Goodbar Shoe Co. *v.* Montgomery, 73 Miss. 73, 19 So. 196; Zucharello *v.* Randolph, (Tenn. Ch. 1899) 58 S. W. 453; Stoneburger *v.* Motley, 95 Va. 784, 30 S. E. 364. See also *supra*, IV, C, 1.

18. Debts already paid.— Guerin *v.* Hunt, 6 Minn. 375; Portchester First Nat. Bank *v.* Halsted, 20 Abb. N. Cas. (N. Y.) 155. But see Jones *v.* McQuien, 71 Miss. 98, 14 So. 146 (holding that the fact that a note preferred

ble,[19] debts of another person,[20] fictitious claims,[21] or usurious claims[22] are not *bona fide* debts within the rule allowing such debts to be preferred in an assignment for the benefit of creditors. But claims barred by statute of limitations,[23] claims constituting fiduciary obligations,[24] claims not due,[25] claims of a confidential nature,[26] claims purchased by third person,[27] and claims which have been secured[28] have been

by the terms of an assignment for the benefit of creditors was paid before delivery of the assignment does not invalidate the assignment, when the assignee was informed of the payment, and the creditors were not prejudiced by the failure to withdraw the item); Renard *v.* Maydore, 25 How. Pr. (N. Y.) 178 (holding that where an assignment preferred certain creditors who had previously obtained a composition deed providing for the payment of one half of their respective claims and a release of the assignor, the assignment is not for that reason fraudulent and void, if the composition deed and the assignment are separate and distinct transactions).

19. Debts for which assignee cannot be liable.— Chambers *v.* Smith, 60 Hun (N. Y.) 248, 14 N. Y. Suppl. 706, 38 N. Y. St. 213.

20. Debts of another person.— Chambers *v.* Smith, 60 Hun (N. Y.) 248, 14 N. Y. Suppl. 706, 38 N. Y. St. 213; Smith *v.* Howard, 1 Sheld. (N. Y.) 5, 20 How. Pr. (N. Y.) 121.

21. Fictitious claims.— *Mississippi.*— Sanders *v.* Goodbar, (Miss. 1898) 23 So. 583.

New York.— Nichols *v.* Wellings, 61 Hun (N. Y.) 601, 16 N. Y. Suppl. 452, 41 N. Y. St. 881; Frazier *v.* Trnax, 27 Hun (N. Y.) 587; Webb *v.* Daggett, 2 Barb. (N. Y.) 9; Universal Bag Co. *v.* Fensley, 18 Misc. (N. Y.) 408, 42 N. Y. Suppl. 776. But see Roberts *v.* Vietor, 54 Hun (N. Y.) 461, 7 N. Y. Suppl. 777, 28 N. Y. St. 100; American Exch. Bank *v.* Webb, 15 How. Pr. (N. Y.) 193.

North Carolina.— Jordan *v.* Newsome, 126 N. C. 553, 36 S. E. 154.

Pennsylvania.— Irwin *v.* Keen, 3 Whart. (Pa.) 347.

Utah.— W. P. Noble Mercantile Co. *v.* Mt. Pleasant Equitable Co-Operative Inst., 12 Utah 213, 42 Pac. 869.

Wisconsin.— Backhaus *v.* Sleeper, 66 Wis. 68, 27 N. W. 409.

But *compare* Danzig *v.* Saks, 20 D. C. 177, where the assignment was upheld.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 360.

22. Usurious claims.— Hiller *v.* Ellis, 72 Miss. 701, 18 So. 95, 41 L. R. A. 707; Marks *v.* Bradley, 69 Miss. 1, 10 So. 922. But in H. Wetter Mfg. Co. *v.* Dinkins, 70 Miss. 835, 12 So. 584, 13 So. 226, it is held that an assignor may prefer a creditor to whom he has agreed to pay a usurious rate of interest, if the preference is only for an amount equal to or less than the principal and the legal rate of interest, thus waiving his privilege to defeat all interest on account of his usurious contract. And in Peyser *v.* Myers, 135 N. Y. 599, 32 N. E. 699, 48 N. Y. St. 825 [*affirming* 18 N. Y. Suppl. 736, 45 N. Y. St. 413], it is held that the fact that a preference in an assignment for the benefit of creditors illegally includes compound interest is not ground for setting aside the assignment and requiring the preferred creditor to return the whole amount received by him, in the absence of fraud, and when the creditor had already returned the excess of interest.

23. Claims barred by limitation.— An assignment for benefit of creditors may prefer a debt barred by limitations at the time the assignment was executed. Stoneburner *v.* Motley, 95 Va. 784, 30 S. E. 364.

24. Claims constituting fiduciary obligations.— Cohen *v.* Morehouse, 3 N. Y. Suppl. 313, 21 N. Y. St. 436 [*affirmed* in 127 N. Y. 669, 28 N. E. 255, 38 N. Y. St. 1015, where the claim was against assignor as guardian]; Tilford's Case, 8 Watts (Pa.) 531, where the claim was against assignor as executor. But see Goldthwaite *v.* Ellison, 99 Ala. 497, 12 So. 812.

Claims for wages see *supra*, IV, A, 2, c.

25. Claims not due.— Read *v.* Worthington, 9 Bosw. (N. Y.) 617.

26. Claims of a confidential nature.— Smith *v.* Perine, 121 N. Y. 376, 24 N. E. 804, 31 N. Y. St. 294; Spaulding *v.* Strang, 38 N. Y. 9, 37 N. Y. 135, 4 Transcr. App. (N. Y.) 80; Benedict *v.* Huntington, 32 N. Y. 219; Roberts *v.* Vietor, 54 Hun (N. Y.) 461, 7 N. Y. Suppl. 777, 28 N. Y. St. 100; Kennedy *v.* Wood, 52 Hun (N. Y.) 46, 4 N. Y. Suppl. 758, 22 N. Y. St. 132; Keteltas *v.* Wilson, 36 Barb. (N. Y.) 298; Dimon *v.* Delmonico, 35 Barb. (N. Y.) 554; Haynes *v.* Brooks, 17 Abb. N. Cas. (N. Y.) 152; Utica City Nat. Bank *v.* Williams, 14 N. Y. St. 163; South Branch Lumber Co. *v.* Ott, 142 U. S. 622, 12 S. Ct. 318, 35 L. ed. 1136; Baer *v.* Rooks, 50 Fed. 898, 4 U. S. App. 349, 2 C. C. A. 76. *Contra*, Barremore *v.* Bradford, 10 La. 149.

Taint of fraud must not exist.— But such preference must be *bona fide* and not tainted with fraud. Hitchcock *v.* St. John, Hoffm. (N. Y.) 511.

27. Claims purchased by third person.— Low *v.* Graydon, 50 Barb. (N. Y.) 414; Powers *v.* Graydon, 10 Bosw. (N. Y.) 630.

28. Claims which have been secured.— *Arkansas.*— Worthen *v.* Griffith, 59 Ark. 562, 28 S. W. 286, 43 Am. St. Rep. 50, claim secured by confession of judgment.

Massachusetts.— Hatch *v.* Smith, 5 Mass. 42, claim secured by attachment.

New Jersey.— Garretson *v.* Brown, 26 N. J. L. 425.

New York.— Kitchen *v.* Lowery, 127 N. Y. 53, 27 N. E. 357, 37 N. Y. St. 329 [*affirming* 3 Silv. Supreme (N. Y.) 427, 6 N. Y. Suppl. 867, 25 N. Y. St. 252, as to the effect of preferring claim secured by unrecorded mortgage]; Smith *v.* Perine, 121 N. Y. 376, 24 N. E. 804, 31 N. Y. St. 294; Grant *v.* Chapman, 38 N. Y. 293 (claim secured by attachment); Strong *v.* Skinner, 4 Barb. (N. Y.)

held to be *bona fide* debts which may be preferred in an assignment for the benefit of creditors. It has also been held that provisions may be made in an assignment for the payment of rents, or taxes and assessments.[29] Likewise just and reasonable expenses attending the execution of the trust, including attorney's fees, may be included in the claims to be first paid without thereby vitiating the assignment.[30]

3. Consideration Must Not Be Unlawful. So, too, it is equally essential that the preference be made without any unlawful consideration moving from the creditor to the assignor to induce such preference.[31]

546; Dunham *v.* Waterman, 3 Duer (N. Y.) 166; Blain *v.* Pool, 13 N. Y. St. 571; Portchester First Nat. Bank *v.* Halsted, 20 Abb. N. Cas. (N. Y.) 155.

Oregon.— Kruse *v.* Prindle, 8 Oreg. 158.

South Carolina.— South Carolina L. & T. Co. *v.* McPherson, 26 S. C. 431, 2 S. E. 267.

Compare Grinstead *v.* Richardson, 12 Ky. L. Rep. 798; Ball *v.* Bowe, 49 Wis. 495, 5 N. W. 909, in both of which cases the claim was secured by a lien upon the assignor's homestead. See also Preston *v.* Spaulding, 120 Ill. 208, 10 N. E. 903.

29. Rents.— Farquharson *v.* Eichelberger, 15 Md. 63; Morrison *v.* Atwell, 9 Bosw. (N. Y.) 503; Bryce *v.* Foot, 25 S. C. 467.

Taxes and assessments.— Morrison *v.* Atwell, 9 Bosw. (N. Y.) 503.

30. Just and reasonable expenses attending the execution of the trust, including attorney's fees.— *Colorado.*— Burr *v.* Clement, 9 Colo. 1, 9 Pac. 633.

District of Columbia.— National Bank of Republic *v.* Hodge, 3 App. Cas. (D. C.) 140.

Georgia.—Drucker *v.* Wellhouse, 82 Ga. 129, 8 S. E. 40, 2 L. R. A. 328.

Illinois.— Blow *v.* Gage, 44 Ill. 208. But an assignment which authorizes the assignee to retain out of the trust fund "a reasonable and lawful compensation or commission for his own services, both as assignee as aforesaid, and as the lawyer, attorney, solicitor, and counsel in the premises," is fraudulent and void. Heacock *v.* Durand, 42 Ill. 230, 231.

Maine.— Canal Bank *v.* Cox, 6 Me. 395.

Mississippi.— Memphis Grocery Co. *v.* Leach, 71 Miss. 959, 15 So. 113; Armitage *v.* Rector, 62 Miss. 600. *Compare* Ingraham *v.* Grigg, 13 Sm. & M. (Miss.) 22. But see Selleck *v.* Pollock, 69 Miss. 870, 13 So. 248, where it is held that a deed directing the payment of a sum to a specified attorney, not only for drawing the instrument, but for future services for the assignors in defending it, if necessary, is void.

New York.— Jacobs *v.* Remsen, 36 N. Y. 668, 3 Transcr. App. (N. Y.) 129; Campbell *v.* Woodworth, 24 N. Y. 304 [*affirming* 33 Barb. (N. Y.) 425]; Halstead *v.* Gordon, 34 Barb. (N. Y.) 422; Iselin *v.* Dalrymple, 2 Rob. (N. Y.) 142, 27 How. Pr. (N. Y.) 137; Morrison *v.* Atwell, 9 Bosw. (N. Y.) 503; Butt *v.* Peck, 1 Daly (N. Y.) 83; Sloan *v.* Gauhn, 12 N. Y. St. 717; Lentilhon *v.* Moffat, 1 Edw. (N. Y.) 451. But it has been held that a provision directing payment to a person named as the attorney of the assignors of a certain sum "for counsel fee and services in preparing the assignment, and preparing bond, inventory and schedules, and legal advice connected therewith," renders the assignment void. Norton *v.* Mattlews, 7 Misc. (N. Y.) 569, 28 N. Y. Suppl. 265, 58 N. Y. St. 806. And in an assignment a provision that the assignee, being a lawyer, should retain, over and above the expenses of the trust, a reasonable counsel fee, renders the assignment void. Nichols *v.* McEwen, 21 Barb. (N. Y.) 65 [*affirmed* in 17 N. Y. 22]. *Compare* also Wynkoop *v.* Shardlow, 44 Barb. (N. Y.) 84, 29 How. Pr. (N. Y.) 368; Frye *v.* Beebe, 28 How. Pr. (N. Y.) 333; Keteltas *v.* Wilson, 36 Barb. (N. Y.) 298, 23 How. Pr. (N. Y.) 69; Barney *v.* Griffin, 2 N. Y. 365.

South Carolina.— Haynes *v.* Hoffman, 46 S. C. 157, 24 S. E. 103; Verner *v.* Davis, 26 S. C. 609, 2 S. E. 114; Bryce *v.* Foot, 25 S. C. 467.

Texas.— Moody *v.* Carroll, 71 Tex. 143, 8 S. W. 510, 10 Am. St. Rep. 734; Muse *v.* Chaney, (Tex. Civ. App. 1895) 30 S. W. 374; Willis *v.* Murphy, (Tex. Civ. App. 1894) 28 S. W. 362; Kellar *v.* Self, 5 Tex. Civ. App. 393, 24 S. W. 578.

United States.— Wooldridge *v.* Irving, 23 Fed. 676; Hill *v.* Agnew, 12 Fed. 230. *Compare* Myers *v.* Fenn, 5 Wall. (U. S.) 205, 18 L. ed. 604, as to the effect of payment of assignee's commissions in advance of assignment.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 397.

A preference to an attorney for services in sustaining and enforcing the assignment is void, but, if made without fraudulent intent, does not invalidate the assignment in other respects. Bank of Little Rock *v.* Frank, 63 Ark. 16, 37 S. W. 400.

31. Craft *v.* Bloom, 59 Miss. 69, 42 Am. Rep. 351; Manning *v.* Beck, 129 N. Y. 1, 29 N. E. 90, 41 N. Y. St. 199, 14 L. R. A. 198 [*reversing* 13 N. Y. Suppl. 869, 35 N. Y. St. 978 (*affirming* 54 Hun (N. Y.) 102, 7 N. Y. Suppl. 215, 26 N. Y. St. 483)]; Smith *v.* Perine, 121 N. Y. 376, 24 N. E. 804, 31 N. Y. St. 294; Elias *v.* Farley, 2 Abb. Dec. 11, 3 Keyes (N. Y.) 398, 2 Transcr. App. (N. Y.) 116, 5 Abb. Pr. N. S. (N. Y.) 39; Marbury *v.* Brooks, 7 Wheat. (U. S.) 556, 5 L. ed. 522; Means *v.* Montgomery, 23 Fed. 421; Shufeldt *v.* Jenkins, 22 Fed. 359. See also, generally, CONTRACTS.

4. Excessive Amount. While a mere mistake as to the amount of the debt preferred will not necessarily invalidate the assignment [32] a deed of assignment for the benefit of creditors which contains preferences in excess of the amount allowed by statute is ordinarily invalid to the extent of such excess,[33] although the assignment may be otherwise valid and operative in the absence of fraud or dishonest intent to evade the law.[34]

V. RESERVATIONS.

A. In General. A reservation to the grantor in a deed of assignment of a power to revoke, alter, or amend the conveyance,[35] or to remove the trustee or

A release of a dower right, upon consideration that the sum provided in the assignment shall be paid in lieu thereof, will not affect the validity of an assignment where the creditors were aware of such agreement. American Exch. Bank *v.* Webb, 15 How. Pr. (N. Y.) 193.

32. Mere mistake as to the amount.— Strauss *v.* Rose, 59 Md. 525; Yerger *v.* Carter Dry-Goods Co., (Miss. 1900) 27 So. 989; H. Wetter Mfg. Co. *v.* Dinkins, 70 Miss. 835, 12 So. 584, 13 So. 226; Mattison *v.* Judd, 59 Miss. 99; Smith *v.* Smith, 136 N. Y. 313, 32 N. E. 761, 49 N. Y. St. 398 [*affirming* 14 N. Y. Suppl. 461, 39 N. Y. St. 46]; Roberts *v.* Vietor, 54 Hun (N. Y.) 461, 7 N. Y. Suppl. 777, 28 N. Y. St. 100 [*reversed* in 130 N. Y. 585, 29 N. E. 1025, 42 N. Y. St. 729]; Kavanagh *v.* Beckwith, 44 Barb. (N. Y.) 192; Brown *v.* Halsted, 17 Abb. N. Cas. (N. Y.) 197. See also *supra*, note 8.

The delivery by an assignor of a greater amount of property than necessary to secure the payment of a certain creditor in full and when the debt thus secured was not at the time due will not render an assignment void, as it is the duty of the assignor to seek to recover such property by an appropriate proceeding. Lininger *v.* Raymond, 12 Nebr. 167, 10 N. W. 716.

33. Invalid as to excess.— Central Nat. Bank *v.* Seligman, 138 N. Y. 435, 34 N. E. 196, 53 N. Y. St. 14 [*reversing* 64 Hun (N. Y.) 615, 19 N. Y. Suppl. 362, 47 N. Y. St. 17]; Manning *v.* Beck, 129 N. Y. 1, 29 N. E. 90, 41 N. Y. St. 199, 14 L. R. A. 198 [*reversing* 54 Hun (N. Y.) 102, 7 N. Y. Suppl. 215, 26 N. Y. St. 483, and in effect *reversing* 13 N. Y. Suppl. 869, 35 N. Y. St. 978]; Shotwell *v.* Dixon, 22 N. Y. App. Div. 258, 48 N. Y. Suppl. 984; Cutter *v.* Hume, 17 N. Y. Suppl. 255, 43 N. Y. St. 242 [*affirmed* in 138 N. Y. 630, 33 N. E. 1084, 51 N. Y. St. 934]; Rose *v.* Renton, 13 N. Y. Suppl. 592; National Wall-Paper Co. *v.* Davis, 98 Fed. 472.

In New York preferences exceeding one third of the debtor's estate were formerly held to be void *in toto*. Berger *v.* Varrelmann, 127 N. Y. 281, 27 N. E. 1065, 38 N. Y. St. 813, 12 L. R. A. 808. See also Wilcox *v.* Payne, 8 N. Y. Suppl. 407, 28 N. Y. St. 712. But under later authorities the preferences are cut down to one third as the allowance to which the preferred creditors may be entitled. London *v.* Martin, 149 N. Y. 586, 44 N. E. 1125; Abegg *v.* Bishop, 142 N. Y. 286, 36 N. E. 1058, 58 N. Y. St. 788; Central Nat. Bank *v.* Seligman, 138 N. Y. 435, 34 N. E. 196, 53 N. Y. St. 14 [*reversing* 64 Hun (N. Y.) 615, 19 N. Y. Suppl. 362, 47 N. Y. St. 17]; Manning *v.* Beck, 129 N. Y. 1, 29 N. E. 90, 41 N. Y. St. 199, 14 L. R. A. 198 [*reversing* 54 Hun (N. Y.) 102, 7 N. Y. Suppl. 215, 26 N. Y. St. 488, and in effect *reversing* 13 N. Y. Suppl. 869, 35 N. Y. St. 978].

34. Otherwise operative in absence of fraud.— Manning *v.* Beck, 129 N. Y. 1, 29 N. E. 90, 41 N. Y. St. 199, 14 L. R. A. 198 [*reversing* 54 Hun (N. Y.) 102, 7 N. Y. Suppl. 215, 26 N. Y. St. 483, and in effect *reversing* 13 N. Y. Suppl. 869, 35 N. Y. St. 978]; Chambers *v.* Smith, 60 Hun (N. Y.) 248, 14 N. Y. Suppl. 706, 38 N. Y. St. 213 [*following* Richardson *v.* Thurber, 104 N. Y. 606, 11 N. E. 133]; Kavanagh *v.* Beckwith, 44 Barb. (N. Y.) 192. *Contra*, Roberts *v.* Vietor, 130 N. Y. 585, 29 N. E. 1025, 42 N. Y. St. 729 [*reversing* 54 Hun (N. Y.) 461, 7 N. Y. Suppl. 777, 28 N. Y. St. 100]. See also *infra*, IX.

Evidence of fraud.— The preference by an assignor for the benefit of creditors of one creditor for one thousand five hundred dollars, knowing that he owed such creditor but five hundred dollars, with the intent to subsequently direct the application of the surplus, one thousand dollars, to the payment of another debt, not preferred, is conclusive evidence against the assignor of the fraudulent character of the assignment. Waples-Platter Co. *v.* Low, 54 Fed. 93, 10 U. S. App. 704, 4 C. C. A. 205 [*distinguishing* Farwell *v.* Maxwell, 34 Fed. 727].

35. Revocation or amendment of conveyance.— *Louisiana.*— Fellows *v.* Commercial, etc., Bank, 6 Rob. (La.) 246.

Maryland.— Green *v.* Trieber, 3 Md. 11.

New York.— Reichenbach *v.* Winkhaus, 12 Daly (N. Y.) 525, 67 How. Pr. (N. Y.) 512; Riggs *v.* Murray, 2 Johns. Ch. (N. Y.) 565.

North Carolina.— Cannon *v.* Peebles, 26 N. C. 204.

Ohio.— Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 299.

Perfection of schedule.— Where an assignment for the benefit of creditors reserves to the assignors power to perfect the schedule attached, it in no respect affects the validity of the assignment. Nye *v.* Van Husan, 6

trustees at his pleasure without the consent of a majority of the creditors will defeat the assignment as to creditors who are seeking to enforce their claims.[36]

B. Of Part of Property — 1. In General. In an assignment for the benefit of creditors it is generally held that a debtor cannot make a reservation of any part of his property or income which may hinder or delay his creditors, either for his own benefit,[37] or for the support of himself or family,[38] or in favor of any

Mich. 329, 74 Am. Dec. 690. See also Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 11 Fed. Cas. No. 5,964.

36. Removal of assignee.—Fellows *v.* Commercial, etc., Bank, 6 Rob. (La.) 246; Riggs *v.* Murray, 2 Johns. Ch. (N. Y.) 565; McCormack *v.* Bignall, 1 Tex. App. Civ. Cas. § 760.

Consent of creditors.— The assignor may make a valid reservation of a power to remove trustees with consent of the creditors. Wright *v.* Thomas, 9 Biss. (U. S.) 244, 1 Fed. 716.

Appointment of successor.— A provision that if the assignee decline to accept and execute the trust or should a vacancy occur through the death of the assignee or otherwise, the assignor, with the consent of the creditors, shall have power to appoint a successor in his stead is not such a reservation as will render the assignment invalid. Vansands *v.* Miller, 24 Conn. 180; Smith *v.* Bowdre, 69 Miss. 692, 13 So. 829; Robins *v.* Embry, Sm. & M. Ch. (Miss.) 207. But see Planck *v.* Schermerhorn, 3 Barb. Ch. (N. Y.) 644, holding that a power reserved to the assignor to name a successor to the assignee, should the latter decline to act, renders the assignment invalid as to creditors.

37. Reservation for benefit of debtor.— *Alabama.*— Gazzam *v.* Poyntz, 4 Ala. 374, 37 Am. Dec. 745.

Delaware.— Maberry *v.* Shisler, 1 Harr. (Del.) 349.

Illinois.— Hardin *v.* Osborne, 60 Ill. 93.

Iowa.—Moss *v.* Humphrey, 4 Greene (Iowa) 443.

Kansas.— Wichita Wholesale Grocery Co. *v.* Records, 40 Kan. 119, 19 Pac. 346; Clark *v.* Robbins, 8 Kan. 574; Kayser *v.* Heavenrich, 5 Kan. 324.

Kentucky.— Grinstead *v.* Richardson, 12 Ky. L. Rep. 798.

Maine.— Foster *v.* Libby, 24 Me. 448.

Maryland.— Green *v.* Trieber, 3 Md. 11.

Massachusetts.— Platt *v.* Brown, 16 Pick. (Mass.) 553; Harris *v.* Sumner, 2 Pick. (Mass.) 129.

Minnesota.— *Compare* Blackman *v.* Wheaton, 13 Minn. 326.

Mississippi.— Montgomery *v.* Goodbar, 69 Miss. 333, 13 So. 624; Henderson *v.* Downing, 24 Miss. 106; Robins *v.* Embry, Sm. & M. Ch. (Miss.) 207.

Missouri.— Baker *v.* Harvey, 133 Mo. 653, 34 S. W. 853.

New York.— Haydock *v.* Coope, 53 N. Y. 68; Oliver Lee, etc., Bank *v.* Talcott, 19 N. Y. 146; Leitch *v.* Hollister, 4 N. Y. 211; Kennedy *v.* Wood, 52 Hun (N. Y.) 46, 4 N. Y. Suppl. 758, 22 N. Y. St. 132; Wilson *v.* Ferguson, 10 How. Pr. (N. Y.) 175; Riggs *v.* Murray, 2 Johns. Ch. (N. Y.) 565; Mead *v.* Phillips, 1 Sandf. Ch. (N. Y.) 83.

North Carolina.—Hafner *v.* Irwin, 23 N. C. 490.

Ohio.— Dickson *v.* Rawson, 5 Ohio St. 218; Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637.

Pennsylvania.— Johns *v.* Bolton, 12 Pa. St. 339.

Texas.— Baldwin *v.* Peet, 22 Tex. 708, 75 Am. Dec. 806; Wright *v.* Linn, 16 Tex. 34.

United States.— Curtis *v.* Worstman, 25 Fed. 893; Stadler *v.* Carroll, 19 Fed. 721; Muller *v.* Norton, 19 Fed. 719; Lawrence *v.* Norton, 4 Woods (U. S.) 406, 15 Fed. 853.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 306.

In Virginia it has been held that an insolvent debtor may reserve the use and enjoyment of the assigned property to himself until the trustee is required by a creditor to take possession. Lewis *v.* Glenn, 84 Va. 947, 6 S. E. 866.

The exception of specific property without reservation, stipulation, or any benefit in favor of the grantor does not render the assignment void as to creditors. Knight *v.* Waterman, 36 Pa. St. 258. So the reservation of a trifling sum, where the assets are specifically designated in the schedule, is not a badge of fraud. Swearingen *v.* Hendley, 1 Tex. Unrep. Cas. 639; Long *v.* Meriden Britannia Co., 94 Va. 594, 27 S. E. 499. See also Blow *v.* Gage, 44 Ill. 208. And a stipulation that the deed shall not be put on record "for a few days," or reserving the right of redemption will not vitiate the assignment. Hoopes *v.* Knell, 31 Md. 550; Dow *v.* Platner, 16 N. Y. 562. A direction to the trustee to take charge of and sell the property when directed so to do by the creditors is not a reservation in the grantor. Stoneburner *v.* Motley, 95 Va. 784, 30 S. E. 364. And the express omission of property subject to a lien will not necessarily vitiate the assignment. Henry *v.* Root, 38 Mich. 371.

38. Reservation for support of debtor or family.— *Alabama.*— Richards *v.* Hazzard, 1 Stew. & P. (Ala.) 139.

Maryland.— Green *v.* Trieber, 3 Md. 11.

New York.— Mackie *v.* Cairns, 5 Cow. (N. Y.) 547, 15 Am. Dec. 477. *Compare* Austin *v.* Bell, 20 Johns. (N. Y.) 442, 11 Am. Dec. 297; Murray *v.* Riggs, 15 Johns. (N. Y.) 571.

North Carolina.— Hafner *v.* Irwin, 23 N. C. 490.

Ohio.— Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637.

person not a creditor.[39] And such assignment is void though the reservation does not appear on the face of the instrument.[40]

2. Assignment Purporting to Convey All Property Some authorities hold that an assignment which purports to convey all the property of the assignor, but which intentionally withholds part, not exempt from execution, is void.[41] Others hold that this will not invalidate the assignment, since the title is in the assignee and he may in a proper proceeding compel the delivery of the assets withheld.[42]

3. Exempt Property. The reservation of such property as the law exempts from execution will not invalidate an assignment,[43] and the same has been held to

Pennsylvania.— McClurg *v.* Lecky, 3 Penr. & W. (Pa.) 83, 23 Am. Dec. 64.

Texas.— Carlton *v.* Baldwin, 22 Tex. 724.

Assent of creditors.— A reservation of a portion of his property for the benefit of the assignor or his family will not invalidate the assignment when all the creditors assent thereto. Green *v.* Trieber, 3 Md. 11.

39. Reservation in favor of one not a creditor.— Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637; Curtis *v.* Wortsman, 25 Fed. 893.

40. Reservation not apparent.— Platt *v.* Brown, 16 Pick. (Mass.) 553; Harris *v.* Sumner, 2 Pick. (Mass.) 129.

41. *Arkansas.*— Penzel Grocer Co. *v.* Williams, 53 Ark. 81, 13 S. W. 736; Probst *v.* Welden, 46 Ark. 405.

Colorado.— Campbell *v.* Colorado Coal, etc., Co., (Colo. 1885) 7 Pac. 291.

Indian Territory.— Tait *v.* Carey, (Indian Terr. 1899) 49 S. W. 50.

Kentucky.— Kleine *v.* Nie, 88 Ky. 542, 11 Ky. L. Rep. 583, 11 S. W. 590.

Michigan.— See Farrington *v.* Sexton, 43 Mich. 454, 5 N. W. 654.

Mississippi.— Montgomery *v.* Goodbar, 69 Miss. 333, 13 So. 624; Marks *v.* Bradley, 69 Miss. 1, 10 So. 922.

New York.— Constable *v.* Hardenbergh, 4 N. Y. App. Div. 143, 38 N. Y. Suppl. 694, 74 N. Y. St. 123; Bagley *v.* Bowe, 50 N. Y. Super. Ct. 100. *Compare* Miller *v.* Halsey, 4 Abb. Pr. N. S. (N. Y.) 28.

Rhode Island.— Spencer *v.* Jackson, 2 R. I. 35.

West Virginia.— Clarke *v.* Figgins, 27 W. Va. 663.

United States.— Fuller *v.* Ives, 6 McLean (U. S.) 478, 9 Fed. Cas. No. 5,150; Gilkerson *v.* Hamilton, 10 Fed. Cas. No. 5,424*a*, 1 Am. L. Mag. 35.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 304.

Note for rent.— Since a deed of assignment purporting to convey all the assignor's lands, tenements, and hereditaments carries with it, as a necessary incident, the rents of the lands conveyed, the retention of notes given for rent, and their subsequent delivery by the assignor to a third person, is ineffectual to defeat the assignee's rights thereto, and does not therefore affect the validity of the assignment. Allen *v.* Smith, 72 Miss. 689, 18 So. 579.

42. Turrill *v.* McCarthy, (Iowa 1901) 87 N. W. 667; Loomis *v.* Stewart, 75 Iowa 387, 39 N. W. 660; Pike *v.* Bacon, 21 Me. 280, 38 Am. Dec. 259; Williams *v.* Lord, 75 Va. 390.

43. Exempt property.— *Alabama.*— Richardson *v.* Stringfellow, 100 Ala. 416, 14 So. 283; Southern Suspender Co. *v.* Van Borries, 91 Ala. 507, 8 So. 367; Flournoy *v.* Lyon, 62 Ala. 213.

Arkansas.— Lazarus *v.* Camden Nat. Bank, 64 Ark. 322, 42 S. W. 412; King *v.* Hargadine-McKittrick Dry Goods Co., 60 Ark. 1, 28 S. W. 514. See also Clark Shoe Co. *v.* Edwards, 57 Ark. 331, 21 S. W. 477.

Florida.— Parker *v.* Cleveland, 37 Fla. 39, 19 So. 344.

Indiana.— Garnor *v.* Frederick, 18 Ind. 507.

Indian Territory.— Robinson *v.* Belt, 2 Indian Terr. 360, 51 S. W. 975.

Iowa.— Bradley *v.* Bischel, 81 Iowa 80, 46 N. W. 755; Perry *v.* Vezina, 63 Iowa 25, 18 N. W. 657.

Kentucky.— Grinstead *v.* Richardson, 12 Ky. L. Rep. 798; Moore *v.* Stege, 11 Ky. L. Rep. 330.

Maryland.— Muhr *v.* Pinover, 67 Md. 480, 10 Atl. 289.

Michigan.— Hollister *v.* Loud, 2 Mich. 309.

Mississippi.— Richardson *v.* Marqueze, 59 Miss. 80, 42 Am. Rep. 353. See also Mahorner *v.* Forcheimer, 73 Miss. 302, 18 So. 570.

Missouri.— Rainwater *v.* Stevens, 15 Mo. App. 544.

Nebraska.— Miller *v.* Waite, 59 Nebr. 319, 80 N. W. 907; Lininger *v.* Raymond, 9 Nebr. 40, 2 N. W. 359.

North Carolina.— Thomas *v.* Fulford, 117 N. C. 667, 23 S. E. 635; Blair *v.* Brown, 116 N. C. 631, 21 S. E. 434; Davis *v.* Smith, 113 N. C. 94, 18 S. E. 53; Barber *v.* Buffaloe, 111 N. C. 206, 16 S. E. 386; Morehead Banking Co. *v.* Whitaker, 110 N. C. 345, 14 S. E. 920.

North Dakota.— Red River Valley Bank *v.* Freeman, 1 N. D. 196, 46 N. W. 36.

Pennsylvania.—Hildebrand *v.* Bowman, 100 Pa. St. 580; Heckman *v.* Messinger, 49 Pa. St. 465; Mulford *v.* Shirk, 26 Pa. St. 473; Johns *v.* Bolton, 12 Pa. St. 339.

South Carolina.— Haynes *v.* Hoffman, 46 S. C. 157, 24 S. E. 103; Adler *v.* Cloud, 42 S. C. 272, 20 S. E. 393; Wiesenfeld *v.* Stevens, 15 S. C. 554. See also Durham Fertilizer Co. *v.* Hemphill, 45 S. C. 621, 24 S. E. 85.

South Dakota.— Dawley *v.* Sherwin, 5 S. D. 594, 59 N. W. 1027.

Tennessee.— Farquharson *v.* McDonald, 2 Heisk. (Tenn.) 404.

be true of a reservation of property not, in fact, exempt, if the claim that the property was exempt was made in good faith.[44]

C. Of Possession or Control of Property — 1. In General. A provision in an assignment permitting the assignor to remain in the possession or control of the assigned property vitiates the assignment if it hinders and delays the creditors or inures to the benefit of the assignor;[45] but if the continuance of the grantor in possession is with the consent of the creditors, or if it is for the benefit of the creditors that the assignor be allowed to retain possession or control, the assignment will be valid.[46] Whether such a provision is for the benefit of the

Texas.— Baldwin *v.* Peet, 22 Tex. 708, 75 Am. Dec. 806.

Wisconsin.— Severson *v.* Porter, 73 Wis. 70, 40 N. W. 577; Cribben *v.* Ellis, 69 Wis. 337, 34 N. W. 154; McNair *v.* Rewey, 62 Wis. 167, 22 N. W. 339.

United States.— Wooldridge *v.* Irving, 23 Fed. 676.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 320.

Exemption from proceeds of sale.— Where it is provided that the assignee shall dispose of all the property and pay the assignor the value of his exemption out of the proceeds the reservation is void. King *v.* Ruble, 54 Ark. 418, 16 S. W. 7. *Contra,* Blair *v.* Brown, 116 N. C. 631, 21 S. E. 434; Adler *v.* Cloud, 42 S. C. 272, 20 S. E. 393.

44. Invalid claim of exemption.— Baker *v.* Baer, 59 Ark. 503, 28 S. W. 28; Dorr *v.* Schmidt, 38 Fla. 354, 21 So. 279; McFarland *v.* Bate, 45 Kan. 1, 25 Pac. 238, 10 L. R. A. 521; Dubuque First Nat. Bank *v.* Baker, 68 Wis. 442, 32 N. W. 523.

A deed is not avoided by an invalid reservation of a dower right. Carter *v.* Cocke, 64 N. C. 239.

45. Retention of possession invalid.— *Alabama.*— Montgomery *v.* Kirksey, 26 Ala. 172.

Illinois.— Hardin *v.* Osborne, 60 Ill. 93.

Kansas.— Brigham *v.* Jones, (Kan. 1892) 29 Pac. 308.

Maryland.— Green *v.* Trieber, 3 Md. 11.

Massachusetts.— Foster *v.* Saco Mfg. Co., 12 Pick. (Mass.) 451.

Michigan.— Pierson *v.* Manning, 2 Mich. 445.

Mississippi.— Robins *v.* Embry, Sm. & M. Ch. (Miss.) 207.

Missouri.— Martin *v.* Rice, 24 Mo. 581.

New Jersey.— Owen *v.* Arvis, 26 N. J. L. 22; Knight *v.* Packer, 12 N. J. Eq. 214, 72 Am. Dec. 388.

New York.— Renton *v.* Kelly, 49 Barb. (N. Y.) 536.

Ohio.—Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637.

Pennsylvania.—Whallon *v.* Scott, 10 Watts (Pa.) 237.

Tennessee.—Galt *v.* Dibrell, 10 Yerg. (Tenn.) 146.

Virginia.— Saunders *v.* Waggoner, 82 Va. 316; Sheppards *v.* Turpin, 3 Gratt. (Va.) 357.

United States.— Means *v.* Montgomery, 23 Fed. 421.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 326.

In Arizona a reservation by the assignor of possession of personalty invalidates the assignment but a reservation of the possession of realty does not. Rochester *v.* Sullivan, (Ariz. 1886) 11 Pac. 58.

Rebuttal of presumption.— Where an assignment for the benefit of one creditor leaves the property in the possession of the assignor the court should instruct that, though such fact is a badge of fraud, it is open to explanation, and the presumption arising therefrom may be rebutted. Howerton *v.* Holt, 23 Tex. 51. See also Abercrombie *v.* Bradford, 16 Ala. 560.

46. Retention of possession valid.— *Alabama.*— Globe Iron Roofing, etc., Co. *v.* Thacher, 87 Ala. 458, 6 So. 366; Perry Ins., etc., Co. *v.* Foster, 58 Ala. 502, 29 Am. Rep. 779; Lanier *v.* Driver, 24 Ala. 149; Shackelford *v.* Planters', etc., Bank, 22 Ala. 238; Abercrombie *v.* Bradford, 16 Ala. 560.

Maine.— Brinley *v.* Spring, 7 Me. 241.

Massachusetts.—Baxter *v.* Wheeler, 9 Pick. (Mass.) 21.

Missouri.— Howell *v.* Bell, 29 Mo. 135.

North Carolina.— Dewey *v.* Littlejohn, 37 N. C. 495; Cannon *v.* Peebles, 24 N. C. 449.

Pennsylvania.— Klapp *v.* Shirk, 13 Pa. St. 589.

Virginia.— Hurst *v.* Leckie, 97 Va. 550, 34 S. E. 464; Noyes *v.* Carter, (Va. 1895) 23 S. E. 1; Paul *v.* Baugh, 85 Va. 955, 9 S. E. 329; Lewis *v.* Glenn, 84 Va. 947, 6 S. E. 866; Young *v.* Willis, 82 Va. 291; Sipe *v.* Earman, 26 Gratt. (Va.) 563; Dancé *v.* Seaman, 11 Gratt. (Va.) 778; Kevan *v.* Branch, 1 Gratt. (Va.) 274.

United States.— Estes *v.* Gunter, 122 U. S. 450, 7 S. Ct. 1275, 30 L. ed. 1228; Means *v.* Montgomery, 23 Fed. 421; Wright *v.* Thomas, 9 Biss. (U. S.) 244, 1 Fed. 716.

England.— Owen *v.* Body, 5 A. & E. 28, 2 H. & W. 31, 5 L. J. K. B. 191, 6 N. & M. 448, 31 E. C. L. 510; Wheatcroft *v.* Hickman, 9 C. B. N. S. 47, 8 H. L. Cas. 268, 7 Jur. N. S. 105, 30 L. J. C. P. 125, 8 Wkly. Rep. 754, 99 E. C. L. 47.

Assent of assignor to sale.— A deed of trust is not vitiated by a clause requiring the assent of the grantor to any sale in bulk of the goods covered by it. Smith, etc., Implement Co. *v.* Thurman, 29 Mo. App. 186.

Option of assignees.— A deed conveying a plantation to trustees for the benefit of creditors is not void because it provides that the trustees may, if they think proper, permit the grantor to have the management thereof, under the supervision of the trustees, until

assignor or for the benefit of the creditors is generally a question of fact for the jury.[47]

2. Continuance of Business. Where it is provided that the assignor shall remain in possession of the assigned property and continue the selling and buying of goods in the usual course of business without being accountable to any person the assignment will be declared void and it is not necessary to show actual fraudulent intent.[48]

D. Of Surplus. A reservation to the debtor of the surplus after the payment of all debts will not invalidate an assignment;[49] but a reservation of the

the growing crop is sold. Planters', etc., Bank *v.* Clarke, 7 Ala. 765.

47. Question for jury.— Thompson *v.* Foerstel, 10 Mo. App. 290; Young *v.* Booe, 33 N. C. 347; Cannon *v.* Peebles, 24 N. C. 449; Howerton *v.* Holt, 23 Tex. 51.

48. *Maryland.*— Price *v.* Pitzer, 44 Md. 521.

Massachusetts.— Foster *v.* Saco Mfg. Co., 12 Pick. (Mass.) 451.

Missouri.— Billingsley *v.* Bunce, 28 Mo. 547; Martin *v.* Maddox, 24 Mo. 575; Brooks *v.* Wimer, 20 Mo. 503; Oliver-Finnie Grocer Co. *v.* Miller, 53 Mo. App. 107.

New York.— Connah *v.* Sedgwick, 1 Barb. (N. Y.) 210.

Tennessee.— Lowenstein *v.* Love, 16 Lea (Tenn.) 658.

United States.— Means *v.* Dowd, 128 U. S. 273, 9 S. Ct. 65, 32 L. ed. 429; Hill *v.* Agnew, 12 Fed. 230.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 328.

Employment of assignor.— A provision for the employment of the assignor or his servants to assist in the execution of the trust under the supervision of the trustee is not of itself improper. Rindskoff *v.* Guggenheim, 3 Coldw. (Tenn.) 284; Means *v.* Montgomery, 23 Fed. 421. See also Faunce *v.* Lesley, 6 Pa. St. 121. But where the condition of the assigned property renders it clear that such provision is merely for the benefit of the assignor it is evidence of a fraudulent intent which, with other facts, may be submitted to the jury. Renton *v.* Kelly, 49 Barb. (N. Y.) 536; Currie *v.* Hart, 2 Sandf. Ch. (N. Y.) 353; Frank *v.* Robinson, 96 N. C. 28, 1 S. E. 781; Means *v.* Montgomery, 23 Fed. 421.

49. After payment of all creditors.— *Alabama.*— Miller *v.* Stetson, 32 Ala. 161.

Arkansas.— Collier *v.* Davis, 47 Ark. 367, 1 S. W. 684, 58 Am. Rep. 758.

District of Columbia.— Cissell *v.* Johnston, 4 App. Cas. (D. C.) 335; Brown *v.* McLean, 5 Mackey (D. C.) 559. *Compare* Kansas City Packing Co. *v.* Hoover, 1 App. Cas. (D. C.) 268.

Georgia.— Rowland *v.* Coleman, 45 Ga. 204; Banks *v.* Clapp, 12 Ga. 514.

Illinois.— Finlay *v.* Dickerson, 29 Ill. 9; Conkling *v.* Carson, 11 Ill. 503.

Indiana.—New Albany, etc., R. Co. *v.* Huff, 19 Ind. 444. See also Keen *v.* Preston, 24 Ind. 395.

Kentucky.— Ely *v.* Hair, 16 B. Mon. (Ky.) 230.

Maryland.—Sangston *v.* Gaither, 3 Md. 40; Beatty *v.* Davis, 9 Gill (Md.) 211.

Missouri.— Douglass *v.* Cissna, 17 Mo. App. 44; Ring *v.* Ring, 12 Mo. App. 88.

Nebraska.— Lininger *v.* Raymond, 9 Nebr. 40, 2 N. W. 359; Morgan *v.* Bogue, 7 Nebr. 429.

New York.— Portchester First Nat. Bank *v.* Halsted, 20 Abb. N. Cas. (N. Y.) 155; McClelland *v.* Remsen, 36 Barb. (N. Y.) 622, 14 Abb. Pr. (N. Y.) 331, 23 How. Pr. (N. Y.) 175; Ely *v.* Cook, 18 Barb. (N. Y.) 612; Van Rossum *v.* Walker, 11 Barb. (N. Y.) 237; Wintringham *v.* Lafoy, 7 Cow. (N. Y.) 735.

Ohio.—Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637.

Pennsylvania.— Dana *v.* U. S. Bank, 5 Watts & S. (Pa.) 223; Rahn *v.* McElrath, 6 Watts (Pa.) 151.

Texas.— Moody *v.* Carroll, 71 Tex. 143, 8 S. W. 510, 10 Am. St. Rep. 734.

Vermont.— Hall *v.* Denison, 17 Vt. 310.

Virginia.— Johnston *v.* Zane, 11 Gratt. (Va.) 552.

Wisconsin.— Lindsay *v.* Guy, 57 Wis. 200, 15 N. W. 181.

United States.— Means *v.* Montgomery, 23 Fed. 421; Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 11 Fed. Cas. No. 5,964.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 332.

An assignment by partnership which provides that after paying all the firm's creditors in full the surplus, if any, shall be paid to the assignors does not affect the validity of the assignment. Bogert *v.* Haight, 9 Paige (N. Y.) 297; Hubler *v.* Waterman, 33 Pa. St. 414; Trumbo *v.* Hamel, 29 S. C. 520, 8 S. E. 83. *Compare* Collomb *v.* Caldwell, 16 N. Y. 484.

Omission of small claims.— The fact that an assignment for benefit of creditors omitted through mistake to provide for certain small claims, while it reserved the surplus to the debtor after payment of the specified debts, will not vitiate the assignment where the omitted creditors do not complain. McFarland *v.* Birdsall, 14 Ind. 126.

Payment of surplus into court.— An assignment is not invalid because it provides that the surplus, if any, shall be turned over to the debtor instead of being paid into court as provided by statute. Cunningham *v.* Norton, 125 U. S. 77, 8 S. Ct. 804, 31 L. ed. 624.

Surplus to wife.— Where a debtor conveyed all his property to a trustee for the benefit of his creditors and reserved the surplus to his wife after the satisfaction of their demands, subsequent creditors could not cause the title to the surplus to be diverted on the

surplus for the benefit of the assignor after payment of the consenting or releasing creditors,[50] or after payment of a part only of the creditors,[51] renders an assignment fraudulent and void.

VI. STIPULATIONS OR PROVISIONS AS TO POWERS OF ASSIGNEE.

A. In General. The statutes usually contain particular provisions as to the management of the trust, and to what extent the assignor should or may, in the instrument of assignment, confer or attempt to confer upon the assignee powers in its management has often been before the courts. The granting by deed of excessive powers or immunities, or the restricting the legal liabilities of the assignee, is generally held to render an assignment fraudulent and void.[52] But

ground that it was fraudulent as to them. Vance *v.* Smith, 2 Heisk. (Tenn.) 343.

50. After payment of consenting or releasing creditors.— *Alabama.*— West *v.* Snodgrass, 17 Ala. 549; Grimshaw *v.* Walker, 12 Ala. 101. *Compare* Brown *v.* Lyon, 17 Ala. 659.

Arkansas.—McReynolds *v.* Dedman, 47 Ark. 347, 1 S. W. 552.

Illinois.— Ramsdell *v.* Sigerson, 7 Ill. 78. But see Conkling *v.* Carson, 11 Ill. 503, holding that a clause authorizing the payment to the assignor of the surplus that may remain after the satisfaction of the debts of such creditors as shall become parties to it does not invalidate the assignment.

Maryland.— Whedbee *v.* Stewart, 40 Md. 414; Bridges *v.* Hindes, 16 Md. 101; Malcolm *v.* Hodges, 8 Md. 418; Sangston *v.* Gaither, 3 Md. 40; Green *v.* Trieber, 3 Md. 11.

Massachusetts.— *Compare* Andrews *v.* Ludlow, 5 Pick. (Mass.) 28.

Minnesota.— An assignment made under Minn. Laws (1881), c. 148, is not invalidated by a stipulation therein that any surplus remaining in the hands of the assignee after payment of the releasing creditors should be returned to the assignor. Matter of Mann, 32 Minn. 60, 19 N. W. 347.

New Hampshire.—*Compare* Haven *v.* Richardson, 5 N. H. 113.

New York.—Berry *v.* Riley, 2 Barb. (N. Y.) 307; Austin *v.* Bell, 20 Johns. (N. Y.) 442, 11 Am. Dec. 297.

Pennsylvania.— An assignment in trust for creditors is good, although it excludes unreleasing creditors and reserves a trust of the surplus for the debtors. Mechanics' Bank *v.* Gorman, 8 Watts & S. (Pa.) 304.

Rhode Island.— A voluntary assignment of all the property of a debtor, with a provision that no creditor shall share except upon the condition that he executes a discharge in full of all his claims against the assignor, and that the dividends of the creditors who refuse such a discharge shall result to the assignor, is valid. Dockray *v.* Dockray, 2 R. I. 547.

South Carolina.— Claflin *v.* Iseman, 23 S. C. 416; Jacot *v.* Corbett, Cheves Eq. (S. C.) 71.

Texas.— Fechheimer *v.* Ball, 1 Tex. App. Civ. Cas. § 766.

Virginia.— *Contra,* Gordon *v.* Cannon, 18 Gratt. (Va.) 387.

United States.— Seale *v.* Vaiden, 4 Woods (U. S.) 659, 10 Fed. 831.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 333; and *infra,* VII, B.

51. After payment of part of creditors.— *Florida.*— Howell *v.* Dixon, 21 Fla. 413, 58 Am. Rep. 673.

Georgia.— *Compare* Rowland *v.* Coleman, 45 Ga. 204.

Illinois.— Selz *v.* Evans, 6 Ill. App. 466; Lill *v.* Brant, 6 Ill. App. 366.

Maryland.— Sangston *v.* Gaither, 3 Md. 40.

Michigan.— Pierson *v.* Manning, 2 Mich. 445.

Minnesota.— Banning *v.* Sibley, 3 Minn. 389; Truitt *v.* Caldwell, 3 Minn. 364, 74 Am. Dec. 764.

Mississippi.— The reservation to the assignor of the surplus remaining after the payment of the debts provided for does not *per se* invalidate a deed of assignment for creditors. Anderson *v.* Lachs, 59 Miss. 111.

Missouri.— Where the assignment is made in favor of certain mentioned creditors and the surplus, if any, is reserved to the assignor the assignment is not thereby void on the face of it. Johnson *v.* McAllister. 30 Mo. 327. See also Richards *v.* Levin, 16 Mo. 596; Smith, etc., Implement Co. *v.* Thurman, 29 Mo. App. 186.

New York.— Knapp *v.* McGowan, 96 N. Y. 75; Leitch *v.* Hollister, 4 N. Y. 211; Barney *v.* Griffin, 2 N. Y. 365; Doremus *v.* Lewis, 8 Barb. (N. Y.) 124; Strong *v.* Skinner, 4 Barb. (N. Y.) 546; Goodrich *v.* Downs, 6 Hill (N. Y.) 438; Lansing *v.* Woodworth, 1 Sandf. Ch. (N. Y.) 43. *Compare* Bishop *v.* Halsey, 3 Abb. Pr. (N. Y.) 400, 13 How. Pr. (N. Y.) 154; Beck *v.* Burdett, 1 Paige (N. Y.) 305, 19 Am. Dec. 436.

Ohio.— Dickson *v.* Rawson, 5 Ohio St. 218; Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637.

Texas.—*Compare* Howerton *v.* Holt, 23 Tex. 51.

Vermont.— Therasson *v.* Hickok, 37 Vt. 454; Goddard *v.* Bridgman, 25 Vt. 351, 60 Am. Dec. 272; Dana *v.* Lull, 17 Vt. 390.

Virginia.— *Contra,* Dance *v.* Seaman, 11 Gratt. (Va.) 778.

52. Excessive powers render assignment fraudulent.— *Alabama.*— Gazzam *v.* Poyntz, 4 Ala. 374, 37 Am. Dec. 745.

in many instances where the power or restriction is a direction consistent with good faith and the interest of creditors, no invalidity results,[53] or the direction of

Maryland.— Jones *v.* Syer, 52 Md. 211, 36 Am. Rep. 366; Inloes *v.* American Exch. Bank, 11 Md. 173, 69 Am. Dec. 190; American Exch. Bank *v.* Inloes, 7 Md. 380.

Missouri.— Attleboro First Nat. Bank *v.* Hughes, 10 Mo. App. 7.

New York.— McConnell *v.* Sherwood, 84 N. Y. 522, 38 Am. Rep. 537; Dunham *v.* Waterman, 17 N. Y. 9, 72 Am. Dec. 406; Litchfield *v.* White, 7 N. Y. 438, Seld. Notes (N. Y.) 37, 57 Am. Dec. 534; Renton *v.* Kelly, 49 Barb. (N. Y.) 536; D'Ivernois *v.* Leavitt, 23 Barb. (N. Y.) 63.

Pennsylvania.— A stipulation in an assignment by the owner of iron-works that the trustee should manufacture iron so long as the creditors should determine it was their interest to do so was void as against non-assenting creditors. Peters *v.* Light, 76 Pa. St. 289. But *compare* Guiterman *v.* Landis, 2 Pearson (Pa.) 188.

Rhode Island.—Gardner *v.* Commercial Nat. Bank, 13 R. I. 155.

Wisconsin.— Hutchinson *v.* Lord, 1 Wis. 286, 60 Am. Dec. 381.

United States.— Webb *v.* Armistead, 26 Fed. 70; Hill *v.* Agnew, 12 Fed. 230.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 128.

Restricting liabilities of assignee.— *Connecticut.*— De Wolf *v.* Sprague Mfg. Co., 49 Conn. 282.

District of Columbia.— Kansas City Packing Co. *v.* Hoover, 1 App. Cas. (D. C.) 278.

Illinois.— Finlay *v.* Dickerson, 29 Ill. 9; Robinson *v.* Nye, 21 Ill. 592; McIntire *v.* Benson, 20 Ill. 500.

Kentucky.— Pitts *v.* Viley, 4 Bibb (Ky.) 446.

New York.— Litchfield *v.* White, 7 N. Y. 438, 57 Am. Dec. 534 [*affirming* 3 Sandf. (N. Y.) 545]; Olmstead *v.* Herrick, 1 E. D. Smith (N. Y.) 310.

Tennessee.— August *v.* Seeskind, 6 Coldw. (Tenn.) 166.

Texas.— Carlton *v.* Baldwin, 22 Tex. 724; Fechheimer *v.* Ball, 1 Tex. App. Civ. Cas. § 769.

Wisconsin.— Hutchinson *v.* Lord, 1 Wis. 286, 60 Am. Dec. 381.

United States.—Hayes *v.* Johnson, 1 Hayw. & H. (U. S.) 174.

Canada.— Kirk *v.* Chisholm, 26 Can. Supreme Ct. 111.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 58.

53. Directions consistent with good faith. — *Alabama.*—Richardson *v.* Stringfellow, 100 Ala. 416, 14 So. 283. See also Ashurst *v.* Martin, 9 Port. (Ala.) 566.

Georgia.— Anthony *v.* Price, 92 Ga. 170, 17 S. E. 1024 (direction to employ clerk and dispose of property in store-house where situated); McCallie *v.* Walton, 37 Ga. 611, 95 Am. Dec. 369.

Illinois.— Blow *v.* Gage, 44 Ill. 208; Whipple *v.* Pope, 33 Ill. 334.

Maine.— Thomas *v.* Clark, 65 Me. 296.

Maryland.— Beatty *v.* Davis, 9 Gill (Md.) 211, power to mortgage estate. See also Farquharson *v.* Eichelberger, 15 Md. 63; Maennel *v.* Murdock, 13 Md. 164.

Massachusetts.—Woodward *v.* Marshall, 22 Pick. (Mass.) 468, power to finish and prepare for market goods in process of manufacture.

Michigan.— Watkins *v.* Wallace, 19 Mich. 57, directing disputed questions to be submitted to arbitrators.

Minnesota.— Langdon *v.* Thompson, 25 Minn. 509.

Mississippi.— Wickham *v.* Green, 61 Miss. 463; Robins *v.* Embry, Sm. & M. Ch. (Miss.) 207.

Missouri.— Gates *v.* Labeaume, 19 Mo. 17.

New Hampshire.— Rundlett *v.* Dole, 10 N. H. 458.

New York.— Robbins *v.* Butcher, 104 N. Y. 575, 11 N. E. 272 (power to complete unfinished buildings); Townsend *v.* Stearns, 32 N. Y. 209; Watson *v.* Butcher, 37 Hun (N. Y.) 391 [*reversing* Watson *v.* Brown, 15 Abb. N. Cas. (N. Y.) 412]; Van Dine *v.* Willett, 38 Barb. (N. Y.) 319, 24 How. Pr. (N. Y.) 206; Mann *v.* Witbeck, 17 Barb. (N. Y.) 388 (giving assignee in general terms discretion to take such measures as will advance the true interests of the estate); Whitney *v.* Krows, 11 Barb. (N. Y.) 198; Hitchcock *v.* Cadmus, 2 Barb. (N. Y.) 381; Dunham *v.* Waterman, 3 Duer (N. Y.) 166 (power to complete the manufacture of partially completed articles); Beste *v.* Burger, 17 Abb. N. Cas. (N. Y.) 162; Bellows *v.* Partridge, 12 N. Y. Leg. Obs. 219. See also Casey *v.* Janes, 37 N. Y. 608; Jacobs *v.* Allen, 18 Barb. (N. Y.) 549.

North Carolina.— Stoneburner *v.* Jeffreys, 116 N. C. 78, 21 S. E. 29, power to replenish stock of goods.

Ohio.— Conkling *v.* Coonrod, 6 Ohio St. 611.

Pennsylvania.— Dana *v.* U. S. Bank, 5 Watts & S. (Pa.) 223. See also Hennessy *v.* Western Bank, 6 Watts & S. (Pa.) 300, 40 Am. Dec. 560.

Rhode Island.—Waldron *v.* Wilcox, 13 R. I. 518.

Texas.— Eicks *v.* Copeland, 53 Tex. 581, 37 Am. Rep. 760.

Vermont.— Mussey *v.* Noyes, 26 Vt. 462.

Virginia.—See Gordon *v.* Cannon, 18 Gratt. (Va.) 387.

United States.— Talley *v.* Curtain, 54 Fed. 43, 8 U. S. App. 347, 4 C. C. A. 177 (power to complete manufacture of material on hand); Hill *v.* Woodberry, 49 Fed. 138, 4 U. S. App. 68, 1 C. C. A. 206 (power to sue to collect assets); Sanger *v.* Flow, 48 Fed. 152, 4 U. S. App. 32, 1 C. C. A. 56; Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 11 Fed. Cas. No. 5,964 (power to require oath of creditor as to truth of his debt).

the assignor is deemed merely nugatory,[54] or the exercise of the granted powers is under the direction of the courts.[55]

B. As to Compromise. As a rule giving the assignee power to compromise with creditors[56] renders the assignment fraudulent and void; but it has been held that he may be empowered to compromise bad or doubtful debts.[57]

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 128.

Power conferred or restriction imposed not inconsistent with the statute and not otherwise fraudulent does not affect the validity of the assignment. Maennel *v.* Murdock, 13 Md. 163; Madison First Nat. Bank *v.* Frost, 61 Wis. 335, 21 N. W. 280. Especially when the direction is to do something which the law requires the assignee to do in the performance of his legal duties. Jessup *v.* Hulse, 21 N. Y. 168 [*reversing* 29 Barb. (N. Y.) 539]; Ogden *v.* Peters, 21 N. Y. 23, 78 Am. Dec. 122.

Power to employ attorneys, clerks, or agents and to discharge the same does not render the assignment fraudulent and void, as the law implies such power.

Georgia.— Anthony *v.* Price, 92 Ga. 170, 17 S. E. 1024.

Kentucky.— Vernon *v.* Morton, 8 Dana (Ky.) 247.

Maryland.— Maennel *v.* Murdock, 13 Md. 163.

Michigan.—Nye *v.* Van Husan, 6 Mich. 329, 74 Am. Dec. 690.

Minnesota.— Langdon *v.* Thompson, 25 Minn. 509.

New York.— Casey *v.* Janes, 37 N. Y. 608, 5 Transcr. App. (N. Y.) 327; Jacobs *v.* Remsen, 36 N. Y. 668, 3 Transcr. App. (N. Y.) 129; Van Dine *v.* Willett, 38 Barb. (N. Y.) 319, 24 How. Pr. (N. Y.) 206; Mann *v.* Witbeck, 17 Barb. (N. Y.) 388.

United States.— See Bickham *v.* Lake, 51 Fed. 892 [*explaining* Mattison *v.* Judd, 59 Miss. 99].

54. Directions considered as surplusage and nugatory.— Falk *v.* Liebes, 6 Colo. App. 473, 42 Pac. 46; Adler *v.* Cloud, 42 S. C. 272, 20 S. E. 393; Schoolher *v.* Hutchins, 66 Tex. 324, 1 S. W. 266.

Provision empowering assignee to lease or mortgage estate is void, but does not invalidate an assignment which is otherwise unobjectionable. Darling *v.* Rogers, 22 Wend. (N. Y.) 483; Planck *v.* Schermerhorn, 3 Barb. Ch. (N. Y.) 644; Van Nest *v.* Yoe, 1 Sandf. Ch. (N. Y.) 4; Rogers *v.* De Forest, 7 Paige (N. Y.) 272.

55. Powers exercised under direction of court.— Maughlin *v.* Tyler, 47 Md. 545; Montgomery *v.* Galbraith, 11 Sm. & M. (Miss.) 555.

For instances of authority more extensive than contemplated by statute conferred upon assignee which have been held not to invalidate see:

Alabama.— Ravisies *v.* Alston, 5 Ala. 297.

Connecticut.— De Wolf *v.* A. & W. Sprague Mfg. Co., 49 Conn. 282; Kendall *v.* New-England Carpet Co., 13 Conn. 383; De Forest *v.* Eacon, 2 Conn. 633.

Kentucky.— Gerst *v.* Turley, 7 Ky. L. Rep. 217.

Massachusetts.—Woodward *v.* Marshall, 22 Pick. (Mass.) 468.

New York.— Hitchcock *v.* Cadmus, 2 Barb. (N. Y.) 381; Cunningham *v.* Freeborn, 11 Wend. (N. Y.) 240 [*affirming* 3 Paige (N. Y.) 557 (*affirming* 1 Edw. (N. Y.) 256)].

Virginia.— Williams *v.* Lord, 75 Va. 390; Marks *v.* Hill, 15 Gratt. (Va.) 400.

But for instances where such directions have been held to invalidate see:

Illinois.— Gardner *v.* Commercial Nat. Bank, 95 Ill. 298; Milligan *v.* O'Conor, 19 Ill. App. 487.

New York.— Schlussel *v.* Willett, 34 Barb. (N. Y.) 615, 12 Abb. Pr. (N. Y.) 397, 22 How. Pr. (N. Y.) 15.

Texas.—McCormack *v.* Bignall, 1 Tex. App. Civ. Cas. § 760.

West Virginia.— Landeman *v.* Wilson, 29 W. Va. 702, 2 S. E. 203.

United States.— Stafford Nat. Bank *v.* Sprague, 21 Blatchf. (U. S.) 473, 17 Fed. 784.

56. Authorizing compromise is fraudulent. — National Bank of Republic *v.* Hodge, 3 App. Cas. (D. C.) 140; Hudson *v.* Maze, 4 Ill. 578; Woodburn *v.* Mosher, 9 Barb. (N. Y.) 255; Grover *v.* Wakeman, 11 Wend. (N. Y.) 187, 25 Am. Dec. 624 [*affirming* 4 Paige (N. Y.) 23]. See Keevil *v.* Donaldson, 20 Kan. 165; McConnell *v.* Sherwood, 84 N. Y. 522, 38 Am. Rep. 537. *Contra*, White *v.* Monsarrat, 18 B. Mon. (Ky.) 809; Bellows *v.* Patridge, 19 Barb. (N. Y.) 176; Van Nest *v.* Yoe, 1 Sandf. Ch. (N. Y.) 4.

Power to collect the choses in action and discharge the debts due does not give the assignee power to compound the debts. Mussey *v.* Noyes, 26 Vt. 462.

Where the authority of an assignee for creditors is statutory and he is under the supervision of the court an assignment is not affected by the fact that it contains void provisions attempting to confer power to compound debts and power of substitution. Falk *v.* Liebes, 6 Colo. App. 473, 42 Pac. 46.

57. Compromise of bad or doubtful debts. — *Iowa.*— Berry *v.* Hayden, 7 Iowa 469.

Maryland.— Price *v.* De Ford, 18 Md. 489.

Michigan.— Watkins *v.* Wallace, 19 Mich. 57.

Mississippi.— Robins *v.* Embry, Sm. & M. Ch. (Miss.) 207.

Nebraska.— Lininger *v.* Raymond, 9 Nebr. 40, 2 N. W. 359.

New York.— Dow *v.* Platner, 16 N. Y. 562; Brigham *v.* Tillinghast, 15 Barb. (N. Y.) 618.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 141.

In Kentucky it has been held that authority might be given to settle and compromise any debts. White *v.* Monsarrat, 18 B. Mon. (Ky.) 809.

In New York the assignees may be empowered to compromise "or compound any

C. As to Manner and Time of Sale — 1. In General. Where a deed of assignment directs a different manner of sale than that prescribed by the statute it is void,[58] or a sale to be made upon different notice,[59] but lodging discretion in the assignee is ordinarily construed to be such discretion as is consistent with the statute and does not invalidate.[60]

2. On Credit. In many of the states an assignment which authorizes sales

claim by taking a part of the whole where they shall deem it expedient so to do." Bagley *v.* Bowe, 105 N. Y. 171, 11 N. E. 386, 59 Am. Rep. 488; McConnell *v.* Sherwood, 84 N. Y. 522, 38 Am. Rep. 537 [*affirming* 19 Hun (N. Y.) 519, 58 How. Pr. (N. Y.) 453]; Ginther *v.* Richmond, 18 Hun (N. Y.) 232.

58. Manner not provided by statute.— *Arkansas.*— Churchill *v.* Hill, 59 Ark. 54, 26 S. W. 378; Raleigh *v.* Griffith, 37 Ark. 150. See also Teah *v.* Roth, 39 Ark. 66. But see Adams *v.* Allen-West Commission Co., 64 Ark. 603, 44 S. W. 462.

Kansas.— Keevil *v.* Donaldson, 20 Kan. 165.

Maryland.— Jones *v.* Syer, 52 Md. 211, 36 Am. Rep. 366; Maughlin *v.* Tyler, 47 Md. 545; American Exch. Bank *v.* Inloes, 7 Md. 380.

Mississippi.— Armstrong *v.* Guenther, 67 Miss. 698, 7 So. 499; Mattison *v.* Judd, 59 Miss. 99. See also Richardson *v.* Stapleton, 60 Miss. 97. But see Armitage *v.* Rector, 62 Miss. 600.

New York.— Burdick *v.* Post, 6 N. Y. 522 [*affirming* 12 Barb. (N. Y.) 168]; Jessup *v.* Hulse, 29 Barb. (N. Y.) 539 [*reversed* in 21 N. Y. 168]; Woodburn *v.* Mosher, 9 Barb. (N. Y.) 255; Bagley *v.* Bowe, 50 N. Y. Super. Ct. 100; Meacham *v.* Sternes, 9 Paige (N. Y.) 398.

Tennessee.— Farmers', etc., Bank *v.* Martin, 96 Tenn. 1, 33 S. W. 565; Barcroft *v.* Snodgrass, 1 Coldw. (Tenn.) 430.

Texas.— Caton *v.* Mosely, 25 Tex. 374.

United States.— Jaffray *v.* McGehee, 107 U. S. 361, 2 S. Ct. 367, 27 L. ed. 495; Sumner *v.* Hicks, 2 Black (U. S.) 532, 17 L. ed. 355; Schoolfield *v.* Johnson, 3 McCrary (U. S.) 551, 11 Fed. 297; Bartlett *v.* Teah, 1 McCrary (U. S.) 176, 1 Fed. 768.

Contra, Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637; Willis *v.* Thompson, 85 Tex. 301, 20 S. W. 155; Schoolher *v.* Hutchins, 66 Tex. 324, 1 S. W. 266; Wert *v.* Schneider, 64 Tex. 327. See also cases cited *infra,* note 60.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 144.

Private sale.— In the Indian Territory an assignment for the benefit of creditors is void when the trustee is directed to sell at private sale and when no bond is filed as required by the Arkansas statute. Appolos *v.* Brady, 49 Fed. 401, 4 U. S. App. 209, 1 C. C. A. 299. But ordinarily, in the absence of a forbidding statute, it is proper to authorize the property to be sold at private sale. Halstead *v.* Gordon, 34 Barb. (N. Y.) 422; Landeman *v.* Wilson, 29 W. Va. 702, 2 S. E. 203; Kyle *v.* Harveys, 25 W. Va. 716, 52 Am. Rep. 235. See and *compare* cases cited *supra,* this note, and *infra,* note 60.

59. Upon notice other than that designated by statute.— Rice *v.* Frayser, 24 Fed. 460; Schoolfield *v.* Johnson, 3 McCrary (U. S.) 551, 11 Fed. 297.

60. Discretion of assignee consistent with statute.— *Alabama.*— England *v.* Reynolds, 38 Ala. 370; Evans *v.* Lamar, 21 Ala. 333.

California.— Wilhoit *v.* Lyons, 98 Cal. 409, 33 Pac. 325.

District of Columbia.— National Bank of Republic *v.* Hodge, 3 App. Cas. (D. C.) 140; Hayes *v.* Johnson, 6 D. C. 174.

Illinois.— Pierce *v.* Brewster, 32 Ill. 268; Finlay *v.* Dickerson, 29 Ill. 9; Sackett *v.* Mansfield, 26 Ill. 21.

Iowa.— Wooster *v.* Stanfield, 11 Iowa 128.

Kentucky.— Ely *v.* Hair, 16 B. Mon. (Ky.) 230.

Maryland.— Farquharson *v.* Eichelberger, 15 Md. 63; Maennel *v.* Murdock, 13 Md. 163; Inloes *v.* American Exch. Bank, 11 Md. 173, 69 Am. Dec. 190.

Massachusetts.— Stevens *v.* Bell, 6 Mass. 339.

Mississippi.— Baum *v.* Pearce, 67 Miss. 700, 7 So. 548; Wickham *v.* Green, 61 Miss. 463; Anderson *v.* Lachs, 59 Miss. 111.

New York.— Benedict *v.* Huntington, 32 N. Y. 219; Townsend *v.* Stearns, 32 N. Y. 209; Griffin *v.* Marquardt, 21 N. Y. 121; Bellows *v.* Patridge, 19 Barb. (N. Y.) 176; Clapp *v.* Utley, 16 How. Pr. (N. Y.) 384; Wilson *v.* Ferguson, 10 How. Pr. (N. Y.) 175; Southworth *v.* Sheldon, 7 How. Pr. (N. Y.) 414; Cunningham *v.* Freeborn, 11 Wend. (N. Y.) 240 [*affirming* 3 Paige (N. Y.) 557 (*affirming* 1 Edw. (N. Y.) 256)]. See also Jessup *v.* Hulse, 21 N. Y. 168 [*reversing* 29 Barb. (N. Y.) 539]; Ogden *v.* Peters, 21 N. Y. 23, 78 Am. Dec. 122.

North Carolina.— Stoneburner *v.* Jeffreys, 116 N. C. 78, 21 N. E. 29.

Virginia.— Sipe *v.* Earman, 26 Gratt. (Va.) 563.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 144.

In Nebraska, however, it is held that empowering the assignee in his discretion to postpone selling avoids the deed. McCleery *v.* Allen, 7 Nebr. 21, 29 Am. Rep. 377.

Though assignor misapprehended the precise mode and time of making the sale of the property the assignment will be given effect where it appears that the debtor intended to distribute his property among his creditors and made a list thereof and of his property, which he afterward destroyed at the solicitation of certain creditors who promised forbearance. Scull *v.* Reeves, 3 N. J. Eq. 131, 29 Am. Dec. 703.

Stipulation merely for reasonable delay before selling property does not of itself invalidate the assignment as being a provision

on credit is declared fraudulent *per se*.[61] In others it is not necessarily void,[62] and it has been held that it is not even presumptive evidence of fraud,[63] and that the provision to this effect in the deed is itself merely void.[64] Unless the direction to sell on credit is plainly expressed the rule of construction leans to the saving of the assignment by denying the power of sale.[65]

made to delay, hinder, or defraud creditors. Planters', etc., Bank *v.* Clarke, 7 Ala. 765; Rochester *v.* Sullivan, (Ariz. 1886) 11 Pac. 58; Christopher *v.* Covington, 2 B. Mon. (Ky.) 357; Armitage *v.* Rector, 62 Miss. 600; Rindskoff *v.* Guggenheim, 3 Coldw. (Tenn.) 284. *Aliter*, where the delay is unreasonable, unless creditors consent thereto. Maughlin *v.* Tyler, 47 Md. 545; Hart *v.* Crane, 7 Paige (N. Y.) 37; Hafner *v.* Irwin, 23 N. C. 490; Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637; Young *v.* Hail, 6 Lea (Tenn.) 175. See also cases cited *supra*, notes, 58, 59, 60.

61. Assignment fraudulent per se.— *District of Columbia.*— Kansas City Packing Co. *v.* Hoover, 1 App. Cas. (D. C.) 268.

Illinois.— Pierce *v.* Brewster, 32 Ill. 268; Bowen *v.* Parkhurst, 24 Ill. 257.

Michigan.— Richardson *v.* Rogers, 45 Mich. 591, 8 N. W. 526; Ryerson *v.* Eldred, 18 Mich. 12; Sutton *v.* Hanford, 11 Mich. 513.

Minnesota.— Benton *v.* Snyder, 22 Minn. 247; Truitt *v.* Caldwell, 3 Minn. 364, 74 Am. Dec. 764; Greenleaf *v.* Edes, 2 Minn. 264.

New York.— Townsend *v.* Stearns, 32 N. Y. 209; Burdick *v.* Post, 6 N. Y. 522 [*affirming* 12 Barb. (N. Y.) 168]; Rapalee *v.* Stewart, 27 N. Y. 310; Wilson *v.* Robertson, 21 N. Y. 587 [*affirming* 19 How. Pr. (N. Y.) 350]; Nicholson *v.* Leavitt, 10 N. Y. 591 [*reversing* 4 Sandf. (N. Y.) 252]; Porter *v.* Williams, 9 N. Y. 142, 59 Am. Dec. 519; Barney *v.* Griffin, 2 N. Y. 365; Houghton *v.* Westervelt, Seld. Notes (N. Y.) 34; Schufeldt *v.* Abernethy, 2 Duer (N. Y.) 533; Porter *v.* Williams, 5 How. Pr. (N. Y.) 441; Meacham *v.* Sternes, 9 Paige (N. Y.) 398. In Nicholson *v.* Leavitt, 6 N. Y. 510, 57 Am. Dec. 499, the court argues that if the property assigned is sufficient to pay the debts the giving of credit is for the purpose of increasing the surplus for assignor's own benefit, and thus the assignment would be *pro tanto* a trust for his own benefit, and consequently void. If insufficient, then the creditors who suffer by the deficiency have a right to be consulted and to determine whether their interest will be better subserved by a smaller sum presently received, or a larger one at a future period. *Contra*, Rogers *v.* De Forest, 7 Paige (N. Y.) 272.

Texas.— Carlton *v.* Baldwin, 22 Tex. 724; Fechheimer *v.* Ball, 1 Tex. App. Civ. Cas. § 766. But it has been held that the fact that a deed of assignment for the benefit of creditors authorizes the assignee to sell on credit does not render the deed fraudulent *per se*. Eicks *v.* Copeland, 53 Tex. 581, 37 Am. Rep. 760.

Utah.— Sprecht *v.* Parsons, 7 Utah 107, 25 Pac. 730; Beus *v.* Shaughnessy, 2 Utah 492.

Wisconsin.— Norton *v.* Kearney, 10 Wis. 443.

United States.— Stadler *v.* Carroll, 19 Fed. 721; Muller *v.* Norton, 19 Fed. 719.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 146.

Prohibiting sales on credit, on the other hand, has been held not to invalidate the assignment. Anthony *v.* Price, 92 Ga. 170, 17 S. E. 1024; Grant *v.* Chapman, 38 N. Y. 293; Carpenter *v.* Underwood, 19 N. Y. 520; Stern *v.* Fisher, 32 Barb. (N. Y.) 198; Van Rossum *v.* Walker, 11 Barb. (N. Y.) 237.

62. Rule that assignment is not necessarily void.— *Alabama.*— Shackelford *v.* Planters', etc., Bank, 22 Ala. 238.

California.— Billings *v.* Billings, 2 Cal. 107, 56 Am. Dec. 319.

Mississippi.— Richardson *v.* Marqueze, 59 Miss. 80, 42 Am. Rep. 353.

Missouri.— State *v.* Benoist, 37 Mo. 500; Johnson *v.* McAllister, 30 Mo. 327; Moore *v.* Carr, 65 Mo. App. 64.

New Mexico.— C. J. L. Meyer, etc., Co. *v.* Black, 4 N. M. 190, 16 Pac. 620.

Ohio.—Conkling *v.* Coonrod, 6 Ohio St. 611; Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637.

United States.—Muller *v.* Norton, 132 U. S. 501, 10 S. Ct. 147, 33 L. ed. 397 [*following* Cunningham *v.* Norton, 125 U. S. 77, 8 S. Ct. 804, 31 L. ed. 624]; Wright *v.* Thomas, 9 Biss. (U. S.) 244, 1 Fed. 716; *In re* Walker, 29 Fed. Cas. No. 17,063, 18 Nat. Bankr. Reg. 56.

63. Not presumption of fraud.— Bobbitt *v.* Rodwell, 105 N. C. 236, 11 S. E. 245; Dance *v.* Seaman, 11 Gratt. (Va.) 778.

64. Surplusage.— Falk *v.* Liebes, 6 Colo. App. 473, 42 Pac. 46; Kellogg *v.* Muller, 68 Tex. 182, 4 S. W. 361; Moody *v.* Carroll, 71 Tex. 143, 8 S. W. 510, 10 Am. St. Rep. 734.

65. Interpretation to uphold assignment. — *Alabama.*— Discretion reposed in the trustee as to selling publicly or privately; for cash or on credit does not invalidate. England *v.* Reynolds, 38 Ala. 370; Abercrombie *v.* Bradford, 16 Ala. 560.

Illinois.— Whipple *v.* Pope, 33 Ill. 334.

Iowa.— Berry *v.* Hayden, 7 Iowa 469; Meeker *v.* Sanders, 6 Iowa 61.

Nebraska.— Brahmstadt *v.* McWhirter, 9 Nebr. 6, 2 N. W. 232, 31 Am. Rep. 396.

New York.— Bagley *v.* Bowe, 105 N. Y. 171, 11 N. E. 386, 59 Am. Rep. 488; Benedict *v.* Huntington, 32 N. Y. 219; Halstead *v.* Gordon, 34 Barb. (N. Y.) 422; Nichols *v.* McEwen, 21 Barb. (N. Y.) 65; Kellogg *v.* Slawson, 15 Barb. (N. Y.) 56; Whitney *v.* Krows, 11 Barb. (N. Y.) 198; Wilson *v.* Ferguson, 10 How. Pr. (N. Y.) 175.

Utah.—Beus *v.* Shaughnessy, 2 Utah 492; Sprecht *v.* Parsons, 7 Utah 107, 25 Pac. 730.

Vermont.— Mussey *v.* Noyes, 26 Vt. 462.

D. As to Preferences. To authorize the assignee to make or change the order of preference renders the assignment void.[66]

VII. STIPULATIONS OR PROVISIONS IMPOSING CONDITIONS UPON CREDITORS.

A. In General. An assignment for the benefit of creditors cannot impose conditions upon or dictate terms to the creditors which are at variance with the conditions and terms prescribed by law;[67] hence stipulations or provisions exact-

Wisconsin.— Cribben *v.* Ellis, 69 Wis. 337, 34 N. W. 154 [*overruling* Keep *v.* Sanderson, 12 Wis. 352; Keep *v.* Sanderson, 2 Wis. 42, 60 Am. Dec. 404]; Messersmith *v.* Devendorf, 54 Wis. 498, 11 N. W. 906; Lord *v.* Devendorf, 54 Wis. 491, 11 N. W. 903, 41 Am. Rep. 58; Norton *v.* Kearney, 10 Wis. 443.

United States.— Muller *v.* Norton, 132 U. S. 501, 10 S. Ct. 147, 33 L. ed. 397; Schuler *v.* Israel, 27 Fed. 851.

In "ordinary course of business" and other terms plainly importing credit will be so construed. Truitt *v.* Caldwell, 3 Minn. 364, 74 Am. Dec. 764; Deming *v.* Colt, 3 Sandf. (N. Y.) 284; Murphy *v.* Bell, 8 How. Pr. (N. Y.) 468; Lyon *v.* Platner, 11 N. Y. Leg. Obs. 87; Beus *v.* Shaughnessy, 2 Utah 492; Hutchinson *v.* Lord, 1 Wis. 286, 60 Am. Dec. 381. Authorizing assignee to convert into money "or other available means" necessarily imports credit. Brigham *v.* Tillinghast, 13 N. Y. 215.

66. Authority to make or change order of preferences.— *Maryland.*—Green *v.* Trieber, 3 Md. 11.

Massachusetts.— Wyles *v.* Beals, 1 Gray (Mass.) 233.

Mississippi.— Polkinghorne *v.* Martinez, 65 Miss. 272, 3 So. 742.

New York.— Strong *v.* Skinner, 4 Barb. (N. Y.) 546; Boardman *v.* Halliday, 10 Paige (N. Y.) 223; Barnum *v.* Hempstead, 7 Paige (N. Y.) 568.

Texas.— Moody *v.* Paschal, 60 Tex. 483.

Contra, Brown *v.* McLean, 5 Mackey (D. C.) 559.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 137.

Extent and limits of rule.— But to vest the assignee with power to add omitted names to the schedule of unpreferred creditors does not invalidate. Armstrong *v.* Guenther, 67 Miss. 698, 7 So. 499. Nor to direct the assignees if they shall deem it necessary to pay the interest on a mortgage, which is a prior lien upon the assigned property, and the principal and interest upon another mortgage if they shall deem it to the interest of the creditors. Whitney *v.* Krows, 11 Barb. (N. Y.) 198. Nor a stipulation in an assignment for a hill of merchandise embraced in the stock to be delivered in specie to a particular class of preferred creditors at prime cost, the value to be settled by the assignee. Bayne *v.* Wylie, 10 Watts (Pa.) 309. A clause in a deed of trust for the benefit of creditors conveying individual and partnership assets of the grantors in several firms, directing the trustees "to pay in such order and priority, and out of such part of the trust funds, as by law they may be entitled to be paid, all such of the creditors of the parties of the first part, being creditors in any of the copartnership or individual relations aforesaid, as shall, within sixty days" assent to the deed and execute releases, is entirely unobjectionable, as it displays an upright intention to submit all legal questions to the adjudication of the tribunals constituted for that purpose. Maennel *v.* Murdock, 13 Md. 163, 167. A debtor assigned, preferring two classes of creditors, and directing assignee to advertise the assignment. All creditors who presented their claims to him in a reasonable time and place, excepting the first and second classes, were to constitute the third class, and all others the fourth class. It was held that this assignment was not fraudulent as to creditors. The question was whether the assignment was fraudulent, and not whether the assignee could commit fraud. Ward *v.* Tingley, 4 Sandf. Ch. (N. Y.) 476.

Authority not only to prefer parties to accommodation paper but also to pay all "costs, charges and expenses to arise in consequence" of such paper is a badge of fraud. Kirk *v.* Chisholm, 26 Can. Supreme Ct. 111.

67. *California.*— Groschen *v.* Page, 6 Cal. 138.

Illinois.— Hardin *v.* Osborne, 60 Ill. 93.

Michigan.— Pierson *v.* Manning, 2 Mich. 445.

Minnesota.— Banning *v.* Sibley, 3 Minn. 389.

Missouri.— Oliver-Finnie Grocer Co. *v.* Miller, 53 Mo. App. 107.

New Hampshire.— Fellows *v.* Greenleaf, 43 N. H. 421.

New Jersey.— Knight *v.* Packer, 12 N. J. Eq. 214, 72 Am. Dec. 388.

New York.— Haydock *v.* Coope, 53 N. Y. 68; Lentilhon *v.* Moffat, 1 Edw. (N. Y.) 451.

Ohio.— Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 149.

A conveyance for the benefit of creditors to be valid must be unconditional and without unwarrantable delay or prejudice to their claims. Owen *v.* Arvis, 26 N. J. L. 22. See also *supra,* II, A, 2.

But unless the stipulation is clearly within the rule stated in the text the assignment will be upheld. Spaulding *v.* Strang, 38 N. Y. 9, 37 N. Y. 135, 4 Transcr. App. (N. Y.) 80 [*reversing* 32 Barb. (N. Y.) 235, *affirming* 36 Barb. (N. Y.) 310]; Oliver Lee, etc., Bank *v.* Talcott, 19 N. Y. 146; Mayer *v.* Pulliam, 2 Head (Tenn.) 346.

In Mississippi, where the common law pre-

ing forbearance in the enforcement of creditors' claims,[68] imposing unreasonable terms, such as assent to the assignment under which creditors are to be allowed to participate in the distribution of the trust fund,[69] or tending to coerce the creditors to a compromise or a release of a part of their debts[70] have been held to render the assignment void.

B. As to Release. As a general rule a stipulation or provision in the assignment which exacts a release from creditors to entitle them to share any benefits in the estate of the debtor will render an assignment for the benefit of creditors void.[71] Under some of the decisions, however, provisions of this character have

vails, a debtor, though insolvent, may by a trust deed prefer part of his creditors, and having a right to determine which of them shall be paid may dictate the terms of payment. Layson *v.* Rowan, 7 Rob. (La.) 1.

68. Forbearance to enforce claims.—Oliver-Finnie Grocer Co. *v.* Miller, 53 Mo. App. 107; Moore *v.* Carr, 65 Mo. App. 64; Marsh *v.* Bennett, 5 McLean (U. S.) 117, 16 Fed. Cas. No. 9,110.

69. Unreasonable conditions as to participation in fund.— *Illinois.*— Hardin *v.* Osborne, 60 Ill. 93.

Louisiana.— Underhill *v.* Townsend, 17 La. 517.

New Hampshire.— Fellows *v.* Greenleaf, 43 N. H. 421; Jefts *v.* Spaulding [*cited* in Hurd *v.* Silsby, 10 N. H. 110].

New York.—Berry *v.* Riley, 2 Barb. (N. Y.) 307; Riggs *v.* Murray, 2 Johns. Ch. (N. Y.) 565.

Ohio.— Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 151.

The doctrine that assent of creditors cannot be required by a provision in the assignment as a prerequisite to their participation in the trust fund is limited by the application of the rule relating to the necessity of assent to or acceptance of the assignment by the creditors in order to constitute a valid and operative assignment. [See *supra*, II, F.] Hence it has been held in some jurisdictions that a valid assignment may contain a provision that it shall be for the benefit of such creditors only as shall become parties or assent thereto within a specified time. Finlay *v.* Dickerson, 29 Ill. 9 (preferential assignment); Pearson *v.* Rockhill, 4 B. Mon. (Ky.) 296; Vernon *v.* Morton, 8 Dana (Ky.) 247; National Mechanics', etc., Bank *v.* Eagle Sugar Refinery, 109 Mass. 38; Keighler *v.* Nicholson, 4 Md. Ch. 86 [*compare* Hollins *v.* Mayer, 3 Md. Ch. 343]; Dedham Bank *v.* Richards, 2 Metc. (Mass.) 105; Read *v.* Baylies, 18 Pick. (Mass.) 497; Hatch *v.* Smith, 5 Mass. 42; Vaughan *v.* Evans, 1 Hill Eq. (S. C.) 414. It has also been held, however, that such assignment may be invalid as against the dissenting creditors as to the surplus not needed to satisfy the claims of those who have become parties to the assignment. Russell *v.* Woodward, 10 Pick. (Mass.) 408; Borden *v.* Sumner, 4 Pick. (Mass.) 265, 16 Am. Dec. 338. See also *supra*, IV; V.

70. Coercion of compromise or release.— Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637. But where, by an arrangement between a debtor and a portion of his creditors, the former assigned his property to trustees in trust for his creditors generally, and the trustees, in consideration of the assignment and pursuant to the arrangement, personally bound themselves to the debtor to procure for him a release and discharge from all his creditors, except certain ones who were specified, it was held that the assignment was not conditional or partial. Hastings *v.* Belknap, 1 Den. (N. Y.) 190. See also *infra*, VII, B.

71. Rule that assignment is void.—*Arkansas.*— Collier *v.* Davis, 47 Ark. 367, 1 S. W. 684, 58 Am. Rep. 758 [*overruling* Clayton *v.* Johnson, 36 Ark. 406, 38 Am. Rep. 40]; McReynolds *v.* Dedman, 47 Ark. 347, 1 S. W. 552.

Colorado.— See Duggan *v.* Bliss, 4 Colo. 223, 34 Am. Rep. 80.

Connecticut.— Ingraham *v.* Wheeler, 6 Conn. 277.

District of Columbia.— Hayes *v.* Johnson, 6 D. C. 174.

Florida.— Howell *v.* Dixon, 21 Fla. 413, 58 Am. Rep. 673.

Georgia.— Johnson *v.* Farnum, 56 Ga. 144; Francis *v.* Herz, 55 Ga. 249; Miller *v.* Conklin, 17 Ga. 430, 63 Am. Dec. 248; Ezekiel *v.* Dixon, 3 Ga. 146.

Illinois.— Nesbitt *v.* Digby, 13 Ill. 387; Conkling *v.* Carson, 11 Ill. 503; Ramsdell *v.* Sigerson, 7 Ill. 78; Howell *v.* Edgar, 4 Ill. 417.

Indiana.— Butler *v.* Jaffray, 12 Ind. 504.

Iowa.— Sperry *v.* Gallaher, 77 Iowa 107, 41 N. W. 586.

Maine.— Vose *v.* Holcomb, 31 Me. 407; Pearson *v.* Crosby, 23 Me. 261. But see *infra*, note 72.

Massachusetts.— Widgery *v.* Haskell, 5 Mass. 144, 4 Am. Dec. 41. But see Hewlett *v.* Cutler, 137 Mass. 285, where the assignment was upheld.

Michigan.— Hubbard *v.* McNaughton, 43 Mich. 220, 5 N. W. 293, 38 Am. Rep. 176.

Minnesota.— McConnell *v.* Rakness, 41 Minn. 3, 42 N. W. 539; May *v.* Walker, 35 Minn. 194, 28 N. W. 252.

Missouri.—Brown *v.* Knox, 6 Mo. 302. But *compare* Jeffries *v.* Bleckmann, 86 Mo. 350, for a case held not to fall within the rule that a deed of assignment is void which contains a stipulation for release.

New Hampshire.— See Hurd *v.* Silsby, 10 N. H. 108, 34 Am. Dec. 142. A provision that creditors becoming parties shall execute releases of all their debts is not conclusive evi-

been upheld;[72] but the time allowed creditors in which to determine whether

dence of fraud. Haven *v.* Richardson, 5 N. H. 113.

New Jersey.—See Owen *v.* Arvis, 26 N. J. L. 22.

New York.— Renton *v.* Kelly, 49 Barb. (N. Y.) 536; Austin *v.* Bell, 20 Johns. (N. Y.) 442, 11 Am. Dec. 297; Hyslop *v.* Clarke, 14 Johns. (N. Y.) 458; Ames *v.* Blunt, 5 Paige (N. Y.) 13; Wakeman *v.* Grover, 4 Paige (N. Y.) 23; Mills *v.* Levy, 2 Edw. (N. Y.) 183; Armstrong *v.* Byrne, 1 Edw. (N. Y.) 79. But see Hastings *v.* Belknap, 1 Den. (N. Y.) 190, for an assignment held not intended to coerce a release within the rule.

Ohio.—Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637; Repplier *v.* Orrich, 7 Ohio, pt. II, 246; Atkinson *v.* Jordan, 5 Ohio 293, 24 Am. Dec. 281; Barret *v.* Reed, Wright (Ohio) 700; Woolsey *v.* Urner, Wright (Ohio) 606.

Tennessee.— Wilde *v.* Rawlings, 1 Head (Tenn.) 34.

Texas.— Bayne *v.* Denny. 1 Tex. App. Civ. Cas. § 808. But see *contra*, under statute, McIlhenny Co. *v.* Craddock, 68 Tex. 359, 4 S. W. 616.

Wyoming.— Ware *v.* Wanless, 2 Wyo. 144. *Compare* Downes *v.* Parshall, 3 Wyo. 425, 26 Pac. 994.

United States.— Seale *v.* Vaiden, 4 Woods (U. S.) 659, 10 Fed. 831; The Watchman, 1 Ware (U. S.) 233, 29 Fed. Cas. No. 17,251. See also Curtain *v.* Talley, 46 Fed. 580. *Compare* Stewart *v.* Spenser, 1 Curt. (U. S.) 157, 23 Fed. Cas. No. 13,437, 1 Am. L. Reg. 520. See also *infra*, note 72.

England.— Spencer *v.* Slater, 4 Q. B. D. 13. See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 155.

At common law, an assignment which provides for the payment of such creditors only as shall release their claims, and for the payment of any surplus to the assignor, is void. May *v.* Walker, 35 Minn. 194, 28 N. W. 252.

Requiring release of attachment has been held to be within the rule. Mackie *v.* Cairns, Hopk. (N. Y.) 373.

Secret agreement stipulating for release has been held to be a part of the assignment and under the rule to render the latter fraudulent and void. Spaulding *v.* Strang, 36 Barb. (N. Y.) 310 [*reversed* in 38 N. Y. 9, 37 N. Y. 135, 4 Transcr. App. (N. Y.) 80, *distinguished* in Haydock *v.* Coope, 53 N. Y. 68].

The rule does not apply, however, where the clause requiring a release is made with the consent of the creditors — especially where the consent is obtained before the assignment is made, and before the debtor's property is placed beyond the reach of creditors (Powers *v.* Graydon, 10 Bosw. (N. Y.) 630); or where the creditors are subsequently released from the condition (Cohen *v.* Summers, 54 Ga. 501).

72. Rule that provision is valid.—*Alabama.* — Robinson *v.* Rapelye, 2 Stew. (Ala.) 86.

Maine.— Doe *v.* Scribner, 41 Me. 277; Todd *v.* Bucknam, 11 Me. 41; Fox *v.* Adams, 5 Me. 245. But see *supra*, note 71.

Maryland.— Coakley *v.* Weil, 47 Md. 277; Foley *v.* Bitter, 34 Md. 646; Kettlewell *v.* Stewart, 8 Gill (Md.) 472. But *compare* Albert *v.* Winn, 7 Gill (Md.) 446; Hollins *v.* Mayer, 3 Md. Ch. 343.

North Dakota.— Bangs *v.* Fadden, 5 N. D. 92, 64 N. W. 78.

Pennsylvania.— Mechanics' Bank *v.* Gorman, 8 Watts & S. (Pa.) 304; Livingston *v.* Bell, 3 Watts (Pa.) 198; McClurg *v.* Lecky, 3 Penr. & W. (Pa.) 83, 23 Am. Dec. 64; Lippincott *v.* Barker, 2 Binn. (Pa.) 174, 4 Am. Dec. 433. But *compare* Johns *v.* Bolton, 12 Pa. St. 339, holding that an assignment which provides for a release is voidable at the election of the creditors.

Rhode Island.— Smith *v.* Millett, 11 R. I. 528; Dockray *v.* Dockray, 2 R. I. 547. *Compare* Spencer *v.* Jackson, 2 R. I. 35.

South Carolina.— Trumbo *v.* Hamel, 29 S. C. 520, 8 S. E. 83; Niolon *v.* Douglas, 2 Hill Eq. (S. C.) 443, 30 Am. Dec. 368. But see Clarke *v.* Baker, 36 S. C. 420, 15 S. E. 614; Claflin *v.* Iseman, 23 S. C. 416. Where one partner assigns, a clause requiring creditors to release to the firm as well as to himself is, it seems, unjust and unfair to the creditors. Gadsden *v.* Carson, 9 Rich. Eq. (S. C.) 252, 70 Am. Dec. 207.

Texas.— See Kellogg *v.* Cayce, 84 Tex. 213, 19 S. W. 388.

Vermont.— Hall *v.* Denison, 17 Vt. 310, preferential assignment.

Virginia.— Gordon *v.* Cannon, 18 Gratt. (Va.) 387; Phippen *v.* Durham, 8 Gratt. (Va.) 457; Kevan *v.* Branch, 1 Gratt. (Va.) 274; Skipwith *v.* Cunningham, 8 Leigh (Va.) 271, 31 Am. Dec. 642.

West Virginia.— Clarke *v.* Figgins, 27 W. Va. 663.

United States.— Brashear *v.* West, 7 Pet. (U. S.) 608, 8 L. ed. 801; Heydock *v.* Stanhope, 1 Curt. (U. S.) 471, 12 Fed. Cas. No. 6,445; Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 11 Fed. Cas. No. 5,964; Pearpoint *v.* Graham, 4 Wash. (U. S.) 232, 19 Fed. Cas. No. 10,877. See also *supra*, note 71.

All of debtor's property must be conveyed where releases by creditors are stipulated for.

Louisiana.— Graves *v.* Roy, 13 La. 454, 33 Am. Dec. 568.

Maryland.—Maughlin *v.* Tyler, 47 Md. 545; Barnitz *v.* Rice, 14 Md. 24, 74 Am. Dec. 513; Green *v.* Trieber, 3 Md. 11. The burden is upon the party who sets up the deed to show that it embraces all the property of the grantor. Sangston *v.* Gaither, 3 Md. 40; Keighler *v.* Nicholson, 4 Md. Ch. 86.

New York.— Seaving *v.* Brinkerhoff, 5 Johns. Ch. (N. Y.) 329.

Pennsylvania.— Weber *v.* Samuel, 7 Pa. St. 499. But see Weiner *v.* Davis, 18 Pa. St. 331, as to rule since the act of 1843. Assignment stipulating for a release is not void, as not conveying the assignor's whole estate, merely

or not they will accept such condition and release their claims must be reasonable.[73]

VIII. WHAT LAW GOVERNS.

A. In General. In general an assignment for the benefit of creditors has its requisites, validity, and character determined by the law of the state authorizing it in force at the date of the assignment,[74] or in its absence by the common law,[75] or in some parts of the United States by the civil law.[76] This rule holds, not-

for the reason that his wife did not join to release her dower. Breitenbach *v.* Dungan, 5 Pa. L. J. Rep. 236.

South Carolina.—Gadsden *v.* Carson, 9 Rich. Eq. (S. C.) 252, 70 Am. Dec. 207; Le Prince *v.* Guillemot, 1 Rich. Eq. (S. C.) 187.

United States.—Dodd *v.* Martin, 5 McCrary (U. S.) 53, 15 Fed. 338. *Compare* Stewart *v.* Spenser, 1 Curt. (U. S.) 157, 23 Fed. Cas. No. 13,437, 1 Am. L. Reg. 520. *Contra,* Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 11 Fed. Cas. No. 5,964.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 160.

An assignment by a partnership containing a stipulation for release must include the firm property and the property of the individuals composing it. Citizens F., etc., Ins. Co. *v.* Wallis, 23 Md. 175; Hennessy *v.* Western Bank, 6 Watts & S. (Pa.) 300, 40 Am. Dec. 560; Focke *v.* Blum, 82 Tex. 436, 17 S. W. 770; Orr, etc., Shoe Co. *v.* Ferrell, 68 Tex. 638, 5 S. W. 490; Cleveland *v.* Battle, 68 Tex. 111, 3 S. W. 681; Donoho *v.* Fish, 58 Tex. 164; Gordon *v.* Cannon, 18 Gratt. (Va.) 387.

Omission to include an equity of redemption in land, the encumbrances on which were much in excess of its value, will not invalidate it, though it contain a provision requiring a creditor secured to release a part of his claim, as such an omission is no evidence of fraud unless it is of such an amount of property as to indicate an intention of securing to the grantor a substantial benefit. Paul *v.* Baugh, 85 Va. 955, 9 S. E. 329.

Particular form of release may be prescribed in the deed of assignment. Bayne *v.* Wylie, 10 Watts (Pa.) 309.

73. Reasonable time for acceptance.—Green *v.* Trieber, 3 Md. 11; Mayer *v.* Shields, 59 Miss. 107; Owen *v.* Arvis, 26 N. J. L. 22; Curtain *v.* Talley, 46 Fed. 580; Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 11 Fed. Cas. No. 5,964. See also *infra,* XIV, B, 5, b.

If a creditor fails to sign within the time mentioned in the deed but has impliedly acquiesced he is in equity still entitled to share under the assignment. Owens *v.* Ramsdell, 33 Ohio St. 439; Biron *v.* Mount, 24 Beav. 642, 4 Jur. N. S. 43, 27 L. J. Ch. 191. *Contra,* Easton First Nat. Bank *v.* Smith, 133 Mass. 26.

Where the time is fixed by statute it may be omitted. New York City Metropolitan Nat. Bank *v.* Morehead, 38 N. J. Eq. 493. In other states its omission has been held fatal. Collier *v.* Davis, 47 Ark. 367, 1 S. W. 684, 58 Am. Rep. 758; Bickham *v.* Lake, 51 Fed. 892.

74. Law in force at date of assignment.—*Connecticut.*—Greene *v.* A. & W. Sprague Mfg. Co., 52 Conn. 330.

Georgia.—Birdseye *v.* Underhill, 82 Ga. 142, 7 S. E. 863, 14 Am. St. Rep. 142, 2 L. R. A. 99.

Illinois.—May *v.* Attleboro First Nat. Bank, 122 Ill. 551, 13 N. E. 806.

Iowa.—King *v.* Glass, 73 Iowa 205, 34 N. W. 820.

Kentucky.—Johnson *v.* Parker, 4 Bush (Ky.) 149.

Louisiana.—U. S. *v.* U. S. Bank, 8 Rob. (La.) 262.

Massachusetts.—Burlock *v.* Taylor, 16 Pick. (Mass.) 335; Daniels *v.* Willard, 16 Pick. (Mass.) 36.

Minnesota.—*In re* Paige, etc., Lumber Co., 31 Minn. 136, 16 N. W. 700.

Missouri.—Brown *v.* Knox, 6 Mo. 302.

New York.—Ackerman *v.* Cross, 40 Barb. (N. Y.) 465; Moore *v.* Willett, 35 Barb. (N. Y.) 663; Grady *v.* Bowe, 11 Daly (N. Y.) 259; Howard Nat. Bank *v.* King, 10 Abb. N. Cas. (N. Y.) 346.

Pennsylvania.—Law *v.* Mills, 18 Pa. St. 185.

United States.—Barnett *v.* Kinney, 147 U. S. 476, 13 S. Ct. 403, 37 L. ed. 247; Livermore *v.* Jenckes, 21 How. (U. S.) 126, 16 L. ed. 55; Caskie *v.* Webster, 2 Wall. Jr. (U. S.) 131, 5 Fed. Cas. No. 2,500; Wickham *v.* Dillon, 29 Fed. Cas. No. 17,612, 2 West. L. Month. 511.

Effect of subsequent statute.—If a deed of assignment is invalid under the law in force at the time it was made a subsequent act declaring the requisites of an assignment and to which the deed conforms does not validate it. Elliott *v.* Montell, 7 Houst. (Del.) 194, 30 Atl. 854. Where an insolvent law repealed an assignment law the assignments which had been made stood. Pleasant Hill Cemetery *v.* Davis, 76 Me. 289; Hamilton *v.* East Texas F. Ins. Co., 1 Tex. App. Civ. Cas. § 448.

75. By the common law.—Forbes *v.* Scannell, 13 Cal. 242; Pleasant Hill Cemetery *v.* Davis, 76 Me. 289; Schroder *v.* Tompkins, 58 Fed. 672. In Mayer *v.* Hellman, 91 U. S. 496, 23 L. ed. 377, it is held that a statute of Ohio not being an insolvent law in any proper sense of the term does not compel, or even in terms authorize, assignments, and that the common law determines the character and validity of the assignment, and the statute enforces the trust created by the assignment.

76. Mexican or civil law determining.—In Leitensdorfer *v.* Webb, 1 N. M. 34, the validity of an assignment made in December, 1848,

withstanding that the execution and delivery of the deed of assignment may be elsewhere,[77] or because the assignment may not be held valid, in its entirety, as to property situated elsewhere.[78]

B. In Case of Foreign Assignments — 1. Conflict With Policy — a. In General. Though an assignment, as such, may be recognized abroad as valid it is often held inoperative, as in conflict with the policy of the law, where the rights of citizens of a foreign jurisdiction are affected in relation to property there situated.[79]

b. Rule as to Personalty and Realty. The rule just stated is almost universal with respect to real estate,[80] but the weight of authority is otherwise in regard to personal property.[81]

was held to be determined by the Mexican law as modified by the Kearney code, a code promulgated by the general in command of the military department of New Mexico during the war between the United States and Mexico.

77. McKibbin *v.* Ellingson, 58 Minn. 205, 59 N. W. 1003, 49 Am. St. Rep. 499.

78. Watkins *v.* Wallace, 19 Mich. 57; Frink *v.* Buss, 45 N. H. 325; Tyler *v.* Strang, 21 Barb. (N. Y.) 198.

Right of resident to assail.— A citizen of the state whose laws declare the assignment invalid if he be a creditor at the time of the assignment may assail same. Hunt *v.* Lathrop, 7 R. I. 58.

79. Kansas City Packing Co. *v.* Hoover, 1 App. Cas. (D. C.) 268; Mason *v.* Stricker, 37 Ga. 262; J. Walter Thompson Co. *v.* Whitehed, 185 Ill. 454, 56 N. E. 1106, 76 Am. St. Rep. 51 [*affirming* 86 Ill. App. 76]; Johnson *v.* Parker, 4 Bush (Ky.) 149; Walter *v.* F. E. McAlister Co., 21 Misc. (N. Y.) 747, 48 N. Y. Suppl. 26, 27 N. Y. Civ. Proc. 33; Ayres *v.* Des Portes, 56 S. C. 544, 35 S. E. 218. *Compare* Fenton *v.* Edwards, 126 Cal. 43, 58 Pac. 320, 77 Am. St. Rep. 141, 46 L. R. A. 832; Pitman *v.* Marquardt, 20 Ind. App. 431, 50 N. E. 894; Byers *v.* Tabb, 76 Miss. 843, 25 So. 492; Workum *v.* Caldwell, 67 N. Y. Suppl. 1151; Wright *v.* Youtsey, 5 Ohio N. P. 57; Zucker *v.* Froment, 5 Pa. Dist 579; Carter-Battle Grocer Co. *v.* Jackson, 18 Tex. Civ. App. 353, 45 S. W. 615; Security Trust Co. *v.* Dodd, 173 U. S. 624, 19 S. Ct. 545, 43 L. ed. 835; Noyes *v.* Neel, 100 Fed. 555, 40 C. C. A. 539; Stowe *v.* Belfast Sav. Bank, 92 Fed. 90. See also *infra*, X, K.

Assignees of firm in different states.— Where the member of an insolvent firm which made a voluntary assignment in Massachusetts gave a mortgage on land in Maine and assignees were appointed in both states, it was held that inasmuch as the mortgage was valid against the assignee in Maine it could not be avoided by the assignee in Massachusetts, though if the property had been situated in Massachusetts it would have been held by the laws of the latter state invalid. Chipman *v.* Peabody, 159 Mass. 420, 34 N. E. 563, 38 Am. St. Rep. 437.

Void where made — Valid where property situate.— Where a resident of Rhode Island made an assignment, void under the laws of that state, conveying land thereby in Missouri, it was held effectual to pass title to the land in the latter state, because in conformity with its assignment law. Attleboro First Nat. Bank *v.* Hughes, 10 Mo. App. 7.

80. Realty.— Mason *v.* Stricker, 37 Ga. 262; Loving *v.* Pairo, 10 Iowa 282, 77 Am. Dec. 108; Watson *v.* Holden, 58 Kan. 657, 50 Pac. 883; Denny *v.* Bennett, 128 U. S. 489, 9 S. Ct. 134, 32 L. ed. 491. See also Keane *v.* Chamberlain, 14 App. Cas. (D. C.) 84.

Setting aside where made, though property elsewhere.— Notwithstanding that rights relating to disposition of real property are dependent upon the laws of the country where the land lies, nevertheless an instrument purporting to convey land elsewhere is within reach of the law of the state where it is made and may be set aside as in fraud of the citizens of that state, upon the principle that every country has the inherent right to protect its citizens as to a fraud there committed. D'Ivernois *v.* Leavitt, 23 Barb. (N. Y.) 63.

Where a mortgage conveys substantially all of debtor's property it is or is not construed to be a general assignment as may or may not be required by the law of the state where the land is. Danner *v.* Brewer, 69 Ala. 191.

81. Personalty.—Greene *v.* A. & W. Sprague Mfg. Co., 52 Conn. 330; Tyler *v.* Strang, 21 Barb. (N. Y.) 198; Russell *v.* Tunno, 11 Rich. (S. C.) 303; Livermore *v.* Jenckes, 21 How. (U. S.) 126, 16 L. ed. 55; Wickham *v.* Dillon, 29 Fed. Cas. No. 17,612, 2 West. L. Month. 511.

Law of domicile controls as to personalty. —"The general rule of inter-state comity is that the law of the domicile of the owner of personal property and choses in action controls in their disposition by sale, devise, or assignment." Benedict *v.* Steiglitz, 27 Ohio St. 365; Fuller *v.* Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312. But in New Jersey it is held, however, that where the contract sought to be enforced is injurious to the state's own interest, or to that of its citizens, or contravenes its policy, this rule will not be enforced. Varnum *v.* Camp, 13 N. J. L. 326, 25 Am. Dec. 476. And where Massachusetts creditors attached personal property in that state as belonging to a resident of Rhode Island the attachment was held valid, the court not adverting in its opinion to any distinction between land and personalty. Pierce *v.* O'Brien, 129 Mass. 314, 37 Am. Rep. 360.

c. Rule as to Choses in Action. As to choses in action and credits belonging to the debtor, some courts uphold the assignment in a foreign jurisdiction notwithstanding that the law in which it is made is in conflict with the policy of the forum,[82] while others, in holding the assignment void, make no distinction as regards this species of personal property.[83]

2. NONCONFORMITY TO LAW OF SITUS. Besides the hindrance to a foreign assignment, because of contravention of policy of law, is that of its being executed and acknowledged not in conformity to the law of the foreign state,[84] or of there being no filing or registration,[85] or of the title to personal property not passing except by actual change of possession,[86] but the fact of the deed of assignment containing no schedule of debts and assets, or of it in other respects not complying with local law as to form, is immaterial.[87]

A like ruling was previously made where the attachment was upon shares of stock in a Massachusetts corporation held by a non-resident assignor. Boyd *v.* Rockport Steam Cotton Mills, 7 Gray (Mass.) 406. Also where debts were attached under trustee process. Faulkner *v.* Hyman, 142 Mass. 53, 6 N. E. 846.

Vessel on high seas.— Following the principle stated, an assignment, valid where made, will pass title to a vessel at sea, so that on its subsequent arrival at the port of a state where the assignment statute is in conflict with the policy of the law of that state it will be secure from attachment. Moore *v.* Willett, 35 Barb. (N. Y.) 663; Crapo *v.* Kelly, 16 Wall. (U. S.) 610, 21 L. ed. 430.

Voluntary distinguished from involuntary assignments.— It has been held that a transfer of personal property will be upheld everywhere in a voluntary, as contradistinguished from a bankrupt or involuntary, assignment. Princeton Mfg. Co. *v.* White, 68 Ga. 96; Paine *v.* Lester, 44 Conn. 196, 26 Am. Rep. 442. See also Egbert *v.* Baker, 58 Conn. 319, 20 Atl. 466.

82. Debt transferable by law of owner's domicile.— Egbert *v.* Baker, 58 Conn. 319, 20 Atl. 466; Birdseye *v.* Underhill, 82 Ga. 142, 7 S. E. 863, 14 Am. St. Rep. 142, 2 L. R. A. 99. See also Fuller *v.* Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312. In Caskie *v.* Webster, 2 Wall. Jr. (U. S.) 131, 5 Fed. Cas. No. 2,500, Grier, J., says: "A debt is a mere incorporeal right. It has no situs, and follows the person of the creditor. A voluntary assignment of it by the creditor, which is valid by the law of his domicil, whether such assignment be called legal or equitable, will operate as a transfer of the debt, which should be regarded in all places. In America, bankrupt or involuntary assignments by operation of law, have not been considered as subject to this rule. But I know of no other established exception to the general rule, that a transfer of personal property, valid by the law of the owner's domicil, is valid everywhere."

Foreign corporation — Situs of debt.— Where a Connecticut insurance company was doing business in New York under a statute, there requiring it to appoint an agent upon whom service might be had sufficient to support a personal judgment, an assignment of a debt due a resident of New York protected the corporation in its state where chartered against attachment. Crouse *v.* Phœnix Ins. Co., 56 Conn. 176, 14 Atl. 82, 7 Am. St. Rep. 298.

83. Boyd *v.* Rockport Steam Cotton Mills, 7 Gray (Mass.) 406; Ingraham *v.* Geyer, 13 Mass. 146, 7 Am. Dec. 132.

84. King *v.* Glass, 73 Iowa 205, 34 N. W. 820; Houston *v.* Nowland, 7 Gill & J. (Md.) 480.

85. Law of situs as to registration.— An assignment which is valid in the state where it is made will not preclude attachment upon personal property in New York by creditors without notice of the assignment, unless it shall have been recorded in the county in which the property is situated. Warner *v.* Jaffray, 96 N. Y. 248, 48 Am. Rep. 616.

Reducing to possession.— Former decisions in the New York courts hold that if the assignee had reduced property to possession he can hold same against subsequent attachments. Ockerman *v.* Cross, 54 N. Y. 29; Howard Nat. Bank *v.* King, 10 Abb. N. Cas. (N. Y.) 346.

86. Title only on possession taken.— In Vermont it was held that the uniform rule being that title to personal property did not change in the absence of a complete change of possession from seller to buyer, a foreign assignment did not prevent attachment as to property situated in Vermont prior to the assignee taking actual possession. Rice *v.* Courtis, 32 Vt. 460, 78 Am. Dec. 597.

87. Contract element in assignment.— In Birdseye *v.* Underhill, 82 Ga. 142, 7 S. E. 863, 14 Am. St. Rep. 142, 2 L. R. A. 99, it was held that failure to attach schedule of debts and assets as required by statute of Georgia and not required by statute of New York was not violative of the policy of the Georgia law, as such was not a contract element in the assignment.

Statutory formalities apply to domestic assignment.— The requirements of New York statute, as to the filing of the schedule, assignee's bond, and the recording of the assignment in the county where the debtor resides have no application to f reign assignments, and they are recognized in New York, though there is no schedule, bond, or registration. Ockerman *v.* Cross, 54 N. Y. 29. See also Williams *v.* Kemper Hundley, etc., Dry Goods Co., 4 Okla. 145, 43 Pac. 1148; Han-

IX. WHEN FRAUD WILL VITIATE.

A. In General. It has been held that a fraudulent assignment for the benefit of creditors is a nullity and confers no rights on the assignee or the creditors;[88] this, however, is stating the rule too broadly, for numerous cases hold that under certain circumstances the effect of fraud is only to render the assignment voidable[89] or at most to invalidate it in part, not *in toto*.[90]

B. What Constitutes Fraud — 1. In General. To render an assignment for the benefit of creditors fraudulent it must have been made with intent to defraud or must contain provisions which will void it, although made with an honest

ford *v.* Paine, 32 Vt. 442, 78 Am. Dec. 586. *Contra*, in Kentucky, where it was held that as attaching creditors in that state had never assented to the assignment made in Ohio, and as the trustee under the assignment had never executed bond as prescribed by Kentucky law, the assignment could not prevail over the attachment. Johnson *v.* Parker, 4 Bush (Ky.) 149.

88. Void in toto.—*Iowa.*—Wooster *v.* Stanfield, 11 Iowa 128.

Kentucky.—Scott *v.* Strauss, 14 Ky. L. Rep. 892 (even though the effect would have been to cause a *pro rata* distribution of the debtor's property among his creditors); York *v.* Ferrell, 14 Ky. L. Rep. 207.

Maryland.— Main *v.* Lynch, 54 Md. 658; Foley *v.* Bitter, 34 Md. 646; Sangston *v.* Gaither, 3 Md. 40.

Michigan.— Pierson *v.* Manning, 2 Mich. 445, holding that if an assignment be fraudulent as to any of its provisions it is void *in toto* as to creditors entitled to take advantage of the fraud.

Minnesota.— Lester *v.* Getman, 28 Minn. 93, 9 N. W. 585.

New York.— White *v.* Benjamin, 3 Misc. (N. Y.) 490, 23 N. Y. Suppl. 981 [*affirmed* in 8 Misc. (N. Y.) 684, 28 N. Y. Suppl. 1148, 59 N. Y. St. 893].

North Carolina.— Stone *v.* Marshall, 52 N. C. 300 [*overruled* in Morris *v.* Pearson, 79 N. C. 253, 28 Am. Rep. 315].

Ohio.— Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637.

Tennessee.— Solinsky *v.* Lincoln Sav. Bank, 85 Tenn. 368, 4 S. W. 836.

Texas.— Humphries *v.* Freeman, 22 Tex. 45; Simon *v.* Ash, 1 Tex. Civ. App. 202, 20 S. W. 719. But see Burnham *v.* Logan, 88 Tex. 1, 29 S. W. 1067, construing Sayles' Stat. Tex. art. 65*f*.

Virginia.— Galt *v.* Calland, 7 Leigh (Va.) 594, holding that where an assignment is tainted with either moral or legal fraud the property does not pass but remains in the debtor, liable to the execution of those creditors who have not assented to the assignment.

United States.— Bickham *v.* Lake, 51 Fed. 892.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 456. See also *supra*, II, G, 3.

Fraudulent and void assignment is not cured where, pending a suit by the other creditors to set it aside, the assignee offers to give up the property on being paid his own claim. Humphries *v.* Freeman, 22 Tex. 45. So where a partner assigning the firm property for the benefit of creditors fraudulently transferred firm assets in payment of an individual debt, a subsequent attempt at restoration of the proceeds of sale of such property will not validate the assignment. Friedburgher *v.* Jaberg, 20 Abb. N. Cas. (N. Y.) 279.

Fraudulent assignments are not so absolutely void that the parties may not lose their right of complaint by waiver or acquiescence. Blake *v.* Hubbard, 45 Mich. 1, 7 N. W. 204. On the other hand all persons attempted to be secured in a deed of trust fraudulent on its face, who claim a benefit under it, become *particeps criminis* and are precluded from such benefit. Palmer *v.* Giles, 58 N. C. 75.

The fact that the property can be sold to better advantage under the assignment than on execution does not affect the invalidity of the assignment for fraud. Knight *v.* Packer, 12 N. J. Eq. 214, 72 Am. Dec. 388.

When, upon the face of an assignment, or by proof aliunde, it appears to have been made with intent to hinder or delay creditors, it affords no protection to the assignee against an execution against the debtor. McConnell *v.* Sherwood, 61 How. Pr. (N. Y.) 67.

89. Voidable.— Blake *v.* Hubbard, 45 Mich. 1, 7 N. W. 204; Matter of Ginsberg, 21 N. Y. App. Div. 525, 48 N. Y. Suppl. 697; Hone *v.* Woolsey, 2 Edw. (N. Y.) 289; Hone *v.* Henriquez, 2 Edw. (N. Y.) 120 [*affirmed* in 13 Wend. (N. Y.) 240, 27 Am. Dec. 204]; Vernon *v.* Upson, 60 Wis. 418, 19 N. W. 400.

90. Void in part.—Lazarus *v.* Camden Nat. Bank, 64 Ark. 322, 42 S. W. 412; Woodson *v.* Carson, 135 Mo. 521, 35 S. W. 1005, 37 S. W. 197; Pinneo *v.* Hart, 30 Mo. 561, 77 Am. Dec. 625; Hardcastle *v.* Fisher, 24 Mo. 70; Morris *v.* Pearson, 79 N. C. 253, 28 Am. Rep. 315 [*overruling* Stone *v.* Marshall, 52 N. C. 300]; Palmer *v.* Giles, 58 N. C. 75; Bloch *v.* Spruance, 12 Tex. Civ. App. 309, 33 S. W. 1002; Muse *v.* Chaney, (Tex. Civ. App. 1895) 30 S. W. 374; Louisiana Sugar Refining Co. *v.* Harrison, 9 Tex. Civ. App. 141, 29 S. W. 500; Craig *v.* Hoge, 95 Va. 275, 28 S. E. 317.

As to creditor or creditors defrauded, a fraudulent assignment is void. Vernon *v.* Upson, 60 Wis. 418, 19 N. W. 400. And a provision in an assignment for the benefit

intent.[91] The fraudulent character of an assignment must be ascertained from the instrument itself or from the circumstances attendant upon the transaction.[92]

2. Assignor's Intent — a. In General. The acts and intention of the party executing the deed give it its character,[93] and whether or not a fraudulent intention existed is to be determined by the intent of the assignor and his contemporaneous fraudulent acts are evidence of such intention.[94]

b. To Compel Compromise. There must be no attempt on the part of the assignor to coerce creditors in a voluntary assignment;[95] hence an assignment will

of creditors which defrauds a creditor as to a part of his demand is as fatal as if the fraudulent intent covered the whole debt. Vernon *v.* Upson, 60 Wis. 418, 19 N. W. 400.

The fraud of one or more of the creditors will not defeat a voluntary assignment, or render it ineffectual as to the other creditors. Hardcastle *v.* Fisher, 24 Mo. 70.

91. Townsend *v.* Stearns, 32 N. Y. 209; Bishop *v.* Halsey, 3 Abb. Pr. (N. Y.) 400, 13 How. Pr. (N. Y.) 154; Means *v.* Montgomery, 23 Fed. 421.

An assignment will not be subverted because its language admits of a construction consistent with a fraudulent intent, if it is not plainly inconsistent with an honest purpose and a lawful act. Townsend *v.* Stearns, 32 N. Y. 209; Lestor *v.* Pollock, 3 Rob. (N. Y.) 691.

92. U. S. Bank *v.* Huth, 4 B. Mon. (Ky.) 423; Pitts Agricultural Works *v.* Smelser, 87 Md. 493, 40 Atl. 56; Wilson *v.* Harris, 19 Mont. 69, 47 Pac. 1101, 21 Mont. 374, 54 Pac. 46; Billings *v.* Parsons, 17 Utah 22, 53 Pac. 730. See also *infra*, IX, B, 3, 4, 5.

93. Acts and intention of assignor govern. — U. S. Bank *v.* Huth, 4 B. Mon. (Ky.) 423; Baldwin *v.* Peet, 22 Tex. 708, 75 Am. Dec. 806; Adler *v.* Ecker, 1 McCrary (U. S.) 256, 2 Fed. 126. Where, in a suit to set aside an assignment for the benefit of creditors, the deed appears valid upon its face, but evidence *aliunde* discloses facts which will operate to hinder and delay creditors, this is sufficient to avoid the deed *in toto*, without proof of an actual covinous intent. Marks *v.* Bradley, 69 Miss. 1, 10 So. 922; Fuller *v.* Williamson, 14 How. Pr. (N. Y.) 289. See also *infra*, IX, B, 2, b, c.

Fraudulent intent in respect to creditors means that the debtor's design was to hinder and delay his creditors and this must be established by satisfactory evidence. Nicholson *v.* Leavitt, 4 Sandf. (N. Y.) 252. The fact that an assignment was executed on the same day that a judgment creditor, seeking to set it aside, recovered his verdict, is not conclusive proof that it was made with the design to defeat the recovery. Jackson *v.* Cornell, 1 Sandf. Ch. (N. Y.) 348.

That an assignment was made in anticipation of an attachment does not of itself show an intent to hinder and delay creditors.

Kentucky.— Moore *v.* Stege, 12 Ky. L. Rep. 469.

Maine.— Pike *v.* Bacon, 21 Me. 280, 38 Am. Dec. 259.

Michigan.— Hollister *v.* Loud, 2 Mich. 309.

New York.— Davis *v.* Howard, 73 Hun (N. Y.) 347, 26 N. Y. Suppl. 194, 55 N. Y. St. 762; Gillott *v.* Redlich, 50 Hun (N. Y.) 390, 3 N. Y. Suppl. 325, 20 N. Y. St. 893 [*affirmed* in 117 N. Y. 629, 22 N. E. 1128, 26 N. Y. St. 980]; McClure *v.* Goodenough, 12 N. Y. Suppl. 459, 19 N. Y. Civ. Proc. 191.

Texas.— Johnson *v.* Robinson, 68 Tex. 399, 4 S. W. 625; Bailey *v.* Mills, 27 Tex. 434; Baldwin *v.* Peet, 22 Tex. 708, 75 Am. Dec. 806.

United States.— Olney *v.* Tanner, 10 Fed. 101.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 40.

To defeat an assignment good upon its face the fraudulent intent must have existed at the time of the making of the assignment. Main *v.* Lynch, 54 Md. 658; Gates *v.* Labeaume, 19 Mo. 17; Mathews *v.* Poultney, 33 Barb. (N. Y.) 127; Wilson *v.* Forsyth, 24 Barb. (N. Y.) 105.

94. What does not constitute fraudulent intent.— *Arkansas.*— Worthen *v.* Griffith, 59 Ark. 562, 28 S. W. 286, 43 Am. St. Rep. 50.

Iowa.— Bradley *v.* Bischel, 81 Iowa 80, 46 N. W. 755.

Maryland.— Horwitz *v.* Ellinger, 31 Md. 492.

New York.— Casey *v.* Janes, 37 N. Y. 608, 5 Transcr. App. (N. Y.) 327; Davis *v.* Howard, 73 Hun (N. Y.) 347, 26 N. Y. Suppl. 194, 55 N. Y. St. 762; Wilson *v.* Forsyth, 24 Barb. (N. Y.) 105; Bishop *v.* Halsey, 3 Abb. Pr. (N. Y.) 400, 13 How. Pr. (N. Y.) 154.

Ohio.— Thomas *v.* Talmadge, 16 Ohio St. 433.

Texas.— Bailey *v.* Mills, 27 Tex. 434.

United States.— Olney *v.* Tanner, 10 Fed. 101.

See also *infra*, IX, C.

95. Attempt to coerce.— Albert *v.* Winn, 7 Gill (Md.) 446; Wilson *v.* Ferguson, 10 How. Pr. (N. Y.) 175; Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637.

To secure extension of time.— An assignment executed by a solvent debtor for the purpose of securing an extension of time is held to be fraudulent.

Illinois.— Goodner *v.* Commercial Nat. Bank, 95 Ill. 298.

Kentucky.— Grinstead *v.* Richardson, 12 Ky. L. Rep. 798.

Michigan.— Baldwin *v.* Buckland, 11 Mich. 389.

New York.— Kellogg *v.* Slawson, 15 Barb. (N. Y.) 56.

Wisconsin.— Bates *v.* Ableman, 13 Wis. 644.

be set aside as fraudulent where it appears that it was made in furtherance of a scheme to obtain an advantageous settlement,[96] to force a compromise,[97] or to compel creditors to enter into a composition.[98]

c. To Defraud, Hinder, or Delay Creditors. The intent of the assignor in making a general assignment for the benefit of his creditors must be an honest one and free from suspicion.[99] And an assignment made by a debtor with intent on his part, or in pursuance of an intent on his part,[1] to defraud, hinder, and delay his creditors in the collection of their claims is invalid,[2] whether such

96. Intent to obtain advantageous settlement.— Bank of Commerce *v.* Payne, 86 Ky. 446, 10 Ky. L. Rep. 43, 8 S. W. 856.

97. To force compromise.— *Kentucky.*— Bank of Commerce *v.* Payne, 86 Ky. 446, 10 Ky. L. Rep. 43, 8 S. W. 856. But the fact that the assignor, when he made the assignment, expected and hoped to compromise with his creditors, did not vitiate the assignment. Moore *v.* Stege, 93 Ky. 27, 13 Ky. L. Rep. 948, 18 S. W. 1019.

Massachusetts.— Bowles *v.* Graves, 4 Gray (Mass.) 117.

Minnesota.— Bennett *v.* Ellisen, 23 Minn. 242.

New York.—Work *v.* Ellis, 50 Barb. (N. Y.) 512.

Ohio.— Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637.

Wisconsin.— Backhaus *v.* Sleeper, 66 Wis. 68, 27 N. W. 409. But the fact that an assignment is made with the secret purpose, on the part of the assignor, to force his creditors to compromise, does not render it void, as a conveyance made with intent to hinder or delay creditors. Killman *v.* Gregory, 91 Wis. 478, 65 N. W. 53.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 152.

98. To compel composition.— South Danvers Nat. Bank *v.* Stevens, 5 N. Y. App. Div. 392, 39 N. Y. Suppl. 298. But the mere fact that after an assignment for the benefit of creditors the assignors, at the suggestion of some of the creditors, proposed a composition with creditors, has no tendency to show that the assignment was made merely to coerce a settlement. Van Bergen *v.* Lehmaier, 72 Hun (N. Y.) 304, 25 N. Y. Suppl. 356, 55 N. Y. St. 532.

99. Honest intent.— Powles *v.* Dilley, 2 Md. Ch. 119; Wilson *v.* Ferguson, 10 How. Pr. (N. Y.) 175.

13 Eliz. c. 5, the English statute against fraudulent conveyances, has been reënacted in terms or nearly so by the legislatures of several of the states and has been universally adopted in this country as a basis of our jurisprudence on other subjects. 4 Kent Comm. 510; Story Eq. Jur. § 353. This statute, both in England and in the United States, has always received a liberal construction. Cadogan *v.* Kennett, 2 Cowp. 432; Platt *v.* Lock, Plowd. 36; U. S. *v.* Hooe, 3 Cranch (U. S.) 73, 2 L. ed. 370. It is partly remedial and partly penal but notwithstanding this double quality the two opposite principles of construction have been held to apply. "Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule [that penal statutes are to be construed strictly]; most statutes against frauds being in their consequences penal. But this difference is here to be taken: where the statute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly; but when the statute acts upon the offence, by setting aside the fraudulent transaction, here it is to be construed liberally." 1 Bl. Comm. 88, 89.

1. Main *v.* Lynch, 54 Md. 658.

2. Invalidates assignment.— *Iowa.*—Wooster *v.* Stanfield, 11 Iowa 128.

Kansas.— Smith *v.* Hunter, 4 Kan. App. 377, 45 Pac. 911.

Kentucky.— U. S. Bank *v.* Huth, 4 B. Mon. (Ky.) 423; Vernon *v.* Morton, 8 Dana (Ky.) 247; Pitts *v.* Viley, 4 Bibb (Ky.) 446; York *v.* Ferrell, 14 Ky. L. Rep. 207; Scott *v.* Strauss, 14 Ky. L. Rep. 892 (holding that an assignment made with a fraudulent intent is invalid, though it would have resulted in a *pro rata* distribution of the debtor's property among the creditors); Robberts *v.* Nicklies, 10 Ky. L. Rep. 364. But see *contra*, by statute, Maskovitz *v.* Simon, (Ky. 1901) 62 S. W. 871.

Maryland.— Main *v.* Lynch, 54 Md. 658; Maughlin *v.* Tyler, 47 Md. 545; Foley *v.* Bitter, 34 Md. 646. To render an assignment valid under 13 Eliz. c. 5, it is not enough to show that it was made for a valuable consideration. It must also be *bona fide*. Powles *v.* Dilley, 2 Md. Ch. 119.

Minnesota.— Lesher *v.* Getman, 28 Minn. 93, 9 N. W. 585; Burt *v.* McKinstry, 4 Minn. 204, 77 Am. Dec. 507. But see Matter of Mann, 32 Minn. 60, 19 N. W. 347, holding that an assignment under the insolvent law [Laws (1881), c. 148], under which all the debtor's unexempt property passes by the assignment, and the assignee is invested with power to attack fraudulent preferences and conveyances, is not avoided by the fraudulent intent of the assignor in making it.

Mississippi.— Henderson *v.* Downing, 24 Miss. 106.

Missouri.— Van Frank *v.* Walther, 84 Mo. App. 472.

New Hampshire.— See Dalton *v.* Currier, 40 N. H. 237.

New Jersey.— North Ward Nat. Bank *v.* Conklin, 51 N. J. Eq. 7, 26 Atl. 678; Knight *v.* Packer, 12 N. J. Eq. 214, 72 Am. Dec. 388.

New York.— Ogden *v.* Peters, 21 N. Y. 23, 78 Am. Dec. 122; Wilson *v.* Forsyth, 24 Barb. (N. Y.) 105; Fox *v.* Heath, 21 How. Pr.

fraudulent intent is of a primary or secondary character.[3] But the hindrance and delay to creditors in the enforcement of their legal remedies, which results necessarily from the making of an assignment, is not considered to be fraudulent or illegal, and in no way impeaches the *bona fides* of an assignment.[4] The fact that an assignment to certain preferred creditors may hinder and delay other creditors in the enforcement of their demands will not render the deed fraudulent.[5]

d. Necessity of Assignee's Knowledge. In some states it is held that a fraudulent intent on the part of the assignor will avoid the assignment though the assignee is not chargeable with knowledge.[6] In other states it has been held that

(N. Y.) 384. See also Bagley *v.* Bowe, 105 N. Y. 171, 11 N. E. 386, 59 Am. Rep. 488; Gasherie *v.* Apple, 14 Abb. Pr. (N. Y.) 64.

North Carolina.— Barber *v.* Buffaloe, 122 N. C. 128, 29 S. E. 336.

Texas.— Bailey *v.* Mills, 27 Tex. 434; York *v.* Le Gierse, 1 Tex. App. Civ. Cas. § 1327.

Vermont.— Stickney *v.* Crane, 35 Vt. 89, holding that an assignment made with the purpose on the part of the assignor of preventing a particular creditor from getting payment of his debt is fraudulent and void as against such creditor, although the same result would have been produced by the assignment if made with an honest purpose.

United States.— M. Ivin *v.* Wert, 19 Fed. 721; Olney *v.* Tanner, 10 Fed. 101. But *compare* Burton *v.* Platter, 53 Fed. 901, 10 U. S. App. 657, 4 C. C. A. 95; Porter *v.* James, 67 Fed. 21, 30 U. S. App. 260, 14 C. C. A. 229.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 424.

3. Refining Co. *v.* Harrison, 9 Tex. Civ. App. 141, 29 S. W. 500. *Compare* Mathews *v.* Poultney, 33 Barb. (N. Y.) 127, wherein it is said that the only intent that has anything to do with the validity of an assignment is the intent of the assignor at the time of making it — the intent with which, or to carry out which, it was made. An assignment made with intent to defraud creditors cannot stand as against any creditor who is thereby defrauded whether the intent was specially to defraud him or not, and whether or not such creditor may have a right to sue some other person for the debt. Clark *v.* MacDonald, 62 Hun (N. Y.) 149, 16 N. Y. Suppl. 493, 41 N. Y. St. 753.

4. **Incidental hindrance or delay.**— *Illinois.* — Myers *v.* Kinzie, 26 Ill. 36.

Indiana.— Chandler *v.* Caldwell, 17 Ind. 256.

Kentucky.— U. S. Bank *v.* Huth, 4 B. Mon. (Ky.) 423.

Maryland.— Maughlin *v.* Tyler, 47 Md. 545.

Michigan.— Hollister *v.* Loud, 2 Mich. 309.

Missouri.— Hazell *v.* Tipton Bank, 95 Mo. 60, 8 S. W. 173, 6 Am. St. Rep. 22.

New Jersey.— Arnold *v.* Hagerman, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. Rep. 712.

New York.— Hauselt *v.* Vilmar, 76 N. Y. 630 [*affirming* 43 N. Y. Super. Ct. 574, 2 Abb. N. Cas. (N. Y.) 222]; Welles *v.* March, 30 N. Y. 344; Silver Creek Bank *v.* Talcott, 22 Barb. (N. Y.) 550; Nicholson *v.* Leavitt, 4 Sandf. (N. Y.) 252.

Ohio.— Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637; Armstrong *v.* Grannis, 4 Ohio Dec. (Reprint) 54, Clev. L. Rec. 71.

Tennessee.— Hefner *v.* Metcalf, 1 Head (Tenn.) 577.

Texas.— Bailey *v.* Mills, 27 Tex. 434.

United States.— Reed *v.* McIntyre, 98 U. S. 507, 25 L. ed. 171; Means *v.* Montgomery, 23 Fed. 421.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 40.

5. **Delay due to preferences.**— Worthen *v.* Griffith, 59 Ark. 562, 28 S. W. 286, 43 Am. St. Rep. 50; U. S. Bank *v.* Huth, 4 B. Mon. (Ky.) 423; Strauss *v.* Rose, 59 Md. 525; Horwitz *v.* Ellinger, 31 Md. 492.

6. **Assignee need not have knowledge.**— *Indian Territory.*— Before it will be held that the assignee should have instituted such an investigation, it must appear that, at the time of the execution of the assignment, he was in possession of some fact or circumstance that would of itself suggest the fraud. Martin-Brown Co. *v.* Morris, 1 Indian Terr. 495, 42 S. W. 423.

Iowa.— Lampson *v.* Arnold, 19 Iowa 479; Ruble *v.* McDonald, 18 Iowa 493.

Kansas.— Hairgrove *v.* Millington, 8 Kan. 480; Smith *v.* Hunter, 4 Kan. App. 377, 45 Pac. 911.

Maryland.— Foley *v.* Bitter, 34 Md. 646. But see Ferrall *v.* Farnen, 67 Md. 76, 5 Atl. 622, 8 Atl. 819.

Michigan.—Flanigan *v.* Lampman, 12 Mich. 58. *Compare* Parsell *v.* Patterson, 47 Mich. 505, 11 N. W. 291; Pierson *v.* Manning, 2 Mich. 445; Hollister *v.* Loud, 2 Mich. 309.

Minnesota.— Bennett *v.* Ellison, 23 Minn. 242. See also Gere *v.* Murray, 6 Minn. 305.

Mississippi.— Craft *v.* Bloom, 59 Miss. 69, 42 Am. Rep. 351; Harney *v.* Pack, 4 Sm. & M. (Miss.) 229.

New York.— Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99, 18 N. Y. St. 110, 1 L. R. A. 250; Griffin *v.* Marquardt, 17 N. Y. 28; Kennedy *v.* Wood, 52 Hun (N. Y.) 46, 4 N. Y. Suppl. 758, 22 N. Y. St. 132; Talcott *v.* Hess, 31 Hun (N. Y.) 282, 4 N. Y. St. 62; Cuyler *v.* McCartney, 33 Barb. (N. Y.) 165; Wilson *v.* Forsyth, 24 Barb. (N. Y.) 105; Rathbun *v.* Platner, 18 Barb. (N. Y.) 272; Scofield *v.* Scott, 3 N. Y. Suppl. 496, 20 N. Y. St. 815. See also Koechl *v.* Leibinger, etc., Brewing Co., 26 N. Y. App. Div. 573, 50 N. Y. Suppl. 568. But *compare* Manning *v.* Beck, 129 N. Y. 1, 29 N. E. 90, 41 N. Y. St. 199, 14 L. R. A. 198 [*reversing* 54 Hun (N. Y.) 172, 7 N. Y. Suppl. 300, 26 N. Y. St. 806, and in effect *reversing*

to defeat the assignment it must appear that the assignee participated in the fraud.[7]

3. Provisions in Instrument of Assignment. As has been said, the fraudulent character of the assignment may be ascertained from the instrument of assignment itself;[8] and this has been applied, among other provisions, to provisions allowing creditors a certain time within which to come in and become parties to the assignment,[9] to provisions relating to the disposition and sale of the property conveyed

13 N. Y. Suppl. 869, 35 N. Y. St. 978]; Hine *v.* Bowe, 114 N. Y. 350, 21 N. E. 733, 23 N. Y. St. 891 [*affirming* 46 Hun (N. Y.) 196]; Miller *v.* Halsey, 4 Abb. Pr. N. S. (N. Y.) 28.

North Carolina.— Barber *v.* Buffaloe, 122 N. C. 128, 29 S. E. 336; Savage *v.* Knight, 92 N. C. 493, 53 Am. Rep. 423; Stone *v.* Marshall, 52 N. C. 300. But *compare* Morris *v.* Pearson, 79 N. C. 253, 28 Am. Rep. 315. And see Rouse *v.* Bowers, 111 N. C. 360, 16 S. E. 684.

Vermont.— Stickney *v.* Crane, 35 Vt. 89.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 427.

Fraudulent intent of assignor's agent.—An assignment for benefit of creditors, executed at the suggestion of the assignor's agent, who had exclusive control and management of the business, will be set aside if the agent thereby intended to defraud the assignor's creditors, though the assignor was personally ignorant of his intention. Malkemesius *v.* Pauly, 17 Misc. (N. Y.) 621, 40 N. Y. Suppl. 936.

Likewise creditor's knowledge of assignor's fraud is not necessary to render the assignment invalid. Caldwell *v.* Rose, Smith (Ind.) 190. See also cases cited *supra*, this note. But see and *compare* Shotwell *v.* Dixon, 163 N. Y. 43, 57 N. E. 178 [*affirming* 22 N. Y. App. Div. 258, 48 N. Y. Suppl. 984]; Weaver *v.* Goodman, (Tex. Civ. App. 1899) 51 S. W. 860.

7. Assignee must participate in fraud.— *Alabama.*— Halsey *v.* Connell, 111 Ala. 221, 20 So. 445; Barrett *v.* Pollak Co., 108 Ala. 390, 18 So. 615, 54 Am. St. Rep. 172; Truss *v.* Davidson, 90 Ala. 359, 7 So. 812; Governor *v.* Campbell, 17 Ala. 566; Abercrombie *v.* Bradford, 16 Ala. 560. See also Robinson, etc., Co. *v.* Thomason, 113 Ala. 526, 20 So. 951.

Arkansas.— Hill *v.* Shrygley, 51 Ark. 56, 9 S. W. 845. See also Hunt *v.* Weiner, 39 Ark. 70.

Florida.— See Mayer *v.* Wilkins, 37 Fla. 244, 19 So. 632.

Illinois.— Myers *v.* Kinzie, 26 Ill. 36.

Missouri.— State *v.* Adler, 97 Mo. 413, 10 S. W. 824; State *v.* Keeler, 49 Mo. 548; Wise *v.* Wimer, 23 Mo. 237. See also Van Frank *v.* Walther, 84 Mo. App. 472.

Ohio.— Bancroft *v.* Blizzard, 13 Ohio 30.

Oregon.— O'Connell *v.* Hansen, 29 Oreg. 173, 44 Pac. 387; Kruse *v.* Prindle, 8 Oreg. 158.

Texas.— Burnham *v.* Logan, 88 Tex. 1, 29 S. W. 1067; Lewis *v.* Alexander, (Tex. Civ. App. 1895) 31 S. W. 414. But see Green *v.* Banks, 24 Tex. 508; Baldwin *v.* Peet, 22 Tex. 708, 75 Am. Dec. 806; Solomon *v.* Wright, 8 Tex. Civ. App. 565, 28 S. W. 414.

Utah.— Pettit *v.* Parsons, 9 Utah 223, 33 Pac. 1038. *Compare* Billings *v.* Parsons, 17 Utah 22, 53 Pac. 730.

Virginia.—Sipe *v.* Earman, 26 Gratt. (Va.) 563.

West Virginia.—Yost *v.* Graham, 50 W. Va. 199, 40 S. E. 361. See also Douglass Merchandise Co. *v.* Laird, 37 W. Va. 687, 17 S. E. 188.

United States.— Emerson *v.* Senter, 118 U. S. 3, 6 S. Ct. 981, 30 L. ed. 49; Porter *v.* James, 67 Fed. 21, 30 U. S. App. 260, 14 C. C. A. 229. *Compare* Waples-Platter Co. *v.* Low, 54 Fed. 93, 10 U. S. App. 704, 4 C. C. A. 205.

What necessary to put on guard.— The fact that an assignor was considered solvent by the assignee till the assignment was made was not such evidence of fraud as to require the assignee to investigate the business of the firm before accepting the trust. Martin-Brown Co. *v.* Morris, 1 Indian Terr. 495, 42 S. W. 423. See also Humphries *v.* Freeman, 22 Tex. 45; Douglass Merchandise Co. *v.* Laird, 37 W. Va. 687, 17 S. E. 188; Talley *v.* Curtain, 54 Fed. 43, 8 U. S. App. 347, 4 C. C. A. 177.

8. See *supra*, IX, B, 1; and Badgett *v.* Johnson-Fife Hat Co., 1 Indian Terr. 133, 38 S. W. 667; Hastings *v.* Baldwin, 17 Mass. 552; Lester *v.* Pollock, 3 Rob. (N. Y.) 691, 28 How. Pr. (N. Y.) 488; Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637; Hill *v.* Agnew, 12 Fed. 230.

The omission of certain personal property from the inventory and schedules, filed at the time of an assignment for benefit of creditors, is not in itself an evidence of fraud sufficient to warrant setting the assignment aside, in the absence of other evidence of fraudulent intent, where the property was in fact turned over to the assignee. Troescher *v.* Cosgrove, 46 N. Y. App. Div. 498, 61 N. Y. Suppl. 1036. See also *supra*, III, B.

9. Allowing time to creditors to come in.— *Alabama.*—Ashurst *v.* Martin, 9 Port. (Ala.) 566.

Illinois.— Howell *v.* Edgar, 4 Ill. 417.

Maine.— Fox *v.* Adams, 5 Me. 245.

Maryland.— Green *v.* Trieber, 3 Md. 11.

Pennsylvania.— Burd *v.* Smith, 4 Dall. (Pa.) 76, 1 L. ed. 748.

Virginia.— Williams *v.* Lord, 75 Va. 390; Gordon *v.* Cannon, 18 Gratt. (Va.) 387.

United States.— Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 11 Fed. Cas. No. 5,964.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 4. See also *supra*, VII, A.

by the deed of assignment[10] and to provisions relating to the payment of certain debts and certain creditors,[11] especially in respect of the payment of fictitious or invalid claims.[12] And concerning provisions for preferences it seems that preferences actually tainted with fraud, as distinguished from common-law preferences merely forbidden by statute,[13] will invalidate an assignment for the benefit of creditors.[14]

10. Disposition and sale of property.— *Arkansas.*— Mansur, etc., Implement Co. *v.* Wood, 63 Ark. 362, 38 S. W. 898, as to time and mode of sale.

Florida.— Dorr *v.* Schmidt, 38 Fla. 354, 21 So. 279.

Indian Territory.— Pace *v.* J. S. Merrill Drug Co., 2 Indian Terr. 218, 48 S. W. 1061; Noyes *v.* Guy, 2 Indian Terr. 205, 48 S. W. 1056, as to selling choses in action at public auction.

Kansas.— Reese *v.* Platt, 4 Kan. App. 801, 44 Pac. 31, 46 Pac. 990.

Mississippi.— O'Gwinn *v.* Winner, (Miss. 1899) 25 So. 354, as to time of sale.

Montana.— Authorizing sale for cash or on credit in assignee's discretion. Willoughby *v.* Reynolds, 19 Mont. 421, 48 Pac. 743; Rosenstein *v.* Coleman, 18 Mont. 459, 45 Pac. 1081.

Pennsylvania.— Shebel *v.* Bryden, 114 Pa. St. 147, 6 Atl. 905.

Tennessee.—Robinson *v.* Baugh, (Tenn. Ch. 1900) 61 S. W. 98.

Texas.— Sanger *v.* Burke, 18 Tex. Civ. App. 106, 43 S. W. 1070.

Utah.— Lippincott *v.* Rich, 19 Utah 140, 56 Pac. 806, as to sale on credit.

Virginia.— Taylor *v.* Mahoney, 94 Va. 508, 27 S. E. 107.

Washington.— Smith *v.* Cullen, 18 Wash. 398, 51 Pac. 1040, as to sale on credit.

United States.— Peters *v.* Bain, 133 U. S. 670, 10 S. Ct. 354, 33 L. ed. 696.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," §§ 144, 412. See also *supra*, VI, C.

11. Payment of debts.— *Alabama.*—Inman *v.* Schloss, 122 Ala. 461, 25 So. 739.

New York.— Livermore *v.* Northrup, 44 N. Y. 107; Read *v.* Worthington, 9 Bosw. (N. Y.) 617; De Camp *v.* Marshall, 2 Abb. Pr. N. S. (N. Y.) 373.

North Carolina.— Blalock *v.* Kernersville Mfg. Co., 110 N. C. 99, 14 S. E. 501.

Rhode Island.— Nightingale *v.* Harris, 6 R. I. 321.

South Carolina.— Stewart *v.* Kerrison, 3 S. C. 266.

United States.— Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 11 Fed. Cas. No. 5,964.

12. Fictitious or invalid claims.— In some states it has been held that a clause providing for the payment of fictitious claims renders an assignment voidable. Trueheart *v.* Craddock, (Miss. 1898) 23 So. 549; Rothschild *v.* Salomon, 52 Hun (N. Y.) 486, 5 N. Y. Suppl. 865, 24 N. Y. St. 205; Talcott *v.* Hess, 31 Hun (N. Y.) 282, 4 N. Y. St. 62; American Exch. Bank *v.* Webb, 36 Barb. (N. Y.) 291; Silver Creek Bank *v.* Talcott, 22 Barb. (N. Y.) 550; Patchen *v.* Waefelaer, 29 Misc. (N. Y.) 494, 61 N. Y. Suppl. 949; Mead *v.* Phillips, 1 Sandf. Ch. (N. Y.) 83; Peacock *v.* Tompkins, Meigs (Tenn.) 317; Bickham *v.* Lake, 51 Fed. 892. But see Farwell *v.* Maxwell, 34 Fed. 727. While in other states it is held not to invalidate the deed as to *bona fide* creditors. Union Nat. Bank *v.* Mead Mercantile Co., 151 Mo. 149, 52 S. W. 196; Woodson *v.* Carson, 135 Mo. 521, 35 S. W. 1005, 37 S. W. 197; Pinneo *v.* Hart, 30 Mo. 561, 77 Am. Dec. 625; Friedenwald Co. *v.* Sparger, 128 N. C. 446, 39 S. E. 64; Stone *v.* Marshall, 52 N. C. 300; Nightingale *v.* Harris, 6 R. I. 321; Muse *v.* Chaney, (Tex. Civ. App. 1895) 30 S. W. 374; Louisiana Sugar Refining Co. *v.* Harrison, 9 Tex. Civ. App. 141, 29 S. W. 500; Simon *v.* Ash, 1 Tex. Civ. App. 202, 20 S. W. 719; Craig *v.* Hoge, 95 Va. 275, 28 S. E. 317.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," §§ 360, 418. See also *supra*, IV, C, 2.

That statute of limitations may be successfully pleaded as to some of the debts mentioned in the schedule will not affect the validity of the assignment. Livermore *v.* Northrup, 44 N. Y. 107; Patchen *v.* Waefelaer, 29 Misc. (N. Y.) 494, 61 N. Y. Suppl. 949.

13. See *supra*, IV, A, 2, a.

14. Invalidates assignment.— *New York.*— Smith *v.* White, 2 N. Y. Suppl. 855, 19 N. Y. St. 164; Fiedler *v.* Day, 2 Sandf. (N. Y.) 594, holding that where an assignment for the benefit of creditors is fraudulent, in giving a preference to a particular debt, it is void *in toto*, though other preferred debts, and others provided for, are *bona fide*.

Ohio.— Shaw *v.* Lowry, Wright (Ohio) 190. *Compare* Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637.

South Carolina.— Middleton *v.* Taber, 46 S. C. 337, 24 S. E. 282, holding that a deed containing an illegal preference cannot be rendered valid by an assurance of the assignee and the agent of the creditors that the property will be distributed according to law.

Utah.— Smith *v.* Sipperley, 9 Utah 267, 34 Pac. 54.

Wisconsin.—Vernon *v.* Upson, 60 Wis. 418, 19 N. W. 400.

United States.— Crawford *v.* Neal, 144 U. S. 585, 12 S. Ct. 759, 36 L. ed. 552.

Compare Hafner *v.* Irwin, 23 N. C. 490.

In the absence of actual fraud, however, the rule will not apply. Roberts *v.* Vietor, 54 Hun (N. Y.) 461, 7 N. Y. Suppl. 777, 28 N. Y. St. 100 (holding that the entry in favor of several preferred creditors of judgments which are found to have been obtained in good faith, and for sums actually due, except in one case in which an honest mis-

4. Transactions After Assignment. As has been shown, the fraudulent character of the assignment may depend on the circumstances attendant upon the transaction.[15] But as a general rule this does not apply to acts or transactions after the making of the assignment; for as hitherto stated the *bona fide* character of an assignment for the benefit of creditors cannot be affected by subsequent acts upon the part of either the assignor or the assignee,[16] such acts being at most merely evidentiary on the question of fraudulent intent.[17] Hence it has been generally held that the mere fact of the assignor being left in possession of the assigned property as the agent of the assignee or that after the date of the assignment he was engaged in assisting in the sale or disposal of the property is not conclusive evidence of fraud.[18] Likewise it has been held that the fact that assignor remains in possession of the property conveyed by the deed of assignment is merely a circumstance from which fraud may be inferred;[19] though in some cases such

take was made, will not invalidate the assignment); Cox *v.* Platt, 32 Barb. (N. Y.) 126, 19 How. Pr. (N. Y.) 121 (holding that where an assignor preferred certain debts, believing he had a right to prefer them, it does not constitute fraud for which the assignment will be wholly set aside, but it may be reformed to protect the rights of creditors).

15. See *supra*, IX, B, 1.

16. Subsequent acts of parties.—*Arkansas.*— Lowenstein *v.* Finney, 54 Ark. 124, 15 S. W. 153.

California.—Forbes *v.* Scannell, 13 Cal. 242.

Iowa.— Savery *v.* Spaulding, 8 Iowa 239, 74 Am. Dec. 300.

Kentucky.— Hull *v.* Evans, 22 Ky. L. Rep. 1118, 59 S. W. 851.

Mississippi.— Union, etc., Bank *v.* Allen, 77 Miss. 442, 27 So. 631; Thompson *v.* Preston, 73 Miss. 587, 19 So. 347; Allen *v.* Union, etc., Bank, 72 Miss. 549, 17 So. 442; English *v.* Friedman, 70 Miss. 457, 12 So. 252.

Missouri.— Hatcher *v.* Winters, 71 Mo. 30; Gates *v.* Labeaume, 19 Mo. 17.

Nebraska.— Sullivan *v.* Smith, 15 Nebr. 476, 19 N. W. 620, 48 Am. Rep. 354; Lininger *v.* Raymond, 12 Nebr. 19, 9 N. W. 550.

New York.— Shultz *v.* Hoagland, 85 N. Y. 464; Cox *v.* Platt, 32 Barb. (N. Y.) 126, 19 How. Pr. (N. Y.) 121; Browning *v.* Hart, 6 Barb. (N. Y.) 91; Scott *v.* Guthrie, 10 Bosw. (N. Y.) 408; Phillips *v.* Tucker, 14 N. Y. St. 120; Blain *v.* Pool, 13 N. Y. St. 571; American Exch. Bank *v.* Webb, 15 How. Pr. (N. Y.) 193.

North Carolina.— See Friedenwald Co. *v.* Sparger, 128 N. C. 446, 39 S. E. 64.

Pennsylvania.— Klapp *v.* Shirk, 13 Pa. St. 589.

Rhode Island.— Spencer *v.* Jackson, 2 R. I. 35.

South Dakota.— Wright *v.* Lee, 10 S. D. 263, 72 N. W. 895.

Virginia.— Taylor *v.* Mahoney, 94 Va. 508, 27 S. E. 107.

West Virginia.—Kyle *v.* Harveys, 25 W. Va. 716, 52 Am. Rep. 235.

Wisconsin.— Hammel *v.* Schuster, 65 Wis. 669, 27 N. W. 620.

United States.— *In re* Walker, 29 Fed. Cas. No. 17,063, 18 Nat. Bankr. Reg. 56.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," §§ 65, 441.

17. Such facts are evidentiary only.—Mattison *v.* Judd, 59 Miss. 99; Goodwin *v.* Kerr, 80 Mo. 276; Wilson *v.* Forsyth, 24 Barb. (N. Y.) 105; Blain *v.* Pool, 13 N. Y. St. 571; Wilson *v.* Ferguson, 10 How. Pr. (N. Y.) 175; Green *v.* Banks, 24 Tex. 508. See also *supra*, II, G, 4; and *infra*, IX, C.

18. Employment, etc., of assignee by assignor.— *Alabama.*— Smith *v.* Leavitts, 10 Ala. 92.

California.— Forbes *v.* Scannell, 13 Cal. 242.

Connecticut.— But see Peck *v.* Whiting, 21 Conn. 206.

Illinois.— Blow *v.* Gage, 44 Ill. 208.

Iowa.— Savery *v.* Spaulding, 8 Iowa 239, 74 Am. Dec. 300.

Kentucky.— Pearson *v.* Rockhill, 4 B. Mon. (Ky.) 296; Vernon *v.* Morton, 8 Dana (Ky.) 247; Sachs *v.* Hess, 6 Ky. L. Rep. 652.

Michigan.— Baldwin *v.* Buckland, 11 Mich. 389.

Minnesota.— Noyes *v.* Beaupre, 36 Minn. 49, 30 N. W. 126 [*affirmed* in 138 U. S. 397, 11 S. Ct. 296, 34 L. ed. 991].

New York.— Turney *v.* Van Gelder, 68 Hun (N. Y.) 481, 23 N. Y. Suppl. 27, 52 N. Y. St. 664 [*affirmed* in 143 N. Y. 632, 37 N. E. 826, 60 N. Y. St. 876]; Wilbur *v.* Fradenburg, 52 Barb. (N. Y.) 474; Browning *v.* Hart, 6 Barb. (N. Y.) 91; Vietor *v.* Nichols, 13 N. Y. St. 461; Beamish *v.* Conant, 24 How. Pr. (N. Y.) 94.

Texas.— Van Hook *v.* Walton, 28 Tex. 59; Linn *v.* Wright, 18 Tex. 317, 70 Am. Dec. 282.

Virginia.— Hurst *v.* Leckie, 97 Va. 550, 34 S. E. 464.

Wisconsin.— Bates *v.* Simmons, 62 Wis. 69, 22 N. W. 335.

United States.— Beaupre *v.* Noyes, 138 U. S. 397, 11 S. Ct. 296, 34 L. ed. 991.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," §§ 310, 441. See also *infra*, XII, A, 1.

Permitting the assignor to remain in possession as tenant is within the rule stated in the text (Scott *v.* Ray, 18 Pick. (Mass.) 360; Hollister *v.* Loud, 2 Mich. 309); unless there is a secret trust for the benefit of the assignor (Caldwell *v.* Rose, Smith (Ind.) 190; Stewart *v.* Kerrison, 3 S. C. 266).

19. Assignor's retention of possession.— *Kentucky.*— Pitts *v.* Viley, 4 Bibb (Ky.)

retention of possession may raise such a presumption of fraud which, if not rebutted, will be conclusive.[20]

5. Transactions Before Assignment. Transactions before or contemporaneous with the making of the assignment may be such as to taint the whole transaction with fraud and invalidate the assignment;[21] but where the prior act is a separate and distinct transaction it will not affect the validity of the assignment.[22] In applying these rules it has been held that neither fraudulently contracting debts,[23]

446; Robinson *v.* Worley, 19 Ky. L. Rep. 791, 42 S. W. 95.

Michigan.— Baldwin *v.* Buckland, 11 Mich. 389.

Missouri.— Burkett *v.* Thornbury, (Mo. 1887) 2 S. W. 838; Goodwin *v.* Kerr, 80 Mo. 276.

Ohio.— Thomas *v.* Talmadge, 16 Ohio St. 433.

Pennsylvania.— Dallam *v.* Fitler, 6 Watts & S. (Pa.) 323; Fitler *v.* Maitland, 5 Watts & S. (Pa.) 307.

Utah.— Snyder *v.* Murdock, 20 Utah 419, 59 Pac. 91.

Vermont.— Hall *v.* Parsons, 17 Vt. 271.

Virginia.— Hurst *v.* Leckie, 97 Va. 550, 34 S. E. 464.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 199.

20. Raising presumption of fraud which must be explained.— *Connecticut.*— Osborne *v.* Tuller, 14 Conn. 529.

Indiana.—Caldwell *v.* Williams, 1 Ind. 405; Caldwell *v.* Rose, Smith (Ind.) 190.

Mississippi.— Baum *v.* Pearce, 67 Miss. 700, 7 So. 548.

Nebraska.— Morgan *v.* Bogue, 7 Nebr. 429.

New York.— Ball *v.* Loomis, 29 N. Y. 412; Dolson *v.* Kerr, 5 Hun (N. Y.) 643; Terry *v.* Butler, 43 Barb. (N. Y.) 395; Pine *v.* Rikert, 21 Barb. (N. Y.) 469; Connah *v.* Sedgwick, 1 Barb. (N. Y.) 210; Fuller *v.* Williamson, 14 How. Pr. (N. Y.) 289; Currie *v.* Hart, 2 Sandf. Ch. (N. Y.) 353; Mead *v.* Phillips, 1 Sandf. Ch. (N. Y.) 83; Van Nest *v.* Yoe, 1 Sandf. Ch. (N. Y.) 4. But see Vredenbergh *v.* White, 1 Johns. Cas. (N. Y.) 156.

Texas.— Howerton *v.* Holt, 23 Tex. 52.

21. Prior transactions showing fraud.— Third Nat. Bank *v.* Buffalo Wheel Co., 66 N. Y. App. Div. 293, 73 N. Y. Suppl. 114; Wright *v.* Seaman, 32 N. Y. App. Div. 106, 52 N. Y. Suppl. 893; Williams *v.* Lowndes, 1 Hall (N. Y.) 637; White *v.* Benjamin, 3 Misc. (N. Y.) 490, 23 N. Y. Suppl. 981 [*affirmed* in 8 Misc. (N. Y.) 684, 28 N. Y. Suppl. 1148, 59 N. Y. St. 893]; Messonnier *v.* Kauman, 3 Johns. Ch. (N. Y.) 3; Solinsky *v.* Lincoln Sav. Bank, 85 Tenn. 368, 4 S. W. 836; Shufeldt *v.* Jenkins, 22 Fed. 359.

Prior transactions held not to invalidate the assignment for fraud.— *Alabama.*— H. B. Claflin Co. *v.* Muscogee Mfg. Co., 127 Ala. 376, 30 So. 555.

Arkansas.— Little Rock Bank *v.* Frank, 63 Ark. 16, 37 S. W. 400, 58 Am. St. Rep. 65.

Georgia.— Anthony *v.* Price, 92 Ga. 170, 17 S. E. 1024.

Kentucky.— Stephens *v.* Dickinson, 19 Ky. L. Rep. 1223, 43 S. W. 212.

Massachusetts.— Woodward *v.* Marshall, 22 Pick. (Mass.) 468.

Mississippi.— Thompson *v.* Preston, 73 Miss. 587, 19 So. 347; Anderson *v.* Lachs, 59 Miss. 111.

New York.— Cutter *v.* Hume, 138 N. Y. 630, 33 N. E. 1084, 51 N. Y. St. 934; Livermore *v.* Northrup, 44 N. Y. 107; Fay *v.* Grant, 53 Hun (N. Y.) 44, 5 N. Y. Suppl. 910, 23 N. Y. St. 571 [*affirmed* in 126 N. Y. 624, 27 N. E. 410, 36 N. Y. St. 1012]; Ogden *v.* Peters, 15 Barb. (N. Y.) 560; Cutter *v.* Hume, 17 N. Y. Suppl. 255, 43 N. Y. St. 242 [*affirmed* in 138 N. Y. 630, 33 N. E. 1084, 51 N. Y. St. 934].

North Carolina.— Jordan *v.* Newsome, 126 N. C. 553, 36 S. E. 154; Royster *v.* Stallings, 124 N. C. 55, 32 S. E. 384.

South Dakota.— Wright *v.* Lee, 10 S. D. 263, 72 N. W. 895.

United States.— Peters *v.* Bain, 133 U. S. 670, 10 S. Ct. 354, 33 L. ed. 696; Myers *v.* Fenn, 5 Wall. (U. S.) 205, 18 L. ed. 604; Brooks *v.* Marbury, 11 Wheat. (U. S.) 78, 6 L. ed. 423; Marbury *v.* Brooks, 7 Wheat. (U. S.) 556, 5 L. ed. 522; Baer *v.* Rooks, 50 Fed. 898, 4 U. S. App. 399, 2 C. C. A. 76.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 438.

The intention of the assignor is the true and guiding principle in determining the validity of an assignment for the benefit of creditors, as affected by transactions on the part of the assignor, prior to and in contemplation of such assignment. Anthony *v.* Price, 92 Ga. 170, 17 S. E. 1024; Cutter *v.* Hume, 138 N. Y. 630, 33 N. E. 1084, 51 N. Y. St. 934. See also *supra*, IX, B, 2.

22. When an act is a separate and distinct transaction it will not affect the validity of an assignment. Fay *v.* Grant, 126 N. Y. 624, 27 N. E. 410, 36 N. Y. St. 1012; National Hudson River Bank *v.* Chaskin, 28 N. Y. App. Div. 311, 51 N. Y. Suppl. 64; Zimmer *v.* Hays, 8 N. Y. App. Div. 34, 40 N. Y. Suppl. 397; Champlain First Nat. Bank *v.* Wood, 86 Hun (N. Y.) 491, 33 N. Y. Suppl. 777, 66 N. Y. St. 523 [*affirmed* in 157 N. Y. 690, 51 N. E. 1090]; Dimon *v.* Delmonico, 35 Barb. (N. Y.) 554; Smith *v.* Clarendon, 3 Silv. Supreme (N. Y.) 136, 6 N. Y. Suppl. 809, 25 N. Y. St. 219; Renard *v.* Maydore, 25 How. Pr. (N. Y.) 178; Wilson *v.* Berg, 88 Pa. St. 167. See also *supra*, IV, A, 2, a, (III).

23. Mere fact that debts were fraudulently contracted will not constitute such fraud as will defeat a subsequent assignment for the benefit of creditors.

Arkansas.— Excelsior Mfg. Co. *v.* Owens, 58 Ark. 556, 25 S. W. 868.

nor fraudulently transferring property before assignment will invalidate the deed of assignment,[24] unless such transfer be a part of the transaction so as to be considered as part of the assignment itself, or unless such transfer constitutes part of a common scheme to defraud.[25] So the withdrawal or transfer of a substantial portion of the assets of a debtor immediately prior to the filing of a general assignment raises a presumption of fraud,[26] and the assignment is invalidated where the withdrawal and the assignment appear to be parts of a common design to defraud.[27]

Kansas.— Marlin *v.* Teichgraeber, (Kan. 1901) 66 Pac. 234.

Kentucky.— Reinhard *v.* State Bank, 6 B. Mon. (Ky.) 252.

Maryland.— Strauss *v.* Rose, 59 Md. 525.

Massachusetts.— Woodward *v.* Marshall, 22 Pick. (Mass.) 468.

New York.— Talcott *v.* Rosenthal, 22 Hun (N. Y.) 573.

Rhode Island.— Spencer *v.* Jackson, 2 R. I. 35.

Wisconsin.— Greene, etc., Co. *v.* Van Vechten, 63 Wis. 16, 22 N. W. 943.

United States.— South Branch Lumber Co. *v.* Ott, 142 U. S. 622, 12 S. Ct. 318, 35 L. ed. 1136.

24. Fraudulently transferring property.— *Colorado.*— Cleghorn *v.* Sayre, 22 Colo. 400, 45 Pac. 372.

Illinois.— Feltenstein *v.* Stein, 157 Ill. 19, 45 N. E. 502.

Kansas.— Marshall *v.* Van de Mark, 57 Kan. 304, 46 Pac. 308.

Kentucky.— See Stephens *v.* Dickinson, 19 Ky. L. Rep. 1223, 43 S. W. 212.

Nebraska.— Deere *v.* Losey, 48 Nebr. 622, 67 N. W. 462.

New York.— Zimmer *v.* Hays, 8 N. Y. App. Div. 34, 40 N. Y. Suppl. 397; Champlain First Nat. Bank *v.* Wood. 86 Hun (N. Y.) 491, 33 N. Y. Suppl. 777, 66 N. Y. St. 523 [*affirmed* in 157 N. Y. 690, 51 N. E. 1090]; Ogden *v.* Peters, 15 Barb. (N. Y.) 560; Cutter *v.* Hume, 17 N. Y. Suppl. 255, 43 N. Y. St. 242 [*affirmed* in 138 N. Y. 630, 33 N. E. 1084, 51 N. Y. St. 934].

Pennsylvania.— Wilson *v.* Berg, 88 Pa. St. 167.

Wisconsin.— Batten *v.* Richards, 70 Wis. 272, 35 N. W. 542.

25. Part of same transaction or of common scheme to defraud.— Cummings *v.* McCullough, 5 Ala. 324; Vahlberg *v.* Birnbaum, 64 Ark. 207, 41 S. W. 581; Westport First Nat. Bank *v.* Raymond, 14 N. Y. St. 868; Hill *v.* Woodberry, 49 Fed. 138, 4 U. S. App. 68, 1 C. C. A. 206; Fuller *v.* Ives, 6 McLean (U. S.) 478, 9 Fed. Cas. No. 5,150.

In some states, however, it is held that such fraudulent disposition will not defeat the assignment, the property transferred being recoverable by the assignee. Cleghorn *v.* Sayre, 22 Colo. 400, 45 Pac. 372; Feltenstein *v.* Stein, 157 Ill. 19, 45 N. E. 502; Deere *v.* Losey, 48 Nebr. 622, 67 N. W. 462.

26. Withdrawal of assets immediately before assignment.— Danzig *v.* Saks, 20 D. C. 177; Coursey *v.* Morton, 132 N. Y. 556, 30 N. E. 231, 43 N. Y. St. 673; Loeschick *v.* Baldwin, 38 N. Y. 326 [*affirming* 1 Rob. (N. Y.) 377]; National Hudson River Bank *v.* Chaskin, 28 N. Y. App. Div. 311, 51 N. Y. Suppl. 64; Birdsall, etc., Mfg. Co. *v.* Schwarz, 3 N. Y. App. Div. 298, 38 N. Y. Suppl. 368, 74 N. Y. St. 24; Rothschild *v.* Salomon, 52 Hun (N. Y.) 486, 5 N. Y. Suppl. 865, 24 N. Y. St. 205; Smith *v.* Clarendon, 3 Silv. Supreme (N. Y.) 136, 6 N. Y. Suppl. 809, 25 N. Y. St. 219; Constable *v.* Hardenbergh, 14 Misc. (N. Y.) 159, 35 N. Y. Suppl. 353, 69 N. Y. St. 740; Younger *v.* Massey, 39 S. C. 115, 17 S. E. 711; Baer *v.* Rooks, 50 Fed. 898, 4 U. S. App. 399, 2 C. C. A. 76.

Where assignor takes assets on the advice of counsel and without any intent to defraud his creditors the assignment is void. Constable *v.* Hardenbergh, 14 Misc. (N. Y.) 159, 35 N. Y. Suppl. 353, 69 N. Y. St. 740.

27. Part of common scheme to defraud.— Ball-Warren Commission Co. *v.* Wills, 65 Ark. 270, 45 S. W. 687; Coursey *v.* Morton, 132 N. Y. 556, 30 N. E. 231, 43 N. Y. St. 673; Cruikshank *v.* Walsh, 39 N. Y. App. Div. 632, 56 N. Y. Suppl. 894; Smith *v.* Clarendon, 3 Silv. Supreme (N. Y.) 136, 6 N. Y. Suppl. 809, 25 N. Y. St. 219; King *v.* Baer, 31 Misc. (N. Y.) 308, 64 N. Y. Suppl. 228; Passavant *v.* Cantor, 17 N. Y. Suppl. 37, 43 N. Y. St. 247; Wilcox *v.* Payne, 8 N. Y. Suppl. 407, 28 N. Y. St. 712 [*affirming* 4 N. Y. Suppl. 358, 19 N. Y. St. 893, 22 Abb. N. Cas. (N. Y.) 307]; Vietor *v.* Nichols, 13 N. Y. St. 461.

In Arkansas it is held that the withdrawal of a large sum by a director of an insolvent corporation immediately before an assignment by the latter will not vitiate the assignment where the assignor has not attempted to conceal the transaction. Worthen *v.* Griffith, 59 Ark. 562, 28 S. W. 286, 43 Am. St. Rep. 50.

In Missouri it is held that the fact that a grantor sold certain of the assigned property and kept the proceeds is not conclusive evidence of fraudulent intent where the right is not reserved, but the deed merely provides that he shall retain possession and sell certain property and reinvest the proceeds. Thompson *v.* Foerstel, 10 Mo. App. 290.

Accounting to assignee for proceeds.— In Hyman *v.* Kapp, 6 N. Y. Suppl. 31, 25 N. Y. St. 1034 [*affirmed* in 125 N. Y. 700, 26 N. E. 752, 34 N. Y. St. 1012], it is held that where transfers of substantial portions of property have been made immediately prior to assignment the same will not defeat the conveyance where the proceeds have been delivered to the assignee.

C. Evidence of Fraud — 1. Presumptions and Burden of Proof. While the fraudulent nature of an assignment for the benefit of creditors may be presumed from the facts and attendant circumstances[28] this presumption of fraud may be rebutted and explained by other facts or circumstances.[29] The absence of fraud and the existence of good faith are presumed in the execution of an assignment for the benefit of creditors fair upon its face, and the burden of showing the presence of fraud or of fraudulent intent is upon him who assails the assignment;[30] but where from an inspection of the instrument itself the assignment is *prima facie* fraudulent the burden of proof is upon the assignor to show the validity of the deed.[31]

2. Admissibility — a. In General. Fraud in an instrument of assignment must be determined from an inspection of the instrument itself, without regard to extrinsic facts.[32] Fraud in fact, however, arises from the acts and circumstances in connection with the transaction in question, and an assignment though valid on its face is void as being fraudulent in fact if made with a fraudulent intent to hinder, delay, and defraud creditors and which by its terms may operate in aid of such fraudulent intent.[33] Fraud or fraudulent intent such as will vitiate an assignment for the benefit of creditors must be shown by legal and competent evidence.[34]

Mere continuance of the withdrawal of a regular amount which it has been the custom of the debtor for some time to withdraw will not vitiate the assignment. Estes *v.* Gunter, 122 U. S. 450, 7 S. Ct. 1275, 30 L. ed. 1228.

The transfer of a deposit before assignment of itself does not justify a presumption of fraud. Shultz *v.* Hoagland, 85 N. Y. 464.

28. Fraud may be presumed.— Hastings *v.* Baldwin, 17 Mass. 552; Pierson *v.* Manning, 2 Mich. 445; Stern *v.* Fisher, 32 Barb. (N. Y.) 198; Williams *v.* Lowndes, 1 Hall (N. Y.) 637; Mead *v.* Phillips, 1 Sandf. Ch. (N. Y.) 83; Carlton *v.* Baldwin, 22 Tex. 724; Hill *v.* Agnew, 12 Fed. 230. See also, generally, cases cited *infra*, notes 42–45.

29. Presumption of fraud may be rebutted. — Cummings *v.* McCullough, 5 Ala. 324; Hutchinson *v.* Green, 91 Mo. 367, 1 S. W. 853; Wilt *v.* Franklin, 1 Binn. (Pa.) 502, 2 Am. Dec. 474; Howerton *v.* Holt, 23 Tex. 52. See also, generally, cases cited *infra*, notes 42–45.

30. Assignment fair upon its face.— *Arkansas.*— Dews *v.* Cornish, 20 Ark. 332.

Louisiana.—Layson *v.* Rowan, 7 Rob. (La.) 1.

Maryland.— Pitts Agricultural Works *v.* Smelser, 87 Md. 493, 40 Atl. 56; Strauss *v.* Rose, 59 Md. 525. See also Pfaff *v.* Prag, 79 Md. 369, 29 Atl. 824 [*explaining* Riley *v.* Carter, 76 Md. 581, 25 Atl. 667, 35 Am. St. Rep. 443, 19 L. R. A. 489]. And *compare* Sangston *v.* Gaither, 3 Md. 40.

Missouri.— State *v.* Keeler, 49 Mo. 548.

Montana.— Wilson *v.* Harris, 21 Mont. 374, 54 Pac. 46, 19 Mont. 69, 47 Pac. 1101.

New York.— Shultz *v.* Hoagland, 85 N. Y. 464; Townsend *v.* Stearns, 32 N. Y. 209; Silver Creek Bank *v.* Talcott, 22 Barb. (N. Y.) 550; Phillips *v.* Tucker, 14 N. Y. St. 120.

North Carolina.— Hodges *v.* Lassiter, 96 N. C. 351, 2 S. E. 923. See also Blalock *v.* Kernersville Mfg. Co., 110 N. C. 99, 14 S. E. 501.

South Dakota.— Landauer *v.* Conklin, 3 S. D. 462, 54 N. W. 322.

Tennessee.— Washington *v.* Ryan, 5 Baxt. (Tenn.) 622.

Wisconsin.— Bates *v.* Simmons, 62 Wis. 69, 22 N. W. 335.

United States.— Means *v.* Montgomery, 23 Fed. 421.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 445.

The burden of proof is shifted, however, upon proof of facts raising the presumption of fraud; it is then incumbent upon the assignor, the assignee, or the beneficiaries to show the *bona fides* of the transaction. Cummings *v.* McCullough, 5 Ala. 324; Einstein *v.* Chapman, 42 N. Y. Super. Ct. 144; Howerton *v.* Holt, 23 Tex. 52; Carlton *v.* Baldwin, 22 Tex. 724; Estes *v.* Spain, 19 Fed. 714.

31. Deed prima facie fraudulent on its face.— Pfaff *v.* Prag, 79 Md. 369, 29 Atl. 824; Pierson *v.* Manning, 2 Mich. 445. *Compare* Blalock *v.* Kernersville Mfg. Co., 110 N. C. 99, 14 S. E. 501.

32. Fraud in law.— Malcolm *v.* Hodges, 8 Md. 418; Silver Creek Bank *v.* Talcott, 22 Barb. (N. Y.) 550; Hill *v.* Agnew, 12 Fed. 230.

33. Fraud in fact.— York *v.* Ferrell, 14 Ky. L. Rep. 207; Foley *v.* Bitter, 34 Md. 646; Lester *v.* Abbott, 28 How. Pr. (N. Y.) 488; Solinsky *v.* Lincoln Sav. Bank, 85 Tenn. 368, 4 S. W. 836. See also *supra*, IX, B.

34. Evidence must be competent and material.— *Alabama.*— Richardson *v.* Stringfellow, 100 Ala. 416, 14 So. 283.

Michigan.— Smith *v.* Mitchell, 12 Mich. 180.

Missouri.— Wise *v.* Wimer, 23 Mo. 237.

New York.— Seymour *v.* Wilson, 15 How. Pr. (N. Y.) 355. See also McClure *v.* Goodenough, 12 N. Y. Suppl. 459, 19 N. Y. Civ. Proc. 191.

Texas.— Swearingen *v.* Hendley, 1 Tex. Unrep. Cas. 639.

Fraudulent intent in making an assign-

b. Prior Acts, Declarations, and Transactions. Evidence relative to transactions prior to or in contemplation of assignment is admissible as tending to show the fraudulent intention of the assignor in making it.[35] Thus declarations, promises, or statements of the assignor made prior to the assignment for the benefit of his creditors may be admissible in evidence against him to establish the fraudulent character of the assignment;[36] so, misrepresentations by the assignor as to his circumstances is evidence tending to show that the debt was fraudulently contracted[37] and this taken with other facts may be sufficient to invalidate an assignment.[38]

c. Contemporaneous Facts, Statements, and Transactions. Admissions of the assignor, as well as other facts and circumstances, which are contemporaneous with the making of the assignment, may be admitted in evidence as tending to show whether the assignment was fraudulently made or not.[39]

d. Subsequent Acts, Declarations, and Transactions. As a rule evidence of acts, declarations, and transactions subsequent to the assignment is inadmissible to show its invalidity for fraud;[40] but it has been held that under some circumstances and for some purposes such evidence may be admitted.[41]

ment for creditors may be shown by the acts and declarations of the assignor, his circumstances and situation, and the terms or provisions of the instrument. Baldwin *v.* Buckland, 11 Mich. 389.

35. *Alabama.*— Richardson *v.* Stringfellow, 100 Ala. 416, 14 So. 283.

New Hampshire.— Haven *v.* Richardson, 5 N. H. 113.

New York.— Gillott *v.* Redlich, 50 Hun (N. Y.) 390, 3 N. Y. Suppl. 325, 20 N. Y. St. 893; Peck *v.* Crouse, 46 Barb. (N. Y.) 151; Roberts *v.* Shepard, 2 Daly (N. Y.) 110.

Rhode Island.— Dodge *v.* Goodell, 16 R. I. 48, 12 Atl. 236.

United States.— Peters *v.* Bain, 133 U. S. 670, 10 S. Ct. 354, 33 L. ed. 696.

36. Assignor's declarations.— Wyckoff *v.* Carr, 8 Mich. 44; Kennedy *v.* Wood, 52 Hun (N. Y.) 46, 4 N. Y. Suppl. 758, 22 N. Y. St. 132; Clark *v.* Taylor, 37 Hun (N. Y.) 312; Passavant *v.* Cantor, 17 N. Y. Suppl. 37, 43 N. Y. St. 247; Gasherie *v.* Apple, 14 Abb. Pr. (N. Y.) 64. But see Cuyler *v.* McCartney, 40 N. Y. 221; Flagler *v.* Schoeffel, 40 Hun (N. Y.) 178; Flagler *v.* Wheeler, 40 Hun (N. Y.) 125; Low *v.* Graydon, 50 Barb. (N. Y.) 414; Powers *v.* Graydon, 10 Bosw. (N. Y.) 630; North River Bank *v.* Schumann, 63 How. Pr. (N. Y.) 476.

37. See *supra*, IX, B, 5.

38. Misrepresentations of assignor.— Excelsior Mfg. Co. *v.* Owens, 58 Ark. 556, 25 S. W. 868; McNaney *v.* Hall, 86 Hun (N. Y.) 415, 33 N. Y. Suppl. 518, 67 N. Y. St. 174 [*affirmed* in 159 N. Y. 544, 54 N. E. 1093]; Bath First Nat. Bank *v.* Warner, 55 Hun (N. Y.) 120, 8 N. Y. Suppl. 765, 28 N. Y. St. 450; Cohen *v.* Irion, 7 N. Y. Suppl. 106, 26 N. Y. St. 1 [*reversed* in 126 N. Y. 665, 27 N. E. 853, 37 N. Y. St. 963]; Wilson *v.* Ferguson, 10 How. Pr. (N. Y.) 175. But see Reinhard *v.* State Bank, 6 B. Mon. (Ky.) 252; Trueheart *v.* Craddock, (Miss. 1898) 23 So. 549; Pool *v.* Ellison, 56 Hun (N. Y.) 108, 9 N. Y. Suppl. 171, 30 N. Y. St. 135; Hyman *v.* Kapp, 6 N. Y. Suppl. 31, 25 N. Y. St. 1034 [*affirmed* in 125 N. Y. 700, 26 N. E. 752, 34 N. Y. St. 1012]; Tim *v.* Smith, 13 Abb. N. Cas. (N. Y.) 31; Spencer *v.* Jackson, 2 R. I. 35; Bean *v.* Warden, (Tex. Civ. App. 1895) 31 S. W. 831, construing Sayles' Civ. Stat. Tex. (1895), art. 65*f*.

39. Contemporaneous circumstances.— Jellenik *v.* May, 41 Hun (N. Y.) 386; Gasherie *v.* Apple, 14 Abb. Pr. (N. Y.) 64; North River Bank *v.* Schumann, 63 How. Pr. (N. Y.) 476; Bades *v.* Ableman, 13 Wis. 644; Estes *v.* Spain, 19 Fed. 714; Adler *v.* Ecker, 1 McCrary (U. S.) 256, 2 Fed. 126; Gilkerson *v.* Hamilton, 10 Fed. Cas. No. 5,424*a*, 1 Am. L. Mag. 35. But see Jackson *v.* Cornell, 1 Sandf. Ch. (N. Y.) 348; Paul *v.* Baugh, 85 Va. 955, 9 S. E. 329.

Assignee's insolvency or character for honesty and fair dealing may be shown. Holmberg *v.* Dean, 21 Kan. 73; Angell *v.* Rosenbury, 12 Mich. 241.

Proof of the solvency of an assignee for the benefit of creditors is not admissible to rebut the presumption of improper motive arising from the selection of an illiterate person as such assignee. Guerin *v.* Hunt, 6 Minn. 375.

40. Generally inadmissible.— *Alabama.*— Stetson *v.* Miller, 36 Ala. 642, acts of assignor.

Iowa.— Savery *v.* Spaulding, 8 Iowa 239, 74 Am. Dec. 300, declarations of assignor.

Montana.—Wilson *v.* Harris, 21 Mont. 374, 54 Pac. 46, 19 Mont. 69, 47 Pac. 1101, declarations of others not participated in by assignor.

New York.— Coyne *v.* Weaver, 84 N. Y. 386; Flagler *v.* Wheeler, 40 Hun (N. Y.) 125.

North Carolina.— Hodges *v.* Lassiter, 96 N. C. 351, 2 S. E. 923.

Wisconsin.— Ford *v.* Clarke, 83 Wis. 45, 53 N. W. 31; Bates *v.* Ableman, 13 Wis. 644 (declarations of assignor); Norton *v.* Kearney, 10 Wis. 443 (declarations of assignor).

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 450. See also *supra*, II, G, 4.

41. When admissible.— *Indiana.*— Caldwell *v.* Williams, 1 Ind. 405, where there

3. SUFFICIENCY. Mere suspicion of fraud or of fraudulent intent is not enough to invalidate an assignment for fraud.[42] An assignment for the benefit of creditors should not be set aside except upon clear and convincing proof of fraudulent intent;[43] and although the evidence in the cause may show a presumptive case

seemed to exist a common intent on the part of assignor and assignee to defraud.

Kansas.— Hairgrove *v.* Millington, 8 Kan. 480, admissible against assignor but not against assignee.

Michigan.— Frankel *v.* Coots, 41 Mich. 75, 1 N. W. 940, admissions of assignor retaining possession.

Minnesota.— Guerin *v.* Hunt, 6 Minn. 375, assignee's conduct of the business.

New York.— Newlin *v.* Lyon, 49 N. Y. 661 (where assignor continues in possession); Cuyler *v.* McCartney, 40 N. Y. 221 (conduct of assignee on taking possession); Adams *v.* Davidson, 10 N. Y. 309 (where assignor continues in possession); Wright *v.* Seaman, 32 N. Y. App. Div. 106, 52 N. Y. Suppl. 893 (in case of preferential assignment); Mathews *v.* Poultney, 33 Barb. (N. Y.) 127; Smith *v.* Clarendon, 3 Silv. Supreme (N. Y.) 136, 6 N. Y. Suppl. 809, 25 N. Y. St. 219 (considered with many circumstances tending to show fraud).

Rhode Island.— Dodge *v.* Goodell, 16 R. I. 48, 12 Atl. 236, statements of assignor remaining in possession.

Texas.— Linn *v.* Wright, 18 Tex. 317, 70 Am. Dec. 282 (where assignor is employed by assignee to manage property); Wright *v.* Linn, 16 Tex. 34.

United States.— Badgett *v.* Johnson-Fife Hat Co., 85 Fed. 408, 56 U. S. App. 416, 29 C. C. A. 230.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 447 *et seq.*

42. Mere suspicion of fraudulent intent is not enough. McClure *v.* Goodenough, 12 N. Y. Suppl. 459, 19 N. Y. Civ. Proc. 191; Simon *v.* Ellison (Va. 1895), 22 S. E. 860. Where an assignment for the benefit of creditors is assailed on the ground of fraud, the fraud is to be proved and not presumed; and it is not sufficient that the facts are ambiguous, and as consistent with innocence as with guilt, if, taken together, they are consistent with an honest intent. Shultz *v.* Hoagland, 85 N. Y. 464.

43. Evidence must be clear and convincing. — For illustrations of evidence held to be sufficiently clear and convincing see:

Illinois.— Gardner *v.* Commercial Nat. Bank, 95 Ill. 298; Nimmo *v.* Kuykendall, 85 Ill. 476.

Kentucky.— German Ins. Bank *v.* Nunes, 80 Ky. 334, 4 Ky. L. Rep. 16; Ward *v.* Trotter, 3 T. B. Mon. (Ky.) 1; Grinstead *v.* Richardson, 12 Ky. L. Rep. 798.

Massachusetts.— Bernard *v.* Barney Myroleum Co., 147 Mass. 356, 17 N. E. 887.

Michigan.— Hollister *v.* Loud, 2 Mich. 309.

Minnesota.— Gere *v.* Murray, 6 Minn. 305.

Mississippi.— Scott *v.* Francis Vandergrift Shoe Co., (Miss. 1891) 10 So. 455.

New Jersey.— Knight *v.* Packer, 12 N. J. Eq. 214, 72 Am. Dec. 388.

New Mexico.— Field *v.* Romero, 7 N. M. 630, 41 Pac. 517.

New York.— Bagley *v.* Bowe, 105 N. Y. 171, 11 N. E. 386, 59 Am. Rep. 488; Clark *v.* Taylor, 37 Hun (N. Y.) 312; Cuyler *v.* McCartney, 33 Barb. (N. Y.) 165; Mathews *v.* Poultney, 33 Barb. (N. Y.) 127; Jessup *v.* Hulse, 29 Barb. (N. Y.) 539; Kellogg *v.* Slawson, 15 Barb. (N. Y.) 56; Smith *v.* Clarendon, 3 Silv. Supreme (N. Y.) 136, 6 N. Y. Suppl. 809, 25 N. Y. St. 219; Illinois Watch Co. *v.* Payne, 11 N. Y. Suppl. 408, 33 N. Y. St. 967 [*affirmed* in 132 N. Y. 597, 30 N. E. 1151, 44 N. Y. St. 934]; Smith *v.* White, 2 N. Y. Suppl. 855, 19 N. Y. St. 164; Friedburgher *v.* Jaberg, 20 Abb. N. Cas. (N. Y.) 279; Portchester First Nat. Bank *v.* Halsted, 20 Abb. N. Cas. (N. Y.) 155; Currie *v.* Hart, 2 Sandf. Ch. (N. Y.) 353; Cram *v.* Mitchell, 1 Sandf. Ch. (N. Y.) 251; Van Nest *v.* Yoe, 1 Sandf. Ch. (N. Y.) 4.

North Carolina.— Hodges *v.* Lassiter, 96 N. C. 351, 2 S. E. 923; London *v.* Parsley, 52 N. C. 313.

Rhode Island.— Gardner *v.* Commercial Nat. Bank, 13 R. I. 155.

Virginia.— Armstrong *v.* Lachman, 84 Va. 726, 6 S. E. 129.

Wisconsin.— Lindsay *v.* Guy, 57 Wis. 200, 15 N. W. 181.

United States.— Adler *v.* Ecker, 1 McCrary (U. S.) 256, 2 Fed. 126; Bickham *v.* Lake, 51 Fed. 892; Wooldridge *v.* Irving, 23 Fed. 676; Shufeldt *v.* Jenkins, 22 Fed. 359; Olney *v.* Tanner, 10 Fed. 101.

Canada.— McDonald *v.* Cummings, 24 Can. Supreme Ct. 321.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 451.

Illustrations of insufficient evidence.— *Colorado.*— Burr *v.* Clement, 9 Colo. 1, 9 Pac. 633; Hunter *v.* Ferguson, 3 Colo. App. 287, 33 Pac. 82.

Connecticut.— Greene *v.* A. & W. Sprague Mfg. Co., 52 Conn. 330.

Kentucky.— Carlisle Deposit Bank *v.* Lee, 13 Ky. L. Rep. 495.

Mississippi.— Chambers *v.* Meaut, 66 Miss. 625, 6 So. 465.

New York.— Shultz *v.* Hoagland, 85 N. Y. 464; Putnam *v.* Hubbell, 42 N. Y. 106; Van Vechten *v.* Van Vechten, 65 Hun (N. Y.) 215, 20 N. Y. Suppl. 140, 47 N. Y. St. 511; Roberts *v.* Vietor, 54 Hun (N. Y.) 461, 7 N. Y. Suppl. 777, 28 N. Y. St. 100; Brigham *v.* Tillinghast, 15 Barb. (N. Y.) 618; Nordlinger *v.* Anderson, 2 Silv. Supreme (N. Y.) 334, 5 N. Y. Suppl. 609, 24 N. Y. St. 240; Perry *v.* Volkening, 44 N. Y. Super. Ct. 332; Gates *v.* Citizens' Nat. Bank, 19 N. Y. Suppl. 513, 47 N. Y. St. 95; Lewis *v.* Bache, 7 N. Y.

of fraud[44] it has been held that this will not be sufficient unless the presumption is conclusive.[45]

D. Question of Law or of Fact. Whether or not a deed of assignment is fraudulent as a matter of law is a question which the court must determine from an inspection of the record alone and there must appear some provision or stipulation irreconcilable with an honest intent;[46] but the question of fraud in an assignment for the benefit of creditors, where the same is not apparent on the face of the assignment, but is dependent upon external proofs, must be determined by the jury and not by the court.[47]

X. CONSTRUCTION, OPERATION, AND EFFECT.

A. Rules of Construction. Assignments for the benefit of creditors are subject to the same rules of construction which are applied to other contracts or

Suppl. 757 [*affirmed* in 130 N. Y. 640, 29 N. E. 151, 40 N. Y. St. 983]; Durfee *v.* Bump, 3 N. Y. Suppl. 505, 20 N. Y. St. 833; Smith *v.* White, 2 N. Y. Suppl. 855, 19 N. Y. St. 164; Sloan *v.* Gauhn, 12 N. Y. St. 717; Eastern Nat. Bank *v.* Hulshizer, 2 N. Y. St. 93; North River Bank *v.* Schumann, 63 How. Pr. (N. Y.) 476; Beamish *v.* Conant, 24 How. Pr. (N. Y.) 94; Pearce *v.* Beach, 12 How. Pr. (N. Y.) 404.

North Carolina.— Barber *v.* Buffaloe, 111 N. C. 206, 16 S. E. 386; Bobbitt *v.* Rodwell, 105 N. C. 236, 11 S. E. 245.

South Carolina.— Sullivan *v.* Sullivan Mfg. Co., 17 S. C. 588.

Tennessee.— Hefner *v.* Metcalf, 1 Head (Tenn.) 577.

United States.— Farwell *v.* Maxwell, 34 Fed. 727.

44. Evidence merely raising presumption is insufficient.— *Illinois.*—Clark *v.* Groom, 24 Ill. 316.

Maine.— Pike *v.* Bacon, 21 Me. 280, 38 Am. Dec. 259.

Massachusetts.— Hastings *v.* Baldwin, 17 Mass. 552.

Michigan.— Baldwin *v.* Buckland, 11 Mich. 389.

Minnesota.— Guerin *v.* Hunt, 6 Minn. 375.

Mississippi.— Taylor *v.* Watkins, (Miss. 1893) 13 So. 811.

New York.— Acker *v.* Leland, 109 N. Y. 5, 15 N. E. 743, 14 N. Y. St. 23; Turney *v.* Van Gelder, 68 Hun (N. Y.) 481, 23 N. Y. Suppl. 27, 52 N. Y. St. 664 [*affirmed* in 143 N. Y. 632, 37 N. E. 826, 60 N. Y. St. 876]; Roberts *v.* Vietor, 54 Hun (N. Y.) 461, 7 N. Y. Suppl. 777, 28 N. Y. St. 100; Waverly Nat. Bank *v.* Halsey, 57 Barb. (N. Y.) 249; Cutter *v.* Hume, 17 N. Y. Suppl. 255, 43 N. Y. St. 242 [*affirmed* in 138 N. Y. 630, 33 N. E. 1084, 51 N. Y. St. 934]; De Camp *v.* Marshall, 2 Abb. Pr. N. S. (N. Y.) 373; Reed *v.* Emery, 8 Paige (N. Y.) 417, 35 Am. Dec. 720; Currie *v.* Hart, 2 Sandf. Ch. (N. Y.) 353.

Virginia.— Paul *v.* Baugh, 85 Va. 955, 9 S. E. 329.

Wisconsin.— Bates *v.* Ableman, 13 Wis. 644.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 447.

45. Presumption of fraud must be conclusive.— Higby *v.* Ayres, 14 Kan. 331; Hays *v.* Doane, 11 N. J. Eq. 84; Talcott *v.* Hess, 31 Hun (N. Y.) 282, 4 N. Y. St. 62. See also cases cited *supra*, note 44.

46. Question of law for the court.—*Massachusetts.*— Harris *v.* Sumner, 2 Pick. (Mass.) 129.

Missouri.— Johnson *v.* McAllister, 30 Mo. 327.

New York.— Sheldon *v.* Dodge, 4 Den. (N. Y.) 217. See also Place *v.* Miller, 6 Abb. Pr. N. S. (N. Y.) 178.

Michigan.— Pierson *v.* Manning, 2 Mich. 445.

Montana.—Rosenstein *v.* Coleman, 18 Mont. 459, 45 Pac. 1081.

South Carolina.— Stewart *v.* Kerrison, 3 S. C. 266.

Texas.— Bailey *v.* Mills, 27 Tex. 434.

West Virginia.— Landeman *v.* Wilson, 29 W. Va. 702, 2 S. E. 203.

United States.— Means *v.* Montgomery, 23 Fed. 421.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 455.

47. Question of fact for jury.— *Connecticut.*—Warner Glove Co. *v.* Jennings, 58 Conn. 74, 19 Atl. 239.

Illinois.— Nimmo *v.* Kuykendall, 85 Ill. 476.

Missouri.— State *v.* Keeler, 49 Mo. 548; Johnson *v.* McAllister, 30 Mo. 327.

New York.—Fay *v.* Grant, 53 Hun (N. Y.) 44, 5 N. Y. Suppl. 910, 23 N. Y. St. 571 [*affirmed* in 126 N. Y. 624, 27 N. E. 410, 36 N. Y. St. 1012]; Mathews *v.* Poultney, 33 Barb. (N. Y.) 127; Place *v.* Miller, 6 Abb. Pr. N. S. (N. Y.) 178. *Compare* Chambers *v.* Smith, 60 Hun (N. Y.) 248, 14 N. Y. Suppl. 706, 38 N. Y. St. 213.

North Carolina.— Hodges *v.* Lassiter, 96 N. C. 351, 2 S. E. 923; Hardy *v.* Skinner, 31 N. C. 191. *Compare* Barber *v.* Buffaloe, 111 N. C. 206, 16 S. E. 386.

Texas.— Van Hook *v.* Walton, 28 Tex. 59; Bailey *v.* Mills, 27 Tex. 434; Green *v.* Banks, 24 Tex. 508; Baldwin *v.* Peet, 22 Tex. 708, 75 Am. Dec. 806; Linn *v.* Wright, 18 Tex. 317, 70 Am. Dec. 282. See also Weaver *v.* Goodman, (Tex. Civ. App. 1899) 51 S. W. 860.

United States.— Bickham *v.* Lake, 51 Fed. 892.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 433.

conveyances.[1] General statements or recitals are restricted by words or clauses of narrower import,[2] unless such restriction defeats the intention of the parties.[3]

B. Operation and Effect Generally — 1. Amendment of Assignment.[4] An assignment properly executed and accepted by the assignee cannot be subsequently amended by the assignor,[5] and a subsequent assignment will not affect a valid prior assignment[6] or disturb a prior composition agreement between the debtor and his creditors.[7]

2. Revocation of Assignment.[8] An assignment duly executed and accepted by the assignee and assented to by the creditors[9] cannot be revoked by the

1. *Alabama.*— Mobile Bank *v.* Dunn, 67 Ala. 381.

Maryland.— Hall *v.* Farmers' Nat. Bank, 53 Md. 120.

New York.— Crook *v.* Rindskopf, 105 N. Y. 476, 12 N. E. 174; Knapp *v.* McGowan, 96 N. Y. 75; Matter of Fay, 6 Misc. (N. Y.) 462, 27 N. Y. Suppl. 910.

South Dakota.— Landauer *v.* Conklin, 3 S. D. 462, 54 N. W. 322.

Wisconsin.— Eau Claire Grocer Co. *v.* Hubbard, 97 Wis. 661, 73 N. W. 570.

See, generally, Contracts; Deeds; and 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 484.

Deeds of assignment giving preferences are to be construed strictly, and courts of equity will not interpolate phrases to carry out a possible intent to give preferences otherwise than as expressed. Market Nat. Bank *v.* Hofheimer, 23 Fed. 13.

Several instruments.— Where a partnership owning personal property situated in two different states executes two instruments, each transferring the property in one state, they are to be construed separately, each in accordance with the laws of the state where the property conveyed is situated, and the fact that one operates as a general assignment cannot affect the construction of the other. Dunham *v.* McNatt, 15 Tex. Civ. App. 552, 39 S. W. 1016.

2. Hatchett *v.* Blanton, 72 Ala. 423; Halsey *v.* Fairbanks, 4 Mason (U. S.) 206, 11 Fed. Cas. No. 5,964.

General words will be limited and controlled by a schedule attached thereto and referred to containing a particular description of the property assigned.

District of Columbia.— Keane *v.* Chamberlain, 14 App. Cas. (D. C.) 84.

Georgia.—See Roberts *v.* Boylan, 24 Ga. 40.

Kentucky.—Scott *v.* Coleman, 5 Litt. (Ky.) 349, 15 Am. Dec. 71.

Maryland.— Mims *v.* Armstrong, 31 Md. 87, 1 Am. Rep. 22.

Minnesota.— Guerin *v.* Hunt, 6 Minn. 375.

New Hampshire.—Rundlett *v.* Dole, 10 N. H. 458.

New York.— Wilkes *v.* Ferris, 5 Johns. (N. Y.) 335, 4 Am. Dec. 364.

United States.— Bock *v.* Perkins, 139 U. S. 628, 11 S. Ct. 677, 35 L. ed. 314.

3. Emigrant Industrial Sav. Bank *v.* Roche, 93 N. Y. 374.

4. As to reservation in conveyance of power to amend see *supra*, V, A.

5. **Amendment by assignor.**— Ingram *v.* Kirkpatrick, 41 N. C. 463, 51 Am. Dec. 428.

The name of a creditor unintentionally omitted in the deed by reason of the draftsman's mistake cannot be inserted by an amended deed acknowledged and registered with the original deed of trust, except by consent of the trustee and the beneficiaries. Baker *v.* Harlan, 3 Lea (Tenn.) 505.

6. **Prior assignment.**— Drake *v.* Ellman, 80 Ky. 434; Seal *v.* Duffy, 4 Pa. St. 274, 95 Am. Dec. 691.

Cure of illegal provision.— A second assignment may be made to cure an illegal provision in a former one, and if such is its apparent purpose it will be construed, if possible, so as not to conflict in other particulars with the first assignment. Morrison *v.* Shuster, 1 Mackey (D. C.) 190.

Prior assignment invalid.—Where a debtor makes an unrecorded assignment of certain of his property in trust for a single creditor, and afterward makes a general assignment of all his property for the benefit of all his creditors, which is recorded, the prior assignment is void as against all creditors save the one named therein, and the property thereby transferred passes to the assignee named in the second assignment. Kern *v.* Powell, 98 Pa. St. 253.

7. **Prior composition agreement.**— Robert *v.* Barnum, 80 Ky. 28.

8. As to reservation in conveyance of power to revoke see *supra*, V, A.

9. **Revocation before assent.**— If the creditors are not parties or privies to a deed of assignment, and the trustee has not dealt with them in performance of its provisions, the deed operates merely as a power to the trustee and is revocable by the debtor.

Georgia.— Jones *v.* Dougherty, 10 Ga. 273.

Missouri.—Attleboro First Nat. Bank *v.* Hughes, 10 Mo. App. 7.

Nevada.— Gibson *v.* Chedic, 1 Nev. 497, 90 Am. Dec. 503.

Pennsylvania.— Watson *v.* Bagaley, 12 Pa. St. 164, 51 Am. Dec. 595.

Tennessee.—Mills *v.* Haines, 3 Head (Tenn.) 331; Brevard *v.* Neely, 2 Sneed (Tenn.) 164; Galt *v.* Dibrell, 10 Yerg. (Tenn.) 146.

Wisconsin.— See Oakley *v.* Hibbard, 1 Pinn. (Wis.) 674, 44 Am. Dec. 425, holding that one who was not in failing circumstances, but who made an assignment of his property to a trustee to pay off certain debts out of the proceeds of the sale of the same, had the right to revoke the assignment after partial

assignor,[10] or by the joint act of the assignor and assignee, or by the court on their application.[11] As against subsequent creditors, however, an assignment may be annulled by the parties and the property reconveyed.[12]

3. ATTACKING ASSIGNMENT — **a. Who May Attack.** A debtor of the assignor cannot attack an assignment,[13] nor an individual creditor of a partner, a partnership assignment.[14] So an officer must show that he is acting under a valid judgment or attachment, when levying on the property covered by an assignment, before he can attack the assignment.[15]

b. Collateral Attack. An assignment valid on its face cannot be attacked collaterally.[16]

execution thereof and sell the remainder of the property to the assignee, as against any of his creditors who had not been paid, and who had no notice of such assignment.

Bankruptcy of grantor.—A fraudulent deed of assignment, if the express assent of the creditors is not shown, is a mere power subject, like other powers, to revocation, and is revoked by the bankruptcy of the grantor. Ashley *v.* Robinson, 29 Ala. 112, 65 Am. Dec. 387.

10. Revocation by assignor.— *Alabama.*— Danner *v.* Brewer, 69 Ala. 191.

California.—Forbes *v.* Scannell, 13 Cal. 242.

Iowa.— Petrikin *v.* Davis, Morr. (Iowa) 296.

Minnesota.— Mackellar *v.* Pillsbury, 48 Minn. 396, 51 N. W. 222.

Mississippi.—Sevier *v.* McWhorter, 27 Miss. 442.

New Jersey.— Scull *v.* Reeves, 3 N. J. Eq. 131, 29 Am. Dec. 703.

New York.— Cunningham *v.* Freeborn, 1 Edw. (N. Y.) 256 [*affirmed* in 3 Paige (N. Y.) 557 (*affirmed* in 11 Wend. (N. Y.) 240)].

North Carolina.— Walker *v.* Crowder, 37 N. C. 478.

Pennsylvania.— Watson *v.* Bagaley, 12 Pa. St. 164, 51 Am. Dec. 595.

Tennessee.— Farquharson *v.* McDonald, 2 Heisk. (Tenn.) 404; Furman *v.* Fisher, 4 Coldw. (Tenn.) 626, 94 Am. Dec. 210; Robertson *v.* Sublett, 6 Humphr. (Tenn.) 313.

Vermont.— Hall *v.* Denison, 17 Vt. 310.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 488.

Subsequent agreement.— An assignment contemplating merely the sale of the property by the assignees, and an application of the proceeds to the payment of the assignor's debts for which the assignees were liable as indorsers, and the return of the surplus is superseded by a subsequent agreement for a continuation of the business of the assignors by the use of the assigned property, together with advances to be made by the assignees. Craig *v.* Bradley, 26 Mich. 353. See also Whitcomb *v.* Fowle, 7 Abb. N. Cas. (N. Y.) 295, 56 How. Pr. (N. Y.) 365.

11. Revocation by joint action of assignor and assignee.— Mackellar *v.* Pillsbury, 48 Minn. 396, 51 N. W. 222; Alpaugh *v.* Roberson, 27 N. J. Eq. 96.

Renunciation by assignee.—An assignment for creditors, once accepted by the assignee, is vested for the benefit of creditors, and a subsequent renunciation does not affect the validity of the conveyance. Handley *v.* Pfister, 39 Cal. 283, 2 Am. Rep. 449; Bellamy *v.* Sheriff, Jackson County, 6 Fla. 62; State *v.* Grover, 37 N. J. L. 174; Seal *v.* Duffy, 4 Pa. St. 274, 45 Am. Dec. 691. So where all the assignees have accepted the trust they cannot afterward, collectively or severally, repudiate the responsibilities of the office, or divest themselves of the title so vested in them, save in the performance of the trust. Ratcliffe *v.* Sangston, 18 Md. 383; Scull *v.* Reeves, 3 N. J. Eq. 84, 29 Am. Dec. 694; Brennan *v.* Willson, 71 N. Y. 502.

Revocation by court.— Mackellar *v.* Pillsbury, 48 Minn. 396, 51 N. W. 222.

12. Revocation as against subsequent creditors.— Small *v.* Sproat, 3 Metc. (Mass.) 303.

13. Debtor of assignor.—*Colorado.*—James *v.* McPhee, 9 Colo. 486, 13 Pac. 535.

Michigan.— Butler *v.* Wendell, 57 Mich. 62, 23 N. W. 460, 58 Am. Rep. 329.

Minnesota.—Rohrer *v.* Turrill, 4 Minn. 407.

Ohio.— Thomas *v.* Talmadge, 16 Ohio St. 433.

Pennsylvania.— Shryock *v.* Basehore, 82 Pa. St. 159.

United States.— Missouri, etc., R. Co. *v.* Fuller, 72 Fed. 467, 36 U. S. App. 456, 18 C. C. A. 641.

As to right of creditors to attack assignment see *infra*, XIV, D.

A defect in the notary's certificate of the acknowledgment of an assignee of his acceptance of an assignment for the benefit of creditors can be of no avail to the assignor's debtor in an action against him by such assignee. Jones *v.* Howard Ins. Co., 10 N. Y. St. 120.

14. Creditor of partner.—Haynes *v.* Brooks, 8 N. Y. Civ. Proc. 106.

15. Levying officer.— Dawley *v.* Sherwin, 5 S. D. 594, 59 N. W. 1027. See also Lawton *v.* Levy, 2 Edw. (N. Y.) 197, holding that a creditor who seeks to impeach an assignment on the ground of fraud must first put himself in a situation to complain by becoming a judgment creditor who has exhausted all legal remedies. But see Lincoln *v.* Cross, 11 Wis. 91, holding that in an action by an assignee for benefit of creditors against an officer who had taken goods from the assignee under an execution on a judgment against the assignor, the officer cannot question the validity of the assignment.

16. McCandless *v.* Hazen, 98 Iowa 321, 67 N. W. 256; Staples *v.* Schulenburg, etc., Lumber Co., 62 Minn. 158, 64 N. W. 148; Holto-

4. Rights of Creditors Under Void or Voidable Assignment. Under a void or voidable assignment, the creditor who is most diligent in securing a lien or claim on the property assigned will have a priority over the others,[17] but such creditor cannot claim under such assignment and also a subsequent judgment.[18]

5. Rights of Non-Assenting Creditors. A creditor who does not assent to the terms of a general assignment has no authority over the proceeds of the debtor's property in the hands of the assignee, except where a surplus may remain after payment of the claims of assenting creditors and the expense of executing the trust.[19]

6. Rights of Purchaser From Assignee. An innocent purchaser of goods sold by the assignee for the benefit of creditors of the assignor will be protected in his purchase, even if the assignment is invalid.[20]

C. Property Conveyed — 1. In General. A valid general assignment for the benefit of creditors passes all the property, real and personal, which the debtor owned at the time of the assignment.[21] Applying this rule, a chose in

quist *v.* Clark, 59 Minn. 59, 60 N. W. 1077; St. Paul Second Nat. Bank *v.* Schranck, 43 Minn. 38, 44 N. W. 524; Warner *v.* Hedly, 1 R. I. 357; McCourt *v.* Bond, 64 Wis. 596, 25 N. W. 532. *Contra*, Zimmerman *v.* Willard, 114 Ill. 364, 2 N. E. 70.

17. *Georgia.*— Lee *v.* Brown, 7 Ga. 275.

Iowa.— Loeb *v.* Pierpoint, 58 Iowa 469, 12 N. W. 544, 43 Am. Rep. 122.

Massachusetts.— Platt *v.* Brown, 16 Pick. (Mass.) 553.

Mississippi.— Menken *v.* Gumbel, 57 Miss. 756.

Ohio.— Barret *v.* Reed, Wright (Ohio) 700.

South Carolina.— *Compare* Le Prince *v.* Guillemot, 1 Rich. Eq. (S. C.) 187, holding that judgments recovered after a fraudulent assignment of property by the debtor and a sale by the assignee, but before proceedings to set aside the assignment, do not affect the property, and will be paid *pro rata* with simple contract debts.

Utah.— Ogden Paint, etc., Co. *v.* Child, 10 Utah 475, 37 Pac. 734.

Wisconsin.— Vernon *v.* Upson, 60 Wis. 418, 19 N. W. 400; Selleck *v.* Phelps, 11 Wis. 380.

United States.— Johnson *v.* Rogers, 13 Fed. Cas. No. 7,408, 14 Alb. L. J. 427, 5 Am. L. Rec. 536, 15 Nat. Bankr. Reg. 1.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 504.

18. D'Ivernois *v.* Leavitt, 23 Barb. (N. Y.) 63.

Assignee as creditor.— If the assignees are themselves *bona fide* creditors of the assignor to the amount of the property assigned they cannot be held by the trustee process as his garnishees, at the suit of creditors who are not parties to the assignment, although the assignment be constructively fraudulent. Andrews *v.* Ludlow, 5 Pick. (Mass.) 28; Beach *v.* Viles, 2 Pet. (U. S.) 675, 7 L. ed. 559. But if the property exceeds in amount the sum owed to the assignee he is liable under trustee process for the surplus. Merrill *v.* Englesby, 28 Vt. 150; Bishop *v.* Catlin, 28 Vt. 71. So an assignment made by one member of a partnership for the purpose of depriving the other partner of all power in the disposition of the property and with a view to dissolving the partnership gives to the trustee no lien or security upon the partnership effects for the payment of a debt due to him. Kirby *v.* Ingersoll, 1 Dougl. (Mich.) 477.

19. Warner Glove Co. *v.* Jennings, 58 Conn. 74, 19 Atl. 239; Foster *v.* Saco Mfg. Co., 12 Pick. (Mass.) 451; Schoolher *v.* Hutchins, 66 Tex. 324, 1 S. W. 266. *Contra*, Bothick *v.* Greves, 34 La. Ann. 907.

20. Cummings *v.* McCullough, 5 Ala. 324; Wilson *v.* Marion, 147 N. Y. 589, 42 N. E. 190, 70 N. Y. St. 349; Sheldon *v.* Stryker, 42 Barb. (N. Y.) 284, 27 How. Pr. (N. Y.) 387; Pine *v.* Rikert, 21 Barb. (N. Y.) 469; Ames *v.* Blunt, 5 Paige (N. Y.) 13.

As to sale of assigned property, generally, see *infra*, XII, E.

Assignment fraudulent on face.— A purchaser, for a full consideration, from a trustee who held the real estate, under a deed of trust for creditors, fraudulent on its face, takes no title. Palmer *v.* Giles, 58 N. C. 75. See also Ward *v.* Trotter, 3 T. B. Mon. (Ky.) 1, holding that a declaration in a deed of trust for the benefit of creditors that the transfer was made "to prevent a sacrifice of the grantor's property" is, as to creditors, a fraudulent purpose, and invalidates the deed as to them; and purchasers under such deed cannot protect themselves on the ground of want of notice, when their conveyances refer to the deed. But see Okie *v.* Kelly, 12 Pa. St. 323, holding that a sale by assignees, under a deed voidable for a defect apparent on its face, to a *bona fide* purchaser for value, cannot be avoided by the insolvent trustee of the assignors, where the sale was made before an election by the assignee to disaffirm the assignment.

Taking subject to lien.— Purchasers from an assignee take subject to any lien, though they have not had notice. Vandoren *v.* Todd, 3 N. J. Eq. 397. See also McConihe *v.* Fales, 107 N. Y. 404, 14 N. E. 285.

21. Property, in general.—*Alabama.*—Pollak Co. *v.* Muscogee Mfg. Co., 108 Ala. 467, 18 So. 611, 54 Am. St. Rep. 165.

District of Columbia.— Chafee *v.* Blatchford, 6 Mackey (D. C.) 459.

Illinois.— Freydendall *v.* Baldwin, 103 Ill. 325; Gibson *v.* Rees, 50 Ill. 383.

action,[22] a claim against the government,[23] a contingent interest or expectancy,[24] an equity of redemption in mortgaged premises,[25] a fire insurance policy,[26]

Iowa.— Turrill *v.* McCarthy, (Iowa 1901) 87 N. W. 667, holding that under a deed assigning all a debtor's property, except such as is "exempt from execution," the furniture and equipments belonging to and used by the assignor in his capacity of third-class postmaster are not reserved, since these are not exempt.

Kentucky.— Trimble *v.* Shawhan, 101 Ky. 403, 19 Ky. L. Rep. 625, 41 S. W. 546; Forepaugh *v.* Appold, 17 B. Mon. (Ky.) 625; Nethercutt *v.* Herron, 10 Ky. L. Rep. 247, 8 S. W. 13. See also Dickinson *v.* Beahr, 6 Ky. L. Rep. 359.

Maine.— Pike *v.* Bacon, 21 Me. 280, 38 Am. Dec. 259.

Maryland.— Farquharson *v.* Eichelberger, 15 Md. 63.

Massachusetts.— Coverdale *v.* Aldrich, 19 Pick. (Mass.) 391; Pingree *v.* Comstock, 18 Pick. (Mass.) 46.

Mississippi.— Tishomingo Sav. Inst. *v.* Allen, (Miss. 1898) 23 So. 958.

Montana.— McCulloh *v.* Price, 14 Mont. 320, 36 Pac. 194, 43 Am. St. Rep. 637.

Nebraska.— Commercial Nat. Bank *v.* Nebraska State Bank, 33 Nebr. 292, 50 N. W. 157.

New Hampshire.— Gignoux *v.* Bilbruck, 63 N. H. 22.

New York.— Emigrant Industrial Sav. Bank *v.* Roche, 93 N. Y. 374; Raynor *v.* Raynor, 21 Hun (N. Y.) 36; Leger *v.* Bonnaffe, 2 Barb. (N. Y.) 475; Beckwith *v.* Union Bank, 4 Sandf. (N. Y.) 604.

North Carolina.— Watson *v.* Dobbin, 89 N. C. 107.

Ohio.— Ennis *v.* Hulse, Wright (Ohio) 259.

Pennsylvania.— Vandyke *v.* Christ, 7 Watts & S. (Pa.) 373; Barker's Estate, 2 Pa. Dist. 571; Bloom *v.* Miller, 11 Pa. Co. Ct. 620.

Rhode Island.— Tillinghast *v.* Bradford, 5 R. I. 205.

South Carolina.— See Gilchrist *v.* Martin, Bailey Eq. (S. C.) 492.

Tennessee.— Graves *v.* McFarlane, 2 Coldw. (Tenn.) 167.

Vermont.— Dana *v.* Lull, 17 Vt. 390.

Wisconsin.— Killen *v.* Barnes, 106 Wis. 546, 82 N. W. 536.

United States.— Geilinger *v.* Philippi, 133 U. S. 246, 10 S. Ct. 266, 33 L. ed. 614; Cunningham *v.* Norton, 125 U. S. 77, 8 S. Ct. 804, 31 L. ed. 624; Milnor *v.* Metz, 16 Pet. (U. S.) 221, 10 L. ed. 943; Anderson Mfg. Co. *v.* Mansur, etc., Implement Co., 85 Fed. 241, 52 U. S. App. 546, 29 C. C. A. 134; Bradley Fertilizer Co. *v.* Pace, 80 Fed. 862, 52 U. S. App. 194, 26 C. C. A. 198; Arnold *v.* Danziger, 30 Fed. 898; Rumsey *v.* Town, 20 Fed. 558.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 512.

The benefit of a covenant of a third person to indemnify a grantor of lands against a mortgage executed by him does not pass to the assignee for creditors of such grantor, especially where there has been no breach before the assignment. Ball *v.* Tennant, 21 Ont. App. 602.

Goods manufactured but not delivered.— Where one contracts with another for a chattel not in existence, but to be made for him, though he pays the whole price in advance, or from time to time as the work progresses, he acquires no title in the chattel until it is finished and delivered to him, as against an assignee in insolvency of the maker: and this, although the seller induced the buyer to pay the contract-price by falsely representing the chattel to be finished. Shaw *v.* Smith, 48 Conn. 306, 40 Am. Rep. 170. See also Matter of Adams, 12 Daly (N. Y.) 454.

Transfer of note for collection.— A deed of assignment of "all the bills, drafts, promissory notes, negotiable securities, etc.," does not pass a bill or note transferred to the maker of the deed, by indorsement merely, for purposes of collection. Worthington *v.* Greer, 17 B. Mon. (Ky.) 741.

22. Chose in action.— Benner *v.* Kilpatrick, 54 N. Y. Super. Ct. 532; McMahon *v.* Sherman, 14 N. Y. St. 637.

23. Claim against government.— Stanford *v.* Lockwood, 24 Hun (N. Y.) 291; Maitland *v.* Newton, 3 Leigh (Va.) 714; Goodman *v.* Niblack, 102 U. S. 556, 26 L. ed. 229; Milnor *v.* Metz, 16 Pet. (U. S.) 221, 10 L. ed. 943; Hunter *v.* U. S., 5 Pet. (U. S.) 173, 8 L. ed. 86 [*affirming* 5 Mason (U. S.) 62, 26 Fed. Cas. No. 15,426]. But see Sibbald's Estate, 18 Pa. St. 249, holding that a claim against the United States for wrongfully preventing the owner of land from cutting and removing timber therefrom will not pass by virtue of an assignment under the insolvent law, because it is neither estate, credits, nor effects.

Claim against foreign government.—Under the words in a trust deed, of "all debts due the grantor," a claim which the grantor has on a foreign government for damages for detention of a ship will pass. Griffin *v.* Macaulay, 7 Gratt. (Va.) 476.

24. Contingent interest or expectancy.— White *v.* White, 86 Ky. 602, 9 Ky. L. Rep. 757, 7 S. W. 26; Gardner *v.* Hooper, 3 Gray (Mass.) 398; Robbins' Estate, 199 Pa. St. 500, 49 Atl. 233; Shuman *v.* Reigart, 7 Watts & S. (Pa.) 168; Eckert's Estate, 2 Pa. Dist. 65; Stuckert *v.* Harvey, 1 Miles (Pa.) 247; Churchman's Estate, 20 Wkly. Notes Cas. (Pa.) 367; Brooks *v.* Brooks, 12 S. C. 422. *Compare* Barker's Estate, 32 Wkly. Notes Cas. (Pa.) 540.

25. Equity of redemption.—Gimble *v.* Ferguson, 58 Iowa 414, 10 N. W. 789; Van Keuren *v.* McLaughlin, 21 N. J. Eq. 163. See also Graves *v.* McFarlane, 2 Coldw. (Tenn.) 167. But see Bellamy *v.* Sheriff, Jackson County, 6 Fla. 62, holding that an assignment for the benefit of creditors, conveying "all the future cotton crops" on mortgaged premises, does not pass the equity of redemption in such premises.

26. Fire insurance policy.— Dube *v.* Mascoma Mut. F. Ins. Co., 64 N. H. 527, 15 Atl.

an inchoate right to a mechanic's lien,[27] a lease,[28] on the election of the assignee to enter under it,[29] right of action,[30] if such right is not personal to the assignor,[31] or a trade-mark or trade-name not personal in character[32] passes to the assignee.

141, 1 L. R. A. 57; Firth *v.* Preston, 1 Chest. Co. Rep. (Pa.) 517. See also Hatfield's Estate, 2 Pa. Dist. 17, 12 Pa. Co. Ct. 251, holding that where a mortgagee holds an insurance policy as collateral security, and the building is burned, and on mortgage sale the proceeds satisfy the debt, the proceeds of the insurance belong to the assignee for creditors of the mortgagor.

Accident insurance policy.— Where an accident policy is renewable yearly so long as the assured pays the specified premium in advance and the insurance company consents to receive it, a new contract arises upon the payment of each premium, and the amount payable under it on the death of the assured in the current year for which a premium has been paid is not affected by an assignment for creditors made in any previous year and not including after-acquired property. Stokell *v.* Heywood, [1897] 1 Ch. 459.

Life insurance policy.— The question whether a life insurance policy passes under an assignment for the benefit of creditors is to be determined from the language of the deed and the intention of the assignor in the procurement of the policy. Larue *v.* Larue, 96 Ky. 326, 16 Ky. L. Rep. 641, 28 S. W. 790; Rhode Island Nat. Bank *v.* Chase, 16 R. I. 37, 12 Atl. 233. See also Shenk *v.* Franke, 10 Lanc. Bar (Pa.) 146, holding that a policy of life insurance, payable to the "heirs, executors, administrators or assignee" of the insured, passes, as a chose in action, to his assignee for the benefit of creditors. But see Barbour *v.* Larue, 21 Ky. L. Rep. 94, 51 S. W. 5, holding that where a policy of life insurance has no surrender or pecuniary value at the date of the assignment, it does not pass. See also Burnsides *v.* National Bank, 23 Ky. L. Rep. 880, 64 S. W. 520.

27. Mechanic's lien.— Curtis *v.* Broadwell, 66 Iowa 662, 24 N. W. 265; German Bank *v.* Schloth, 59 Iowa 316, 13 N. W. 314; Cody *v.* Vaughan, 53 Mo. App. 169; Bristol Iron, etc., Co. *v.* Thomas, 93 Va. 396, 25 S. E. 110.

28. Lease.— Smith *v.* Ingram, 90 Ala. 529, 8 So. 144; Horwitz *v.* Davis, 16 Md. 313; Crouse *v.* Frothingham, 97 N. Y. 105; Astor *v.* Lent, 6 Bosw. (N. Y.) 612. See also *infra*, XII, D, 1.

Rents before sale.—Where land is conveyed in trust for the benefit of creditors, with a power to sell, the rents before sale belong to the grantor, unless the deed otherwise specifies. Litterer *v.* Berry, 4 Lea (Tenn.) 193.

Right of entry.—An assignment which conveys all the real estate of the grantor in a specified town, and all leases and reservations and rents thereof issuing therefrom, together with all debts due for rents of land in such town, passes to the assignee the covenants, conditions, or right of entry contained in a lease in fee. Main *v.* Green, 32 Barb. (N. Y.) 448.

29. Election of assignee to enter.—Dorrance *v.* Jones, 27 Ala. 630; Smith *v.* Goodman, 149 Ill. 75, 36 N. E. 621; Reynolds *v.* Fuller, 64 Ill. App. 134; Horwitz *v.* Davis, 16 Md. 313; Carter *v.* Hammett, 12 Barb. (N. Y.) 253; Martin *v.* Black, 9 Paige (N. Y.) 641, 38 Am. Dec. 574.

30. Right of action.— *Iowa.*— Rumsey *v.* Robinson, 58 Iowa 225, 12 N. W. 243.

Kentucky.— Mayo *v.* Snead, 78 Ky. 634, 1 Ky. L. Rep. 350; Cleveland Coal Co. *v.* Sloan, 11 Ky. L. Rep. 306. See also Arnold *v.* Wyler, 13 Ky. L. Rep. 301.

Missouri.—Shultz *v.* Christman, 6 Mo. App. 338.

New York.— McKee *v.* Judd, 12 N. Y. 622, 64 Am. Dec. 515; Moore *v.* McKinstry, 37 Hun (N. Y.) 194; Whittaker *v.* Merrill, 30 Barb. (N. Y.) 389; Hyde v. Tuffts, 45 N. Y. Super. Ct. 56.

Pennsylvania.—Sibbald's Estate, 18 Pa. St. 249.

Wisconsin.— J. S. Keator Lumber Co. *v.* St. Croix Boom Corp., 72 Wis. 62, 38 N. W. 529, 7 Am. St. Rep. 837.

The rights of action transferred to an assignee are rights of action founded upon beneficial contracts made with the bankrupt, where the pecuniary loss is the substantial and primary cause of action, and for injuries affecting his property, so far as they do not involve a claim for personal damages. Dillard *v.* Collins, 25 Gratt. (Va.) 343.

A right of action to recover a penalty for usury passes to the assignee. Henderson Nat. Bank *v.* Alves, 91 Ky. 142, 12 Ky. L. Rep. 722, 15 S. W. 132; Gray *v.* Bennett, 3 Metc. (Mass.) 522. But see Osborn *v.* Athens First Nat. Bank, 175 Pa. St. 494, 34 Atl. 858, 38 Wkly. Notes Cas. (Pa.) 341, holding that the right of action for the penalty is personal to the assignor.

31. Right of action personal to assignor. — *Connecticut.*— Stanly *v.* Duhurst, 2 Root (Conn.) 52, action founded on tort.

Kentucky.— Francis *v.* Burnett, 84 Ky. 23, 7 Ky. L. Rep. 715, action for malicious prosecution.

New York.—Williams *v.* Boyle, 1 Misc. (N. Y.) 364, 20 N. Y. Suppl. 720, 48 N. Y. St. 713.

Pennsylvania.— Sommer *v.* Wilt, 4 Serg. & R. (Pa.) 19, action for malicious abuse of legal process.

Virginia.— Dillard *v.* Collins, 25 Gratt. (Va.) 343.

Washington.— Slauson *v.* Schwabacher, 4 Wash. 783, 31 Pac. 329, 31 Am. St. Rep. 948.

32. Trade-mark or trade-name.— Wilmer *v.* Thomas, 74 Md. 485, 22 Atl. 403, 13 L. R. A. 380; Warren *v.* Warren Thread Co., 134 Mass. 247; Hegeman *v.* Hegeman, 8 Daly (N. Y.) 1; *In re* Knox, 1 N. Y. L. Bul. 47; Sarrazin *v.* W. R. Irby Cigar, etc., Co., 93 Fed. 624, 35 C. C. A. 496, 46 L. R. A. 541. But see Bradley *v.* Norton, 33 Conn. 157, 87 Am. Dec. 200,

But property acquired by a debtor after making an assignment for the benefit of creditors does not pass.[33]

2. ASSIGNMENT BY PARTNERSHIP OR PARTNER. Whether an assignment by a firm carries only firm property, or includes separate property of the partners, or whether an assignment by an individual includes his interest in the assets of a firm in which he is a partner is a question of intention to be ascertained from the deed itself.[34]

holding that a general assignment is inoperative in respect to passing a right to a trade-mark, if the right was not inventoried by the trustee or appraisers and never claimed by the trustee or the creditors of the insolvent, nor in any manner disposed of under the assignment. See also Iowa Seed Co. *v.* Dorr, 70 Iowa 481, 30 N. W. 866, 59 Am. Rep. 446, holding that a right to the exclusive use of the name of a partnership, consisting of the individual name of one partner, with the addition "& Co.," under which the firm had acquired an extensive business, does not pass by an assignment for creditors. *Compare* Bellows *v.* Bellows, 24 Misc. (N. Y.) 482, 53 N. Y. Suppl. 853.

Letters patent will pass to an assignee though not subject to be seized on execution. Barton *v.* White, 144 Mass. 281, 10 N. E. 840, 59 Am. Rep. 84.

33. Property subsequently acquired.—Hall *v.* Gill, 10 Gill & J. (Md.) 325; Lorenz *v.* Orlady, 87 Pa. St. 226. See also Crow *v.* Colton, 7 Daly (N. Y.) 52, holding that a general assignment for the benefit of creditors does not transfer to the assignee a claim of the assignor for services rendered after the date of the assignment but before its delivery.

Remission of forfeiture.— The owner of property forfeited to the government is divested of title thereto, and if, after he has made an assignment for creditors, part of the property is remitted, it does not pass to the assignee. Ward *v.* Webster, 9 Daly (N. Y.) 182.

Subsequent judgment.— Where a debtor, pending an action by him, makes an assignment for the benefit of creditors, a judgment subsequently rendered in his favor vests in the assignee. Mitchell *v.* Magowan, 13 Ky. L. Rep. 685.

Subsequent rents.—Where a landlord makes an assignment it carries with it the right to rents not then accrued. Williamson *v.* Richardson, 6 T. B. Mon. (Ky.) 596; Neal *v.* Cornwall, 7 Ky. L. Rep. 755.

34. *Connecticut.*— Boughton *v.* Crosby, 47 Conn. 577; Von Wettberg *v.* Carson, 44 Conn. 287; Coggill *v.* Botsford, 29 Conn. 439.

Kansas.—Williams *v.* Hadley, 21 Kan. 350, 30 Am. Rep. 430.

Kentucky.— John Hibben Dry Goods Co. *v.* Haley, 20 Ky. L. Rep. 1854, 50 S. W. 252.

Maine.— Simmons *v.* Curtis, 41 Me. 373; Merrill *v.* Wilson, 29 Me. 58.

Maryland.— Riley *v.* Carter, 76 Md. 581, 25 Atl. 667, 35 Am. St. Rep. 443, 19 L. R. A. 489.

Massachusetts.—Driscoll *v.* Fiske, 21 Pick. (Mass.) 503.

Michigan.—Van Kleeck *v.* McCabe, 87 Mich. 599, 49 N. W. 872, 24 Am. St. Rep. 182.

Minnesota.— Security Bank *v.* Beede, 37 Minn. 527, 35 N. W. 435.

New Hampshire.— Moody *v.* Downs, 63 N. H. 50; Derry Bank *v.* Davis, 44 N. H. 548.

New York.— Birdsall, etc., Mfg. Co. *v.* Schwarz, 3 N. Y. App. Div. 298, 38 N. Y. Suppl. 368, 74 N. Y. St. 24; Sherman *v.* Jenkins, 70 Hun (N. Y.) 593, 24 N. Y. Suppl. 186, 53 N. Y. St. 780. See also Kuehnemundt *v.* Haar, 46 N. Y. Super. Ct. 188, 58 How. Pr. (N. Y.) 464.

Ohio.— *In re* Perin, 6 Ohio S. & C. Pl. Dec. 347. See also State *v.* Hanousek, 19 Ohio Cir. Ct. 303.

Pennsylvania.— Baker's Appeal, 21 Pa. St. 76, 59 Am. Dec. 752; Clark *v.* Wilson, 19 Pa. St. 414; Moddewell *v.* Keever, 8 Watts & S. (Pa.) 63; Graham's Estate, 1 Chest. Co. Rep. (Pa.) 301; Nicholas *v.* Patterson, 1 Phila. (Pa.) 92, 7 Leg. Int. (Pa.) 166.

Rhode Island.— Stiness *v.* Pierce, 13 R. I. 452.

Texas.— Coffin *v.* Douglass, 61 Tex. 406; Batts *v.* Moore, (Tex. Civ. App. 1899) 54 S. W. 1036; Blum *v.* Bratton, 2 Tex. Civ. App. 226, 21 S. W. 65. See also Hart *v.* Blum, 76 Tex. 113, 13 S. W. 181.

Virginia.— Griffin *v.* Macaulay, 7 Gratt. (Va.) 476; Anderson *v.* Bullock, 4 Munf. (Va.) 442.

Wisconsin.—Eau Claire Grocer Co. *v.* Hubbard, 97 Wis. 661, 73 N. W. 570; *In re* Gilbert, 94 Wis. 108, 68 N. W. 863; McNair *v.* Rewey, 62 Wis. 167, 22 N. W. 339.

United States.— Tracy *v.* Tuffly, 134 U. S. 206, 10 S. Ct. 527, 33 L. ed. 879; Bradley Fertilizer Co. *v.* Pace, 80 Fed. 862, 52 U. S. App. 194, 26 C. C. A. 198.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 548.

Dissolution of partnership.— Where there has been a dissolution of a firm and a division of its property among the partners, an assignment for creditors by either of the former partners individually vests the title to the property, as divided, in his assignee, in the same manner and to the same extent as it would the title to any other individual property covered by the assignment. McKinney *v.* Baker, 9 Oreg. 74.

Lands bought and paid for by a partnership, the deeds for which, for convenience, were taken in the name of one partner, pass under an assignment by all the partners, for benefit of creditors, of all the copartnership estate, property, assets, and effects, with a schedule of assets attached including such lands. Paxson *v.* Brown, 61 Fed. 874, 27

3. Check Drawn But Not Presented Till After Assignment. The authorities are in conflict as to the rights of the holder of a check drawn by the assignor before, but not presented for payment until after, the assignment. One line of cases protects such holder.[35] The other line gives him no greater rights than those of a general creditor.[36]

4. Goods Purchased on Credit — a. In General. The title to goods purchased on credit passes to the assignee of the vendee,[37] except where the purchase was induced by fraud. In such case the assignee takes subject to the vendor's right of recovery.[38]

b. Conditional Sale. An assignee for creditors cannot claim possession of

U. S. App. 49, 10 C. C. A. 135. See also Burnside *v.* Merrick, 4 Metc. (Mass.) 537.

Where an individual partner makes an assignment for the benefit of his creditors, such creditors are entitled, after the individual property is exhausted, to have also the benefit of the assignor's interest in his firm's effects, which interest would be his share of the surplus after payment of all firm debts. Fellows *v.* Greenleaf, 43 N. H. 421.

35. *Iowa.*—Roberts *v.* Corbin, 26 Iowa 315, 96 Am. Dec. 146.

Kentucky.— Buckner *v.* Sayre, 18 B. Mon. (Ky.) 745; Chambers *v.* Northern Bank, 5 Ky. L. Rep. 123.

New Hampshire.—Peterborough Sav. Bank *v.* Hartshorn, 67 N. H. 156, 33 Atl. 729.

New York.— See Dickinson *v.* Champlain First Nat. Bank, 64 N. Y. App. Div. 254, 72 N. Y. Suppl. 6.

West Virginia.— Hulings *v.* Hulings Lumber Co., 38 W. Va. 351, 18 S. E. 620.

United States.—German Sav. Inst. *v.* Adae, 1 McCrary (U. S.) 501, 8 Fed. 106.

See, generally, Banks and Banking; and 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 527.

Where an assignor receives money for the sale of consigned goods, and sends to the consignor a check which was not paid, the consignor has a lien on the fund in the assignee's hands. Standard Wagon Co. *v.* Nichols, 41 Hun (N. Y.) 261.

36. Ray *v.* Hiller, 11 Colo. 445, 18 Pac. 622; Chaffee *v.* Ravenna First Nat. Bank, 40 Ohio St. 1; Philadelphia Fourth St. Nat. Bank *v.* Yardley, 165 U. S. 634, 17 S. Ct. 439, 41 L. ed. 855; Laclede Bank *v.* Schuler, 120 U. S. 511, 7 S. Ct. 644, 30 L. ed. 704.

Where, before the presentation of a check, the drawer and drawee both make assignments for the benefit of creditors, the payee cannot recover against the assignee of the drawer. Hawes *v.* Blackwell, 107 N. C. 196, 12 S. E. 245, 22 Am. St. Rep. 870.

37. Blow *v.* Gage, 44 Ill. 208; McElroy *v.* Seery, 61 Md. 389, 48 Am. Rep. 110; Van Dine *v.* Willett, 38 Barb. (N. Y.) 319, 24 How. Pr. (N. Y.) 206. *Compare* Lacker *v.* Rhoades, 51 N. Y. 641. See also Sales.

Stoppage in transitu.— An assignment for creditors by a vendee, including goods *in transitu*, does not defeat the vendor's right of stoppage *in transitu*. Harris *v.* Hart, 6 Duer (N. Y.) 606.

Where goods sold for cash were not paid for on delivery, the vendee's assignee takes subject to the vendor's right to retake them. Hodgson *v.* Barrett, 33 Ohio St. 63, 31 Am. Rep. 527. See also Leutz *v.* Flint, etc., R. Co., 53 Mich. 444, 19 N. W. 138; Wolff *v.* Zeller, 31 Misc. (N. Y.) 255, 64 N. Y. Suppl. 129.

38. *Alabama.*— Cohn *v.* Stringfellow, 100 Ala. 242, 14 So. 286; Frow *v.* Downman, 11 Ala. 880.

Kentucky.— Wright *v.* Geo. W. McAlpin Co., 18 Ky. L. Rep. 226, 35 S. W. 1039. But see Gibson *v.* Moore, 7 B. Mon. (Ky.) 92, holding that if goods fraudulently purchased be conveyed in trust for the payment of previously subsisting debts of the purchaser, without notice of the fraud, before the vendor pursues and sues for the recovery of the goods, his right to be restored to their possession will be lost.

Maine.— Ingersoll *v.* Barker, 21 Me. 474.

Maryland.— Peters *v.* Hilles, 48 Md. 506; Ratcliffe *v.* Sangston, 18 Md. 383.

New Hampshire.— Farley *v.* Lincoln, 51 N. H. 577, 12 Am. Rep. 182.

New York.— American Sugar Refining Co. *v.* Fancher, 145 N. Y. 552, 40 N. E. 206, 65 N. Y. St. 506, 27 L. R. A. 757; Goodwin *v.* Wertheimer, 99 N. Y. 149, 1 N. E. 404; Levy *v.* Carr, 85 Hun (N. Y.) 289, 32 N. Y. Suppl. 1023, 66 N. Y. St. 428; Joslin *v.* Cowee, 60 Barb. (N. Y.) 48; Pike *v.* Wieting, 49 Barb. (N. Y.) 314.

North Carolina.— Wallace *v.* Cohen, 111 N. C. 103, 15 S. E. 892.

Pennsylvania.— Knowles *v.* Lord, 4 Whart. (Pa.) 500, 34 Am. Dec. 525; Artman *v.* Walton, 12 Phila. (Pa.) 442, 34 Leg. Int. (Pa.) 13.

Tennessee.— See Belding *v.* Frankland, 8 Lea (Tenn.) 67, 41 Am. Rep. 630.

Virginia.— *Compare* Wickham *v.* Martin, 13 Gratt. (Va.) 427.

Wisconsin.— Singer *v.* Schilling, 74 Wis. 369, 43 N. W. 101; Lee *v.* Simmons, 65 Wis. 523, 27 N. W. 174.

United States.— Davis *v.* Stewart, 3 McCrary (U. S.) 174, 8 Fed. 803.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 521.

Replevin of goods.— A vendor of goods fraudulently obtained by the vendee in a voidable sale is entitled to replevy them from one to whom the vendee had transferred them in a general assignment. Farley *v.* Lincoln, 51 N. H. 577, 12 Am. Rep. 182; Lee *v.* Simmons, 65 Wis. 523, 27 N. W. 174.

property which was delivered to the assignor under an agreement that the title was to remain in the vendor until the property was paid for.[39]

5. Property Conveyed Before Assignment. In the absence of a statute, a general assignment for the benefit of creditors does not pass to the assignee property previously transferred by the assignor by a conveyance good between the parties,[40] even though such transfer is fraudulent as to the creditors of the assignor.[41]

39. *Florida.*—Campbell Printing Press, etc., Co. *v.* Walker, 22 Fla. 412, 1 So. 59.

Illinois.— Hooven, etc., Co. *v.* Burdette, 153 Ill. 672, 39 N. E. 1107.

Maine.— Rogers *v.* Whitehouse, 71 Me. 222.

Mississippi. — Herring-Hall-Marvin Co. *v.* Moore, (Miss. 1895) 17 So. 385; Gayden *v.* Tufts, 68 Miss. 691, 10 So. 53.

Missouri.— Tufts *v.* Thompson, 22 Mo. App. 564.

New York.—Keeler *v.* Field, 1 Paige (N. Y.) 312.

Pennsylvania.— Collins *v.* Houston, 138 Pa. St. 481, 21 Atl. 234.

Utah.— Lippincott *v.* Rich, 19 Utah 140, 56 Pac. 806.

Wisconsin.— Clark *v.* Bartlett, 50 Wis. 543, 7 N. W. 663.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 519.

Proceeds of property.—The vendor, on tracing the property sold through its transformation into a mass of property afterward passing into the possession of the assignee, is entitled to recover the money obtained therefor. Bent *v.* Barnes, 90 Wis. 631, 64 N. W. 428.

Retaking possession on default.— A provision in a contract of sale allowing the vendor to retake possession on default is valid as against the assignee of the vendee. Hercules Iron Works *v.* Hummer, 49 Ill. App. 598.

Sale on approval.— Where goods were forwarded for acceptance, but acceptance and payment were unreasonably delayed and the consignee meanwhile assigned, it was held that title had not passed. Shipman *v.* Graves, 41 Mich. 675, 3 N. W. 177.

40. *Missouri.*—Drew *v.* Drum, 44 Mo. App. 25; Haeussler *v.* Teichmann, 9 Mo. App. 594.

New York.—Muir *v.* Schenck, 3 Hill (N. Y.) 228, 38 Am. Dec. 633.

North Carolina. — Thigpen *v.* Horne, 36 N. C. 20.

Pennsylvania.—Williams *v.* Bristol Rolling Mill Co., 174 Pa. St. 299, 34 Atl. 442.

Rhode Island.— If a married woman lends her own money to her husband in good faith, upon his promise to pay it in chattels, and he does so repay it by direct delivery, she will get a title which will be good even at law against his assignee under a subsequent assignment for the benefit of his creditors. Barrows *v.* Keene, 15 R. I. 484, 8 Atl. 713.

Conditional sale.—A chattel, the title to which was retained by the vendor as security for the price, passes under a general assignment by the vendor of all his personal property for the security of creditors. Watson *v.* Dobbin, 89 N. C. 107.

Conveyance not recorded.— A conveyance of land in trust for the benefit of creditors, duly registered, gives a right prior to that of the grantee under an earlier unregistered deed. Simpkinson *v.* McGee, 4 Lea (Tenn.) 432; Von Stein *v.* Trexler, 5 Tex. Civ. App. 299, 23 S. W. 1047. *Contra,* Tyler *v.* Abergh, 65 Md. 18, 3 Atl. 904.

A previous transfer of personalty unaccompanied by possession is invalid against the claim of a subsequent assignee for the benefit of creditors. Grieve *v.* McGovern, 18 N. Y. Suppl. 444; Ward *v.* Wooten, 75 N. C. 413. *Compare* Ayers' Estate, 5 Pa. Co. Ct. 540.

41. *California.*— Francisco *v.* Aguirre, 94 Cal. 180, 29 Pac. 495.

Illinois.— Hinkley *v.* Reed, 182 Ill. 440, 55 N. E. 337; Bouton *v.* Dement, 123 Ill. 142, 14 N. E. 62; Colburn *v.* Shay, 17 Ill. App. 289.

Indiana.— Where an insolvent debtor assumes on the face of his deed to make a statutory assignment, and thus brings his property under control of the court, the assignment will be treated as an assignment of all his property, including that previously conveyed in fraud of creditors, although not mentioned in the deed. Seibert *v.* Milligan, 110 Ind. 106, 10 N. E. 929.

Michigan.—A creditor cannot levy on goods fraudulently transferred by the assignor, the property therein being in the assignee. Kinter *v.* Pickard, 67 Mich. 125, 34 N. W. 535. See also Kennedy *v.* Dawson, 96 Mich. 79, 55 N. W. 676.

Missouri.— Roan *v.* Winn, 93 Mo. 503, 4 S. W. 736.

Nebraska.—Housel *v.* Cremer, 13 Nebr. 298, 14 N. W. 398 [*overruling dictum* in Lininger *v.* Raymond, 12 Nebr. 167, 10 N. W. 716].

New Jersey.— Van Keuren *v.* McLaughlin, 21 N. J. Eq. 163.

New York.— Storm *v.* Davenport, 1 Sandf. Ch. (N. Y.) 135.

Ohio.— *Compare* Hallowell *v.* Bayliss, 10 Ohio St. 536.

Pennsylvania.— Thomson *v.* Dougherty, 12 Serg. & R. (Pa.) 448.

South Carolina.—*Compare* Younger *v.* Massey, 39 S. C. 115, 17 S. E. 711.

Wisconsin.— Estabrook *v.* Messersmith, 18 Wis. 545.

United States.— Bamberger *v.* Schoolfield, 160 U. S. 149, 16 S. Ct. 225, 40 L. ed. 374.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 526.

Where a debtor to secure the performance of an agreement by him for an extension by his creditors conveys land, intending thereby to secure present and future creditors, and afterward makes a general assignment, the

6. PROPERTY OF THIRD PERSON — a. In General. Property of a third person in the hands of an assignor,[42] or property held by an assignor in trust for a third person[43] does not pass to an assignee.

b. Consigned Goods. A factor holds goods consigned to him or the proceeds thereof, in trust, and under his assignment for the benefit of creditors they do not pass to his assignee, but when identified may be recovered by the consignor.[44]

court, at the instance of one who became a creditor after the execution of the deed, will adjudge the title of the land in the trustee for the benefit of all the creditors. Merwin *v.* Richardson, 52 Conn. 223.

42. Property of third person.— *Alabama.* —See Casey *v.* Pratt, 8 Ala. 238, holding that where certain property was held as collateral security by an assignor and the debt for which the security was held has been paid no interest in the property so held passes to the assignee.

Kansas.— Peak *v.* Ellicott, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90.

Louisiana.— Jacquet *v.* His Creditors, 38 La. Ann. 863.

New York.— National Butchers', etc., Bank *v.* Hubbell, 117 N. Y. 384, 22 N. E. 1031, 27 N. Y. St. 396, 15 Am. St. Rep. 515, 7 L. R. A. 852; Lafort *v.* Carpenter, 91 Hun (N. Y.) 76, 36 N. Y. Suppl. 168, 71 N. Y. St. 370.

Pennsylvania.—Vandyke *v.* Christ, 7 Watts & S. (Pa.) 373; Ayers' Estate, 5 Pa. Co. Ct. 540.

Assignees, having notice of the claim of a third person as the equitable owner of part of property assigned, are liable to account to him for his share of the proceeds thereof. Plumkett *v.* Carew, 1 Hill Eq. (S. C.) 169.

Assignment by assignee.— A conveyance of all his property to trustees by the trustee named in a voluntary assignment for creditors does not embrace or transfer the property assigned. Ballou's Petition, 11 R. I. 359. And neither his assignee nor his personal representative is entitled to a debt due to the original bankrupt, but it must go to a new assignee of the original bankrupt. Merrick's Estate, 5 Watts & S. (Pa.) 9. But where an assignee for creditors has converted the trust estate, and then made an assignment for the benefit of creditors, and it does not appear that the proceeds of the converted property came into the hands of the last assignee, or that they can be identified in his hands, the beneficiaries of the converted estate are remitted to the rights which belong to general creditors. Woodring *v.* White, 12 Ky. L. Rep. 505.

43. Property held in trust.— *Connecticut.* — Vail's Appeal, 37 Conn. 185.

Massachusetts.— Chesterfield Mfg. Co. *v.* Dehon, 5 Pick. (Mass.) 7, 16 Am. Dec. 367.

Michigan.— Garlinghouse *v.* Dixon, Walk. (Mich.) 440.

Mississippi.— Clark *v.* Wilson, 53 Miss. 119.

New York.— Bishop *v.* Chamberlin, 49 Hun (N. Y.) 135, 1 N. Y. Suppl. 857, 17 N. Y. St. 73.

Ohio.— Mannix *v.* Purcell, 46 Ohio St. 102, 19 N. E. 572, 15 Am. St. Rep. 562, 2 L. R. A. 753.

Pennsylvania.— Ludwig *v.* Highley, 5 Pa. St. 132; *In re* Roberts, 2 Pa. St. 371; Wolf *v.* Eichelberger, 2 Penr. & W. (Pa.) 346.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 514.

As to following trust funds see *infra*, XIV, B, 4, c, (VI).

Charges on trust property.— Where a trustee has made advances from his own private means, otherwise than as donations, to assist in buying or improving the trust property, he has a claim upon the particular property so purchased or improved, which passes to his assignee in insolvency as individual assets. Mannix *v.* Purcell, 46 Ohio St. 102, 19 N. E. 572, 15 Am. St. Rep. 562, 2 L. R. A. 753.

44. *Connecticut.*— Terry *v.* Bamberger, 44 Conn. 558.

Kentucky.— *Compare* Atchison *v.* Jones, 8 Ky. L. Rep. 259, 1 S. W. 406.

Massachusetts.—Denston *v.* Perkins, 2 Pick. (Mass.) 86.

Missouri.— Peet *v.* Spencer, 90 Mo. 384, 2 S. W. 434.

New York.— Georgia M. & F. Ins. Bank *v.* Jauncey, 1 Barb. (N. Y.) 486; Rabel *v.* Griffin, 12 Daly (N. Y.) 241.

Pennsylvania.— Louisville Cotton Mills Co. *v.* Fritz, 155 Pa. St. 144, 25 Atl. 1046.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 517.

Del credere commission.— Debts due a factor for goods consigned to him under a *del credere* commission, and sold by him, do not pass to his assignee. Converseville Co. *v.* Chambersburg Woolen Co., 14 Hun (N. Y.) 609; Merrill *v.* Thomas, 7 Daly (N. Y.) 393.

Lien of factor.— Where by agreement a factor has a lien on goods, he can deliver the lien to his creditors and the goods to his assignee "solely as security to the extent of his lien." Terry *v.* Bamberger, 44 Conn. 558.

Payment of proceeds.— One who permits an assignee to consider him as an ordinary creditor cannot, after the proceeds of the goods assigned have been paid out in good faith by the assignee in the course of his administration of the trust, claim the right to follow the proceeds on the ground that specific goods were his, and that as to such goods the assignor was a factor. Matter of Kobbe, 10 Daly (N. Y.) 42.

Stoppage in transitu.— When the consignee becomes insolvent, the consignor has the right to stop goods *in transitu*. Stanton *v.* Eager, 16 Pick. (Mass.) 467.

7. Property Omitted From Deed or Schedule. Where a debtor assumes on the face of his deed to act under a statute which requires all property to be conveyed, or recites an intention to convey his whole property, all his property passes whether mentioned in the deed or schedule or not.[45]

D. Title Acquired by Assignee — 1. In General. An assignment for the benefit of creditors passes the title, legal and equitable, to the assignee; and as against the assignee and those holding under him the debtor has no interest in the property, legal or equitable, which he can convey or encumber.[46] An assignee

45. *Arizona.*— Babbitt *v.* Mandell, (Ariz. 1898) 53 Pac. 577.

California.—Poehlmann *v.* Kennedy, 48 Cal. 201.

Colorado.— Falk *v.* Liebes, 6 Colo. App. 473, 42 Pac. 46.

Connecticut.— *Compare* Whitaker *v.* Gavit, 18 Conn. 522.

Illinois.—Smith *v.* Goodman, 149 Ill. 75, 36 N. E. 621.

Indiana.— Seibert *v.* Milligan, 110 Ind. 106, 10 N. E. 929.

Indian Territory.— Robinson *v.* Belt, 2 Indian Terr. 360, 51 S. W. 975.

Iowa.— Loomis *v.* Griffin, 78 Iowa 482, 43 N. W. 296; Schaller *v.* Wright, 70 Iowa 667, 28 N. W. 460.

Kentucky.— Knefler *v.* Shreve, 78 Ky. 297; Ely *v.* Hair, 16 B. Mon. (Ky.) 230.

Louisiana.— Nimick *v.* Ingram, 17 La. Ann. 85; Dwight *v.* Smith, 9 Rob. (La.) 32.

Maine.— Knevals *v.* Blauvelt, 82 Me. 458, 19 Atl. 818.

Massachusetts.— See Faxon *v.* Durant, 9 Metc. (Mass.) 339.

Mississippi.— Tishomingo Sav. Inst. *v.* Allen, 76 Miss. 114, 23 So. 305.

Missouri.— St. George's Church Soc. *v.* Branch, 120 Mo. 226, 25 S. W. 218.

New Jersey.—Loucheim *v.* Casperson, (N. J. 1901) 48 Atl. 1107; Meeker *v.* Felts, 49 N. J. Eq. 502, 23 Atl. 672; Hays *v.* Doane, 11 N. J. Eq. 84.

New York.—Emigrant Industrial Sav. Bank *v.* Roche, 93 N. Y. 374; Platt *v.* Lott, 17 N. Y. 478. See also Turner *v.* Jaycox, 40 Barb. (N. Y.) 164.

Oregon.—Sabin *v.* Lebenbaum, 26 Oreg. 420, 38 Pac. 434.

Texas.— McIlhenny Co. *v.* Miller, 68 Tex. 356, 4 S. W. 614; City Nat. Bank *v.* Merchants' Nat. Bank, 7 Tex. Civ. App. 584, 27 S. W. 848; Miller *v.* Schneider, 2 Tex. App. Civ. Cas. § 369.

Utah.— Snyder *v.* Murdock, 20 Utah 407, 59 Pac. 88.

United States.— Bock *v.* Perkins, 139 U. S. 628, 11 S. Ct. 677, 35 L. ed. 314; Geilinger *v.* Philippi, 133 U. S. 246, 10 S. Ct. 266, 33 L. ed. 614; Spindle *v.* Shreve, 111 U. S. 542, 4 S. Ct. 522, 28 L. ed. 512; Phillips, etc., Mfg. Co. *v.* Whitney, 102 Fed. 838, 42 C. C. A. 667; Sarrazin *v.* W. R. Irby Cigar, etc., Co., 93 Fed. 624, 35 C. C. A. 496, 46 L. R. A. 541.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 550.

Omission by mistake.— Where a deed of assignment to trustees by mistake omitted part of the land included in the debtor's schedule of assets, but possession thereof was delivered, with the rest of the property, to the trustees, equity will correct the mistake and enforce the contract as reformed against all who become parties thereto, on parol proof that the deed of assignment was intended by all the parties to it to include the property covered by the schedule, and that the land in question was omitted by mistake. Moale *v.* Buchanan, 11 Gill & J. (Md.) 314.

46. Title acquired by assignee.— *Connecticut.*— Taylor *v.* Atwood, 47 Conn. 498; Hart *v.* Stone, 30 Conn. 94; Freeman *v.* Perry, 22 Conn. 617.

Kentucky.— Petry *v.* Randolph, 85 Ky. 351, 9 Ky. L. Rep. 14, 3 S. W. 420; Neal *v.* Cornwall, 7 Ky. L. Rep. 755.

Louisiana.— By a cession of property the creditors of the insolvent do not acquire the right of ownership in the property surrendered, but only the right of possession; the ownership remains in the insolvent. Jacquet *v.* His Creditors, 38 La. Ann. 863; Rivas *v.* Hunstock, 2 Rob. (La.) 187.

Maryland.— See Farquharson *v.* Eichelberger, 15 Md. 63.

New York.— Hoag *v.* Hoag, 35 N. Y. 469; Briggs *v.* Davis, 21 N. Y. 574.

Pennsylvania.— Golden's Appeal, 110 Pa. St. 581, 1 Atl. 660; Gray *v.* Hill, 10 Serg. & R. (Pa.) 436.

Rhode Island.— Meyers *v.* Briggs, 11 R. I. 180.

South Carolina.— Middleton *v.* Taber, 46 S. C. 337, 24 S. E. 282; Fuller *v.* Missroon, 35 S. C. 314, 14 S. E. 714.

Texas.— Dwight *v.* Overton, 35 Tex. 390; Winslett *v.* Randle, 1 Tex. App. Civ. Cas. § 1189.

Utah.— Wilson *v.* Sullivan, 17 Utah 341, 53 Pac. 994.

United States.— Bartlett *v.* Teah, 1 McCrary (U. S.) 176, 1 Fed. 768.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 555.

Conditions precedent.— An assignment of property to A, he paying to B whatever balance is justly due to him from me for labor on said property, so far as he has a lien on it for said balance, is conditional; and the assignee acquires no title to the property without payment or tender of the balance due to B. Lloyd *v.* Holly, 8 Conn. 491.

Right to enforce collateral obligation.— Neither a receiver, an assignee in bankruptcy, nor an assignee under a voluntary general assignment for the benefit of creditors, each of whom represents creditors as well as the insolvent, acquires any right to enforce a

for creditors is not, however, a *bona fide* purchaser for value.[47] He succeeds only to the rights of the assignor,[48] and takes the property subject to all equities to which it was liable in the hands of the assignor.[49]

collateral obligation given to a creditor or to a body of creditors by a third person for the payment of the debts of the insolvent. Jacobson *v.* Allen, 20 Blatchf. (U. S.) 525, 12 Fed. 454.

47. Assignee not a bona fide purchaser.— *Arkansas.*— *Compare* Bridgeford *v.* Adams, 45 Ark. 136.

District of Columbia.— Fechheimer *v.* Hollander, 21 D. C. 76.

Florida.— Mayer *v.* Wilkins, 37 Fla. 244, 19 So. 632.

Illinois.— O'Hara *v.* Jones, 46 Ill. 288; Willis *v.* Henderson, 5 Ill. 13, 38 Am. Dec. 120.

Iowa.— Arnold *v.* Grimes, 2 Iowa 1.

Kentucky.— Todd *v.* Johnson, 99 Ky. 548, 18 Ky. L. Rep. 354, 36 S. W. 987, 33 L. R. A. 399; Bank of Commerce *v.* Payne, 10 Ky. L. Rep. 43, 8 S. W. 856; Bridgeford *v.* Barbour, 80 Ky. 529, 4 Ky. L. Rep. 470; Milburn Wagon Co. *v.* Edwards, 7 Ky. L. Rep. 835.

Maryland.— Tyler *v.* Abergh, 65 Md. 18, 3 Atl. 904.

Massachusetts.— Chace *v.* Chapin, 130 Mass. 128; Clark *v.* Flint, 22 Pick. (Mass.) 231, 33 Am. Dec. 733.

Michigan.— Pierson *v.* Manning, 2 Mich. 445. *Compare* Hollister *v.* Loud, 2 Mich. 309.

Mississippi.— Paine *v.* Aberdeen Hotel Co., 60 Miss. 360. *Compare* Anderson *v.* Lachs, 59 Miss. 111.

Missouri.— Peet *v.* Spencer, 90 Mo. 384, 2 S. W. 434.

Montana.—Merchants' Nat. Bank *v.* Greenhood, 16 Mont. 395, 41 Pac. 250.

New Jersey.— Van Waggoner *v.* Moses, 26 N. J. L. 570; Moses *v.* Thomas, 26 N. J. L. 124.

New York.— Griffin *v.* Marquardt, 17 N. Y. 28; Reed *v.* Sands, 37 Barb. (N. Y.) 185; Harris *v.* Hart, 6 Duer (N. Y.) 606; Maas *v.* Goodman, 2 Hilt. (N. Y.) 275; Cook *v.* Smith, 3 Sandf. Ch. (N. Y.) 338.

North Carolina.— Wallace *v.* Cohen, 111 N. C. 103, 15 S. E. 892.

Ohio.— Williams *v.* Miller, 2 Ohio Dec. (Reprint) 119, 1 West. L. Month. 409.

Oregon.— O'Connell *v.* Hansen, 29 Oreg. 173, 44 Pac. 387; Jacobs *v.* Ervin, 9 Oreg. 52.

Pennsylvania.— Kepler *v.* Erie Dime Sav., etc., Co., 101 Pa. St. 602; Spackman *v.* Ott, 65 Pa. St. 131; Knowles *v.* Lord, 4 Whart. (Pa.) 500, 34 Am. Dec. 525.

Tennessee.— Stainback *v.* Junk Bros. Lumber, etc., Co., 98 Tenn. 306, 39 S. W. 530; Nashville Trust Co. *v.* Nashville Fourth Nat. Bank, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710.

Texas.— Keller *v.* Smalley, 63 Tex. 512.

Virginia.— *Compare* Wickham *v.* Martin, 13 Gratt. (Va.) 427.

West Virginia.— *Compare* Douglass Merchandise Co. *v.* Laird, 37 W. Va. 687, 17 S. E. 188.

Wisconsin.— Lee *v.* Simmons, 65 Wis. 523, 27 N. W. 174.

United States.— Clements *v.* Berry, 11 How. (U. S.) 398, 13 L. ed. 745.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 558.

48. Assignee succeeds only to rights of assignor.— *District of Columbia.*— Eastern Trust, etc., Co. *v.* American Ice Co., 14 App. Cas. (D. C.) 304.

Illinois.— Hinkley *v.* Reed, 82 Ill. App. 60; Levy *v.* Chicago Nat. Bank, 57 Ill. App. 143; Hooven *v.* Burdette, 51 Ill. App. 115.

Iowa.— Roberts *v.* Corbin, 26 Iowa 315, 96 Am. Dec. 146; Arnold *v.* Grimes, 2 Iowa 1.

Kentucky.— Tandy *v.* Robbins, 8 Ky. L. Rep. 265; Bridgeford *v.* Barbour, 80 Ky. 529, 4 Ky. L. Rep. 470.

Maine.— State *v.* Patten, 49 Me. 383; Billings *v.* Collins, 44 Me. 271.

Massachusetts.— Silsby *v.* Boston, etc., R. Co., 176 Mass. 158, 57 N. E. 376; King *v.* Nichols, 138 Mass. 18.

Missouri.— Gregory *v.* Tavenner, 38 Mo. App. 627.

New Hampshire.— Peterborough Sav. Bank *v.* Hartshorn, 67 N. H. 156, 33 Atl. 729.

New Jersey.— Vandoren *v.* Todd, 3 N. J. Eq. 397.

Oregon.— Helm *v.* Gilroy, 20 Oreg. 517, 26 Pac. 851.

Pennsylvania.— Pierce *v.* McKeehan, 3 Pa. St. 136, 45 Am. Dec. 635; Luckenbach *v.* Brickenstein, 5 Watts & S. (Pa.) 145; Ayer's Estate, 5 Pa. Co. Ct. 540.

Rhode Island.— James *v.* Mechanics' Nat. Bank, 12 R. I. 460; Williams *v.* Winsor, 12 R. I. 9.

Tennessee.— Nashville Trust Co. *v.* Nashville Fourth Nat. Bank, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710.

Texas.— Christian *v.* Hughes, 12 Tex. Civ. App. 622, 36 S. W. 298.

United States.— Goff *v.* Kelly, 74 Fed. 327; Kelley-Goodfellow Shoe Co. *v.* Milligan, 58 Fed. 161, 12 U. S. App. 610, 7 C. C. A. 140; Omaha First Nat. Bank *v.* Mastin Bank, 48 Fed. 433; German Sav. Inst. *v.* Adae, 1 McCrary (U. S.) 501, 8 Fed. 106.

49. Assignee takes subject to equities.— *Alabama.*— Sayre *v.* Weil, 94 Ala. 466, 10 So. 546, 15 L. R. A. 544; Grangers' L., etc., Ins. Co. *v.* Kamper, 73 Ala. 325.

California.— San Jose First Nat. Bank *v.* Menke, 128 Cal. 103, 60 Pac. 675.

Connecticut.— Palmer *v.* Thayer, 28 Conn. 237.

Florida.— Shad *v.* Livingston, 31 Fla. 89, 12 So. 646.

Illinois.— Wetherell *v.* Thirty-first St. Bldg., etc., Assoc., 153 Ill. 361, 39 N. E. 143; O'Hara *v.* Jones, 46 Ill. 288; Wheeler *v.* Home Sav., etc., Bank, 85 Ill. App. 28; White *v.* More, 54 Ill. App. 606.

Indiana.— Davis *v.* Newcomb, 72 Ind. 413.

Indian Territory.—Byrne *v.* Ft. Smith Nat. Bank, 1 Indian Terr. 680, 43 S. W. 957.

2. Set-Off Against Assignee. The assignee takes the assigned estate subject to all offsets existing at the time of the assignment.[50] In respect of debts not due at the time of the assignment the authorities are not in accord. Some support the right of set-off.[51] Others deny it.[52]

Iowa.— Arnold *v.* Grimes, 2 Iowa 1.

Kentucky.— Owingsville Exch., etc., Bank *v.* Stone, 80 Ky. 109; Corn *v.* Sims, 3 Metc. (Ky.) 391; Neal *v.* Cornwall, 7 Ky. L. Rep. 755.

Maine.— Billings *v.* Collins, 44 Me. 271.

Maryland.— Tyler *v.* Abergh, 65 Md. 18, 3 Atl. 904.

Massachusetts.— Chace *v.* Chapin, 130 Mass. 128.

Missouri.— Hach *v.* Hill, (Mo. 1890) 14 S. W. 739; Parlin-Orendorf Co. *v.* Hord, 78 Mo. App. 279; Gregory *v.* Tavenner, 38 Mo. App. 627.

Nebraska.— Salladin *v.* Mitchell, 42 Nebr. 859, 61 N. W. 127.

New Hampshire.— Morrill *v.* Merrill, 64 N. H. 71, 6 Atl. 602.

New Jersey.— Shaw *v.* Glen, 37 N. J. Eq. 32.

New York.— Van Heusen *v.* Radcliff, 17 N. Y. 580, 72 Am. Dec. 480; Reed *v.* Sands, 37 Barb. (N. Y.) 185; Averill *v.* Loucks, 6 Barb. (N. Y.) 470; Leger *v.* Bonnaffe, 2 Barb. (N. Y.) 475; Matter of Howe, 1 Paige (N. Y.) 125, 19 Am. Dec. 395; Addison *v.* Burckmyer, 4 Sandf. Ch. (N. Y.) 498.

Ohio.— Williams *v.* Miller, 2 Ohio Dec. (Reprint) 119, 1 West. L. Month. 409.

Oregon.— Helm *v.* Gilroy, 20 Oreg. 517, 26 Pac. 851.

Pennsylvania.— Swoyer's Appeal, 5 Pa. St. 377; Pierce *v.* McKeehan, 3 Pa. St. 136, 45 Am. Dec. 635.

South Carolina.— Tibbetts *v.* Weaver, 5 Strobh. (S. C.) 144; Plumkett *v.* Carew, 1 Hill Eq. (S. C.) 169; Mairs *v.* Smith, 3 McCord (S. C.) 52.

United States.— Rumsey *v.* Town, 20 Fed. 558.

50. Debts due at time of assignment.— *Connecticut.*— Bulkeley *v.* Welch, 31 Conn. 339.

Kentucky.— German Ins. Bank *v.* Jackson, 10 Ky. L. Rep. 1061.

Minnesota.— St. Paul, etc., Trust Co. *v.* Leck, 57 Minn. 87, 58 N. W. 826, 47 Am. St. Rep. 576; Laybourn *v.* Seymour, 53 Minn. 105, 54 N. W. 941, 39 Am. St. Rep. 579.

Missouri.— Green *v.* Conrad, 114 Mo. 651, 21 S. W. 839; Smith *v.* Spengler, 83 Mo. 408; Rubey *v.* Watson, 22 Mo. App. 428.

Nebraska.— Salladin *v.* Mitchell, 42 Nebr. 859, 61 N. W. 127.

New York.—Richards *v.* La Tourette, 119 N. Y. 54, 23 N. E. 531, 28 N. Y. St. 609; Rothschild *v.* Mack, 115 N. Y. 1, 21 N. E. 726, 23 N. Y. St. 922; Smith *v.* Felton, 43 N. Y. 419; Patton *v.* Royal Baking Powder Co., 45 Hun (N. Y.) 248; Reed *v.* Sands, 37 Barb. (N. Y.) 185; Maas *v.* Goodman, 2 Hilt. (N. Y.) 275; Tierney *v.* Peerless Shoe Co., 33 Misc. (N. Y.) 803, 68 N. Y. Suppl. 392; Stallcup *v.* National Park Bank, 6 N. Y. St. 512.

Pennsylvania.—Williams *v.* Wood, 1 Wkly. Notes Cas. (Pa.) 412.

South Carolina.— Lowrie *v.* Williamson, 3 McCord (S. C.) 247.

Tennessee.— Litterer *v.* Berry, 4 Lea (Tenn.) 193.

Wisconsin.— Momsen *v.* Noyes, 105 Wis. 565, 81 N. W. 860.

See, generally, Recoupment, Set-Off, and Counterclaim; and 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 559.

Assignment giving preference.— Where a surety assents to a deed of trust which gives him a preference over other sureties, he will not be permitted to diminish the fund, which in part consisted of a debt due by himself to the maker of the deed, by setting it off with other liabilities to him, not secured by the deed. Miller *v.* Cherry, 56 N. C. 24.

The maker of a note to an individual partner cannot, as against an innocent assignee thereof, set off his claim against the firm, though the latter was insolvent before the maker received notice of the assignment, he having accepted a trust deed conveying all the firm property to secure firm debts. Duncan *v.* Monserratt, 10 B Mon. (Ky.) 93.

Where money is placed by a corporation in the hands of its general manager, as trustee, for safe-keeping, and to be disbursed in its business, such trustee cannot offset a debt due to him by the corporation against the moneys in his hands, after a voluntary assignment by the corporation for the benefit of creditors. Detroit First Nat. Bank *v.* E. T. Barnum Wire, etc., Works, 58 Mich. 124, 24 N. W. 543, 25 N. W. 202, 55 Am. Rep. 660.

51. Debts not due may be set off.— Kentucky Flour Co. *v.* Merchants' Nat. Bank, 90 Ky. 225, 12 Ky. L. Rep. 198, 13 S. W. 910, 9 L. R. A. 108; Chenault *v.* Bush, 84 Ky. 528, 8 Ky. L. Rep. 490, 2 S. W. 160; Martin *v.* Pillsbury, 23 Minn. 175; Nashville Trust Co. *v.* Nashville Fourth Nat. Bank, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710.

52. Debts not due may not be set off.— Huse *v.* Ames, 104 Mo. 91, 15 S. W. 965 [*overruling* Morrow *v.* Bright, 20 Mo. 298]; Fera *v.* Wickham, 135 N. Y. 223, 31 N. E. 1028, 47 N. Y. St. 866, 17 L. R. A. 456 [*overruling* 61 Hun (N. Y.) 343, 15 N. Y. Suppl. 892, 40 N. Y. St. 644]; Myers *v.* Davis, 22 N. Y. 489; Stillings *v.* Smith, 54 N. Y. Super. Ct. 488; Martin *v.* Kunzmuller, 10 Bosw. (N. Y.) 16; Groff *v.* Friedline, 14 Misc. (N. Y.) 237, 35 N. Y. Suppl. 755, 70 N. Y. St. 500; Anderson *v.* Van Alen, 12 Johns. (N. Y.) 343; Chance *v.* Isaacs, 2 Edw. (N. Y.) 348; Thompson *v.* Hooker, 4 N. Y. Leg. Obs. 17; Chipman *v.* Philadelphia Ninth Nat. Bank, 120 Pa. St. 86, 13 Atl. 707; Collins *v.* McKee, 44 Leg. Int. (Pa.) 167; Brashear *v.* West, 7 Pet. (U. S.) 608, 8 L. ed. 801.

E. Time of Taking Effect. In the absence of statutory regulation,[53] an assignment for the benefit of creditors usually takes effect upon its execution and delivery.[54]

F. Effect on Pending Actions. An assignment for the benefit of creditors by a party to a pending action does not abate such action,[55] nor oust the court of

A claim acquired after the assignment cannot be set off against the assignee. Brown *v.* Brittain, 84 N. C. 552; Collins *v.* McKee, (Pa. 1886) 6 Atl. 396; Exchange Bank *v.* Knox, 19 Gratt. (Va.) 739.

53. In California it has been held that an assignee takes possession of the property by relation from the time of the filing of the schedule and petition. Taffts *v.* Manlove, 14 Cal. 47, 73 Am. Dec. 610.

In Kansas a deed of assignment does not become operative until a verified schedule of the assignor's liabilities has been filed with the clerk of the district court. Keith *v.* Hamblin, 7 Kan. App. 456, 53 Pac. 531.

Me. St. (1836), c. 240, concerning assignments, protects property assigned from attachment from the time when the assignment is made and before notice is given, if notice be afterward given according to the requirements of the statute. Fiske *v.* Carr, 20 Me. 301.

In Missouri it has been held that an assignment takes effect from the day it is placed on record, although the assignee refuses the trust. Rendlemann *v.* Willard, 15 Mo. App. 375.

In Ohio a deed of assignment takes effect from the time of its delivery to the probate judge. Eggleston *v.* Harrison, 61 Ohio St. 397, 55 N. E. 993; Betz *v.* Snyder, 48 Ohio St. 492, 28 N. E. 234, 13 L. R. A. 235. See also H. B. Claflin Co. *v.* Evans, 55 Ohio St. 183, 45 N. E. 3, 60 Am. St. Rep. 686.

In Vermont an assignment of choses in action to a trustee in pursuance of Vt. Laws (1852), p. 14, is at once operative against any subsequent attachment by the trustee process, if the proper papers respecting the assignment are duly filed in the county clerk's office within ten days, without giving notice of the assignment to the debtors. Vail *v.* Peck, 27 Vt. 764.

54. *Alabama.*—Pollak Co. *v.* Muscogee Mfg. Co., 108 Ala. 467, 18 So. 611, 54 Am. St. Rep. 165; Brown *v.* Lyon, 17 Ala. 659.

Arkansas.— Clayton *v.* Johnson, 36 Ark. 406, 38 Am. Rep. 40.

Florida.— See Greeley *v.* Hull, 23 Fla. 361, 2 So. 618, holding that possession given to the assignee before execution of the assignment is good as against a subsequent attachment.

Kansas.— Walker *v.* Newlin, 22 Kan. 106.

New York.— McIlhargy *v.* Chambers, 117 N. Y. 532, 23 N. E. 561, 27 N. Y. St. 921; South Danvers Nat. Bank *v.* Stevens, 5 N. Y. App. Div. 392, 39 N. Y. Suppl. 298; McBlain *v.* Speelman, 35 Hun (N. Y.) 263.

North Carolina.— Brannon *v.* Hardie, 88 N. C. 243.

Ohio.—Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637.

Pennsylvania.— Hodenpuhl *v.* Hines, 160 Pa. St. 466, 28 Atl. 825.

Texas.— Calisher *v.* Mathias, (Tex. Civ. App. 1897) 43 S. W. 265.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 572.

Acceptance by creditors.— An assignment for creditors who shall accept its terms and release the assignor is operative from acceptance. Lippincott *v.* Barker, 2 Binn. (Pa.) 174, 4 Am. Dec. 433.

Delivery by the assignor to his attorney for recording gives the assignment effect as against the assignor and those claiming under him. Wright's Estate, 182 Pa. St. 90, 38 Atl. 151.

Ratification by partner.— Where an assignee of a firm took possession of the property under a general assignment executed by one partner only, and valid only from its ratification by his copartner, his rights are inferior to those of a creditor who, prior to the ratification, attached by garnishment the property in his possession. Mills *v.* Miller, 109 Iowa 688, 81 N. W. 169.

Subsequent indorsement.— Where a general assignment of property was made, and afterward an agreement was indorsed thereon, with consent of all then concerned, according to the original intention, giving priority to a large debt, the assignment was held to take effect from the first date. Fox *v.* Adams, 5 Me. 245.

55. Abatement of action.— *California.*— Stewart *v.* Spaulding, 72 Cal. 264, 13 Pac. 661, holding that when one of several plaintiffs in an action becomes insolvent his assignee need not be substituted as a party.

Connecticut.—Judson *v.* Metropolitan Washing Mach. Co., 33 Conn. 467, holding that the trustee should be brought in as a party.

Indiana.— Pittsburgh, etc., R. Co. *v.* Nuzum, 60 Ind. 533.

Kentucky.—Jewel *v.* Porter, 11 Ky. L. Rep. 162, 11 S. W. 717, holding that the substitution of plaintiff's assignee for benefit of creditors as plaintiff does not require notice to defendant.

Massachusetts.— Cunningham *v.* Munroe, 15 Gray (Mass.) 471.

Michigan.— Bedford *v.* Penney, 65 Mich. 667, 32 N. W. 888.

New York.—Lawson *v.* Woodstock, 37 Hun (N. Y.) 352, holding that where plaintiff, pending the action, makes a general assignment for the benefit of creditors, the action may be continued in plaintiff's name.

Ohio.— See Collier *v.* Bickley, 33 Ohio St. 523.

Pennsylvania.— Thomson *v.* Dougherty, 12 Serg. & R. (Pa.) 448.

South Carolina.— Cleverly *v.* McCullough, 6 Rich. (S. C.) 517, holding that the assignee

jurisdiction to proceed to trial and judgment the same as if no assignment had been made.[56]

G. Effect on Proceedings After Assignment — 1. Right to Sue Assignor. The right of a creditor to maintain an action against his debtor to recover a personal judgment is not affected by the latter's voluntary assignment of all his property for the benefit of all his creditors;[57] nor is such creditor's right to proceed to judgment defeated by the fact that he has filed his claim with the debtor's assignee.[58] But the lien of a judgment against an assignor obtained after the trustee took possession under the deed of trust is subsequent to that of creditors under the deed.[59]

2. Right to Levy on Assigned Property. Property in the hands of an assignee under a valid assignment for the benefit of creditors is not subject to attachment, execution, or garnishment at the instance of a creditor of the assignor.[60] The

may prosecute the action, but will be required to suggest the assignment on the record and enter into a written consent to pay the costs if the action should fail.

Wisconsin.— Evans *v.* Virgin, 69 Wis. 153, 33 N. W. 569; Eureka Steam Heating Co. *v.* Sloteman, 67 Wis. 118, 30 N. W. 241; Howitt *v.* Blodgett, 61 Wis. 376, 21 N. W. 292.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 585.

As to abatement of action by transfer or devolution of interest, generally, see Abatement and Revival, IV [1 Cyc. 116].

56. Ousting court of jurisdiction.— E. T. Barnum Wire, etc., Works *v.* Speed, 59 Mich. 272, 26 N. W. 802, 805.

Entry of judgment.— An assignment for the benefit of creditors does not operate to prevent the entry of judgment. Connolly *v.* Practical Bldg., etc., Assoc., 6 Wkly. Notes Cas. (Pa.) 176.

57. Right to sue debtor.— *California.*— George *v.* Pierce, 123 Cal. 172, 55 Pac. 775, 56 Pac. 53.

Indiana.— Lawrence *v.* McVeagh, 106 Ind. 210, 6 N. E. 327.

Kentucky.—Trotter *v.* Williamson, 6 T. B. Mon. (Ky.) 38.

Massachusetts.— Rice *v.* Catlin, 14 Pick. (Mass.) 221.

Michigan.—Detroit Stove Works *v.* Osmun, 74 Mich. 7, 41 N. W. 845.

Minnesota.— Smith *v.* St. Paul German F. Ins. Co., 56 Minn. 202, 57 N. W. 475.

Missouri.—Simpson *v.* Schulte, 21 Mo. App. 639.

Nebraska.— Morehead *v.* Adams, 18 Nebr. 569, 26 N. W. 242.

Nevada.— See Empey *v.* Sherwood, 12 Nev. 355.

New Hampshire.— Francestown First Nat. Bank *v.* Newman, 62 N. H. 410.

New York.— Watson *v.* Shuttleworth, 53 Barb. (N. Y.) 357; Butler *v.* Thompson, 4 Abb. N. Cas. (N. Y.) 290.

Ohio.— Haskins *v.* Alcott, 13 Ohio St. 210.

Oregon.— Thompson *v.* Reeves, 26 Oreg. 46, 37 Pac. 46.

Vermont.— See Foster *v.* Deming, 19 Vt. 313.

Washington.— Under the insolvent act of 1890, providing that the assignee shall notify creditors of the assignment and authorizing the discharge of the debtor, each creditor becomes a party to the proceedings, and pending them he cannot sue the insolvent on his claim. Cosh-Murray Co. *v.* Bothell, 10 Wash. 314, 38 Pac. 1118.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 590.

58. Filing claim with assignee.— Harrison *v.* Shaffer, 60 Kan. 176, 55 Pac. 881; Smith *v.* Higinbotham, 53 Kan. 250, 36 Pac. 336; Limbocker *v.* Higinbotham, 52 Kan. 696, 35 Pac. 783; Shullsburg Bank *v.* Eastern Kansas Banking Co., 3 Kan. App. 150, 42 Pac. 835; Detroit Stove Works *v.* Osmun, 74 Mich. 7, 41 N. W. 845; Smith *v.* St. Paul German F. Ins. Co., 56 Minn. 202, 57 N. W. 475. See also Kingsbury *v.* Deming, 17 Vt. 367 note.

59. Lien of judgment.— *Illinois.*— Farber *v.* National Forge, etc., Co., 50 Ill. App. 503.

Maryland.— Moale *v.* Buchanan, 11 Gill & J. (Md.) 314.

Nebraska.— Morehead *v.* Adams, 18 Nebr. 569, 26 N. W. 242.

Tennessee.— Birdwell *v.* Cain, 1 Coldw. (Tenn.) 301.

West Virginia.— Harrison *v.* Farmers' Bank, 9 W. Va. 424.

Setting aside assignment.— A judgment recovered after the making of a general assignment for the benefit of creditors creates no cloud upon the title to property transferred by the assignment, although such assignment be subsequently set aside upon the application of the assignee in bankruptcy. Belden *v.* Smith, 3 Fed. Cas. No. 1,242, 16 Nat. Bankr. Reg. 302.

60. Levy under valid assignment.— *Alabama.*— Thorington *v.* Gould, 59 Ala. 461; Lightfoot *v.* Rupert, 38 Ala. 666; Covington *v.* Kelly, 6 Ala. 860.

California.— Fenton *v.* Edwards, 126 Cal. 43, 58 Pac. 320, 77 Am. St. Rep. 141, 46 L. R. A. 832; Hecht *v.* Green, 61 Cal. 269; Taffts *v.* Manlove, 14 Cal. 47, 73 Am. Dec. 610.

Illinois.— Wilson *v.* Aaron, 132 Ill. 238, 23 N. E. 1037; Nimmo *v.* Kuykendall, 85 Ill. 476; Kimball *v.* Mulhern, 15 Ill. 205; Powell *v.* Daily, 61 Ill. App. 552; Woodward *v.* Brooks, 18 Ill. App. 150; Dehner *v.* Helmbacher Forge, etc., Mills, 7 Ill. App. 47.

Indiana.— Wallace *v.* Milligan, 110 Ind.

rule, however, has been held to be otherwise in the case of a void or voidable assignment.[61]

498, 11 N. E. 599. See also Hasseld *v.* Seyfort, 105 Ind. 534, 5 N. E. 675, holding that personalty omitted by mistake or otherwise from the schedule and afterward surrendered to the trustee is protected against subsequent levies.

Iowa.— Hamilton-Brown Shoe Co. *v.* Mercer, 84 Iowa 537, 51 N. W. 415, 35 Am. St. Rep. 331.

Kansas.— Case *v.* Ingersoll, 7 Kan. 367.

Kentucky.— Nethercutt *v.* Herron, 10 Ky. L. Rep. 247, 8 S. W. 13; Gerst *v.* Turley, 7 Ky. L. Rep. 217. See also Throckmorton *v.* Monroe, 22 Ky. L. Rep. 1450, 60 S. W. 721.

Maryland.— Strauss *v.* Rose, 59 Md. 525.

Massachusetts.— Massachusetts Nat. Bank *v.* Bullock, 120 Mass. 86; Cardany *v.* New England Furniture Co., 107 Mass. 116; Foster *v.* Saco Mfg. Co., 12 Pick. (Mass.) 451; Gore *v.* Clisby, 8 Pick. (Mass.) 555; Lupton *v.* Cutter, 8 Pick. (Mass.) 298.

Michigan.—Angell *v.* Pickard, 61 Mich. 561, 28 N. W. 680.

Minnesota.— Noyes *v.* Beaupre, 36 Minn. 49, 30 N. W. 126; Lord *v.* Meachem, 32 Minn. 66, 19 N. W. 348; Matter of Mann, 32 Minn. 60, 19 N. W. 347.

Mississippi.— See Grand Gulf R., etc., Co. *v.* State, 10 Sm. & M. (Miss.) 428.

Missouri.— Wittmor *v.* Hastings, 51 Mo. 171.

Montana.— A preferred creditor who has assented to an assignment cannot attach without attacking the assignment for fraud or otherwise. Elling *v.* Kirkpatrick, 6 Mont. 119, 9 Pac. 900.

Nebraska.— Schlueter *v.* Raymond, 7 Nebr. 281.

New Jersey.— Garretson *v.* Brown, 26 N. J. L. 425.

New York.— Mumper *v.* Rushmore, 14 Hun (N. Y.) 591.

North Carolina.— Anderson *v.* Doak, 32 N. C. 295.

North Dakota.—An assignment for the benefit of creditors does not place the assignor's property in custody of law so as to prevent its attachment by a creditor. State *v.* Rose, 4 N. D. 319, 58 N. W. 514, 26 L. R. A. 593.

Pennsylvania.— McNutt *v.* Strayhorn, 39 Pa. St. 269; Lippincott *v.* Barker, 2 Binn. (Pa.) 174, 4 Am. Dec. 433; Palm's Estate, 3 Pa. Dist. 456; MacDonald *v.* Furbush, 26 Wkly. Notes Cas. (Pa.) 120; Smethurst *v.* Oppenheimer, 7 Wkly. Notes Cas. (Pa.) 146.

Rhode Island.— Smith *v.* Millett, 11 R. I. 528.

South Carolina.— Howard *v.* Cannon, 11 Rich. Eq. (S. C.) 23, 75 Am. Dec. 736.

Texas.— Moody *v.* Carroll, 71 Tex. 143, 8 S. W. 510, 10 Am. St. Rep. 734; Keating *v.* Vaughn, 61 Tex. 518; Southern Soda Works *v.* Vines, (Tex. Civ. App. 1896) 36 S. W. 942; Huffman Implement Co. *v.* Templeton, (Tex. App. 1889) 14 S. W. 1015.

Vermont.— Hall *v.* Denison, 17 Vt. 310. *Compare* Rogers *v.* Vail, 16 Vt. 327.

Virginia.— Ford *v.* Watts, 95 Va. 192, 28 S. E. 179.

West Virginia.— Harrison *v.* Farmers' Bank, 9 W. Va. 424.

Wisconsin.— Replevin will lie against an assignee for the benefit of creditors for property in his possession claimed under a valid assignment, it not being *in custodia legis.* Matthews *v.* Ott, 87 Wis. 399, 58 N. W. 774.

United States.—Reed *v.* McIntyre, 98 U. S. 507, 25 L. ed. 171; Boltz *v.* Eagon, 34 Fed. 521. See also Bholen *v.* Cleveland, 5 Mason (U. S.) 174, 3 Fed. Cas. No. 1,381.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 594.

A creditor does not lose his right to a distributive share in the assets in the hands of the assignee by attaching a portion of the property which passed to the assignee. Anderson *v.* Risdon-Cahn Co., 13 Wash. 494, 43 Pac. 337. See also Donk *v.* Alexander, 117 Ill. 330, 7 N. E. 672.

Execution issued but not levied.— Executions in the sheriff's hands before the assignment are liens on the property as against the assignment. Frost *v.* Wilson, 70 Mo. 664; Van Waggoner *v.* Moses, 26 N. J. L. 570; Moses *v.* Thomas, 26 N. J. L. 124; Slade *v.* Van Vechten, 11 Paige (N. Y.) 21.

Where the statute provides that the property may be attached after a certain time, the assignee will not be holden for more than the excess of the estate in his hands after the payment of debts due parties to the assignment and the lawful expenses. Thomas *v.* Clark, 65 Me. 296.

61. Levy under void or voidable assignment.— *Colorado.*— Mosconi *v.* Burchinell, 7 Colo. App. 435, 43 Pac. 912.

District of Columbia.— Hayes *v.* Johnson, 6 D. C. 174.

Iowa.— Bradley *v.* Bailey, 95 Iowa 745, 64 N. W. 758.

Kentucky.—See Robberts *v.* Nicklies, 9 Ky. L. Rep. 651, holding that where a debtor is insolvent, and has made a general assignment for the benefit of creditors, one creditor will not be allowed to obtain a preference by attaching the goods on the ground that the debtor and assignee are acting fraudulently.

Maryland.— New York Nat. Park Bank *v.* Lanahan, 60 Md. 477. *Compare* Horwitz *v.* Ellinger, 31 Md. 492; Keighler *v.* Nicholson, 4 Md. Ch. 86.

Massachusetts.— Wyles *v.* Beals, 1 Gray (Mass.) 233; Gore *v.* Clisby, 8 Pick. (Mass.) 555; Stevens *v.* Bell, 6 Mass. 339.

Michigan.— *Compare* Coots *v.* Radford, 47 Mich. 37, 10 N. W. 69.

Minnesota.— Lanpher *v.* Burns, 77 Minn. 407, 80 N. W. 361; May *v.* Walker, 35 Minn. 194, 28 N. W. 252.

New York.— Hess *v.* Hess, 117 N. Y. 306, 22 N. E. 956, 27 N. Y. St. 346; Lux *v.* Davidson, 56 Hun (N. Y.) 345, 9 N. Y. Suppl. 816, 31 N. Y. St. 346; Carr *v.* Van Hoesen, 26 Hun (N. Y.) 316; Jacobs *v.* Remsen, 35 Barb.

H. Termination of Trust — 1. In General. The assignee's trust is in general terminated only on fulfilment of the purposes for which it was created, and a limitation of the trust as to time does not necessarily at the end of that time terminate it.[62]

2. Death of Assignor. The death of the assignor does not operate as a revocation of the trust.[63]

I. Rights as to Surplus. Any surplus after payment of enumerated debts is subject to the claims of creditors generally.[64]

(N. Y.) 384, 12 Abb. Pr. (N. Y.) 390; Schlussel *v.* Willett, 34 Barb. (N. Y.) 615, 12 Abb. Pr. (N. Y.) 397, 22 How. Pr. (N. Y.) 15; Fallon *v.* McCunn, 7 Bosw. (N. Y.) 141.

Oregon.— Dawson *v.* Coffey, 12 Oreg. 513, 8 Pac. 838.

Pennsylvania.— Bunting *v.* McCormick, 3 Wkly. Notes Cas. (Pa.) 496.

Texas.— Simon *v.* Ash, 1 Tex. Civ. App. 202, 20 S. W. 719.

Vermont.— Kimball *v.* Evans, 58 Vt. 655, 5 Atl. 523.

Washington.— Where an assignee for the benefit of creditors has accepted the trust, and is in possession of the debtor's property, the latter is in the custody of the law and is not subject to attachment by a creditor on the ground that the assignment is fraudulent and void. Mansfield *v.* Whatcom First Nat. Bank, 5 Wash. 665, 32 Pac. 789, 999; Hamilton Brown Shoe Co. *v.* Adams, 5 Wash. 333, 32 Pac. 92.

Wisconsin.— Keep *v.* Sanderson, 12 Wis. 352.

Wyoming.— McCord-Brady Co. *v.* Mills, 8 Wyo. 258, 56 Pac. 1003, 46 L. R. A. 737.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 606.

62. Clark *v.* Wilson, 77 Ind. 176; Phillips *v.* Zerbe Run, etc., Imp. Co., 25 Pa. St. 56.

After a long lapse of time the trusts of an assignment will be presumed to have been satisfied. Kip *v.* Hirsh, 103 N. Y. 565, 9 N. E. 317; Hoag *v.* Hoag, 35 N. Y. 469; New York Steam Co. *v.* Stern, 46 Hun (N. Y.) 206; Green *v.* Heruz, 14 Misc. (N. Y.) 474, 35 N. Y. Suppl. 843, 70 N. Y. St. 360; *In re* Potter, 54 Pa. St. 465. But see Adlum *v.* Yard, 1 Rawle (Pa.) 163, 18 Am. Dec. 608, holding that the lapse of seventeen years without corroborating circumstances is too short a time to raise a legal presumption that the objects of an assignment have either been accomplished or abandoned.

Discontinuance of proceedings.— A statute which provides that proceedings under the assignment law may be discontinued upon the written assent of the debtor and a majority of his creditors, in which case all parties shall be restored to the same rights and duties existing at the date of the assignment, except so far as such estate shall have been already administered and disposed of, does not authorize the court, upon the assent of the debtor and a majority of the creditors, to order the proceedings discontinued, and the estate transferred to a third person absolutely. Stoddard *v.* Gilbert, 163 Ill. 131, 45 N. E. 542; Terhune *v.* Kean, 155 Ill. 506, 40 N. E. 481; Howe *v.* Warren, 154 Ill. 227, 40 N. E. 472.

Discovery of assets after close of estate.— The fact that an assignee closes the estate and is discharged does not reinvest the assignor with the title to assigned property, and the assignee may have the estate opened and administer assets discovered after his discharge as against execution creditors who have levied thereon, or persons to whom the assignor has transferred them. St. George's Church Soc. *v.* Branch, 120 Mo. 226, 25 S. W. 218.

Reconveyance to assignor.— The assignee cannot reconvey the assigned property to the assignor before the payment of all the debts (Briggs *v.* Davis, 20 N. Y. 15, 75 Am. Dec. 363; Matter of Leipziger, 8 Daly (N. Y.) 78; Matter of Backer, 2 Abb. N. Cas. (N. Y.) 379; Truby's Appeal, (Pa. 1885) 5 Atl. 664) unless authorized by statute (Golden's Appeal, 110 Pa. St. 581, 1 Atl. 660) or by order of court with the consent of all the parties (Garver *v.* Tisinger, 46 Ohio St. 56, 18 N. E. 491).

63. Jones *v.* Dougherty, 10 Ga. 273; Gardner *v.* Letcher, 16 Ky. L. Rep. 778, 29 S. W. 868; Dwight *v.* Overton, 35 Tex. 390. See also *infra*, XI, C.

As to abatement of action by death of party, generally, see Abatement and Revival, III [1 Cyc. 47].

Reassignment after death of assignor.— The assignee of a bankrupt after the death of the latter reassigned the property to the administrator of the bankrupt, by whom it was accepted. It was held that such reassignment discharged the assignee, though in terms it was made to the use of the administrator in his individual capacity. Dawes *v.* Boylston, 9 Mass. 337, 6 Am. Dec. 72.

64. *Arkansas.*— Cornish *v.* Dews, 18 Ark. 172.

Kentucky.— Divine *v.* Steele, 10 B. Mon. (Ky.) 323; Vernon *v.* Morton, 8 Dana (Ky.) 247.

Maine.— Arnold *v.* Elwell, 13 Me. 261; Todd *v.* Bucknam, 11 Me. 41.

Maryland.— Price *v.* Merchants' Bank, 29 Md. 369. *Compare* Hollins *v.* Mayer, 3 Md. Ch. 343.

Massachusetts.— Douglas *v.* Simpson, 121 Mass. 281; Foster *v.* Saco Mfg. Co., 12 Pick. (Mass.) 451; Bradford *v.* Tappan, 11 Pick. (Mass.) 76. *Compare* Lupton *v.* Cutter, 8 Pick. (Mass.) 298.

New Hampshire.— Fellows *v.* Greenleaf, 43 N. H. 421.

New York.— Where an assignment for the benefit of certain preferred creditors of the

J. Rights as to Property Not Conveyed by Assignment. A creditor may enforce his claim against any property of the assignor not conveyed by the assignment without violating any rights or equities of other creditors.[65]

K. Foreign Assignments.[66] A voluntary assignment made in one jurisdiction and valid in such jurisdiction passes property in another jurisdiction,[67] pro-

assignor is valid, a provision for the distribution of the surplus among his other creditors vests a trust in such residuary assignees which cannot be divested without their consent. Cunningham *v.* Freeborn, 3 Paige (N. Y.) 557 [*affirmed* in 11 Wend. (N. Y.) 240].

Pennsylvania.— Hubler *v.* Waterman, 33 Pa. St. 414. See also *In re* Meitzler's Account, 2 Woodw. (Pa.) 128.

Rhode Island.— Smith *v.* Millett, 12 R. I. 59.

Texas.— Craddock *v.* Orand, 72 Tex. 36, 12 S. W. 208; Scott *v.* McDaniel, 67 Tex. 315, 3 S. W. 291; Keating *v.* Vaughn, 61 Tex. 518.

Virginia.—Skipwith *v.* Cunningham, 8 Leigh (Va.) 271, 31 Am. Dec. 642. *Compare* Clark *v.* Ward, 12 Gratt. (Va.) 440.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 638.

An attaching creditor is entitled to recover any surplus over the amount of the debts of those creditors who had become parties to the assignment before service on the assignee and thus defeat the claim of a creditor who assented and became a party thereafter. Leeds *v.* Sayward, 6 N. H. 83.

Burden of showing payment.— Where a creditor issues an attachment against property which has been assigned for the benefit of certain creditors under a valid assignment, and claims that such creditors have been paid, whereby the property has reverted to the assignor, the burden is on the attaching creditor to show such payment before he can establish his attachment as against the assignee. Kellogg *v.* Muller, 68 Tex. 182, 4 S. W. 361.

65. Warner *v.* Jaffray, 96 N. Y. 248, 48 Am. Rep. 616.

Creditors who have received a percentage of their claim under an assignment made by their debtor may still proceed by action against the assignor, and in a proper case may attach any of his goods which are not transferred by the assignment. Estabrook *v.* Messersmith, 18 Wis. 545.

A creditor may contest the debtor's right to a homestead attempted to be reserved in a deed of assignment, provided he does so before he has accepted any of the benefits of the assignment. Creager *v.* Creager, 87 Ky. 449, 10 Ky. L. Rep. 424, 9 S. W. 380. Where creditors refuse to accept the provisions of the assignment and look to the homestead alone, which as to them is not exempt, it is proper to ascertain what the *pro rata* would have been in the fund arising from the sale of the unexempted property, and after deducting that sum from their debts to subject the homestead to the payment of the balance. Simmons *v.* Phelps, 5 Ky. L. Rep. 417.

Where an assignee did not claim certain property, but allowed it to remain under the control of the assignor, an order of the court, in supplementary proceedings, authorizing a receiver of the assignor to take possession thereof, was proper. Eastern Nat. Bank *v.* Hulshizer, 2 N. Y. St. 115.

66. As to what law governs see *supra*, VIII.

67. *Alabama.*— Robinson *v.* Rapelye, 2 Stew. (Ala.) 86.

California.— Fenton *v.* Edwards, 126 Cal. 43, 58 Pac. 320, 77 Am. St. Rep. 141, 46 L. R. A. 832; Forbes *v.* Scannell, 13 Cal. 242.

Colorado.— Campbell *v.* Colorado Coal, etc., Co., 9 Colo. 60, 10 Pac. 248.

Connecticut.— Rockville First Nat. Bank *v.* Walker, 61 Conn. 154, 23 Atl. 696; Egbert *v.* Baker, 58 Conn. 319, 20 Atl. 466; Crouse *v.* Phœnix Ins. Co., 56 Conn. 176, 14 Atl. 82, 7 Am. St. Rep. 298.

Florida.— Waltes *v.* Whitlock, 9 Fla. 86, 76 Am. Dec. 617.

Georgia.— Birdseye *v.* Underhill, 82 Ga. 142, 7 S. E. 863, 14 Am. St. Rep. 142, 2 L. R. A. 99; Princeton Mfg. Co. *v.* White, 68 Ga. 96; Miller *v.* Kernaghan, 56 Ga. 155.

Illinois.— May *v.* Attleboro First Nat. Bank, 122 Ill. 551, 13 N. E. 806; Walton *v.* Detroit Copper, etc., Rolling Mills, 37 Ill. App. 264.

Indiana.— Union Sav. Bank, etc., Co. *v.* Indianapolis Lounge Co., 20 Ind. App. 325, 47 N. E. 846.

Iowa.— King *v.* Glass, 73 Iowa 205, 34 N. W. 820.

Kentucky.— Coffin *v.* Kelling, 83 Ky. 649; Rubel *v.* Louisville Banking Co., 10 Ky. L. Rep. 1021; Barclay *v.* Barclay, 7 Ky. L. Rep. 516.

Louisiana.— Brent *v.* Shouse, 15 La. Ann. 110; Dord *v.* Bonnaffee, 6 La. Ann. 563, 54 Am. Dec. 573.

Maine.— Chafee *v.* New York Fourth Nat. Bank, 71 Me. 514, 36 Am. Rep. 345.

Massachusetts.— Frank *v.* Bobbitt, 155 Mass. 112, 29 N. E. 209; May *v.* Wannemacher, 111 Mass. 202; Cragin *v.* Lamkin, 7 Allen (Mass.) 395; Benedict *v.* Parmenter, 13 Gray (Mass.) 88; Goddard *v.* Winthrop, 8 Gray (Mass.) 180; Richardson *v.* Forepaugh, 7 Gray (Mass.) 546.

Minnesota.— Thompson *v.* Ellenz, 58 Minn. 301, 59 N. W. 1023; Covey *v.* Cutler, 55 Minn. 18, 56 N. W. 255.

Missouri.— Thurston *v.* Rosenfield, 42 Mo. 474, 97 Am. Dec. 351; Bryan *v.* Brisbin, 26 Mo. 423, 72 Am. Dec. 219; Zuppann *v.* Bauer, 17 Mo. App. 678.

New Hampshire.— Roberts *v.* Norcross, 69 N. H. 533, 45 Atl. 560; Eddy *v.* Winchester, 60 N. H. 63; Frink *v.* Buss, 45 N. H. 325; Hoag *v.* Hunt, 21 N. H. 106; Sanderson *v.* Bradford, 10 N. H. 260.

New Jersey.— Frazier *v.* Fredericks, 24 N. J. L. 162.

vided it is not opposed to the laws or public policy of such other jurisdiction and is not prejudicial to creditors residing therein.[68] Courts will accordingly enforce a valid foreign assignment for the benefit of creditors as against foreign creditors seeking to reach property of the assignor within their jurisdiction,[69]

New York.— Ockerman *v.* Cross, 54 N. Y. 29; Pool *v.* Ellison, 56 Hun (N. Y.) 108, 9 N. Y. Suppl. 171, 30 N. Y. St. 135; Thompson *v.* Fry, 51 Hun (N. Y.) 296, 4 N. Y. Suppl. 166, 21 N. Y. St. 95; Bloomingdale *v.* Maas, 30 Misc. (N. Y.) 672, 64 N. Y. Suppl. 266; Moore *v.* Battin, 14 N. Y. St. 191; Kelstadt *v.* Reilly, 55 How. Pr. (N. Y.) 373.

Ohio.— Wright *v.* Franklin Bank, 59 Ohio St. 80, 51 N. E. 876; Fuller *v.* Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312; Sortwell *v.* Jewett, 9 Ohio 180.

Oklahoma.—See Williams *v.* Kemper, Hundley, etc., Dry Goods Co., 4 Okla. 145, 43 Pac. 1148.

Pennsylvania.—Wing *v.* Bradner, 162 Pa. St. 72, 29 Atl. 291; Smith's Appeal, 117 Pa. St. 30, 11 Atl. 394; Speed *v.* May, 17 Pa. St. 91, 55 Am. Dec. 540; Evans *v.* Dunkelberger, 3 Grant (Pa.) 134.

South Carolina.—Greene *v.* Mowry, 2 Bailey (S. C.) 163; West *v.* Tupper, 1 Bailey (S. C.) 193.

Texas.— Harvey *v.* Edens, 69 Tex. 420, 6 S. W. 306; Weider *v.* Maddox, 66 Tex. 372, 1 S. W. 168, 59 Am. Rep. 617; Carter-Battle Grocer Co. *v.* Jackson, 18 Tex. Civ. App. 353, 45 S. W. 615.

Vermont.—Hanford *v.* Paine, 32 Vt. 442, 78 Am. Dec. 586.

Virginia.— Wickham *v.* Martin, 13 Gratt. (Va.) 427.

Washington.— Whitman *v.* Mast, 11 Wash. 318, 39 Pac. 649, 48 Am. St. Rep. 874.

West Virginia.— Yost *v.* Graham, (W. Va. 1901) 40 S. E. 361; Harrison *v.* Farmers' Bank, 9 W. Va. 424.

Wisconsin.— Cook *v.* Van Horn, 81 Wis. 291, 50 N. W. 893; Smith *v.* Chicago, etc., R. Co., 23 Wis. 267.

United States.— Schroder *v.* Tompkins, 58 Fed. 672; Van Wyck *v.* Read, 43 Fed. 716; J. M. Atherton Co. *v.* Ives, 20 Fed. 894; Bholen *v.* Cleveland, 5 Mason (U. S.) 174, 3 Fed. Cas. No. 1,381.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 642.

68. *Connecticut.*— Richmondville Mfg. Co. *v.* Prall, 9 Conn. 487.

Delaware.—King *v.* Johnson, 5 Harr. (Del.) 31; Maberry *v.* Shisler, 1 Harr. (Del.) 349.

District of Columbia.— Kansas City Packing Co. *v.* Hoover, 1 App. Cas. (D. C.) 268.

Florida.— Waltes *v.* Whitlock, 9 Fla. 86, 76 Am. Dec. 607.

Georgia.— Mason *v.* Stricker, 37 Ga. 262; Stricker *v.* Tinkham, 35 Ga. 176, 89 Am. Dec. 280.

Illinois.— Townsend *v.* Coxe, 151 Ill. 62, 37 N. E. 689; Juilliard *v.* May, 130 Ill. 87, 22 N. E. 477; Woodward *v.* Brooks, 128 Ill. 222, 20 N. E. 685, 15 Am. St. Rep. 104, 3 L. R. A. 702.

Iowa.— Franzen *v.* Hutchinson, 94 Iowa 95, 62 N. W. 698; Moore *v.* Church, 70 Iowa 208, 30 N. E. 855, 59 Am. Rep. 439.

Kentucky.— Johnson *v.* Parker, 4 Bush (Ky.) 149.

Massachusetts.— Frank *v.* Bobbitt, 155 Mass. 112, 29 N. E. 209; Faulkner *v.* Hyman, 142 Mass. 53, 6 N. E. 846; Train *v.* Kendall, 137 Mass. 366; Zipcey *v.* Thompson, 1 Gray (Mass.) 243.

Michigan.— Butler *v.* Wendell, 57 Mich. 62, 23 N. W. 460, 58 Am. Rep. 329.

Minnesota.— Matter of Dalpay, 41 Minn. 532, 43 N. W. 564, 16 Am. St. Rep. 729, 6 L. R. A. 108.

Missouri.—Askew *v.* La Cygne Exch. Bank, 83 Mo. 366, 53 Am. Rep. 590; Einer *v.* Deynoodt, 39 Mo. 69; Einer *v.* Beste, 32 Mo. 240, 82 Am. Dec. 129; Bryan *v.* Brisbin, 26 Mo. 423, 72 Am. Dec. 219.

New Hampshire.— Dalton *v.* Currier, 40 N. H. 237.

New Jersey.—Moore *v.* Bonnell, 31 N. J. L. 90; Varnum *v.* Camp, 13 N. J. L. 326, 25 Am. Dec. 476; Green *v.* Wallis Iron Works, 49 N. J. Eq. '48, 23 Atl. 498; Van Winkle *v.* Armstrong, 41 N. J. Eq. 402, 5 Atl. 449; Hutcheson *v.* Peshine, 16 N. J. Eq. 167.

New York.— Barth *v.* Backus, 140 N. Y. 230, 35 N. E. 425, 55 N. Y. St. 561, 37 Am. St. Rep. 545, 23 L. R. A. 47; Warner *v.* Jaffray, 96 N. Y. 248, 48 Am. Rep. 616; Kelly *v.* Crapo, 45 N. Y. 86, 6 Am. Rep. 35; Guillander *v.* Howell, 35 N. Y. 657; Grady *v.* Bowe, 11 Daly (N. Y.) 259; Holmes *v.* Remsen, 20 Johns. (N. Y.) 229, 11 Am. Dec. 269.

South Carolina.— National Exch. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028; *Ex p.* Dickinson, 29 S. C. 453, 7 S. E. 593, 13 Am. St. Rep. 749, 1 L. R. A. 685.

Vermont.— Rice *v.* Courtis, 32 Vt. 460, 78 Am. Dec. 597; Hanford *v.* Paine, 32 Vt. 442, 78 Am. Dec. 586.

Wisconsin.— Smith *v.* Chicago, etc., R. Co., 23 Wis. 267.

United States.— Green *v.* Van Buskirk, 5 Wall. (U. S.) 307, 18 L. ed. 599; Schroder *v.* Tompkins, 58 Fed. 672; Schuler *v.* Israel, 27 Fed. 851.

69. *Connecticut.*— Crouse *v.* Phœnix Ins. Co., 56 Conn. 176, 14 Atl. 82, 7 Am. St. Rep. 298.

Illinois.—J. Walter Thompson Co. *v.* Whitehed, 185 Ill. 454, 56 N. E. 1106, 76 Am. St. Rep. 51; Consolidated Tank Line Co. *v.* Collier, 148 Ill. 259, 35 N. E. 756, 39 Am. St. Rep. 181; Woodward *v.* Brooks, 128 Ill. 222, 20 N. E. 685, 15 Am. St. Rep. 104, 3 L. R. A. 702; May *v.* Attleboro First Nat. Bank, 122 Ill. 551, 13 N. E. 806; Lipman *v.* Link, 20 Ill. App. 359.

Kentucky.— Matthews *v.* Lloyd, 89 Ky. 625, 11 Ky. L. Rep. 843, 13 S. W. 106.

Louisiana.—Merchants' Bank *v.* U. S. Bank,

but will not do so if such enforcement will operate to the detriment of domestic creditors.[70]

XI. APPOINTMENT, QUALIFICATION, AND TENURE OF ASSIGNEE.

A. Appointment — 1. WHO MAY APPOINT. By the common law the assignor had the right to name his assignee.[71] Assignment statutes allow the assignor to select the assignee, but the conditions of qualification and entrance upon his duties are prescribed.[72]

2. WHO MAY BE APPOINTED. In choosing an assignee for the benefit of creditors a competent person must be selected.[73]

2 La. Ann. 659; Richardson *v.* Leavitt, 1 La. Ann. 430, 45 Am. Dec. 90.

Maine.— Chafee *v.* New York Fourth Nat. Bank, 71 Me. 514, 36 Am. Rep. 345; South Boston Iron Co. *v.* Boston Locomotive Works, 51 Me. 585; Felch *v.* Bugbee, 48 Me. 9, 77 Am. Dec. 203.

Massachusetts.— May *v.* Wannemacher, 111 Mass. 202.

Missouri.— Einer *v.* Beste, 32 Mo. 240, 82 Am. Dec. 129.

Nebraska.— Green *v.* Gross, 12 Nebr. 117, 10 N. W. 459.

New York.— *Compare* Barth *v.* Backus, 140 N. Y. 230, 35 N. E. 425, 55 N. Y. St. 561, 37 Am. St. Rep. 545, 23 L. R. A. 47; Hibernia Nat. Bank *v.* Lacombe, 84 N. Y. 367, 38 Am. Rep. 518.

Pennsylvania.— Long *v.* Girdwood, 150 Pa. St. 413, 30 Wkly. Notes Cas. (Pa.) 473, 24 Atl. 711, 23 L. R. A. 33; Bacon *v.* Horne, 123 Pa. St. 452, 16 Atl. 794, 2 L. R. A. 355.

Rhode Island.— Noble *v.* Smith, 6 R. I. 446.

United States.— Barnett *v.* Kinney, 147 U. S. 476, 13 S. Ct. 403, 37 L. ed. 247.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 645.

Property abandoned by assignee.— Comity does not require that a foreign insolvent debtor's property in one state should be protected from attachment by his creditors when his assignee for the benefit of his creditors, under the laws of another state, has abandoned it. Harvey *v.* Watson, 63 N. H. 466, 3 Atl. 624.

70. *Illinois.*— J. Walter Thompson Co. *v.* Whitehed, 185 Ill. 454, 56 N. E. 1106, 76 Am. St. Rep. 51; Smith *v.* Lamson, 184 Ill. 71, 56 N. E. 387; Woodward *v.* Brooks, 128 Ill. 222, 20 N. E. 685, 15 Am. St. Rep. 104, 3 L. R. A. 702; Heyer *v.* Alexander, 108 Ill. 385; Walton *v.* Detroit Copper, etc., Rolling Mills, 37 Ill. App. 264.

Kentucky.— Johnson *v.* Parker, 4 Bush (Ky.) 149.

Louisiana.— Beirne *v.* Patton, 17 La. 589.

Maine.— Chafee *v.* New York Fourth Nat. Bank, 71 Me. 514, 36 Am. Rep. 345.

Massachusetts.— Faulkner *v.* Hyman, 142 Mass. 53, 6 N. E. 846.

Michigan.— The rule that where a voluntary assignment is made by a foreign insolvent debtor the rights of an attaching home creditor will be considered superior to those of the assignee does not apply to real property. Palmer *v.* Mason, 42 Mich. 146, 3 N. W. 945.

New Hampshire.— Eddy *v.* Winchester, 60 N. H. 63; Dunlap *v.* Rogers, 47 N. H. 281, 93 Am. Dec. 433; Dalton *v.* Currier, 40 N. H. 237.

North Carolina.—Bizzell *v.* Bedient, 4 N. C. 233.

South Carolina.— Robinson *v.* Crowder, 4 McCord (S. C.) 519, 17 Am. Dec. 762.

Washington.— Happy *v.* Prickett, 24 Wash. 290, 64 Pac. 528.

United States.— Sheldon *v.* Wheeler, 32 Fed. 773; The Watchman, 1 Ware (U. S.) 233, 29 Fed. Cas. No. 17,251.

71. At common law.— Wilt *v.* Franklin, 1 Binn. (Pa.) 502, 2 Am. Dec. 474.

The whole extent of the power of an insolvent debtor over his property, in making an assignment, is to select his assignee, and to direct the order of the application of his property, and of the payment of his debts. Jessup *v.* Hulse, 29 Barb. (N. Y.) 539 [*affirmed* in 21 N. Y. 168].

72. See list of statutes cited *supra*, note 6, p. 120. See also *infra*, XI, B. See also Wyles *v.* Beals, 1 Gray (Mass.) 233; Wilt *v.* Franklin, 1 Binn. (Pa.) 502.

Assignee need not be named in the instrument. Burrows *v.* Lehndorff, 8 Iowa 96. See also as to constructive assignments *supra*, I, B.

Failure to appoint assignee will not render the assignment invalid. Burrows *v.* Lehndorff, 8 Iowa 96; Tompkins *v.* Wheeler, 16 Pet. (U. S.) 106, 10 L. ed. 903. See also *supra*, II, E.

Judicial order of appointment of a trustee cannot be collaterally attacked. Turner *v.* New Farmers' Bank, 102 Ky. 473, 19 Ky. L. Rep. 1522, 43 S. W. 721. See also Brigel *v.* Starbuck, 34 Ohio St. 280 [*reversing* 7 Ohio Dec. (Reprint) 477, 3 Cinc. L. Bul. 501], 7 Ohio Dec. (Reprint) 587, 4 Cinc. L. Bul. 83. It is proper for the court to pass on the qualification of a person named as assignee in an assignment for the benefit of creditors. Preiss *v.* Cohen, 112 N. C. 278, 17 S. E. 520.

73. Must be competent to act.— De Ruyter *v.* St. Peter's Church, 3 N. Y. 238; Cram *v.* Mitchell, 1 Sandf. Ch. (N. Y.) 251. See also Hawley *v.* Baldwin, 19 Conn. 589.

Among the persons held to be competent are the following:

Attorney. Tucker *v.* Parks, 7 Colo. 62, 1 Pac. 427.

B. Qualification — 1. In General. Under the statutes of some states the assignee for creditors is required to take oath and give bond for the faithful performance of his duties,[74] and the statutory requirements as to the execution,[75]

Clerk of assignor. *In re* Walker, 29 Fed. Cas. No. 17,063, 18 Nat. Bankr. Reg. 56.

Clerk of court. Brahmstadt *v.* McWhirter, 9 Nebr. 6, 2 N. W. 232, 31 Am. Rep. 396.

Creditor. Wooster *v.* Stanfield, 11 Iowa 128; Taylor *v.* Watkins, (Miss. 1893) 13 So. 811; Frink *v.* Buss, 45 N. H. 325; Gordon *v.* Cannon, 18 Gratt. (Va.) 387; State *v.* Johnson, 105 Wis. 164, 81 N. W. 146, 83 N. W. 320. See also Widgery *v.* Haskell, 5 Mass. 144, 4 Am. Dec. 1. *Contra*, Farrar *v.* Powell, 71 Vt. 247, 44 Atl. 344. But assignee need not be a creditor. Ripplier *v.* Buck, 5 B. Mon. (Ky.) 96; U. S. Bank *v.* Huth, 4 B. Mon. (Ky.) 423; Layson *v.* Rowan, 7 Rob. (La.) 1.

Debtor of assignor. *Ex p.* Conway, 4 Ark. 302; Wooster *v.* Stanfield, 11 Iowa 128.

Married woman. T. T. Haydock Carriage Co. *v.* Pier, 74 Wis. 582, 43 N. W. 502, under statute but not at common law where her disabilities existed.

Non-resident. Bachrack *v.* Norton, 132 U. S. 337, 10 S. Ct. 106, 33 L. ed. 377. *Contra*, Lanpher *v.* Burns, 77 Minn. 407, 80 N. W. 361, under statute requiring assignee to be a resident. But in Texas it has been held that Sayles' Civ. Stat. art. 65*f*, providing that the assignee shall be a resident of the county where the assignor resides, or his principal business is conducted, is directory only. Burnette *v.* Foreman, (Tex. Civ. App. 1895) 36 S. W. 1032. See also Brown *v.* Parker, 97 Fed. 446, 38 C. C. A. 261, holding that the right of an assignee, appointed by a court to succeed to the trust of the original assignee, to maintain an action as such, cannot be questioned on the ground that he has removed from the state of his appointment, so long as his appointment remains unrevoked by the court which made it.

Officer of assigning corporation. Stetson *v.* Durrell, 3 Ohio Dec. (Reprint) 93, 3 Wkly. L. Gaz. 154.

An insolvent has been held to be incompetent. Haggarty *v.* Pittman, 1 Paige (N. Y.) 298, 19 Am. Dec. 434.

Number of assignees.— An assignment for creditors may be made to one or to several assignees. Douglass *v.* Cissna, 17 Mo. App. 44; Muller *v.* Norton, 132 U. S. 501, 10 S. Ct. 147, 33 L. ed. 397.

Presumption of competency may sometimes arise under the circumstances of the case. Standard Paper Co. *v.* Krauthoefer, 89 Wis. 168, 61 N. W. 764.

74. See list of statutes cited *supra*, note 6, p. 120.

Necessity of oath.— Bank of Commerce *v.* Payne, 86 Ky. 446, 10 Ky. L. Rep. 43, 8 S. W. 856; Maupin *v.* Everett, 8 Ky. L. Rep. 356; Rockwell *v.* Brown, 42 How. Pr. (N. Y.) 226; Wright *v.* Thomas, 1 Fed. 716.

Who may administer the oath see Barcroft *v.* Snodgrass, 1 Coldw. (Tenn.) 430.

Necessity of bond.—*Arkansas.*—Lowenstein *v.* Finney, 54 Ark. 124, 15 S. W. 153.

California.—Wilhoit *v.* Lyons, 98 Cal. 409, 33 Pac. 325; Bryant *v.* Langford, 80 Cal. 542, 22 Pac. 219.

Illinois.— Mann *v.* Reed, 49 Ill. App. 406 [*following* Farwell *v.* Cohen, 138 Ill. 216, 27 N. E. 35, 32 N. E. 893].

Iowa.— Price *v.* Parker, 11 Iowa 144.

Kansas.— Dudley *v.* Whiting, 10 Kan. 47.

Kentucky.— Bank of Commerce *v.* Payne, 86 Ky. 446, 10 Ky. L. Rep. 43, 8 S. W. 856; Rubel *v.* Louisville Banking Co., 10 Ky. L. Rep. 1021.

Louisiana.— U. S. *v.* U. S. Bank, 8 Rob. (La.) 262.

Maryland.— White *v.* Pittsburg Nat. Bank, 80 Md. 1, 30 Atl. 567; Walgamot *v.* Davis, 6 Gill (Md.) 483.

Michigan.— Beard *v.* Clippert, 63 Mich. 716, 30 N. W. 323; Sibley *v.* Prescott Ins. Co., 57 Mich. 14, 23 N. W. 473.

Minnesota.— Kingman *v.* Barton, 24 Minn. 295.

Missouri.—Hardcastle *v.* Fisher, 24 Mo. 70.

New Mexico.— Schofield *v.* Folsom, 7 N. M. 601, 38 Pac. 251.

New York.— Brennan *v.* Willson, 71 N. Y. 502; Smith *v.* Newell, 32 Hun (N. Y.) 501; Plume & Atwood Mfg. Co. *v.* Strauss, 17 Hun (N. Y.) 586; *In re* Farnum, 14 Hun (N. Y.) 159 [*affirmed* in 75 N. Y. 187]; Worthy *v.* Benham, 13 Hun (N. Y.) 176; Von Hein *v.* Elkus, 8 Hun (N. Y.) 516.

Texas.—Fant *v.* Elsbury, 68 Tex. 1, 2 S. W. 866; Barber *v.* Hutchins, 66 Tex. 319, 1 S. W. 275; Schoolber *v.* Hutchins, 66 Tex. 324, 1 S. W. 266.

Wisconsin.— Goll *v.* Hubbell, 61 Wis. 293, 20 N. W. 674, 21 N. W. 288; Norton *v.* Reed, 6 Wis. 522.

United States.— Appolos *v.* Brady, 49 Fed. 401, 4 U. S. App. 209, 1 C. C. A. 299; Linder *v.* Lewis, 4 Fed. 318; *In re* Walker, 29 Fed. Cas. No. 17,063.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 670.

75. Execution of bond.— *Alabama.*— Andrews *v.* Ford, 106 Ala. 173, 17 So. 446.

Connecticut.— Clark *v.* Mix, 15 Conn. 152.

Michigan.— McCuaig *v.* City Sav. Bank, 111 Mich. 356, 69 N. W. 500 (holding that the filing of a bond signed by a corporation of another state which has not been authorized to become surety on undertakings does not qualify the assignee to sue for assets of his assignor); Munson *v.* Ellis, 58 Mich. 331, 25 N. W. 305 (amount of bond).

New Mexico.— Lyndonville Nat. Bank *v.* Folson, 7 N. M. 611, 38 Pac. 253, amount of bond.

New York.— People *v.* White, 28 Hun (N. Y.) 289, bond may be joint and several.

Ohio.— Walsh *v.* Miller, 51 Ohio St. 462, 38 N. E. 381.

filing,[76] and approval of the bond[77] should be complied with, but it seems that substantial compliance may suffice.

2. Failure to Qualify. The failure of the assignee named in an assignment for the benefit of creditors to qualify or to act does not defeat the assignment,[78]

Rhode Island.— Earle *v.* Millard, 2 R. I. 517, amount of bond.

Wisconsin.— Stannard *v.* Youmans, 100 Wis. 275, 75 N. W. 1002 (holding that where the penal sum was inadvertently omitted from an assignee's bond, the assignment was void as to creditors, but operated to transfer the title to the property to the assignee as between the parties); Rollins *v.* Humphrey, 98 Wis. 66, 73 N. W. 331 (holding that the fact that the signature of one of the sureties and his name in the body of the bond had been erased by some unknown and unauthorized person, after the bond had been filed in the clerk's office, did not call for explanation before the bond could be admitted in evidence); John V. Farwell Co. *v.* Arthur, 93 Wis. 56, 67 N. W. 20; Case *v.* James, 90 Wis. 320, 63 N. W. 237; McNair *v.* Reevey, 62 Wis. 167, 22 N. W. 339; Bates *v.* Simmons, 62 Wis. 69, 22 N. W. 339; Farwell *v.* Gundry, 52 Wis. 268, 9 N. W. 11; Klauber *v.* Charlton, 47 Wis. 564, 3 N. W. 443, 45 Wis. 600; Smith *v.* McCulloch, 42 Wis. 564; Churchill *v.* Whipple, 41 Wis. 611 [*distinguishing* Hutchinson *v.* Brown, 33 Wis. 465].

United States.— Bradley Fertilizer Co. *v.* Pace, 80 Fed. 862, 52 U. S. App. 194, 26 C. C. A. 198, holding that a bond executed by the principal who becomes liable for the full amount, and by several sureties who become liable in smaller sums aggregating the whole amount of the bond is sufficient.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 678.

Where the affidavit of a surety on the bond of an assignee for the benefit of creditors fails to show that he is a freeholder of the state, as required by statute, the defect cannot be amended so as to validate the assignment as against rights which attach before the amendment is made. Auley *v.* Osterman, 65 Wis. 118, 25 N. W. 657, 26 N. W. 568.

76. Filing and recording.— Tait *v.* Carey, (Indian Terr. 1899) 49 S. W. 50 (as to place of filing for record); Stiefel *v.* Barton, 73 Md. 408, 21 Atl. 63 (as to place of recording); McCuaig *v.* City Sav. Bank, 111 Mich. 356, 69 N. W. 500 (holding that assignee cannot sue as such unless he has filed a bond within ten days after the assignment, as required by statute); Perkins *v.* Zarracher, 32 Minn. 71, 19 N. W. 385 (time of filing); Bostwick *v.* Burnett, 74 N. Y. 317 (time of filing); Produce Bank *v.* Baldwin, 49 How. Pr. (N. Y.) 277 (place of filing); Hilliard *v.* Enders, 196 Pa. St. 587, 46 Atl. 839 (as to time of filing and presumptions relating thereto); Heckman *v.* Messinger, 49 Pa. St. 465 (time of filing); Farwell *v.* Webster, 71 Wis. 485, 37 N. W. 437 (time of filing).

77. Approval.— The statutes of the several states designate who is to approve the bond. By statute in some states no title passes under the assignment until the bond is approved. People *v.* Colerick, 67 Mich. 362, 34 N. W. 683; Munson *v.* Ellis, 58 Mich. 331, 23 N. W. 305; Ingram *v.* Conway, 36 Minn. 129, 30 N. W. 447; Brahmstadt *v.* McWhirter, 9 Nebr. 6, 2 N. W. 232, 31 Am. Rep. 396; Thrasher *v.* Bentley, 59 N. Y. 649, 1 Abb. N. Cas. (N. Y.) 39; Hedges *v.* Bungay, 3 Hun (N. Y.) 594, 6 Thomps. & C. (N. Y.) 304; *In re* Robinson, 10 Daly (N. Y.) 148; Perry *v.* Stephens, 77 Tex. 246, 13 S. W. 984; Cunningham *v.* Holt, 12 Tex. Civ. App. 150, 33 S. W. 981; Ford *v.* Clarke, 83 Wis. 45, 53 N. W. 31; Smith *v.* Bowen, 61 Wis. 258, 20 N. W. 917. But *compare* Mears *v.* Com., 8 Watts (Pa.) 223. See also, generally, list of statutes cited *supra*, note 6, p. 120.

Sufficiency of approval.—Noyes *v.* Guy, 2 Indian Terr. 205, 48 S. W. 1056 (holding that the acceptance and filing of a bond of an assignee for creditors by the officer whose duty it is to approve it is equivalent to an approval); Miller *v.* Matthews, 87 Md. 464, 40 Atl. 176 (holding that a statute requiring a trustee for benefit of creditors to give a bond, with "sureties," to be approved by the clerk, is complied with when a company which is authorized by its charter granted by the legislature to become "sole surety" in all cases where by law two or more sureties are required is approved as surety by the proper officer); Thomas Mfg. Co. *v.* Drew, 69 Minn. 69, 71 N. W. 921 (holding that when the bond of an assignee for the benefit of creditors has been approved by the court, and filed within the period prescribed by statute, it is immaterial, in so far as the assignee's rights are concerned, that the bond had not been approved or filed when an action in replevin is commenced against him as such assignee); Charles Baumbach Co. *v.* Singer, 86 Wis. 329, 56 N. W. 873; Shakman *v.* Schlueter, 77 Wis. 402, 46 N. W. 542; Fuhrman *v.* Jones, 68 Wis. 497, 32 N. W. 547; Lindsay *v.* Guy, 57 Wis. 200, 15 N. W. 181; Hutchinson *v.* Brown, 33 Wis. 465; Noyes *v.* Neel, 100 Fed. 555, 40 C. C. A. 539 (holding that the omission of the clerk of the United States court for the Indian Territory to indorse his approval upon the bond of an assignee under a general assignment for the benefit of creditors, as required by Mansf. Dig. Ark. § 305, will not invalidate the assignment, in the absence of a statute making such indorsement the sole evidence of approval, where it appears that the bond has been approved by the judge, and, because of such approval, accepted by the clerk as a good bond, and filed by him).

78. Does not defeat assignment.—Moore *v.* Goodbar, 66 Ark. 161, 49 S. W. 571; Abbott *v.* Chaffee, 83 Mich. 256, 47 N. W. 216; Commercial Nat. Bank *v.* Mosser, 57 Mich. 386,

for the court in such a contingency will appoint another person to act in his stead.[79]

C. Death, Resignation, or Removal. The death or resignation of the assignee does not affect the assignment.[80] An assignee for the benefit of creditors

24 N. W. 115; Sabin *v.* Lebenbaum, 26 Oreg. 420, 38 Pac. 434; Golden's Appeal, 110 Pa. St. 581, 1 Atl. 660; Sheppard *v.* Barrett, 17 Phila. (Pa.) 145, 4 Leg. Int. (Pa.) 140; Wait *v.* Zeigler, 9 Tex. Civ. App. 82, 29 S. W. 60. But *compare* Brennan *v.* Willson, 7 Daly (N. Y.) 59 [*affirmed* in 71 N. Y. 502], where one of several assignees refused to qualify.

The assignee may take possession of the assigned property before giving bond. Easton *v.* Durland's Riding Academy Co., 7 N. Y. App. Div. 288, 40 N. Y. Suppl. 283. But in Arkansas, though the deed of assignment vests the legal title in the assignee, yet by statute, before he is entitled to take possession, sell, or in any way control or manage the property assigned, he is obliged to file a schedule and execute the bond required. Thatcher *v.* Franklin, 37 Ark. 64. See also *supra*, note 95, p. 146.

79. Court will appoint another assignee.— Holtoquist *v.* Clark, 59 Minn. 59, 60 N. W. 1077; Golden's Appeal, 110 Pa. St. 581, 1 Atl. 660; Read *v.* Robinson, 6 Watts & S. (Pa.) 329; Brooks *v.* Brooks, 12 S. C. 422; Edmonson *v.* Harris, 2 Tenn. Ch. 427; Foreman *v.* Burnette, 82 Tex. 396, 18 S. W. 756; Keating *v.* Vaughn, 61 Tex. 518; Reynolds *v.* State Bank, 6 Gratt. (Va.) 174; *In re* Hense, 13 Wash. 614, 43 Pac. 888; Brown *v.* Parker, 97 Fed. 446, 38 C. C. A. 261, 73 Fed. 762, 40 U. S. App. 54, 19 C. C. A. 675.

"**The failure to give the bond did not affect the validity** of the deed. The execution and delivery of the deed vested the title to the property in the assignee. A failure on the part of the assignor to file an inventory, or a failure to record the deed, renders the assignment void as 'against creditors of the assignor, and against purchasers and encumbrancers in good faith and for value,' and until the inventory and affidavit have been filed, and the assignee has given the required bond, such assignee has no authority to dispose of the estate or convert it to the purposes of the trust. . . . But the title passes as between the assignor and assignee, and the assignment is irrevocable."

Arkansas.— Falconer *v.* Hunt, 39 Ark. 68; Thatcher *v.* Franklin, 37 Ark. 64. And see *Ex p.* Conway, 4 Ark. 302, where some of the assignees failed to qualify.

California.— Wilhoit *v.* Lyons, 98 Cal. 409, 33 Pac. 325; Bryant *v.* Langford, 80 Cal. 542, 22 Pac. 219.

Indian Territory.—Where attaching creditors, disputing the validity of their debtor's assignment, agree to the appointment of the assignee named therein as receiver of the attached property, and he is appointed, and gives a bond as receiver, the assignee's bond and inventory need not be filed. Tait *v.* Carey, (Indian Terr. 1899) 49 S. W. 50.

Michigan.— Munro *v.* Meech, 94 Mich. 596, 54 N. W. 290; Abbott *v.* Chaffee, 83 Mich. 256, 47 N. W. 216.

Minnesota.— See Swart *v.* Thomas, 26 Minn. 141, 1 N. W. 830, as to filing inventory and bond.

Missouri.— Hardcastle *v.* Fisher, 24 Mo. 70.

New York.— Easton *v.* Durland's Riding Academy Co., 7 N. Y. App. Div. 288, 40 N. Y. Suppl. 283; Plume, etc., Mfg. Co. *v.* Strauss, 17 Hun (N. Y.) 586.

Texas.— Windham *v.* Patty, 62 Tex. 490.

Contra, Dudley *v.* Whiting, 10 Kan. 47.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 688 *et seq.*

80. Death or resignation.— Mitchell *v.* Magowan, 13 Ky. L. Rep. 685. See also McDougald *v.* Carey, 38 Ala. 534; Keiley *v.* Dusenbury, 42 N. Y. Super. Ct. 238 [*affirmed* in 77 N. Y. 597]; and *supra*, X, H, 2.

Courts have power to appoint a successor though there is no statute expressly authorizing such appointment. Matter of Kingsbury, 51 Mich. 623, 17 N. W. 208; Rogers *v.* Pell, 166 N. Y. 565, 60 N. E. 265 (under statute authorizing county court to appoint substituted assignee); *In re* Ballou, 11 R. I. 359; Blum *v.* Welborne, 58 Tex. 157. See also Birmingham Drug Co. *v.* Freeman, 15 Tex. Civ. App. 451, 39 S. W. 626. *Compare* McFerron *v.* Davis, 70 Ga. 661, holding that where assignee resigns, it is proper to appoint a receiver. In McDougald *v.* Carey, 38 Ala. 534, the rule in Alabama is explained and distinguished from the common-law rule in reference to the succession of trust estates upon death of sole or surviving trustee.

Acceptance by the court of the resignation of an assignee pending proceedings for his removal upon the application of creditors is in effect a removal, and is proper. State *v.* Johnson, 105 Wis. 164, 81 N. W. 146, 83 N. W. 320.

Administrator of a deceased assignee does not succeed to the title and duties of the assignee, but succeeds only to his individual estate, since the general assignment statute provides for the appointment of a successor to the assignee. Hayne *v.* Sealy, 22 Misc. (N. Y.) 243, 48 N. Y. Suppl. 769. See also McDougald *v.* Carey, 38 Ala. 534; *In re* Tousey, 2 N. Y. App. Div. 569, 37 N. Y. Suppl. 1025; *In re* Magnus, 2 Misc. (N. Y.) 347, 22 N. Y. Suppl. 70; Woessner *v.* Crank, 67 Tex. 388, 3 S. W. 318.

Successor of sheriff.—An assignment to the sheriff, under Nebr. Comp. Stat. (1897), c. 6, § 5, is to the sheriff as an officer not as an individual, and on the expiration of his term the execution of the trust devolves upon his successor in office. Maul *v.* Drexel, 55 Nebr. 446, 76 N. W. 163.

may be removed by the court for cause,[81] as where he violates his trust or fails to comply with statutory requirements,[82] but such removal does not set aside the assignment,[83] for upon removal the court may appoint a receiver to take charge of

81. Removal for cause.— To remove good cause therefor must appear.

Alabama.— Etowah Min. Co. *v.* Wills Valley Min., etc., Co., 106 Ala. 492, 17 So. 522.

Illinois.— Plotke *v.* Chicago Title, etc., Co., 86 Ill. App. 582; Vose *v.* Cratty, 66 Ill. App. 472.

Iowa.— Drain *v.* Mickle, 8 Iowa 438.

Kansas.— Caldwell *v.* Matthewson, 57 Kan. 258, 45 Pac. 614.

Kentucky.— Grimes *v.* French, 13 Ky. L. Rep. 398.

Michigan.— Old Nat. Bank *v.* Joslin, 81 Mich. 413, 45 N. W. 996.

Minnesota.— American Surety Co. *v.* Nelson, 77 Min. 402, 80 N. W. 300.

Missouri.— Boatmen's Bank's Appeal, 74 Mo. App. 60, where the cause assigned was deemed insufficient.

New York.— Barbour *v.* Everson, 16 Abb. Pr. (N. Y.) 366. *Compare In re* Monahan, 10 Daly (N. Y.) 39; *In re* Leahy, 8 Daly (N. Y.) 124.

Ohio.— *In re* Commercial Bank, 6 Ohio S. & C. Pl. Dec. 105; Campbell *v.* Miner, 4 Ohio Dec. 96.

Pennsylvania.— Ahl's Estate, 192 Pa. St. 370, 43 Atl. 956; Bryson *v.* Wood, 187 Pa. St. 366, 43 Wkly. Notes Cas. (Pa.) 64, 41 Atl. 473.

Rhode Island.— *In re* Durfee, 4 R. I. 401.

Texas.— McIlhenny *v.* Todd, 71 Tex. 400, 9 S. W. 445, 10 Am. St. Rep. 753; Blum *v.* Wettermark, 56 Tex. 80.

Virginia.— Taylor *v.* Mahoney, 94 Va. 508, 27 S. E. 107 (removal in discretion of court); McCullough *v.* Sommerville, 8 Leigh (Va.) 415.

Wisconsin.— State *v.* Johnson, 105 Wis. 164, 81 N. W. 146, 83 N. W. 320. See also Burtt *v.* Barnes, 87 Wis. 519, 58 N. W. 790; Geisse *v.* Beall, 3 Wis. 367.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 691 *et seq.*

82. State *v.* Hunt, 46 Mo. App. 616; *In re* Robinson, 10 Daly (N. Y.) 148; *In re* Mellen, 18 N. Y. Suppl. 515 [*affirmed* in 138 N. Y. 615, 33 N. E. 1083]; *In re* Mayer, 66 How. Pr. (N. Y.) 106; *In re* Shaw, 1 Ashm. (Pa.) 382; Geisse *v.* Beall, 3 Wis. 367.

For any of the following causes an assignee may be removed by proper legal proceedings:

Dilatoriness. Tomkins *v.* Sheehan, 6 N. Y. App. Div. 76, 39 N. Y. Suppl. 466.

Failure to file inventory and schedule. See Barbour *v.* Everson, 16 Abb. Pr. (N. Y.) 366; Redecker *v.* Bowen, 15 R. I. 52, 23 Atl. 62. But *compare* Drain *v.* Mickel, 8 Iowa 438; Case *v.* Mason, 15 R. I. 51, 23 Atl. 48.

Fraud. Matter of Lamoree, 32 Barb. (N. Y.) 122; Brown *v.* Armstrong, 18 R. I. 537, 30 Atl. 461. But an assignee will not be removed at the suit of creditors because he suffered judgment on a valid claim against the estate, where no fraud or fraudulent intent was shown. Markell *v.* Hill, 34 Misc. (N. Y.) 133, 69 N. Y. Suppl. 537.

Gross misconduct. Clark *v.* Stanton, 24 Minn. 232; Havens *v.* Sibbald, (N. J. 1898) 41 Atl. 371. See also *In re* Mast, 58 Minn. 313, 59 N. W. 1044; *In re* Mayer, 10 Daly (N. Y.) 143. But the court will not remove an assignee for alleged misconduct resulting from a mere misunderstanding of his duty, where the safety of the property is not imperiled. Putnam *v.* Timothy Dry-Goods, etc., Co., 79 Fed. 454.

Incompetency. Matter of Cohn, 78 N. Y. 248; Matter of Kaughran, 13 Daly (N. Y.) 526; Weiskettle's Appeal, 103 Pa. St. 522.

Insolvency. Matter of Paddock, 6 How. Pr. (N. Y.) 215; Haggarty *v.* Pittman, 1 Paige (N. Y.) 298, 19 Am. Dec. 434; Regenstein *v.* Pearlstein, 30 S. C. 192, 8 S. E. 850.

Wasting the estate. Caldwell *v.* Matthewson, 57 Kan. 258, 45 Pac. 614; Cox *v.* Platt, 32 Barb. (N. Y.) 126.

Insufficient grounds for removal are mentioned in Etowah Min. Co. *v.* Wills Valley Min., etc., Co., 106 Ala. 492, 17 So. 522; Rogers *v.* Jackman, 12 Gray (Mass.) 144; Le Brun Music Co. *v.* Boulanger, 56 Mo. App. 41; *In re* Mayer, 10 Daly (N. Y.) 143; *In re* Smith, 10 Daly (N. Y.) 106; *In re* Durfee, 4 R. I. 401; Ahl's Estate, 192 Pa. St. 370, 43 Atl. 956.

An assignee cannot litigate the question of his displacement. Campbell *v.* Miner, 4 Ohio S. & C. Pl. Dec. 96.

Proceedings to remove.— The remedy given by Wis. Rev. Stat. § 1702, providing that the circuit court having jurisdiction of a voluntary assignment may on hearing remove any assignee for incompetency or for misapplication of the estate and appoint another in his stead is available only to a person who is a party to the assignment. Such remedy is not exclusive, and a bill in equity will lie to remove an assignee. Morgan *v.* South Milwaukee Lake View Co., 100 Wis. 465, 76 N. W. 354. See also Caldwell *v.* Matthewson, 57 Kan. 258, 45 Pac. 614; Grimes *v.* French, 13 Ky. L. Rep. 398; Stahl *v.* Mitchell, 41 Minn. 325, 43 N. W. 385; Clark *v.* Stanton, 24 Minn. 232; *Ex p.* Millett, 37 Mo. App. 76; *In re* Cohen, 13 Daly (N. Y.) 310; Wallace *v.* Eaton, 5 How. Pr. (N. Y.) 99; *In re* Powel, 163 Pa. St. 349, 30 Atl. 373, 35 Wkly. Notes Cas. (Pa.) 237; Regenstein *v.* Pearlstein, 30 S. C. 192, 8 S. E. 850; Wallace *v.* Foster, 15 S. C. 214; King *v.* McClurg, 7 S. D. 67, 63 N. W. 219; Perry *v.* Stephens, 77 Tex. 246, 13 S. W. 984; McIlhenny Co. *v.* Todd, 71 Tex. 400, 9 S. W. 445, 10 Am. St. Rep. 753; Burtt *v.* Barnes, 87 Wis. 519, 58 N. W. 790.

83. Removal does not set aside assignment. — Kerslake *v.* Brower, etc., Lumber Co., (Oreg. 1901) 66 Pac. 437.

the assigned estate,[84] or may appoint another assignee to succeed the one so removed.[85]

XII. MANAGEMENT AND ADMINISTRATION OF ESTATE.

A. In General — 1. Delegation of Powers. An assignee may employ an agent to assist in the execution of the trust[86] but cannot delegate any power conferred by the trust.[87]

84. Receiver may be appointed. — *Alabama.* — Pollard *v.* Southern Fertilizer Co., 122 Ala. 409, 25 So. 169, where, however, the grounds alleged were deemed insufficient to authorize the appointment of receiver. But see Jones *v.* McPhillips, 77 Ala. 314. See also Maxwell *v.* Peters Shoe Co., 109 Ala. 371, 19 So. 412.

Georgia. — Cohen *v.* Morris, 70 Ga. 313. But a court of equity, upon an allegation of insolvency as to only one of two sureties upon the bond of an assignee, and an allegation that the assignee declines to account to the creditors from time to time, is not authorized to remove such assignee and appoint a receiver, there being no allegation, and no proof of any misfeasance of the assignee, or any misappropriation by him of any part of the trust property. Dozier *v.* Logan, 101 Ga. 173, 28 S. E. 612.

Iowa. — Walker *v.* Stone, 70 Iowa 103, 30 N. W. 39.

Kentucky. — Goldsmith *v.* Fletcheimer, 16 Ky. L. Rep. 432, 28 S. W. 21.

Maryland. — Rosenberg *v.* Moore, 11 Md. 376.

New York. — Dickinson *v.* Earle, 34 N. Y. App. Div. 559, 54 N. Y. Suppl. 475 (holding that the assignor is not as such ineligible to an appointment as receiver to manage hotels for the summer season, such hotels constituting part of the assigned estate); Badger *v.* Sutton, 32 N. Y. App. Div. 633, 53 N. Y. Suppl. 1099, 30 N. Y. App. Div. 294, 52 N. Y. Suppl. 16; Connah *v.* Sedgwick, 1 Barb. (N. Y.) 210; Keyes *v.* Bush, 2 Paige (N. Y.) 311; Haggarty *v.* Pittman, 1 Paige (N. Y.) 298, 19 Am. Dec. 434. See also Hart *v.* Crane, 7 Paige (N. Y.) 37; First Nat. Bank *v.* Raymond, 14 N. Y. St. 868.

Texas. — See Birmingham Drug Co. *v.* Freeman, 15 Tex. Civ. App. 451, 39 S. W. 626.

Virginia. — Bristow *v.* Home Bldg. Co., 91 Va. 18, 20 S. E. 947.

Washington. — State *v.* Superior Ct., 14 Wash. 324, 44 Pac. 542.

West Virginia. — Wagner *v.* Coen, 41 W. Va. 351, 23 S. E. 735.

United States. — Belmont Nail Co. *v.* Columbia Iron, etc., Co., 46 Fed. 8; Tomlinson *v.* Webster Mfg. Co., 34 Fed. 380.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 717.

Receiver not appointed. — For instances where appointment of receiver was properly refused see Penzel Grocer Co. *v.* Williams, 53 Ark. 81, 13 S. W. 736; Matthews *v.* Williams, 84 Ga. 536, 11 S. E. 447; Hutchinson *v.* First Nat. Bank, 133 Ind. 271, 30 N. E. 952; Bank of Maryland *v.* Ruff, 7 Gill & J. (Md.) 448; Thayer *v.* Swift, Harr. (Mich.) 430; Hayes *v.* Heyer, 4 Sandf. Ch. (N. Y.) 485; Branch *v.* Ward, 114 N. C. 148, 19 S. E. 104; Middleton *v.* Taber, 46 S. C. 337, 24 S. E. 282; Pelzer *v.* Hughes, 27 S. C. 408, 3 S. E. 781; Cahn *v.* Johnson, 12 Tex. Civ. App. 304, 33 S. W. 1000; Garden City Banking & Trust Co. *v.* Geilfuss, 86 Wis. 612, 57 N. W. 349; Aschermann *v.* Commercial Bank, 86 Wis. 612, 57 N. W. 349.

85. Successor may be appointed. — State *v.* Johnson, 105 Wis. 164, 81 N. W. 146, 83 N. W. 320. See also Birmingham Drug Co. *v.* Freeman, 15 Tex. Civ. App. 451, 39 S. W. 626; Becker *v.* Shane, 77 Tex. 260, 13 S. W. 1027; and *supra*, note 80.

In Wisconsin the court must appoint the person nominated by a majority of the creditors to fill a vacancy of the office of assignee, unless such person is manifestly an unsuitable person for that office. State *v.* Johnson, 105 Wis. 164, 81 N. W. 146, 83 N. W. 320.

86. Employment of agent. — *Kentucky.* — Vernon *v.* Morton, 8 Dana (Ky.) 247.

Minnesota. — Langdon *v.* Thompson, 25 Minn. 509.

New York. — Van Dine *v.* Willett, 38 Barb. (N. Y.) 319; Mann *v.* Witbeck, 17 Barb. (N. Y.) 388.

Pennsylvania. — Hennessy *v.* Western Bank, 6 Watts & S. (Pa.) 300, 40 Am. Dec. 560.

Virginia. — Gordon *v.* Cannon, 18 Gratt. (Va.) 387.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 746.

The employment of the assignor to assist the assignee in closing out the estate is not of itself improper.

Illinois. — Blow *v.* Gage, 44 Ill. 208.

Indiana. — Hall *v.* Wheeler, 13 Ind. 371.

Kentucky. — Vernon *v.* Morton, 8 Dana (Ky.) 247.

Michigan. — Clark *v.* Craig, 29 Mich. 398.

New York. — Wilbur *v.* Fradenburgh, 52 Barb. (N. Y.) 474.

Virginia. — Gordon *v.* Cannon, 18 Gratt. (Va.) 387.

Wisconsin. — Bates *v.* Simmons, 62 Wis. 69, 22 N. W. 335.

United States. — Tompkins *v.* Wheeler, 16 Pet. (U. S.) 106, 10 L. ed. 903.

See also *supra*, IX, B, 4.

Employment of counsel. — Where difficult questions arise an assignee may lawfully employ counsel to advise him in relation to the administration of the estate. Matter of Rauth, 10 Daly (N. Y.) 52.

87. Delegation of power. — Small *v.* Ludlow, 1 Hilt. (N. Y.) 189, holding that assignees in trust for the benefit of creditors cannot assign a claim due to them, as trus-

2. Compromise of Claims. An assignee may compromise claims when it is for the best interests of the estate that it should be done, though such power is not specifically given by the instrument of assignment.[88]

B. Supervisory Jurisdiction of Courts. Statutes in most states vest supervisory jurisdiction over assignments in designated courts.[89] Such statutes, however, do not as a rule deprive a court of equity or other court of competent jurisdiction of control over matters relating to the administration of the estate.[90]

tees, to a third person to collect the claim, and appropriate the proceeds in accordance with the provisions of the original assignment.

Conveyance by attorney.— An assignee for the benefit of creditors may convey land by attorney, though there be no special authority given in the assignment to delegate his power. Blight *v.* Schenck, 10 Pa. St. 285, 51 Am. Dec. 478.

88. Mitchell *v.* Stoddard County Bank, 22 Ky. L. Rep. 721, 58 S. W. 605; Anonymous *v.* Gelpcke, 5 Hun (N. Y.) 245. See also Matter of Potter, 10 Daly (N. Y.) 133, holding that an assignee for creditors may make a settlement with one of them by paying him a certain percentage, and take an assignment of the balance, where such assignment is taken for the benefit of the original assignor and his estate, and not for the benefit of the assignee. And see Locheimer *v.* Weil, 113 N. C. 181, 18 S. E. 103, 23 L. R. A. 578.

Consent of beneficiaries.—If the deed of assignment confers no authority on the trustee to compromise the debts he cannot compromise them without the consent of the beneficiaries. Royall *v.* McKenzie, 25 Ala. 363.

Consent of court.— An assignee may compromise a claim on consent of court. Coyne *v.* Weaver, 84 N. Y. 386; Matter of Ransom, 8 Daly (N. Y.) 89. Where an action by an assignee for creditors against a sheriff for property taken on attachment by creditors is pending, leave for the assignee to accept an offer of compromise made by such creditors will be denied where the compromise is opposed generally on the part of preferred creditors, and their testimony will be available for the assignee on the trial of the pending action. Matter of Goldschmidt, 10 Daly (N. Y.) 38. On an application by an assignee for leave to compromise a claim due the estate the court may, in its discretion, require notice to be given the creditors, so that they may be heard. Matter of Youngs, 5 Abb. N. Cas. (N. Y.) 346.

89. See list of statutes cited *supra*, note 6, p. 120, and the following cases:

Colorado.— Thatcher *v.* Valentine, 22 Colo. 201, 43 Pac. 1031.

Illinois.— Atlas Nat. Bank *v.* More, 152 Ill. 528, 38 N. E. 684, 43 Am. St. Rep. 274; Lowe *v.* Matson, 140 Ill. 108, 29 N. E. 1036; Plume, etc., Mfg. Co. *v.* Caldwell, 136 Ill. 163, 26 N. E. 599, 29 Am. St. Rep. 305; Davis *v.* Chicago Dock Co., 129 Ill. 180, 21 N. E. 830; P. C. Hanford Oil Co. *v.* Chicago First Nat. Bank, 126 Ill. 584, 21 N. E. 483.

Indiana.— Gilbert *v.* McCorkle, 110 Ind. 215, 11 N. E. 296; Lawson *v.* De Bolt, 78 Ind. 563; Lockwood *v.* Slevin, 26 Ind. 124.

Michigan.— Sawyer *v.* McAdie, 70 Mich. 386, 38 N. W. 292; Edwards *v.* Symons, 65 Mich. 348, 32 N. W. 796.

Minnesota.— Clark *v.* Stanton, 24 Minn. 232.

Nebraska.— Wilson *v.* Coburn, 35 Nebr. 530, 53 N. W. 466; Strunk *v.* State, 33 Nebr. 322, 50 N. W. 14.

New York.— Matter of Morgan, 99 N. Y. 145, 1 N. E. 406; Matter of Bonner, 8 Daly (N. Y.) 75; Matter of Mumford, 5 N. Y. St. 303; Matter of Nelson, 11 Abb. Pr. (N. Y.) 352.

North Dakota.— State *v.* Rose, 4 N. D. 319, 58 N. W. 514, 26 L. R. A. 593.

Ohio.— Havens *v.* Horton, 53 Ohio St. 342, 41 N. E. 253; Clapp *v.* Huron County Banking Co., 50 Ohio St. 528, 35 N. E. 308; Sayler *v.* Simpson, 45 Ohio St. 141, 12 N. E. 181.

Wisconsin.—Durr *v.* Wildish, 100 Wis. 411, 76 N. W. 355.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 734.

Order in chambers.— Where a corporation has made an assignment for the benefit of creditors the court, in chambers, during vacation, has power to make an order authorizing the assignees to collect the whole of the unpaid subscriptions to the capital stock. Citizens', etc., Sav. Bank, etc., Co. *v.* Gillespie, 115 Pa. St. 564, 9 Atl. 73.

90. *Arkansas.*— Clayton *v.* Johnson, 36 Ark. 406, 38 Am. Rep. 40.

Illinois.— The county court when sitting as a court of insolvency has ample equitable powers; and a court of equity will not interpose except under extraordinary circumstances. Weir *v.* Mowe, 182 Ill. 444, 55 N. E. 530; Clark *v.* Burke, 163 Ill. 334, 45 N. E. 235; Farwell *v.* Crandall, 120 Ill. 70, 10 N. E. 672, 11 N. E. 519; Field *v.* Ridgely, 116 Ill. 424, 6 N. E. 156; Hanchett *v.* Waterbury, 115 Ill. 220, 32 N. E. 194; Freydendall *v.* Baldwin, 103 Ill. 325; Powell *v.* Daily, 61 Ill. App. 552; Warren *v.* Howe, 44 Ill. App. 157; Colby *v.* O'Donnell, 17 Ill. App. 473.

Indiana.— Ades *v.* Levi, 137 Ind. 506, 37 N. E. 388; Lockwood *v.* Slevin, 26 Ind. 124.

Iowa.— Knoxville Nat. Bank *v.* Hanirick, 67 Iowa 583, 25 N. W. 816.

Maine.—Although Me. Rev. Stat. c. 70, § 13, declares that "the supreme judicial court has full equity jurisdiction in all insolvency matters," such jurisdiction is supervisory, rather than concurrent with the insolvent court; and a bill in equity to compel an assignee to order and pay a dividend will not be sustained when an application therefor has not first been made by the creditors to the court having original jurisdiction of the

Orders of the court as to the distribution of the assigned property must be obeyed by the assignee.[91]

C. Discovery and Collection of Assets — 1. Right to Possession — a. In General. The assignee is entitled to the possession of the assigned property, and it is his duty to take immediate possession.[92] The personal property must be brought under his actual control, but the real property comes into his possession by the execution and delivery of the assignment.[93]

b. Recovery of Possession. An assignee for the benefit of creditors may sue to recover the assigned property or to release it from an attachment levied at the instance of a creditor.[94]

insolvent proceeding. Bird *v.* Cleveland, 78 Me. 524, 7 Atl. 389.

Mississippi.—Where the assignee takes the steps necessary to invest the court with jurisdiction over the assigned estate, it draws to it jurisdiction of all questions relating to liens thereon, and the rights of attaching creditors must be submitted to its adjudication. Weimer *v.* Scales, 74 Miss. 1, 19 So. 588.

Nebraska.— Wilson *v.* Coburn, 35 Nebr. 530, 53 N. W. 466; Strunk *v.* State, 33 Nebr. 322, 50 N. W. 14.

New York.— Hurth *v.* Bower, 30 Hun (N. Y.) 151.

Ohio.— Where a general assignment has been made by an insolvent, the deed filed in the probate court in the proper county, and the assignee has qualified, the probate court has exclusive jurisdiction of the subject-matter. Farwell *v.* Findlay Dry-Goods Co., 11 Ohio Cir. Ct. 100, 1 Ohio Cir. Dec. 303.

Oregon.— *Contra,* Sprinkle *v.* Wallace, 28 Oreg. 198, 42 Pac. 487.

Virginia.— See Craig *v.* Hoge, 95 Va. 275, 28 S. E. 317.

United States.— A court of competent jurisdiction, other than the one in which his bond and inventory are filed, will compel a voluntary assignee for the benefit of creditors to respond to a writ of garnishment, if the property is not already within the possession or control of a court of concurrent jurisdiction. Kohn *v.* Ryan, 31 Fed. 636.

91. State *v.* Musser, 4 Ind. App. 407, 30 N. E. 944.

As to sale under order of court see *infra,* XII, E, 3.

Asking instructions of court.— If a trustee doubts as to any matter arising in the execution of the trust he may wait until a bill is brought against him, or he may bring a bill asking direction of the court. Dimmock *v.* Bixby, 20 Pick. (Mass.) 368. See also Shipman's Petition, 1 Abb. N. Cas. (N. Y.) 406.

92. *Alabama.*— Abercrombie *v.* Bradford, 16 Ala. 560.

Indiana.— Taylor *v.* Bruner, 130 Ind. 482, 30 N. E. 635.

Kentucky.— Atchison *v.* Jones, 8 Ky. L. Rep. 259, 1 S. W. 406.

Ohio.— Thomas *v.* Talmadge, 16 Ohio St. 433; Stafford *v.* Smith, 11 Ohio Dec. (Reprint) 884, 30 Cinc. L. Bul. 288.

Texas.— Cunningham *v.* Holt, 12 Tex. Civ. App. 150, 33 S. W. 981.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 747.

As to retention of possession by assignor as badge of fraud see *supra,* IX, B, 4.

Rents and profits.— The possession and the rents and profits, until sale, of assigned real estate belong to the assignee as against an attaching creditor of the assignor. Griffith's Estate, 1 Chest. Co. Rep. (Pa.) 39. But where the assignor assigned land and reserved the right in the deed to sell with consent of the assignee and the assignee was to sell if the assignor did not pay the debts enumerated in the deed before a certain time, the assignee cannot claim rents and profits of the assignor covering the time he was entitled to possession under the deed. McCall *v.* Cawthorn, 9 Baxt. (Tenn.) 61.

Void assignment.— An assignee under a void assignment has no title to the property assigned, and cannot maintain replevin against the sheriff seizing it under attachment. Mosconi *v.* Burchinell, 7 Colo. App. 435, 43 Pac. 912.

93. Taylor *v.* Bruner, 130 Ind. 482, 30 N. E. 635.

94. *Alabama.*— Louisville Mfg. Co. *v.* Brown, 101 Ala. 273, 13 So. 15.

Arkansas.— Clayton *v.* Johnson, 36 Ark. 406, 38 Am. Rep. 40.

Iowa.— Goldsmith *v.* Willson, 67 Iowa 662, 25 N. W. 870.

Kansas.— P. Cox Mfg. Co. *v.* August, 51 Kan. 59, 32 Pac. 636.

Kentucky.— Hobbs *v.* Merrifield, 6 Ky. L. Rep. 652.

Michigan.— Emerson *v.* Detroit Steel, etc., Co., 100 Mich. 127, 58 N. W. 659; Gott *v.* Hoschna, 57 Mich. 413, 24 N. W. 123.

Minnesota.— Lord *v.* Meachem, 32 Minn. 66, 19 N. W. 348.

Missouri.— F. O. Sawyer Paper Co. *v.* Continental Printing Co., 77 Mo. App. 184.

Nebraska.— Miller *v.* Waite, 59 Nebr. 319, 80 N. W. 907; Smith *v.* Jones, 18 Nebr. 481, 25 N. W. 624.

New York.— Niagara Falls Paper Co. *v.* Sterling, 39 N. Y. Suppl. 171, 25 N. Y. Civ. Proc. 251.

Pennsylvania.— Sheerer *v.* Lautzerheizer, 6 Watts (Pa.) 543.

Texas.— Tittle *v.* Vanleer, 89 Tex. 174, 29 S. W. 1065, 34 S. W. 715, 37 L. R. A. 337; Willis *v.* Thompson, 85 Tex. 301, 20 S. W. 155; Barber *v.* Hutchins, 66 Tex. 319, 1 S. W. 275; Hamilton-Brown Shoe Co. *v.* Mayo, 8 Tex. Civ. App. 164, 27 S. W. 781; Langham *v.* Lanier, 7 Tex. Civ. App. 4, 26 S. W. 255.

2. Right to Sue to Collect Assets. An assignee for the benefit of creditors may sue to enforce the payment of debts or demands due the assignor.[95]

3. Right to Attack Conveyance by Assignor. Unless expressly authorized by statute[96] an assignee for the benefit of creditors cannot challenge any conveyance or disposition of the property by his assignor.[97]

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 749.

Property withheld by assignor.— An assignee may sue to recover property wrongfully withheld by his assignor. *Ex p.* Conway, 4 Ark. 302; Miller *v.* Halsey, 4 Abb. Pr. N. S. (N. Y.) 28; McLeish *v.* Tylee, 4 Strobh. (S. C.) 287.

Trespass for attachment.— An assignee for creditors may maintain trespass for the attachment of property in his hands. Fiske *v.* Carr, 20 Me. 301; Mason *v.* Hidden, 6 Vt. 600.

95. *Indiana.*— Cooper *v.* Perdue, 114 Ind. 207, 16 N. E. 140.

Maryland.— Barry *v.* Hoffman, 6 Md. 78.

Michigan.— Graydon *v.* Church, 7 Mich. 36.

New York.— Stanford *v.* Lockwood, 95 N. Y. 582; Ryerss *v.* Farwell, 9 Barb. (N. Y.) 615; Kuehnemundt *v.* Haar, 58 How. Pr. (N. Y.) 464; Pratt *v.* Short, 53 How. Pr. (N. Y.) 506.

Ohio.— Johns *v.* Johns, 6 Ohio 271.

Pennsylvania.— Smith's Appeal, 104 Pa. St. 381; Stewart *v.* National Security Bank, 6 Wkly. Notes Cas. (Pa.) 399.

South Carolina.— Salas *v.* Cay, 12 Rich. (S. C.) 558.

West Virginia.— Lamb *v.* Cecil, 25 W. Va. 288.

United States.— Lenox *v.* Roberts, 2 Wheat. (U. S.) 373, 4 L. ed. 264.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 750.

Individual assets of partner.—The assignee of an insolvent firm under a voluntary assignment represents only his assignors and their creditors, and cannot maintain a bill to reach individual assets of a former member of the partnership, alleged to have been fraudulently conveyed by such member after his colorable withdrawal from the firm, for the purpose of hindering and delaying creditors of the former partnership and of the grantor. Michigan Trust Co. *v.* Webber, 109 Mich. 87, 67 N. W. 811.

96. Statutory authorization.— *Connecticut.* — Shipman *v.* Ætna Ins. Co., 29 Conn. 245; Palmer *v.* Thayer, 28 Conn. 237.

Indiana.— Searles *v.* Little, 153 Ind. 432, 55 N. E. 93; Seibert *v.* Milligan, 110 Ind. 106, 10 N. E. 929.

Iowa.— Mehlhop *v.* Ellsworth, 95 Iowa 657, 64 N. W. 638; Schaller *v.* Wright, 70 Iowa 667, 28 N. W. 460.

Kansas.— Walton *v.* Eby, 53 Kan. 257, 36 Pac. 332; Chapin *v.* Jenkins, 50 Kan. 385, 31 Pac. 1084.

Louisiana.— Chapoton *v.* Her Creditors, 44 La. Ann. 350, 10 So. 802; Muse *v.* Yarborough, 11 La. 521.

Maine.— Simpson *v.* Warren, 55 Me. 18.

Michigan.— Kinter *v.* Pickard, 67 Mich. 125, 34 N. W. 535; Angell *v.* Pickard, 61 Mich. 561, 28 N. W. 680; Root *v.* Potter, 59 Mich. 498, 26 N. W. 682; Heineman *v.* Hart, 55 Mich. 64, 20 N. W. 792.

Minnesota.— Merrill *v.* Ressler, 37 Minn. 82, 33 N. W. 117, 5 Am. St. Rep. 822. See also Thomas Mfg. Co. *v.* Drew, 69 Minn. 69, 71 N. W. 921.

Nebraska.— Blair State Bank *v.* Stewart, 57 Nebr. 58, 77 N. W. 370; Lancaster County Bank *v.* Gillilan, 49 Nebr. 165, 68 N. W. 852.

New Jersey.— Smith *v.* Wood, 42 N. J. Eq. 563, 7 Atl. 881; Grant *v.* Crowell, 42 N. J. Eq. 524, 9 Atl. 201; Pillsbury *v.* Kingon, 33 N. J. Eq. 287, 36 Am. Rep. 556 [*overruling* Van Keuren *v.* McLaughlin, 21 N. J. Eq. 163].

New York.—Ball *v.* Slaften, 98 N. Y. 622; Southard *v.* Benner, 72 N. Y. 424; Creteau *v.* Foote, etc., Glass Co., 54 N. Y. App. Div. 168, 66 N. Y. Suppl. 370.

North Carolina.— Taylor *v.* Lauer, 127 N. C. 157, 37 S. E. 197.

Rhode Island.— See Hamilton *v.* Colt, 14 R. I. 209.

Washington.— Mansfield *v.* Whatcom First Nat. Bank, 5 Wash. 665, 32 Pac. 789, 999.

Wisconsin.— See Crocker *v.* Huntzicker, (Wis. 1901) 88 N. W. 232; Frost *v.* Citizens' Nat. Bank, 68 Wis. 234, 32 N. W. 110; Charles Baumbach Co. *v.* Miller, 67 Wis. 449, 30 N. W. 850.

United States.— Loving *v.* Arnold, 84 Fed. 214.

See also *infra*, XIV, A, 1, a.

97. Assignee cannot attack conveyance.— *Alabama.*— Sampson *v.* Jackson, 103 Ala. 550, 15 So. 893.

California.— George *v.* Pierce, 123 Cal. 172, 55 Pac. 775, 56 Pac. 53; Miller *v.* Kehoe, 107 Cal. 340, 40 Pac. 485.

Illinois.— Bouton *v.* Dement, 123 Ill. 142, 14 N. E. 62; Home Sav., etc., Bank *v.* Wheeler, 74 Ill. App. 261; Austin *v.* Bruner, 65 Ill. App. 301.

Maryland.— Brown *v.* Deford, 83 Md. 297, 34 Atl. 788.

Minnesota.— Flower *v.* Cornish, 25 Minn. 473.

Missouri.— Russell *v.* Rutherford, 58 Mo. App. 550; Riddle *v.* Norris, 46 Mo. App. 512; Harris *v.* Harris, 25 Mo. App. 496; Heinrichs *v.* Woods, 7 Mo. App. 236.

Nebraska.— Housel *v.* Cremer, 13 Nebr. 298, 14 N. W. 398.

New York.— Leach *v.* Kelsey, 7 Barb. (N. Y.) 466; Beekman *v.* Kirk, 15 How. Pr. (N. Y.) 228; Brownell *v.* Curtis, 10 Paige (N. Y.) 210.

Pennsylvania.— Mark's Appeal, 85 Pa. St. 231; Vandyke *v.* Christ, 7 Watts & S. (Pa.) 373; Jordan *v.* Mosser, 9 Pa. Co. Ct. 325.

Texas.— Dittman *v.* Weiss, 87 Tex. 614, 30 S. W. 863; Keller *v.* Smalley, 63 Tex. 512.

D. Custody and Management of Assets — 1. ACCEPTANCE OF LEASE. An assignment of all a lessee's property for the benefit of creditors does not make the assignee an assignee of the lease, unless he expressly accepts it or so acts that his conduct will be treated as an adoption of it.[98] If he continues to occupy the leased premises while administering the estate he is liable for rent.[99]

2. CONTINUANCE OF BUSINESS. As the purpose of an assignment is to convert the assigned estate into cash and divide the same among the creditors, an assignee

Wisconsin.— Estabrook *v.* Messersmith, 18 Wis. 545.

United States.— Clapp *v.* Nordmeyer, 25 Fed. 71; Sandwich Mfg. Co. *v.* Wright, 22 Fed. 631.

Canada.— Langley *v.* Van Allen, 32 Ont. 216.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 752.

Conveyance fraudulent as to assignor.—An assignee may bring a suit to set aside a prior conveyance obtained from his assignor by fraud. McMahon *v.* Allen, 35 N. Y. 403, 3 Abb. Pr. N. S. (N. Y.) 74, 32 How. Pr. (N. Y.) 313.

98. *Alabama.*— Smith *v.* Ingram, 90 Ala. 529, 8 So. 144; Dorrance *v.* Jones, 27 Ala. 630.

Illinois.— Rand *v.* Francis, 168 Ill. 444, 48 N. E. 159; Smith *v.* Goodman, 149 Ill. 75, 36 N. E. 621; Reynolds *v.* Fuller, 64 Ill. App. 134.

Maryland.— Horwitz *v.* Davis, 16 Md. 313.

Minnesota.— Forepaugh *v.* Westfall, 57 Minn. 121, 58 N. W. 689.

New Hampshire.— New Hampshire Trust Co. *v.* Taggart, 68 N. H. 557, 44 Atl. 751.

New York.— Walton *v.* Stafford, 14 N. Y. App. Div. 310, 43 N. Y. Suppl. 1049; Carter *v.* Hammett, 12 Barb. (N. Y.) 253; Dennistoun *v.* Hubbell, 10 Bosw. (N. Y.) 155; Lewis *v.* Burr, 8 Bosw. (N. Y.) 140; Johnston *v.* Merritt, 10 Daly (N. Y.) 308; Journeay *v.* Brackley, 1 Hilt. (N. Y.) 447; Bagley *v.* Freeman, 1 Hilt. (N. Y.) 196; Judd *v.* Bennett, 28 Misc. (N. Y.) 558, 59 N. Y. Suppl. 624.

Ohio.— Wilder *v.* McDonald, 63 Ohio St. 383, 59 N. E. 106.

Pennsylvania.— Pratt *v.* Levan, 1 Miles (Pa.) 358.

United States.— *In re* Washburn, 29 Fed. Cas. No. 17,211, 11 Nat. Bankr. Reg. 66.

See also *supra*, X, C, 1; and 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 752.

Dispossession of assignee.— Where a voluntary assignee for the benefit of creditors accepts a lease held by the assignor, which has become subject to forfeiture by such assignor's breach of his covenant to pay rent, the lessor may maintain summary dispossessory proceedings against the assignee. Hasbrouck *v.* Stokes, 13 N. Y. Suppl. 333.

Mere possession of leased premises by an assignee for a short time, while disposing of merchandise therein, is insufficient to show an acceptance of the lease by him. Weinmann's Estate, 164 Pa. St. 405, 35 Wkly. Notes Cas. (Pa.) 321, 30 Atl. 389.

Rent payable in advance.— Where a lease required the rent to be paid monthly in advance, and the lessee executed a general assignment January 5, and the assignee qualified January 15 and occupied the premises, the January rent, being payable in advance, was a valid charge against the lessee but not against his assignee. Anderson *v.* Hamilton, 16 Daly (N. Y.) 18, 8 N. Y. Suppl. 858, 29 N. Y. St. 712.

99. *Georgia.*— An assignee for the benefit of the creditors of a bank is not liable for the rent of a room in which the books of the bank were, after the assignment, deposited by the president of the bank; it not appearing that the assignee exercised any control over the room. Gould *v.* Kerr, 52 Ga. 619.

Illinois.—Willard *v.* World's Fair Encampment Co., 59 Ill. App. 336.

Maryland.— Horwitz *v.* Davis. 16 Md. 313.

New York.— Cameron *v.* Nash, 41 N. Y. App. Div. 532, 58 N. Y. Suppl. 643; Jones *v.* Hausmann, 10 Bosw. (N. Y.) 168; Morton *v.* Pinckney, 8 Bosw. (N. Y.) 135; Astor *v.* Lent, 6 Bosw. (N. Y.) 612. See also Stephens *v.* Stein, 9 N. Y. Suppl. 806; Judd *v.* Bennett, 28 Misc. (N. Y.) 558, 59 N. Y. Suppl. 624; Draper *v.* Salisbury, 11 Misc. (N. Y.) 573, 32 N. Y. Suppl. 757, 66 N. Y. St. 83; Smith *v.* Wagner, 9 Misc. (N. Y.) 122, 29 N. Y. Suppl. 284, 59 N. Y. St. 710; Reitmeyer *v.* Ehlers, 9 N. Y. St. 63; Myers *v.* Hunt, 8 N. Y. St. 338.

Pennsylvania.— Morris *v.* Parker, 1 Ashm. (Pa.) 187.

Personal liability.— An assignee for the benefit of creditors does not become personally liable for the rent of a building leased to his assignor by continuing in possession in the conduct of the business of his trust. White *v.* Thomas, 75 Mo. 454; Walton *v.* Stafford, 14 N. Y. App. Div. 310, 43 N. Y. Suppl. 1049. So an assignee for creditors who takes possession of premises leased by his assignor under an agreement between creditors, in which the owner of the premises joined, by the terms of which rent then due was to be deemed a claim to be paid *pro rata* under an assignment to be made, is not personally liable for such rent as assignee of the lease, though the assignment made in pursuance of the agreement was afterward set aside. Knickerbocker L. Ins. Co. *v.* Patterson, 75 N. Y. 589. And where a lessee assigned his lease for the benefit of his creditors, and the assignees leased the premises for the best price they could obtain, and promptly paid to the landlord all that they received, which he accepted without any

as a general rule has no right to continue the assignor's business.[1] An assignee may, however, work up the stock on hand, if it is manifest that it will be for the benefit of the creditors, as where the stock is of perishable articles, or where it would be of but little or no value unless worked up and prepared for market.[2]

3. Lease of Assigned Realty. A voluntary assignment does not impose upon the assignee any duty to let the real estate.[3]

E. Sale of Property — 1. Duty to Sell. It is the duty of the assignee to sell the assigned property.[4]

2. Authority to Sell. An assignee may sell the assigned property even though the deed of assignment does not expressly confer on him such authority.[5]

3. Order of Court. It is the usual practice for an assignee to apply to a court having jurisdiction over the assigned estate for permission to sell.[6] A sale of

declaration that he took it in part payment, and at the same time they offered to surrender the lease, the assignees at most can only be charged personally with the value of the use of the premises. Jermain *v.* Pattison, 46 Barb. (N. Y.) 9. But see Morrison *v.* Bruce, 1 Ohio S. & C. Pl. Dec. 40, 190, 1 Ohio N. P. 106, holding that where an assignee for the benefit of creditors elects to occupy premises leased to his assignor he becomes personally liable under the lease.

1. Right to continue business.— *Michigan.* — Wilhelm *v.* Byles, 60 Mich. 561, 27 N. W. 847, 29 N. W. 113.

Mississippi.— Richardson *v.* Marqueze, 59 Miss. 80, 42 Am. Rep. 353.

New York.— Matter of Dean, 86 N. Y. 398; Carman *v.* Kelly, 5 Hun (N. Y.) 283; Matter of Rauth, 10 Daly (N. Y.) 52; Hart *v.* Crane, 7 Paige (N. Y.) 37.

North Dakota.— Wells-Stone Mercantile Co. *v.* Grover, 7 N. D. 460, 75 N. W. 911, 41 L. R. A. 252.

Texas.— Wynne *v.* Simmons Hardware Co., 67 Tex. 40, 1 S. W. 568; Fry *v.* Hawkins, (Tex. Civ. App. 1898) 45 S. W. 621.

Consent of creditors.— An assignee under a general assignment for benefit of creditors, in order to replenish a stock of merchandise assigned and to sell it to better advantage, with consent of all creditors bought other goods which he commingled with the original stock and the proceeds were applied indiscriminately toward the payment of the debts of the assignor and the expenses of the assignment, including the debts contracted for such new goods. It was held that at least as against the creditors assenting, the goods so purchased became a part of the trust property as fully as that which was assigned. Noyes *v.* Beaupre, 32 Minn. 496, 21 N. W. 728. See also Hooven, etc., Co. *v.* Burdette, 51 Ill. App. 115, holding that where the assignee of an insolvent estate continued business under orders of the court, which were known and acquiesced in by all the lienholders and other creditors, the presumption is that the business was continued by the assignee under said orders with their consent and approval.

2. Right to work up stock on hand.— *Connecticut.*— Harding *v.* Mill River Woolen Mfg. Co., 34 Conn. 458.

Kentucky.— See Hill *v.* Cornwall, 95 Ky. 512, 16 Ky. L. Rep. 97, 26 S. W. 540.

Massachusetts.—Woodward *v.* Marshall, 22 Pick. (Mass.) 468.

Michigan.— Wilhelm *v.* Byles, 60 Mich. 561, 27 N. W. 847, 29 N. W. 113.

Mississippi.— Richardson *v.* Marqueze, 59 Miss. 80, 42 Am. Rep. 353.

New Jersey.— Miller *v.* Mulford, 31 N. J. Eq. 661.

Pennsylvania.— Patton's Estate, 2 Pars. Eq. Cas. (Pa.) 103. *Compare* Brown's Estate, 193 Pa. St. 281, 44 Atl. 443.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 765.

3. Detwiler's Appeal, 96 Pa. St. 323. See also Creager *v.* Creager, 87 Ky. 449, 10 Ky. L. Rep. 424, 9 S. W. 380, holding that an assignee for creditors is not liable to the creditors for failure to let the land assigned, where it appears that the assignment was made in April, that the assignee commenced proceedings in June for a sale, and that the land was sold in August.

4. Goodwin *v.* Mix, 38 Ill. 115; Laforest *v.* His Creditors, 18 La. Ann. 292; Goodrich *v.* Proctor, 1 Gray (Mass.) 567; Littlejohn *v.* Turner, 73 Wis. 113, 40 N. W. 621.

As to provisions in deed relating to manner and time of sale see *supra*, VI, C; IX, B, 3.

Barter or exchange of property.— An assignee cannot barter or exchange the assigned property. Page *v.* Olcott, 28 Vt. 465. See also Ringgold *v.* Ringgold, 1 Harr. & G. (Md.) 11, 18 Am. Dec. 250.

A trustee cannot lawfully appropriate the trust property to his own use, although he charge himself with the cost price thereof. Geisse *v.* Beall, 3 Wis. 367.

5. Chicago Lumbering Co. *v.* Powell, 120 Mich. 51, 78 N. W. 1022; Williams *v.* Otey, 8 Humphr. (Tenn.) 563, 47 Am. Dec. 632.

Where land is conveyed by an unsealed instrument in writing, in trust to pay certain debts, it is not sufficient in itself to authorize the trustee to sell. Linton *v.* Boly, 12 Mo. 567.

6. Goodrich *v.* Proctor, 1 Gray (Mass.) 567; Bell *v.* Duduit, 40 Ohio St. 330; Littlejohn *v.* Turner, 73 Wis. 113, 40 N. W. 621.

In Louisiana the creditors of an insolvent who has made a surrender are not the owners of the property surrendered for their benefit and cannot sell it without an order of the court in which the proceedings are pending. Rivas *v.* Hunstock, 2 Rob. (La.) 187.

the assigned property is good, however, though it is made without an order of court.[7]

4. Manner of Sale — a. In General. Unless restricted by the assignment or by statute, an assignee for the benefit of creditors is allowed a liberal discretion as to the manner of sale.[8] He must, however, adopt all reasonable modes of proceeding in order to render the sale most beneficial to the debtor.[9]

b. Public or Private Sale. Where the deed of assignment[10] or statutes[11] specify the manner of sale the assignee must do as directed, otherwise he may sell at public or private sale as directed by the court.[12]

5. Notice of Sale. An assignee should give reasonable notice of a public sale.[13] If the statute prescribes the manner of notice the same must be followed.[14]

Discretion of court.— An order allowing an assignee for creditors to sell real estate which was subject to judgment liens will not be disturbed on appeal in the absence of an abuse of discretion. White's Estate, 178 Pa. St. 280, 35 Atl. 985.

Prevention of sale.— Where there is a serious controversy as to the *bona fides* of an assignment and of the preferred debts and of the reliability of the assignee, an injunction to prevent the selling of the property should be granted. Preiss *v.* Cohen, 112 N. C. 278, 17 S. E. 520.

7. Goodrich *v.* Proctor, 1 Gray (Mass.) 567; Jeffries *v.* Bleckmann, 86 Mo. 350.

8. Troth's Estate, 1 Chest. Co. Rep. (Pa.) 89.

Presence of property at sale.— In trust sales the property should be present when sold, but a stranger to the trust has no right to object that the property was not actually present at the sale. Hannah *v.* Carrington, 18 Ark. 85. See also Beebe *v.* De Baun, 8 Ark. 510. But see Pemberton *v.* Klein, 43 N. J. Eq. 98, 10 Atl. 837, holding that an assignee for the benefit of creditors in Pennsylvania may make a valid sale at a public auction room in Philadelphia of lands of the insolvent situated in New Jersey, if such sale is fairly and properly conducted.

9. Goodwin *v.* Mix, 38 Ill. 115; Chelsey *v.* Chesley, 49 Mo. 540; Matter of Leventritt, 40 N. Y. App. Div. 429, 58 N. Y. Suppl. 256.

Advantageous sale.— An assignee should not, except in case of absolute necessity, proceed to sell under an evident disadvantage. Hunt *v.* Bass, 17 N. C. 292, 24 Am. Dec. 274. See also Melick *v.* Voorhees, 24 N. J. Eq. 305, holding that a trustee who sells at an improper time will be liable for a deficiency of the proceeds of sale, though his intentions were good.

10. Greenleaf *v.* Queen, 1 Pet. (U. S.) 138, 7 L. ed. 85, holding that if, by the terms of a deed conveying real estate in trust to be sold for the benefit of the creditors of the grantor, the trustee is directed to sell the property conveyed by public auction, he is bound to conform to this mode of sale.

11. Sloan *v.* Apgar, 24 N. J. L. 608, holding that the sale must be at auction if the statute so prescribes.

If the statute requires a sale at public auction a deed which authorizes the assignee to sell at private sale is void. Teah *v.* Roth, 39 Ark. 66; Raleigh *v.* Griffith, 37 Ark. 150.

12. Matter of Leventritt, 40 N. Y. App. Div. 429, 58 N. Y. Suppl. 256.

In Indiana under 1 Rev. Stat. (1876), p. 144, § 10, as amended, the court may order a private sale of the debtor's real estate. Lawson *v.* De Bolt, 78 Ind. 563.

Where assigned property consisted in part of real estate, which there was no prospect would rise in value, and the creditors would not agree to allow the assignee to continue his efforts to sell at private sale, it was proper to direct the assignee to sell at auction. Brooks *v.* Peck, 38 Barb. (N. Y.) 519. See also Quidnick Co. *v.* Chafee, 13 R. I. 367, holding that where a trustee for creditors holds a large estate which can be best sold in bulk — creditors, debtors, and trustee favoring this mode of sale — the court will approve the scheme, and will allow the trustee to fix a time and place to receive competitive offers, and to contract for a sale to the highest bidder.

13. **Notice of sale.**— Hays *v.* Doane, 11 N. J. Eq. 84; Hart *v.* Crane, 7 Paige (N. Y.) 37.

Sufficiency of notice.— A debtor, in his assignment for creditors, included a right to occupy real estate and conduct a school for a certain period, together with a right to certain fixtures, which he was entitled to remove from the premises. Eight days before the sale of the assigned property the assignees, by printed handbills, gave notice that they would sell all the property of the debtor, without describing it, or explaining that only the debtor's equitable interest in the property would be sold. It was held that the notice was insufficient. Hays *v.* Doane, 11 N. J. Eq. 84.

If the trustee, or one of the creditors, is authorized to prescribe the day of sale and the length of time for which it shall be advertised, the failure to notify any of the creditors of the time and place of sale does not warrant the inference that as to one of the creditors provided for, and who attended the sale and purchased the property, the sale was fraudulent. Haynes *v.* Crutchfield, 7 Ala. 189.

14. **Statutory requirements.**—Teah *v.* Roth, 39 Ark. 66; Raleigh *v.* Griffith, 37 Ark. 150;

6. Time of Sale. It is the duty of an assignee to make a sale of the assigned property within a reasonable time.[15] If the statute prescribes a time, the sale must be made within such time.[16]

7. Sale on Credit. Under an assignment in trust to sell as the trustee may deem expedient, and for the interest of all parties, the trustee may sell on credit.[17]

8. Sale by Joint Assignees. Where joint assignees hold property for the benefit of creditors, a sale and conveyance, to be valid, must be made by them jointly.[18]

9. Rights of Purchaser — a. In General. The title of a *bona fide* purchaser at an assignee's sale is not affected by the failure of the assignee to comply with statutory provisions relating to the manner of sale.[19] A purchaser, however, is

Sloan *v.* Apgar, 24 N. J. L. 608; Rice *v.* Frayser, 24 Fed. 460.

15. Goodwin *v.* Mix, 38 Ill. 115; Hammond *v.* Stanton, 4 R. I. 65; Page *v.* Olcott, 28 Vt. 465; Littlejohn *v.* Turner, 73 Wis. 113, 40 N. W. 621.

A sale within six months is not unreasonably delayed. Wert *v.* Schneider, 64 Tex. 327.

The court will compel the assignee to use reasonable diligence in making a sale. Hollister *v.* Loud, 2 Mich. 309. See also Hammond *v.* Stanton, 4 R. I. 65.

Discretion of assignee.— A deed of assignment containing a provision that the assignee should, as soon as convenient, sell and dispose of the assigned property does not give the assignee unlimited discretion as to the time in which he should execute the trust. McClung *v.* Bergfeld, 4 Minn. 148.

Order of court.— A statute providing that all sales by assignees shall be "made at such times and in such manner as shall be ordered and appointed by the court," was intended to apply to public sales, and not to a private sale ordered by the court. Gignoux *v.* Stafford, 42 Hun (N. Y.) 426, 428 [*distinguishing* Smith *v.* Long, 12 Abb. N. Cas. (N. Y.) 113].

16. Teah *v.* Roth, 39 Ark. 66; Raleigh *v.* Griffith, 37 Ark. 150.

17. *Indiana.*— 1 Rev. Stat. (1876), p. 144, § 10, as amended, authorizes the court to order a private sale of the debtor's real estate, on credit for not more than two years from the sale. Lawson *v.* De Bolt, 78 Ind. 563.

Iowa.— Petrikin *v.* Davis, Morr. (Iowa) 296.

Maryland.— See Inloes *v.* American Exch. Bank, 11 Md. 173, 69 Am. Dec. 190.

Massachusetts.— Hopkins *v.* Ray, 1 Metc. (Mass.) 79; Neally *v.* Ambrose, 21 Pick. (Mass.) 185.

Michigan.— An assignee has no authority to make sales on credit. Wilhelm *v.* Byles, 60 Mich. 561, 27 N. W. 847, 29 N. W. 113; Booth *v.* McNair, 14 Mich. 19; Nye *v.* Van Husan, 6 Mich. 329, 74 Am. Dec. 690. *Compare* Bay City State Bank *v.* Chapelle, 40 Mich. 447, holding that until some creditor has obtained a lien on the property of his debtor the trustee for the latter may, with his consent, sell the property on credit.

Mississippi.— Where an assignment requires the trustee to convert the goods into money, "by a sale for ready money," a sale for credit confers no title upon the purchaser. Cox *v.* Palmer, 60 Miss. 793.

New Hampshire.— Where an assignee sells the property in his hands on credit, without authority, the credit is at his own risk. Brown *v.* Silsby, 10 N. H. 521.

New York.— An assignee should not sell on credit without obtaining leave of court, with notice to the *cestuis que trustent*, or obtaining their consent. Burdick *v.* Post, 12 Barb. (N. Y.) 168. *Compare* Small *v.* Ludlow, 20 N. Y. 155.

Ohio.— When a trustee is authorized to sell on credit, a sale by him on such credit as is authorized by law in the settlement of the estates of deceased persons is not in general an abuse of discretion. Conkling *v.* Coonrod, 6 Ohio St. 611.

Pennsylvania.— Where the liens equal or exceed the value of land assigned for the benefit of creditors, the sale by the assignee must be for cash, unless all persons interested unite in requesting a time sale. Burkholder's Appeal, 94 Pa. St. 522; Wolf's Estate, 3 Pa. Co. Ct. 458. The assignee is responsible for losses resulting from selling on credit without security. McKesson's Estate, 142 Pa. St. 538, 21 Atl. 994; Swoyer's Appeal, 5 Pa. St. 377; Davis' Estate, 5 Whart. (Pa.) 530, 34 Am. Dec. 574.

Vermont.— An assignee cannot sell on credit. Page *v.* Olcott, 28 Vt. 465.

Wisconsin.— The validity of a sale made on credit by an assignee cannot be questioned on that ground by the purchaser, but only by creditors. Becker *v.* Holm, 89 Wis. 86, 61 N. W. 307.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 776.

18. Brennan *v.* Willson, 71 N. Y. 502 [*affirming* 7 Daly (N. Y.) 59]; McIlhenny Co. *v.* Todd, 71 Tex. 400, 9 S. W. 445, 10 Am. St. Rep. 753; Wilbur *v.* Almy, 12 How. (U. S.) 180, 13 L. ed. 944.

19. Tuite *v.* Stevens, 98 Mass. 305.

As to rights of purchaser under void or voidable assignment see *supra*, X, B, 4.

A sale by the assignee of an insolvent corporation, made by him in good faith, is not invalidated or affected by the fraud of a stockholder, committed without the knowledge or privity of the assignee. Trevitt *v.* Converse, 31 Ohio St. 60.

not bound to take the property where there are irregularities in the sale affecting the title.[20]

b. Purchase by Assignee. The assignee cannot purchase, or be interested in the purchase of, the assigned property,[21] and if he does so he will be considered as having purchased in his character of assignee for the benefit of the estate.[22]

c. Set Off Against Purchase-Price. A purchaser at an assignee's sale cannot set off against the purchase-price a debt due him by the assignor.[23]

10. Warranty of Title. An assignment giving the assignee power to sell the real estate "at such time, in such . . . manner and upon such terms as he may

Sale on holiday.— The fact that a sale of trust property took place on the day of the general state election does not of itself constitute a sufficient ground for setting it aside. Bank of Commerce *v.* Lanahan, 45 Md. 396.

Sale subject to redemption by debtor.— At a sale by a trustee under an assignment for the benefit of creditors, the fact that a purchaser buys the property with the understanding that the debtor shall have the privilege of redeeming on payment of the sum advanced does not make the sale void as to creditors. Gutzweiler *v.* Lachman, 28 Mo. 434.

20. Ramsay *v.* Hersker, 153 Pa. St. 480, 32 Wkly. Notes Cas. (Pa.) 71, 26 Atl. 62. See also Matter of Box, 11 Wash. 90, 39 Pac. 240, holding that a bidder at an assignee's sale is justified in refusing to complete the purchase when he afterward learns of mortgages on the land, though the assignee expects to have the mortgages discharged without expense to the bidder.

Right to contest prior encumbrance.— The purchaser under execution of property assigned for the benefit of creditors has no right to contest prior encumbrances on the property, as the assignment remains in force notwithstanding the sale of the assignor's interest in the property, and such right is in the assignee. Tremaine *v.* Mortimer, 128 N. Y. 1, 27 N. E. 1060, 38 N. Y. St. 740 [*affirming* 57 N. Y. Super. Ct. 340, 7 N. Y. Suppl. 681, 28 N. Y. St. 584].

21. *Alabama.*— Harrison *v.* Mock, 10 Ala. 185.

Kansas.— Dunlap *v.* Beckes, 23 Kan. 154, sale to firm of which assignee is a member.

Kentucky.— An assignee, who is himself a large creditor, has the right to protect his own interests; and while this right will not authorize him to buy the land for less than its value, where it appears that the sale was fair, and the rights of creditors protected, there is no equity in setting aside the sale for the purpose only of having a resale that cannot benefit any of the parties. Leavell *v.* Leavell, 4 Ky. L. Rep. 889.

New Jersey.— Blauvelt *v.* Ackerman, 20 N. J. Eq. 141.

New York.— Matter of Black, 13 Daly (N. Y.) 21; Hawley *v.* Cramer, 4 Cow. (N. Y.) 717; Cram *v.* Mitchell, 1 Sandf. Ch. (N. Y.) 251.

North Carolina.— Elliott *v.* Pool, 56 N. C. 17.

Pennsylvania.— Any confirmation of a sale wherein the trustee was the purchaser must be upon a full knowledge of all the circumstances, and a deliberate examination by the creditors. Campbell *v.* McLain, 51 Pa. St. 200.

Rhode Island.— Hammond *v.* Stanton, 4 R. I. 65.

South Carolina.— Farrar *v.* Farley, 3 S. C. 11.

Wisconsin.— Geisse *v.* Beall, 3 Wis. 367.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 780.

A sale by one trustee to his cotrustee is illegal. Ringgold *v.* Ringgold, 1 Harr. & G. (Md.) 11, 18 Am. Dec. 250.

Termination of trust.— An assignee is only prohibited from dealing with the trust property for his own benefit while the trust continues; and when his duty toward it ceases he occupies the same relation to it as a stranger, and acting throughout in good faith may become the owner of the property by purchase or otherwise. *In re* Shotwell, 49 Minn. 170, 51 N. W. 909, 52 N. W. 1078. See also Miller *v.* Mulford, 31 N. J. Eq. 661.

22. Harrison *v.* Mock, 10 Ala. 185; Slade *v.* Van Vechten, 11 Paige (N. Y.) 21; Hawley *v.* Mancius, 7 Johns. Ch. (N. Y.) 174; Chapin *v.* Weed, Clarke (N. Y.) 464; Campbell *v.* McLain, 51 Pa. St. 200; Hartwell *v.* Gurney, 16 R. I. 78, 13 Atl. 113.

23. *Colorado.*— James *v.* McPhee, 9 Colo. 486, 13 Pac. 535.

New Jersey.— Bateman *v.* Connor, 6 N. J. L. 104.

New York.— Otis *v.* Shantz, 128 N. Y. 45, 27 N. E. 955, 38 N. Y. St. 434 [*affirming* 8 N. Y. Suppl. 293, 28 N. Y. St. 69].

North Carolina.— Capehart *v.* Etheridge, 63 N. C. 353.

Pennsylvania.—Wilmarth *v.* Mountford, 8 Serg. & R. (Pa.) 124.

Rhode Island.—Where an assignor remains in possession, and sells goods to one who has no knowledge of the assignment, in an action by the assignee to recover the price the purchaser cannot assail the assignment, but should offset against the assignee demands which he expected to offset against the assignor in payment. Warner *v.* Hedly, 1 R. I. 357.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 786.

Debt of assignee.— An assignee who sells the assigned stock on credit cannot create an offset or payment in reduction of the price by incurring liabilities to his vendee, who knew of the trust, for articles knowingly furnished for his personal use, and not on ac-

deem expedient and prudent," does not give him power to bind the estate by express covenant of warranty; nor does such power exist by implication of law.[24]

11. Setting Aside Sale. A creditor of the assignor may maintain an action on his own behalf and on behalf of all others in like situation to set aside a conveyance made by the assignee in fraud of the rights of creditors.[25]

F. Negligence in Management. An assignee for the benefit of creditors is liable for ordinary negligence, or for the want of that degree of diligence which persons of ordinary prudence are accustomed to exercise in their own business.[26]

count of the trust fund. Paige *v.* Stephens, 23 Mich. 357.

24. Welsh *v.* Davis, 3 S. C. 110, 16 Am. Rep. 690.

Personal liability of assignee.— A trustee is personally liable on his general warranty of title to land sold and conveyed by him in conjunction with his assignor to the extent of the sum realized by so warranting the title. Graves *v.* Mattingly, 6 Bush (Ky.) 361. See also Marshall *v.* Morgan, 58 Vt. 60, 3 Atl. 465, holding that where accounts sold by an assignee, although appearing upon the inventory, have no legal existence but are fictitious, the assignee is not relieved by reason of the character in which he makes the sale from the obligation which the law generally imposes upon vendors to show that the property existed which constituted the consideration of the sale.

25. *Illinois.*— Goodwin *v.* Mix, 38 Ill. 115.

New York.— Matter of Rider, 23 Hun (N. Y.) 91.

Ohio.— See Saxton *v.* Seiberling, 48 Ohio St. 554, 29 N. E. 179, holding that creditors may sue on the refusal of the assignee to do so.

Pennsylvania.— Glenn *v.* Mickey, 130 Pa. St. 586, 18 Atl. 939.

Wisconsin.— Kyes *v.* Merrill Furniture Co., 92 Wis. 32, 65 N. W. 735, holding, however, that creditors cannot sue in such case in the name of the assignee.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 792.

Estoppel.— The fact that creditors claim and receive their *pro rata* of the fund in the hands of an assignee, in a suit by him to settle his trust, does not estop them from seeking to subject to their claim goods which had been sold by the assignee, on the ground that the purchaser had, though buying them in his own name, in fact bought them for and with the money of the debtor, such suit not being determinative of the title of the purchaser. Rothschild *v.* Kohn, 93 Ky. 107, 14 Ky. L. Rep. 36, 19 S. W. 180, 40 Am. St. Rep. 184.

Sufficiency of evidence.— When a creditor seeks to impeach a sale of property by the assignees of his debtor, either upon the ground of neglect of duty or fraudulent intent, he is bound to sustain his charges by affirmative evidence or by strong circumstances. Goodwin *v.* Mix, 38 Ill. 115.

26. *Alabama.*—Royall *v.* McKenzie, 25 Ala. 363.

Illinois.— Goodwin *v.* Mix, 38 Ill. 115; J. I. Case Plow Works *v.* Edwards, 71 Ill. App. 655.

Indiana.—State *v.* Musser, 4 Ind. App. 407, 30 N. E. 944.

Kentucky.— White *v.* Prentiss, 3 T. B. Mon. (Ky.) 449; Woodring *v.* White, 12 Ky. L. Rep. 505.

Michigan.— Clark *v.* Craig, 29 Mich. 398.

Minnesota.— Clark *v.* Stanton, 24 Minn. 232.

New York.— Matter of Dean, 86 N. Y. 398.

North Dakota.— Scott *v.* Jones, 9 N. D. 551, 84 N. W. 479.

Texas.— Wynne *v.* Simmons Hardware Co., 67 Tex. 40, 1 S. W. 568.

Vermont.— Page *v.* Olcott, 28 Vt. 465.

United States.— Chittenden *v.* Brewster, 2 Wall. (U. S.) 191, 17 L. ed. 839.

See also *infra*, XIII, E; and 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 799.

Acts of agent.— Where an assignee for creditors allows the debtor to act as his agent in handling the property, and to retain large sums from the sale thereof as compensation for services, creditors may maintain a bill to hold the assignee personally liable. Redmond *v.* Wemple, 4 Edw. (N. Y.) 221. See also Ward *v.* Lamson, 6 Pick. (Mass.) 358. And a provision in a trust deed that the trustee shall employ such agents as he may deem necessary, and pay them a reasonable compensation for their services out of the trust fund, and not be liable for their omissions or defaults, or for any moneys other than such as shall actually come to his hands in the execution of the trust, does not discharge the trustee from the obligation to select fit agents, and hold them to a strict responsibility for their acts. Gordon *v.* Cannon, 18 Gratt. (Va.) 387.

Conversion of goods.— Where assignees become warehousemen and convert grain in store that they received of their assignors who were warehousemen and appropriate the money to their own use they are liable to account to the owners for the amount received, with interest from the date of the sale. Dole *v.* Olmstead, 41 Ill. 344, 89 Am. Dec. 386. But the assignee of a warehouseman who had issued ineffectual receipts is not personally liable to the holders thereof for the conversion of the property named therein. Ferguson *v.* Northern Bank, 14 Bush (Ky.) 555, 29 Am. Rep. 418.

Fraud in sale.— Even after the assignees have settled their accounts, if fraud can be shown in their sale of the property, they will

G. Actions — 1. Right of Action or Defense — a. In General. Unless conferred by statute an assignee under a voluntary assignment has only such right of action or defense as existed in the assignor, or would have accrued to him had he not assigned.[27]

b. Foreign Assignee. An assignee appointed in one state may be permitted to sue in the courts of another state, if the rights of creditors are not prejudiced thereby.[28]

c. Intervention in Suit Against Assignor. An assignee is not entitled as of right to become a party to a suit begun before the assignment against the assignor.[29]

be personally liable to the creditors for the loss resulting from such fraud. Hays *v.* Doane, 11 N. J. Eq. 84.

27. *Connecticut.*— Central Bank *v.* Curtis, 26 Conn. 533.

Georgia.— Fouche *v.* Brower, 74 Ga. 251.

Michigan.— Wakeman *v.* Barrows, 41 Mich. 363, 2 N. W. 50.

New Jersey.— Anderson *v.* Tuttle, 26 N. J. Eq. 144.

New York.— Minier *v.* Elmira Second Nat. Bank, 13 N. Y. St. 222.

Wisconsin.— Hawks *v.* Pritzlaff, 51 Wis. 160, 7 N. W. 303; Estabrook *v.* Messersmith, 18 Wis. 545.

United States.—Stewart *v.* Platt, 101 U. S. 731, 25 L. ed. 816; Hahn *v.* Salmon, 20 Fed. 801.

England.— Jones *v.* Yates, 9 B. & C. 532, 7 L. J. K. B. O. S. 217, 4 M. & R. 613, 17 E. C. L. 241.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 809.

As to assignee's right of action to: Attack conveyance see *supra*, XII, C, 3. Collect assets see *supra*, XII, C. 2. Recover possession of assigned property see *supra*, XII, C, 1, b.

Action for usury.— Assignees for creditors are "personal representatives," within U. S. Rev. Stat. § 5198, providing that, where a greater rate of interest has been paid to a national bank than is allowed by law of the state in which the bank is located, the person for whom it has been paid, or his legal representatives, may recover twice the amount thus paid. Henderson Nat. Bank *v.* Alves, 91 Ky. 142, 12 Ky. L. Rep. 722, 15 S. W. 132.

The fact that the prosecution of a cause of action by an assignee for the benefit of creditors would not benefit all the creditors, but only a part, is immaterial to his right to sue. Valley Lumber Co. *v.* Hogan, 85 Wis. 366, 55 N. W. 415.

28. *Alabama.*— McDougald *v.* Carey, 38 Ala. 534.

Connecticut.— Upton *v.* Hubbard, 28 Conn. 274, 73 Am. Dec. 670.

District of Columbia.— See Matthai *v.* Conway, 2 App. Cas. (D. C.) 45.

Kansas.— See Rogers *v.* Coates, 38 Kan. 232, 16 Pac. 463.

Kentucky.— An assignee under a deed of assignment executed in Ohio may, without executing bond in Kentucky, maintain an action in the courts of that state for the recovery of the possession of personal property which passed under the deed of assignment. Peach Orchard Coal Co. *v.* Woodward, 20 Ky. L. Rep. 1613, 49 S. W. 793.

Michigan.— Graydon *v.* Church, 7 Mich. 36.

New York.— Hoyt *v.* Thompson, 5 N. Y. 320. *Compare* Abraham *v.* Plestoro, 3 Wend. (N. Y.) 538, 20 Am. Dec. 738.

Pennsylvania.— Milne *v.* Moreton, 6 Binn. (Pa.) 353, 6 Am. Dec. 466.

Texas.— An assignee for creditors of a foreign corporation, suing in a Texas court, need not allege or prove that such assignment was authorized by the laws of the corporation's domicile. Miller *v.* Goodman, 15 Tex. Civ. App. 244, 40 S. W. 743.

Washington.— Happy *v.* Prickett, 24 Wash. 290, 64 Pac. 528.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 816.

As to operation and effect of foreign assignment see *supra*, X, K.

Foreign assignees will not be allowed to sue in their own names upon choses in action required to be specifically assigned. Brush *v.* Curtis, 4 Conn. 312; Orr *v.* Amory, 11 Mass. 25; Dawes *v.* Boylston, 9 Mass. 337, 6 Am. Dec. 72; Bird *v.* Caritat, 2 Johns. (N. Y.) 342, 3 Am. Dec. 433. And where the property is not assignable under the *lex fori*, the assignee cannot sue with respect to it in his own name. Kirkland *v.* Lowe, 33 Miss. 423, 69 Am. Dec. 355.

Federal courts.— An assignee under the Minnesota statutes regulating voluntary assignments for creditors may sue in a federal court in Massachusetts for the value of property acquired by defendant in Minnesota in violation of Minn. Laws (1881), c. 148, § 4, declaring void preferences made within ninety days of making an assignment. Greaves *v.* Neal, 57 Fed. 816. See also Cover *v.* Claflin, 57 Fed. 513, holding that where a conveyance in fraud of creditors has been declared void in one state, and a trustee appointed, to "proceed by due course of law to recover" the property, and administer it for the benefit of creditors, such trustee may maintain a suit to recover the same in a federal court of another state.

29. *Iowa.*— See Ringen Stove Co. *v.* Bowers, 109 Iowa 175, 80 N. W. 318.

Maryland.— Stockett *v.* Goodman, 47 Md. 54.

Nebraska.— Ashton *v.* Jones, 14 Nebr. 426, 16 N. W. 434. *Compare* Commercial Nat.

2. Jurisdiction. Only courts possessing general chancery powers have jurisdiction of an action by an assignee to compel a transfer to him of property conveyed and delivered by the assignor to one of his creditors before the assignment.[30]

3. Conditions Precedent — a. Demand. A demand need not be made to enable an assignee to sue for the recovery of money paid by the assignor to a creditor with the intent of giving a preference.[31]

b. Leave of Court. Leave of court is not as a rule necessary to enable an assignee for the benefit of creditors to sue.[32]

c. Notice of Assignment. Where an assignee of an insolvent debtor sues to recover property of the debtor held by another no notice to the latter of the assignment is necessary.[33]

d. Security For Costs. The court may, in its discretion, compel a non-resident assignee on bringing suit to file security for costs.[34]

4. Parties. In most jurisdictions an assignee for the benefit of creditors may bring suit in regard to the property assigned in his own name,[35] without joining

Bank *v.* Nebraska State Bank, 33 Nebr. 292, 50 N. W. 157.

New Mexico.—Meyer *v.* Black, 4 N. M. 190, 16 Pac. 620.

Rhode Island.— Waterman *v.* A. & W. Sprague Mfg. Co., 14 R. I. 43.

South Dakota.— McClurg *v.* State Bindery Co., 3 S. D. 362, 53 N. W. 428, 44 Am. St. Rep. 799.

Tennessee.—Haynes *v.* Rizer, 14 Lea (Tenn.) 246; Lowenheim *v.* Ireland, 2 Baxt. (Tenn.) 214.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 808.

Suit by assignor for usury.— As the action authorized by 2 N. Y. Rev. Stat. (6th ed.), §§ 1164, 1165, to be brought by the borrower of money at unlawful interest to annul the contract for the loan and to recover the securities received by the lender therefor, is specially restricted to the borrower, the controversy is wholly between him and the lender; and his assignee for benefit of his creditors should neither be substituted for him as plaintiff nor joined as defendant. Richards *v.* Ludington, 60 Hun (N. Y.) 135, 14 N. Y. Suppl. 510, 38 N. Y. St. 401.

30. Ide *v.* Sayer, 129 Ill. 230, 21 N. E. 810.

Federal courts.— A general assignee of the effects of an insolvent cannot sue in the federal courts if his assignor could not have sued in those courts. Sere *v.* Pitot, 6 Cranch (U. S.) 332, 3 L. ed. 240.

31. Bull *v.* Houghton, 65 Cal. 422, 4 Pac. 529. See also Crampton *v.* Valido Marble Co., 60 Vt. 291, 15 Atl. 153, 1 L. R. A. 120, holding that an action by an assignee in insolvency against the debtor for value of property sold is maintainable without averring a demand and refusal by defendant.

Replevin.— In case of an attachment of the property before the expiration of the time within which the assignee is allowed by statute to take possession, the assignee may maintain replevin without showing any demand. Frazier *v.* Fredericks, 24 N. J. L. 162.

32. Glenn *v.* Busey, MacArthur & M. (D. C.) 454.

Impleading assignee.—Where a receiver has been appointed, upon failure of an assignee to qualify, it is contrary to law to allow any one else to implead him with the assignor without leave of the court, or to take out of his hands the control of the proceedings. Scott *v.* Chambers, 62 Mich. 532, 29 N. W. 94.

Partition.— An assignee in insolvency cannot, without leave of court, maintain partition. Jewett *v.* Perrette, 127 Ind. 97, 26 N. E. 685.

Pending action.— The assignee of a bank may, without formal order therefor, prosecute in the bank's name an action begun by the bank before his appointment. Platt *v.* McMurray, 63 How. Pr. (N. Y.) 149.

Suit against assignee.— In Montana an assignee for the benefit of creditors may be sued without leave of court. Babcock *v.* Maxwell, 21 Mont. 507, 54 Pac. 943.

33. Beckwith *v.* Union Bank, 9 N. Y. 211; Stewart *v.* National Security Bank, 6 Wkly. Notes Cas. (Pa.) 399.

34. Ranney *v.* Stringer, 4 Bosw. (N. Y.) 663.

Suit against assignee.— In equity proceedings by non-residents against an assignee who makes affidavit that he has a just defense, petitioners may be required to give security for costs. Tyndall's Estate, 6 Wkly. Notes Cas. (Pa.) 562.

35. Suit in name of assignee.— *Alabama.* — Walker *v.* Miller, 11 Ala. 1067.

Arizona.— Cullum *v.* Paul, (Ariz. 1885) 8 Pac. 187.

Arkansas.— A general assignment to trustees does not pass the legal estate in a bill of exchange, so as to enable the trustees to maintain an action thereon in their own name. Buckner *v.* Real-Estate Bank, 5 Ark. 536, 41 Am. Dec. 105.

Connecticut.— Stanton *v.* Lewis, 26 Conn. 444.

Florida.— Robinson *v.* Nix, 22 Fla. 321.

Kentucky.— Tandy *v.* Hatcher, 6 Ky. L. Rep. 745.

Minnesota.— Langdon *v.* Thompson, 25 Minn. 509; St. Anthony Mill Co. *v.* Vandall, 1 Minn. 246.

Mississippi.— Grand Gulf Bank *v.* Wood, 12 Sm. & M. (Miss.) 482.

Missouri.— Glenn *v.* Hunt, 120 Mo. 330, 25 S. W. 181.

either the assignor[36] or the creditors.[37] If one of two persons named as assignees declines to act the other is the proper person to sue.[38] On the removal of an assignee his successor may sue for a tortious taking of the assigned property from the former assignee.[39]

5. PLEADING. The declaration or complaint in an action by an assignee must aver matters that go to show the assignee's legal capacity to sue and that title to the effects assigned is vested in him.[40]

New York.— Hoagland *v.* Trask, 48 N. Y. 686; Butterfield *v.* Macomber, 22 How. Pr. (N. Y.) 150.

North Carolina.— Hartness *v.* Wallace, 106 N. C. 427, 11 S. E. 259.

Ohio.— Rossman *v.* McFarland, 9 Ohio St. 369; Claypoole *v.* Pope, 9 Ohio Cir. Ct. 309.

Pennsylvania.— A voluntary assignee for the benefit of creditors cannot sue upon a chose in action in his own name. Osborn *v.* Athens First Nat. Bank, 175 Pa. St. 494, 38 Wkly. Notes Cas. (Pa.) 341, 34 Atl. 858. But an assignee should sue in his own name to recover the value of goods sold by him. Wilmarth *v.* Mountford, 8 Serg. & R. (Pa.) 124.

Rhode Island.— Meyers *v.* Briggs, 11 R. I. 180. *Compare* Tillinghast *v.* Phillips, 15 R. I. 162, 1 Atl. 250.

South Carolina.— Salas *v.* Cay, 12 Rich. (S. C.) 558; Ferrall *v.* Paine, 2 Strobh. (S. C.) 293.

Texas.— Simmons Hardware Co. *v.* Kaufman, 77 Tex. 131, 8 S. W. 283.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 823.

Suit against assignee.— Where the effect of a deed is to place property in the hands of a third person for the benefit of creditors, such third person is an assignee and suit is properly brought against him as such, though the instrument is called a "trust deed." Schee *v.* La Grange, 78 Iowa 101, 42 N. W. 616. Replevin should be brought against one wrongfully in possession of chattels in his individual name, though he claims to hold them as an assignee for creditors. Hampshire Paper Co. *v.* Hunt, 9 N. Y. St. 31.

36. Joinder of assignor.— Tandy *v.* Hatcher, 6 Ky. L. Rep. 745.

In a bill by the assignee of a partnership to enforce a trust the partners are not improperly joined as parties plaintiff where it is alleged that the firm is not insolvent, and that if the trust is enforced there will be a surplus for the partners. McCampbell *v.* Brown, 48 Fed. 795.

37. Joinder of creditors.—*Kentucky.*—Robinson *v.* Robinson, 11 Bush (Ky.) 174; Tandy *v.* Hatcher, 6 Ky. L. Rep. 745.

Minnesota.— Langdon *v.* Thompson, 25 Minn. 509.

New York.— Lewis *v.* Graham, 4 Abb. Pr. (N. Y.) 106.

South Carolina.— Salas *v.* Cay, 12 Rich. (S. C.) 558.

Texas.— Simmons Hardware Co. *v.* Kaufman, 77 Tex. 131, 8 S. W. 283; Sanger *v.* Henderson, 1 Tex. Civ. App. 412, 21 S. W. 114.

Intervention by creditors.— Where an assignee for the benefit of creditors files a bill for the administration of the trust, creditors are not entitled to be made parties defendant, but may intervene by petition and propound their respective claims and have their interests ascertained and protected. Louisville Mfg. Co. *v.* Brown, 101 Ala. 273, 13 So. 15.

Suit against assignor.— Creditors are not necessary parties in an action against the assignor.

Alabama.— Walker *v.* Miller, 11 Ala. 1067.

Maine.— Johnson *v.* Candage, 31 Me. 28.

Massachusetts.— Whether or not the creditors of an assignor shall be made parties to a suit in which the assignee is already a party, and defending in their interest, is within the discretion of the trial court. Jewett *v.* Tucker, 139 Mass. 566, 2 N. E. 680.

New York.— Where no misconduct on the part of an assignee is shown, the creditors have no right to intervene and defend an action against the assignee on the ground that their interests might be affected by the litigation. Davies *v.* Fish, 111 N. Y. 681, 19 N. E. 284, 19 N. Y. St. 929.

Pennsylvania.— Irwin *v.* Keen, 3 Whart. (Pa.) 347.

Virginia.— Buck *v.* Pennybacker, 4 Leigh (Va.) 5.

United States.— Kerrison *v.* Stewart, 93 U. S. 155, 23 L. ed. 843.

38. Refusal of one assignee to act.—Shockley *v.* Fisher, 75 Mo. 498. See also Van Valkenburgh *v.* Elmendorf, 13 Johns. (N. Y.) 314, holding that where three assignees of an insolvent debtor are appointed, and one refuses to act, and no other is appointed in his stead, the two others may maintain actions for the insolvent's debts without joining the other assignee.

39. Removal of assignee.— Perry *v.* Stephens, 77 Tex. 246, 13 S. W. 984.

The executrix of an assignee will not be substituted in his place in an action commenced by such assignee in behalf of the insolvent estate. Steinhouser *v.* Mason, 135 N. Y. 635, 32 N. E. 69, 48 N. Y. St. 461. *Compare* Emmerson *v.* Bleakley, 2 Abb. Dec. (N. Y.) 22, 2 Transcr. App. (N. Y.) 171, 3 Transcr. App. (N. Y.) 100, 5 Abb. Pr. N. S. (N. Y.) 350, 41 How. Pr. (N. Y.) 511.

40. *California.*— Wilhoit *v.* Cunningham, 87 Cal. 453, 25 Pac. 675; Bull *v.* Houghton, 65 Cal. 422, 4 Pac. 529, holding that an allegation that plaintiff was appointed assignee by an order "duly given and made" is sufficient.

Indiana.— A complaint by an assignee to recover part of the trust estate, which fails to allege that the deed of assignment has been duly recorded, and to set out a copy, is

6. EVIDENCE — a. In General. In an action by an assignee to recover the value of property attached and sold by creditors of the assignor, the values set down in a schedule attached to the assignment are not conclusive.[41]

b. Burden of Proof. Where suit is brought to set aside conveyances or recover property or its value, because executed or transferred in violation of anti-preference statutes, the burden is on the assignee.[42]

7. MATTERS DETERMINABLE. In an action by an assignee to recover property claimed as part of the assigned estate, the court may determine not only the question of possession but also the right to the property.[43]

had on demurrer. Wheeler *v.* Hawkins, 101 Ind. 486; Foster *v.* Brown, 65 Ind. 234. But a complaint which alleges that the deed of assignment was duly filed and recorded in the recorder's office of the county in which the assignor resided, and in which the real estate is situated, is sufficient. Jewett *v.* Perrette, 127 Ind. 97, 26 N. E. 685.

Kansas.— Rogers *v.* Coates, 38 Kan. 232, 16 Pac. 463.

Kentucky.—An allegation that one of the payees on a note assigned all his estate to plaintiff for the benefit of creditors sufficiently alleges the assignee's right to sue in his own name in connection with the other payee. Bell *v.* Mansfield, 12 Ky. L. Rep. 89, 13 S. W. 838.

Michigan.—In assumpsit by an assignee for goods sold and delivered by the assignor, the declaration should allege that defendant is indebted to the assignor for the goods, and that the claim of the assignor has been assigned to plaintiff. Powell *v.* Williams, 99 Mich. 30, 57 N. W. 1041.

New Jersey.— It is not necessary, to enable one to sue as assignee, that he should aver that he has given bond, filed an inventory, and in other respects complied with the statute regulating assignments. Grant *v.* Crowell, 42 N. J. Eq. 524, 9 Atl. 201.

United States.— Greaves *v.* Neal, 57 Fed. 816.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 824.

Conversion of assigned property.— In an action by an assignee to recover from the wrongdoer the property assigned, or damages for taking it, the declaration need not state the particulars of the assignee's title. It is sufficient if it allege generally that plaintiff was the owner of the property and entitled to the possession of it. State *v.* Krug, 82 Ind. 58; Krug *v.* McGilliard, 76 Ind. 28.

Intervention by foreign assignee.— A foreign assignee has the right to intervene to protect his rights in an attachment proceeding against a non-resident; but his petition should set out the deed of assignment under which he claims with sufficient particularity to enable the court to determine whether, on its face, it is a valid instrument, as against the attachment creditors in the jurisdiction where the attachment is sued out. Matthai *v.* Conway, 2 App. Cas. (D. C.) 45.

41. Guerin *v.* Hunt, 8 Minn. 477.

Assignee's right to sue.— Where the record shows the appointment of a trustee, the bringing of suit by such trustee is conclusive evidence of his having accepted the trust, and of his acting as trustee, and *prima facie* evidence that he was duly qualified. Taylor *v.* Atwood, 47 Conn. 498. See also Partridge *v.* Hannum, 2 Metc. (Mass.) 569, holding that the assignment is conclusive evidence of the assignee's authority to sue for any debt due or belonging to the insolvent.

Assignor's insolvency.— The verified inventory of the assets of an assignor and of the amount due each creditor, filed with the clerk of court pursuant to statute, is *prima facie* evidence of the assignor's insolvency. Ball *v.* Bowe, 49 Wis. 495, 5 N. W. 909. So in an action by an assignee to recover back property conveyed by the assignor by way of preference, evidence that at the time of the conveyance the assignor was reputed to be insolvent in the town where he resided is competent to prove that defendant had reasonable cause to believe him insolvent. Lee *v.* Kilburn, 3 Gray (Mass.) 594. See also Southern Suspender Co. *v.* Von Borries, 91 Ala. 507, 8 So. 367.

Existence of debts.— The deed of trust, the execution of which is proved, is *prima facie* evidence of the existence of the debts therein specified. Martin-Brown Co. *v.* Henderson, 9 Tex. Civ. App. 130, 28 S. W. 695.

Ownership of property.— In a contest between the assignee and an attaching creditor, evidence tending to show the ownership of property not included in the assignment, but alleged to belong to the debtor, is admissible. Singer *v.* Armstrong, 77 Iowa 397, 42 N. W. 332. But an assignee claiming damages for the negligent killing of an animal, covered by the deed, must show that the grantor in the deed owned the animal when the deed was executed. Little Rock, etc., R. Co. *v.* Sparkman, 60 Ark. 25, 28 S. W. 509.

42. Excelsior Mfg. Co. *v.* Owens, 58 Ark. 556, 25 S. W. 868; Glenn *v.* Grover, 3 Md. 212; Butler *v.* Breck, 7 Metc. (Mass.) 164, 39 Am. Dec. 768.

Attachment of assigned property.— In an action by an assignee against a creditor who has attached the assigned property, the burden is on defendant to show that he was the only remaining creditor entitled to the money which plaintiff can recover. Nave *v.* Britton, 61 Tex. 572.

43. Boyden *v.* Frank, 20 Ill. App. 169.

Property passing by assignment.— In Illinois the county court has jurisdiction to de-

8. Questions For Jury. In an action between an assignee and a creditor to determine the right of possession of goods assigned, the question whether the assignor delivered possession to the assignee is for the jury.[44]

9. Judgment. In an action by an assignee for the conversion of the assigned property, the assignee may recover as damages the value of the stock, and is not limited to the amount of the debt secured by the deed of trust.[45]

10. Costs. An assignee for the benefit of creditors is not personally liable for the costs of a suit brought by him in good faith on behalf of the assigned estate.[46]

XIII. ACCOUNTING, SETTLEMENT, AND DISCHARGE OF ASSIGNEE.

A. In General — 1. Duty to Account. The assignee under an assignment for the benefit of creditors is bound to account.[47] He cannot be discharged without an accounting[48] unless the creditors waive it.[49]

2. Who May Require Account. Any person having a direct interest in the trust can call for an accounting by the assignee.[50] This includes a creditor whose claim is fixed by the assignment or allowed during administration,[51] as also the

termine whether property claimed as a homestead passed by the assignment. Holnback *v.* Wilson, 159 Ill. 148, 42 N. E. 169.

44. Hall *v.* Wheeler, 13 Ind. 371.

In replevin by a trustee for creditors against a levying officer, it is the province of the court, and not the jury, to pass on the legal effect of a provision in the assignment alleged to be illegal. Sheldon *v.* Dodge, 4 Den. (N. Y.) 217.

45. Sanger *v.* Henderson, 1 Tex. Civ. App. 412, 21 S. W. 114.

Personal judgment.— It is error to render judgment against the assignee individually, where he is sued as assignee only. Mattingly *v.* Willett, 19 Ky. L. Rep. 1746, 44 S. W. 376.

46. Cunningham *v.* McGregor, 5 Duer (N. Y.) 648, 12 How. Pr. (N. Y.) 305; Murry *v.* Hutcheson, 8 Abb. N. Cas. (N. Y.) 423. But an assignee in trust for creditors, suing in his own right, without alluding to his representative character as trustee of an express trust, will not be protected from costs. Murray *v.* Hendrickson, 1 Bosw. (N. Y.) 635, 6 Abb. Pr. (N. Y.) 96.

As to allowance to assignee of costs of litigation see *infra*, XIII, D, 1, c.

Attorney's fees.— Where creditors execute to the trustee for the benefit of creditors a note to be applied in payment of a judgment secured by another creditor against the trustee, the trustee, if compelled to sue on the note, is entitled to take from the surplus a reasonable attorney's fee. Fetters *v.* Atkinson, 102 Mich. 485, 60 N. W. 1047.

Intervention by assignee.— Where an assignee of the property attached is allowed to become a party to a trustee suit, as a claimant, and the trustee is afterward discharged, neither the assignee nor plaintiff can recover costs of each other. White Mountain Bank *v.* West, 46 Me. 15.

Suit before assignment.— Assignees for creditors are not liable for costs of a suit commenced before the assignment and carried on afterward by the assignor as plaintiff and without the knowledge or consent of the assignee, although the assignor was the general agent of the assignee in the settlement of the assigned estate. Snow *v.* Green, 1 How. Pr. (N. Y.) 216.

47. Assignee bound to account.— *Illinois.* — Lobdell *v.* Nauvoo State Bank, 180 Ill. 56, 54 N. E. 157.

New York.— Matter of Allen, 24 Hun (N. Y.) 408; Matter of Nelson, 11 Abb. Pr. (N. Y.) 352.

Pennsylvania.— De Leon's Estate, 11 Phila. (Pa.) 286, 33 Leg. Int. (Pa.) 382.

South Carolina.— Harth *v.* Gibbes, 4 McCord (S. C.) 8.

Texas.— McIlhenny Co. *v.* Todd, 71 Tex. 400, 9 S. W. 445, 10 Am. St. Rep. 753.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1104.

Failure to account.— An assignee, under a voluntary assignment, who has been discharged for malfeasance, and has not settled his account as such assignee in the proper court, and satisfied such court that there was a balance due him from the assigned estate, has no legal or equitable claim which he can enforce against the assigned estate in the hands of the subsequently appointed assignee. Fournier *v.* Ingraham, 7 Watts & S. (Pa.) 27.

48. No discharge without accounting.— Matter of Groencke, 5 Abb. N. Cas. (N. Y.) 298 note; Matter of Horsfall, 5 Abb. N. Cas. (N. Y.) 289. See also *infra*, XVI, A, 3.

49. Waiver of account.—Matter of Horsfall, 5 Abb. N. Cas. (N. Y.) 289.

50. Persons in interest.— Mills *v.* Husson, 140 N. Y. 99, 35 N. E. 422, 55 N. Y. St. 309; Preston *v.* Fitch, 137 N. Y. 41, 33 N. E. 77, 50 N. Y. St. 72; Bailey *v.* Bergen, 4 Thomps. & C. (N. Y.) 642.

51. Creditors.—Ludington's Petition, 5 Abb. N. Cas. (N. Y.) 307; Matter of Herman, 53 How. Pr. (N. Y.) 377; Tennent *v.* Davis, (Tex. Civ. App. 1895) 31 S. W. 251.

A simple contract creditor cannot ordinarily sue to compel an accounting by the assignee. He must first reduce his claim to judgment at law. Willetts *v.* Vandenburgh, 34 Barb. (N. Y.) 424.

A mortgagee who has not proved his claim against the insolvent estate of the mortgagor,

assignor,[52] but apart from statute a surety on the assignee's bond has not the right.[53]

3. Who Liable to Account. An assignee, who has acted as such,[54] is liable to account, though he has not given bond.[55] And an assignee is bound to account, though the assignment is void, if it is not so treated by the creditors.[56] So an assignee who, after accepting the trust, voluntarily permits his coassignee to take the entire management of it is equally with him liable to account.[57]

4. Settlement Out of Court. A settlement out of court by an assignee in trust for creditors, if made with the assent of all parties in interest, is as effective as if made by decree of court, except that it must be proved, whereas the judgment is conclusive.[58]

B. Proceedings to Obtain Accounting — 1. Jurisdiction. Proceedings to obtain an accounting must be had in a court of competent jurisdiction.[59] If pro-

nor obtained possession of the mortgaged premises, nor intercepted the rent, but remained dormant until after the assignee has collected the rent and distributed it to the general creditors under the orders of the court, and such distribution has been confirmed by the judgment of the court, is in no position to make such assignee account to him as for a misappropriation of the rent. Upson *v.* Milwaukee Nat. Bank, 57 Wis. 526, 15 N. W. 834.

52. Assignor.— Matter of Townsend, 14 Daly (N. Y.) 76; Tomlinson *v.* Claywell, 57 N. C. 317; Hunter *v.* Hubbard, 26 Tex. 537; Carpenter *v.* Robinson, 1 Holmes (U. S.) 67, 5 Fed. Cas. No. 2,431.

One of two or more assignors for the benefit of creditors is a "person interested" in the assigned estate, within Minn. Laws (1876), c. 44, § 10, permitting such "person interested" to file a petition for a citation requiring the assignee to file his report. Clark *v.* Stanton, 24 Minn. 232.

When the assignor is adjudged a bankrupt he can no longer call the assignee to account. His representative in bankruptcy has that right. Bailey *v.* Smith, 10 R. I. 29.

53. Assignee's surety.—Matter of Castle, 1 Abb. N. Cas. (N. Y.) 399. See also Schuehle *v.* Reiman, 86 N. Y. 270.

54. Assignment superseded by bankruptcy. — The assignee under an assignment for the benefit of creditors is bound to account, notwithstanding a composition in bankruptcy, unless the bankruptcy court orders otherwise, or creditors waive their right to an account. Matter of Straus, 9 Abb. N. Cas. (N. Y.) 131. See also Matter of Bieber, 38 N. Y. App. Div. 639, 59 N. Y. Suppl. 118, 59 N. Y. St. 118; Smith *v.* Tighe, 46 N. Y. Super. Ct. 270.

A partial assignee is not relieved from the duty to account by having turned the property over to a general assignee. Whitney's Appeal, 22 Pa. St. 500.

55. Failure to give bond.— Matter of Farnam, 75 N. Y. 187; Matter of Parker, 5 Abb. N. Cas. (N. Y.) 334; Ludington's Petition, 5 Abb. N. Cas. (N. Y.) 307; Cunningham *v.* Freeborn, 1 Edw. (N. Y.) 256 [*affirmed* in 3 Paige (N. Y.) 557 (*affirmed* in 11 Wend. (N. Y.) 240)]; Whitney's Appeal, 22 Pa. St. 500.

56. Void assignment.— Geisse *v.* Beall, 3 Wis. 367.

57. Coassignees.— *Alabama.*— Royall *v.* McKenzie, 25 Ala. 363.

Maine.— See Howe *v.* Handley, 25 Me. 116.

New York.— Bruen *v.* Gillet, 115 N. Y. 10, 21 N. E. 676, 23 N. Y. St. 780, 12 Am. St. Rep. 764, 4 L. R. A. 529; Bowman *v.* Rainetaux, Hoffm. (N. Y.) 150. See also Thatcher *v.* Candee, 4 Abb. Dec. (N. Y.) 387, 3 Keyes (N. Y.) 157.

Pennsylvania.— See Stell's Appeal, 10 Pa. St. 149.

South Carolina.— *Compare* Miller *v.* Sligh, 10 Rich. Eq. (S. C.) 247.

Virginia.— Miller *v.* Holcombe, 9 Gratt. (Va.) 665. But see Griffin *v.* Macaulay, 7 Gratt. (Va.) 476, holding that a trustee named in a deed to secure debts, who unites in sales necessary in the execution of the trust and other formal acts, but receives none of the trust funds — they being received by his cotrustee — and is guilty of no fraud in relation thereto is not responsible for the misapplication or waste of the funds by his cotrustee.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1113.

58. Ludington's Petition, 5 Abb. N. Cas. (N. Y.) 307; Matter of Latimer, 2 Ashm. (Pa.) 520.

59. Eakin *v.* Cattell, 16 N. J. L. 103; Hoagland *v.* See, 40 N. J. Eq. 469, 3 Atl. 513; Matter of Cowing, 26 Hun (N. Y.) 214; Nicholas *v.* Claggett, 15 Hun (N. Y.) 317; Converseville Co. *v.* Chambersburg Woolen Co., 14 Hun (N. Y.) 609.

Court appointing assignee.— Assignees of insolvent debtors' estates appointed by the court, being officers thereof, are subject to be called to account before it. Harth *v.* Gibbes, 4 McCord (S. C.) 8.

Jurisdictional amount.— The right of a creditor to sue to compel the assignee to account is not dependent upon the amount claimed. McIlhenny Co. *v.* Todd, 71 Tex. 400, 9 S. W. 445, 10 Am. St. Rep. 753.

Loss of jurisdiction.— On a proceeding to vacate the trust and procure a reconveyance to the assignor of the property assigned, the probate court will not, in rendering a decree that the assignee file his final report and that

ceedings are pending in one court another court of equal or concurrent jurisdiction will ordinarily decline to interfere.[60]

2. Laches. An assignee, after a long lapse of time, will not be compelled to account, where the assignor and creditors have slept upon their rights, and no special reason for demanding an account is shown.[61]

3. Parties. To a bill for an accounting all persons in interest should be made parties, either as plaintiffs or defendants.[62]

4. Consolidation of Actions. Where different actions have been brought by creditors, for themselves and other creditors, against an assignee for an accounting, an order that all creditors come in and prove their claims in the action first brought is in the discretion of the court.[63]

C. Account and Proceedings Thereon — 1. Notice. Notice of the accounting to all parties in interest is generally required.[64]

the trust be ended by compliance with the terms of the decree, lose its jurisdiction over the person of the assignee for the settlement of his final account. Garver *v.* Tisinger, 46 Ohio St. 56, 18 N. E. 491.

60. Matter of Cromien, 10 Daly (N. Y.) 41; Matter of Union Banking Co., 12 Phila. (Pa.) 214, 34 Leg. Int. (Pa.) 204. See also Schuehle *v.* Reiman, 86 N. Y. 270, holding that where two separate suits for an accounting against an assignee have been brought in courts having equal or concurrent jurisdiction, the jurisdiction of the court whose interference has been first invoked should continue to be exercised, and the proceedings in the other stayed. But see Matter of Dare, 13 Daly (N. Y.) 220, holding that the fact that actions are pending in another court against an assignor and assignee, to set aside the assignment, is not a bar to a proceeding to compel the assignee to account.

61. Matter of Darrow, 10 Daly (N. Y.) 141; Forster *v.* Forster, 1 Pearson (Pa.) 275 (holding that a citation for settlement of account will not issue against an assignee for creditors after more than twenty years have elapsed from the date of the assignment); Mellish's Estate, 1 Pars. Eq. Cas. (Pa.) 482 (holding that equity will not entertain an application to compel an assignee to file an account, as of course, on the application of a creditor, thirty years after the creation of the trust, where no part of plaintiff's proceedings assigns any reason for such delay, and where respondent interposes length of time as an equitable bar to plaintiff's demand for an account). But see Matter of Townsend, 14 Daly (N. Y.) 76, holding that where an assignee has, by agreement with the assignor, secured his own time to account, and an account is sought by the assignor, the assignee cannot defend on the ground of the assignor's delay and laches in seeking the account.

62. Bailey *v.* Bergen, 67 N. Y. 346; Matter of Betts, 33 N. Y. App. Div. 257, 53 N. Y. Suppl. 721; Johnson *v.* Snyder, 8 How. Pr. (N. Y.) 498; Mitchell *v.* Lenox, 2 Paige (N. Y.) 280; Fisher *v.* Worth, 45 N. C. 63; Geisse *v.* Beall, 3 Wis. 367; Greene *v.* Sisson, 2 Curt. (U. S.) 171, 10 Fed. Cas. No. 5,768. See also Accounts and Accounting, 1 Cyc. 432, note 82.

The assignee and the unpaid creditors are the only necessary parties to a bill for an accounting brought by the assignor after the expiration of the time limited by the deed to file releases and pay claims. Carpenter *v.* Robinson, 1 Holmes (U. S.) 67, 5 Fed. Cas. No. 2,431. See also Tomlinson *v.* Claywell, 57 N. C. 317, holding that creditors secured by an assignment for the benefit of creditors are not necessary parties to an action by the assignor for an account.

Where the creditors are numerous, suit may be brought by one creditor on behalf of all. Brooks *v.* Peck, 38 Barb. (N. Y.) 519. So where a creditor has brought an action to compel the assignee to account, other creditors are properly refused leave to intervene, as the action, without their intervention, is for their benefit. Lewis *v.* Hake, 42 Hun (N. Y.) 542; Matter of Hill, 21 N. Y. Suppl. 813, 50 N. Y. St. 808.

63. Travis *v.* Myers, 67 N. Y. 542. See also Houck *v.* Dunham, 92 Va. 211, 23 S. E. 238, holding that an action for the purpose of settling an estate deeded in trust to be sold to pay certain debts of the grantor becomes one for the benefit of general creditors, by a decree requiring a report of all outstanding debts, and restraining the general creditors from maintaining separate actions.

64. Michael *v.* His Creditors, 3 La. Ann. 336; Matter of Nims, 22 N. Y. App. Div. 195, 47 N. Y. Suppl. 1027; Stanton *v.* Ellis, 16 Barb. (N. Y.) 319; Matter of Gouy, 13 Daly (N. Y.) 413; Matter of Phillips, 10 Daly (N. Y.) 47; Matter of Groencke, 10 Daly (N. Y.) 17; Matter of Merwin, 10 Daly (N. Y.) 13; Matter of Farmer, 35 Misc. (N. Y.) 150, 71 N. Y. Suppl. 462; Matter of Hulbert, 9 Abb. N. Cas. (N. Y.) 132; Wiltbank *v.* Scattergood, 7 Wkly. Notes Cas. (Pa.) 147.

Defective notice.— Under a statute authorizing the issue of a citation to parties interested, requiring them to "appear in court" on the settlement of an assignee's account, where such citation is defective, as requiring the parties to appear "at chambers," the petition on which it was issued may properly be used as the foundation of a second citation. Matter of Davis, 10 Daly (N. Y.) 31.

Notice by publication.— The accounts of an assignee for creditors will not be referred to an auditor a second time, on a mere allega-

2. Reference — a. In General. By statute, in some states, the court may refer the taking and stating of an account of an assignee to a referee.[65]

b. Matters Determinable by Referee. A referee appointed to adjust and settle the accounts of a voluntary assignee is confined to the account between the assignee and the *cestuis que trustent*.[66]

c. Report of Referee. The referee must state in his report all the items of the account in order that any party in interest may, if he thinks proper, except to any particular item.[67]

3. Requisites of Account. An assignee's final account must specify amounts.[68]

tion of want of positive notice, when a notice by publication in a legal manner has been given. Coates's Estate, 2 Pars. Eq. Cas. (Pa.) 258.

Sufficiency of publication.— Publication on six successive Thursdays of an order to show cause why an assignor should not be discharged, the first publication being more than six weeks prior to the day fixed for the hearing, is a publication "for at least six successive weeks prior to the day of the hearing" as required by a statute. Johnson *v.* Hill, 90 Wis. 19, 62 N. W. 930.

65. Matter of Cleflin, 51 Hun (N. Y.) 636, 3 N. Y. Suppl. 621, 20 N. Y. St. 801; Matter of May, 13 Daly (N. Y.) 24; Wells *v.* Knox, 18 N. Y. Suppl. 395, 44 N. Y. St. 917; Levy's Accounting, 1 Abb. N. Cas. (N. Y.) 177; Sharpe *v.* Eliason, 116 N. C. 665, 21 S. E. 401; Powel's Estate, 163 Pa. St. 349, 35 Wkly. Notes Cas. (Pa.) 237, 30 Atl. 373, 381; Okie's Appeal, 9 Watts & S. (Pa.) 156.

Costs of reference.—In an action by a judgment creditor to compel an accounting by a general assignee, a provision in the judgment imposing as a condition on which creditors were to be allowed to prove their claims that they should contribute to the expense of a reference of the action is unauthorized. Lewis *v.* Hake, 42 Hun (N. Y.) 542.

Objections to account.— Where a creditor objects to the final report of an assignee, the court may refer the report and objections to a referee, especially if all the parties consent thereto. *In re* Murdoch, 129 Mo. 488, 31 S. W. 942. See also Commercial Bank *v.* McAuliffe, 92 Wis. 242, 66 N. W. 110.

Order of reference.— Where, in an action for an accounting by a general assignee, the pleadings present an issue as to whether or not plaintiff is a creditor, an order of reference to take proof of the matters set forth in the pleadings, and to state the assignee's account, is insufficient. The order should require the hearing and determination of the issues. Wells *v.* Knox, 18 N. Y. Suppl. 395, 44 N. Y. St. 917.

A referee must be sworn or the oath must be waived. Matter of Vilmar, 10 Daly (N. Y.) 15.

66. Powel's Estate, 163 Pa. St. 349, 35 Wkly. Notes Cas. (Pa.) 237, 30 Atl. 373, 381; Wylie's Appeal, 92 Pa. St. 196; Okie's Appeal, 9 Watts & S. (Pa.) 156.

An assignee cannot be directed to hear and determine matters in controversy appertaining to the assignment. Levy's Accounting, 1 Abb. N. Cas. (N. Y.) 177.

A simple contract creditor of an assignor cannot attack a judgment against such assignor, in proceedings before an auditor appointed to distribute a fund in the hands of the assignee. Wenger's Estate, 17 Pa. Co. Ct. 203.

Claim against funds.—Where the assignee's account is referred, the referee has no power to consider a claim made against the funds in the assignee's hands on the ground that he has converted goods of the claimants to the use of the estate. Matter of Marklin, 13 Daly (N. Y.) 105.

67. Sharpe *v.* Eliason, 116 N. C. 665, 21 S. E. 401.

Confirmation of report.— The report of a referee appointed on a final accounting of an assignee for the benefit of creditors may be confirmed on consent of the creditors. Matter of Weinhaus, 5 Abb. N. Cas. (N. Y.) 355.

Conformity to reference.— Where the order of reference directs the master to take an account of the expenses of executing the trust, and to ascertain what would be a reasonable compensation to the trustee, should the court decree compensation, and the master reports, as a reasonable compensation, a certain per cent on the amount of the available assets, which are also ascertained and reported under another part of the reference, the report conforms to the reference. Royall *v.* McKenzie, 25 Ala. 363.

Proof of notice.— In New York the report of the referee must show proof of the mailing of the notices to creditors to present claims. Matter of Phillips, 10 Daly (N. Y.) 47.

68. Matter of Worthley, 10 Daly (N. Y.) 12.

An assignee's account is misleading where it enters on the debit side sums as monthly receipts which are the proceeds of sales of assets at prices below the appraised value, without any correction on the credit side, thus apparently augmenting the assets. Powel's Estate, 163 Pa. St. 349, 35 Wkly. Notes Cas. (Pa.) 237, 30 Atl. 373, 381.

Conformity to statute.— In Wisconsin the right of a creditor of an assigned estate to demand that an account filed by the assignee shall be made to conform to the requirements of the statute, before he is required to make special objections to any particular item therein, is absolute, and not discretionary with the court. State *v.* Johnson, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33.

4. Objections to Account. An objection to items in an assignee's account must be specific, and must sufficiently apprise him of the charge which he has to meet.[69]

5. Order or Decree. A decree on the final accounting of an assignee must specify all amounts to be paid.[70]

6. Appeal. An assignee will not be permitted, as to different creditors of the assigned estate, to take separate appeals from the same decree settling his accounts.[71]

7. Costs. On an accounting by an assignee the costs are ordinarily to be borne by the trust fund.[72]

8. Operation and Effect — a. In General. Under a statute providing that the order entered upon the settlement of an assignee's account "shall be conclusive upon all parties," such order cannot be questioned collaterally.[73]

69. Matter of Mather, 61 Hun (N. Y.) 214, 16 N. Y. Suppl. 13, 40 N. Y. St. 882; Matter of Ripsom, etc., Fur Co., 32 Misc. (N. Y.) 56, 66 N. Y. Suppl. 113; Heywood *v.* Thacher, 19 N. Y. Suppl. 321, 47 N. Y. St. 1, 29 Abb. N. Cas. (N. Y.) 75, holding that a general objection to several items in an assignee's account is insufficient.

As to reference of objections see *supra*, note 65.

Failure to object before auditor.— Where no demand for a surcharge has been made before the auditor appointed to state an assignee's accounts, the claim therefor cannot be made before the court after all proceedings before the auditor have closed. Sprenkle's Appeal, (Pa. 1885) 1 Atl. 51.

Sufficiency of objection.— A general objection to items of the account for counsel fees and disbursements alleged to have been made in the administration of the estate is sufficient. Dorney *v.* Thacher, 76 Hun (N. Y.) 361, 27 N. Y. Suppl. 787, 58 N. Y. St. 466.

Who may object.— A creditor of an estate assigned for the benefit of creditors, being entitled to part of the proceeds to be distributed, has a right to file exceptions to the report of the assignee, and to be heard thereon. *In re* Mansfield, 113 Iowa 104, 84 N. W. 967.

70. Matter of Worthley, 10 Daly (N. Y.) 12. See also *Re* Murray, 31 Oreg. 173, 49 Pac. 961, holding that an assignee for creditors, having discharged the duties of his trust, is entitled upon filing his final account to have it settled and adjusted, and all objections thereto passed upon and determined separately.

Entry of personal judgment.— Where, on an assignee's final accounting, he is directed to make payments to creditors from a sum adjudged to be in his hands, such creditors cannot, as a matter of course, docket judgments against him personally for the amounts so ordered paid. Matter of Rosenback, 10 Daly (N. Y.) 128; Matter of Jung, 65 How. Pr. (N. Y.) 476.

Performance of decree.— An assignee is not discharged until he has performed the decree entered on his account. Julien *v.* Lalor, 47 Hun (N. Y.) 164.

Vacation of order.— An order settling the account of an assignee may be vacated on good cause shown. Downey *v.* May, 19 Abb. N. Cas. (N. Y.) 177; Commercial Bank *v.* McAuliffe, 92 Wis. 242, 66 N. W. 110. See also Branch *v.* American Nat. Bank, 57 Kan. 282, 46 Pac. 305; St. Louis Trust Co. *v.* Vincent, 77 Mo. App. 76.

71. Matter of Maxwell, 74 Hun (N. Y.) 307, 26 N. Y. Suppl. 216, 55 N. Y. St. 684.

In Indiana it has been held that an appeal does not lie from the refusal of the circuit court to approve the report of an assignee in a voluntary assignment of an insolvent debtor. Cravens *v.* Chambers, 55 Ind. 5.

Supersedeas.— In California an assignee perfecting an appeal from an order settling his account is entitled to a stay of proceedings in execution of the order appealed from pending the appeal, though the appeal pertains to the disallowance of only one item in the account. Matter of Sharp, 92 Cal. 577, 28 Pac. 783.

72. Matter of Edwards, 10 Daly (N. Y.) 68; Matter of Elmore, 10 Daly (N. Y.) 48.

A stipulation of counsel as to a referee's fees is not binding on the court. Matter of Currier, 8 Daly (N. Y.) 119.

Where the assignment has been set aside for fraud the assignee must pay the fees of the referee and other expenses incurred in the accounting. Mayer *v.* Hazard, 49 Hun (N. Y.) 222, 1 N. Y. Suppl. 680, 17 N. Y. St. 26.

73. Lawson *v.* Stacy, 82 Wis. 303, 51 N. W. 961, 52 N. W. 306. See also Weber *v.* Samuel, 7 Pa. St. 499.

Fraud.— Even after the assignees have settled their accounts, if fraud can be shown in their sale of the property they will be personally liable to the creditors for the loss resulting from such fraud. Hays *v.* Doane, 11 N. J. Eq. 84. See also Talcott *v.* Thomas, 21 N. Y. Suppl. 1064, 50 N. Y. St. 621, holding that the fact that an assignee has made a final accounting and is discharged will not excuse him from making a further accounting to a referee appointed for that purpose in an action duly brought to set aside the assignment for fraud.

Recovery of uncollected debts.— An order settling an assignee's accounts, and adjudging that he be released from liability as assignee, does not deprive the assignee of power to sue for uncollected debts which were left in his hands. Grimes *v.* French, 13 Ky. L. Rep. 398.

b. Partial Account. The partial accounting of an assignee, had on the application of a creditor to obtain payment of the latter's portion of the estate, does not prejudice other creditors.[74]

D. Credits — 1. Expenses — a. In General. The assignee's expenses are allowed on the basis of their necessity for careful and prudent management of the estate.[75] Disbursements are limited, however, to amounts actually paid.[76]

b. Carrying on Business. An assignee who carries on the business of the assignor instead of turning the stock into cash at once does so at the risk of having to bear the expense himself unless he can prove a benefit therefrom to the estate.[77]

74. Levy's Accounting, 1 Abb. N. Cas. (N. Y.) 177.

Funds not distributed.— The homologation of the tableau concludes the insolvent's creditors, *inter se*, as to the funds to be divided, but no further. It does not affect their claim to funds not distributed or afterward received by the syndic. Williams *v.* Nicholson, 5 La. Ann. 719.

Omitted items.— A partial account of an assignee is not conclusive as to any item omitted by the accountant which he has received or ought to have received. McLellan's Appeal, 76 Pa. St. 231; Truitt's Estate, 10 Phila. (Pa.) 16, 30 Leg. Int. (Pa.) 84.

Where an assignee on his first account takes credit for commissions and counsel fees to an amount in excess of cash on hand, he cannot on a second account have credit for such excess as though it had been finally adjudicated on the first account. Powel's Estate, 163 Pa. St. 349, 35 Wkly. Notes Cas. (Pa.) 237, 30 Atl. 373, 381.

75. *Illinois.*— Blow *v.* Gage, 44 Ill. 208.

Maryland.— Devries *v.* Hiss, 72 Md. 560, 20 Atl. 131.

New Hampshire.— Brown *v.* Silsby, 10 N. H. 521.

New York.— Matter of Morgan, 1 N. Y. App. Div. 89, 36 N. Y. Suppl. 1086, 72 N. Y. St. 34; Matter of Marklin, 13 Daly (N. Y.) 105; Matter of Edwards, 10 Daly (N. Y.) 68; Matter of Bowlby, 34 Misc. (N. Y.) 311, 69 N. Y. Suppl. 783; Matter of Ripsom, etc., Fur Co., 32 Misc. (N. Y.) 56, 66 N. Y. Suppl. 113; *In re* Marquand, 57 How. Pr. (N. Y.) 477.

Ohio.— McLain *v.* Simington, 37 Ohio St. 660.

Pennsylvania.— *In re* Fuller, 4 Kulp (Pa.) 479.

Texas.— Louisiana Sugar Refining Co. *v.* Harrison, 9 Tex. Civ. App. 141, 29 S. W. 500.

United States.— U. S. *v.* Clark, 1 Paine (U. S.) 629, 25 Fed. Cas. No. 14,807.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1143.

Auctioneer's fees for sale of property.— An assignee cannot claim auctioneer's fees for sale of the property, unless authorized by the court to employ him. Ingham *v.* Lindemann, 37 Ohio St. 218.

Expenses of procuring bond.— An assignee may be allowed the expense of procuring his official bond, the deed of assignment having been made with an understanding of the parties to that effect. Tustin's Account, 176 Pa. St. 382, 38 Wkly. Notes Cas. (Pa.) 421, 35 Atl. 199. See also *In re* Commercial Bank, 4 Ohio S. & C. Pl. Dec. 228.

Traveling expenses, unless under extraordinary circumstances, cannot be allowed to an assignee for the benefit of creditors. Troth's Estate, 1 Chest. Co. Rep. (Pa.) 89. So where the bulk of an assigned estate consisted of lands in South Carolina, and the assignee and agent for creditors both resided in New York, traveling and living expenses in going to and from their homes are not legitimate items of expense to be charged against the estate. Williams *v.* Neely, 46 Fed. 450. See also Claflin *v.* Goebel, 7 Ohio Cir. Ct. 384.

Use of horse.— The assignee cannot charge the estate for the use of his horse in the business of the estate. Matter of Felt, 52 Hun (N. Y.) 60, 4 N. Y. Suppl. 754, 22 N. Y. St. 124; Matter of Bicknell, 31 Misc. (N. Y.) 302, 64 N. Y. Suppl. 360.

76. Farrar *v.* Farley, 3 S. C. 11.

Compromise of claims.— An assignee for benefit of creditors who compromises debts for less than the whole sum due is entitled as against other creditors to be allowed only the amount actually paid. Royall *v.* McKenzie, 25 Ala. 363; Ireland *v.* Potter, 16 Abb. Pr. (N. Y.) 218, 25 How. Pr. (N. Y.) 175.

77. Matter of Dean, 86 N. Y. 398; Duffy *v.* Duncan, 35 N. Y. 187 [*affirming* 32 Barb. (N. Y.) 587]; Matter of Hyman, 14 Daly (N. Y.) 375, 13 N. Y. St. 136; Matter of Marklin, 13 Daly (N. Y.) 105; Matter of Petchell, 10 Daly (N. Y.) 102; Matter of Orsor, 10 Daly (N. Y.) 26; Levy's Accounting, 1 Abb. N. Cas. (N. Y.) 177; Bennett's Estate, 21 Pa. Co. Ct. 609. See also Matter of Sutcliffe, 83 Hun (N. Y.) 324, 31 N. Y. Suppl. 929, 64 N. Y. St. 656.

As to right of assignee to carry on business see *supra*, XII, D, 2.

Cultivation of farm.— An assignee is not authorized to pay out the trust funds to cultivate a farm which is a part of the insolvent estate, when there are no growing crops to be preserved. Wynne *v.* Simmons Hardware Co., 67 Tex. 40, 1 S. W. 568.

Order of court.— Where the assignee of an insolvent estate carries on the business under an order of court, with the acquiescence of the creditors, the court may properly order that the funds in his hands be applied in the first instance to the payment of the assignee's charges, and to indebtedness incurred by the assignee. Hooven, etc., Co. *v.* Burdette, 51

c. Costs of Litigation. Expenses of litigation are allowed the assignee in matters directly connected with the execution of the trust, such as the collection of assets or the resistance of invalid claims,[78] unless they are plainly unnecessary.[79]

d. Counsel Fees — (1) *IN GENERAL.* An assignee for the benefit of creditors has the right to employ counsel at the expense of the estate to aid him in protecting and administering the trust.[80] An assignee cannot bind the estate, how-

Ill. App. 115. See also State *v.* McFarland, (Tenn. Ch. 1895) 35 S. W. 1007.

78. Costs of litigation.— Arterburn *v.* National Surety Co., (Ky. 1901) 62 S. W. 864; Weil *v.* Lehmayer, 74 Md. 81, 21 Atl. 563; Perry-Mason Shoe Co. *v.* Sykes, 72 Miss. 390, 17 So. 171, 28 L. R. A. 277; Matter of Ginsberg, 21 N. Y. App. Div. 525, 48 N. Y. Suppl. 697; Matter of Clute, 14 N. Y. App. Div. 234, 43 N. Y. Suppl. 573; Hynes *v.* Campbell, 60 Hun (N. Y.) 391, 15 N. Y. Suppl. 506, 39 N. Y. St. 874; Jack *v.* Robie, 48 Hun (N. Y.) 181, 15 N. Y. St. 605; Pratt *v.* Adams, 7 Paige (N. Y.) 615; Jewett *v.* Woodward, 1 Edw. (N. Y.) 195.

Defending assignment.— An assignee is entitled to counsel fees and disbursements in defending an action to set the assignment aside for fraud, where he was not a party to the fraud, and was not aware of any facts which made it reasonably certain that the assignment could not stand against the attacks of creditors. Tishomingo Sav. Inst. *v.* Allen, 76 Miss. 114, 13 So. 305; Mattison *v.* Judd, 59 Miss. 99; Faxon *v.* Mason, 148 N. Y. 750, 43 N. E. 987; Dorney *v.* Thacher, 76 Hun (N. Y.) 361, 27 N. Y. Suppl. 787, 58 N. Y. St. 466; Webb *v.* Daggett, 2 Barb. (N. Y.) 9; Douglas *v.* Bank, 97 Tenn. 133, 36 S. W. 874. But see Perry-Mason Shoe Co. *v.* Sykes, 72 Miss. 390, 17 So. 171, 28 L. R. A. 277; Mayer *v.* Hazard, 49 Hun (N. Y.) 222, 1 N. Y. Suppl. 680, 17 N. Y. St. 26; T. T. Haydock Carriage Co. *v.* Pier, 78 Wis. 579, 47 N. W. 945.

Removal of assignee.— An assignee is entitled to costs for a successful defense against an attempt to remove him (Matter of Caldwell's Bank, 89 Iowa 533, 56 N. W. 672), but not where his defense fails (*In re* Nicolin, 59 Minn. 323, 61 N. W. 330).

Suits not connected with trust.— An assignee cannot be allowed costs incurred in defending suits brought against the assignor by his creditors to recover their several debts not in any way affecting the assignee or the assigned estate. Levy's Accounting, 1 Abb. N. Cas. (N. Y.) 177.

79. Unnecessary litigation.— McCune *v.* Hartman Steel Co., 87 Ill. App. 162; Graziana *v.* Gebhart, 15 Ky. L. Rep. 702; Pittman *v.* Hopkins, 74 Miss. 563, 21 So. 606; McLain *v.* Simington, 37 Ohio St. 660.

Liens exhausting property.— Where the assignee knows that liens on certain property exhaust its value, leaving nothing for the assignment, he will not be allowed the costs of a suit for settling rights in the property. Kentucky Nat. Bank *v.* Louisville Bagging Co., 98 Ky. 371, 17 Ky. L. Rep. 983, 33 S. W. 101.

80. Allowance for counsel fees.— *Illinois.* — J. I. Case Plow Works *v.* Edwards, 176 Ill. 34, 51 N. E. 618; McCune *v.* Hartman Steel Co., 87 Ill. App. 162. But where the assignee has unnecessarily employed a large number of attorneys his full claim for attorney's fees will not be allowed. Emig *v.* Barnes, 77 Ill. App. 616.

Kentucky.— Courier Journal Job Printing Co. *v.* Columbia F. Ins. Co., 21 Ky. L. Rep. 1258, 54 S. W. 966.

Massachusetts.—Clark *v.* Sawyer, 151 Mass. 64, 23 N. E. 726.

Mississippi.— Perry-Mason Shoe Co. *v.* Sykes, 72 Miss. 390, 17 So. 171, 28 L. R. A. 277; Mattison *v.* Judd, 59 Miss. 99.

New Hampshire.—Brown *v.* Silsby, 10 N. H. 521.

New York.— Matter of Talmage, 161 N. Y. 643, 57 N. E. 1126; Matter of Littell, 16 Daly (N. Y.) 379, 11 N. Y. Suppl. 563, 33 N. Y. St. 657, 26 Abb. N. Cas. (N. Y.) 69; Matter of Wolff, 13 Daly (N. Y.) 481; Matter of Schaller, 10 Daly (N. Y.) 57; Matter of Watt, 10 Daly (N. Y.) 11; Matter of Currier, 8 Daly (N. Y.) 119; Matter of Bicknell, 31 Misc. (N. Y.) 302, 64 N. Y. Suppl. 360; Matter of Ginsburg, 27 Misc. (N. Y.) 745, 59 N. Y. Suppl. 656; Matter of Barr, 6 Misc. (N. Y.) 526, 27 N. Y. Suppl. 416, 56 N. Y. St. 742; Matter of Hulbert, 10 Abb. N. Cas. (N. Y.) 284; Matter of Thomas, 5 Abb. N. Cas. (N. Y.) 354; Havemeyer *v.* Loeb, 5 Abb. N. Cas. (N. Y.) 338. Matter of Schlang, 66 How. Pr. (N. Y.) 199; Matter of Burbank, 65 How. Pr. (N. Y.) 129.

Ohio.— Ingham *v.* Lindemann, 37 Ohio St. 218; *In re* Commercial Bank, 4 Ohio S. & C. Pl. Dec. 440.

Pennsylvania.— Landis' Appeal, 11 Lanc. Bar (Pa.) 206; Insurance's Estate, 9 Lanc. Bar (Pa.) 119.

South Carolina.—Akers *v.* Rowan, 36 S. C. 87, 15 S. E. 350.

Tennessee.— Douglas *v.* Bank, 97 Tenn. 133, 36 S. W. 874.

Washington.— Matter of Day, 18 Wash. 359, 51 Pac. 474.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1145.

Attempt to establish invalid claim.—Where an assignee employs counsel to uphold the validity of an unjust claim against the estate, which he paid, he cannot in case of defeat charge the estate with the counsel fees. Sutliff *v.* Clunie, (Cal. 1894) 37 Pac. 224.

Attempt to remove assignee.— Where application is made for the removal of an assignee, and there is nothing to show that the application is well founded, such assignee is entitled to a reasonable amount as attorney's

ever, by contracts with attorneys for specific compensation.[81] Only reasonable fees will be allowed.[82]

(II) *ASSIGNEE AS COUNSEL.* An assignee who is an attorney is precluded from applying the trust fund to the payment of himself, or of firms in which he may be a partner, for professional services rendered in administration of the trust.[83]

e. Taxes. An assignee is entitled to be reimbursed for taxes paid by him on the trust estate with funds received from the assignor.[84]

2. ALLOWANCES UNDER VOID OR VOIDABLE ASSIGNMENT. An assignee acting in good faith under a void or voidable assignment will be allowed credit for payments made in pursuance of the terms of the assignment[85] and for necessary

fees in resisting the application. Matter of Cadwell's Bank, 89 Iowa 533, 56 N. W. 672. *Compare* Matter of Carrick, 13 Daly (N. Y.) 181.

Mismanagement of trust.— Where an accounting by an assignee shows a reckless waste of almost the entire estate, counsel fees, other than those for preparing and attending execution of the assignment, should not be allowed without specification of the character and necessity of the service. Levy's Accounting, 1 Abb. N. Cas. (N. Y.) 177. So where the accounts of the assignee are carelessly kept, with false and erroneous entries, he is not entitled to any allowance for attorney's fees in settling the accounts. Matter of Felt, 52 Hun (N. Y.) 60, 4 N. Y. Suppl. 754, 22 N. Y. St. 124.

81. Contract for specific compensation.— Jordan *v.* Swift Iron, etc., Works, 13 Ky. L. Rep. 970.

82. Reasonable fees.— Hill *v.* Cornwall, 95 Ky. 512, 16 Ky. L. Rep. 97, 26 S. W. 540; Jordan *v.* Swift Iron, etc., Works, 13 Ky. L. Rep. 970; Faxon *v.* Mason, 90 Hun (N. Y.) 426, 35 N. Y. Suppl. 950, 70 N. Y. St. 624; Mayer *v.* Hazard, 49 Hun (N. Y.) 222, 1 N. Y. Suppl. 680, 17 N. Y. St. 26; *In re* Aplington, 18 N. Y. Suppl. 357; Matter of Hulbert, 9 Abb. N. Cas. (N. Y.) 132; Levy's Accounting, 1 Abb. N. Cas. (N. Y.) 177; *In re* Commercial Bank, 4 Ohio S. & C. Pl. Dec. 440.

In determining the amount due attorneys of assignees for their services, the extent or character of the fund to be administered is not to be considered, but the quality of professional skill that the case requires to be employed and its general value. Matter of Scott, 55 How. Pr. (N. Y.) 441.

Proof of necessity and value of services.— An assignee, upon his accounting, will not be allowed an attorney's bill, without proof of the necessity and value of the attorney's services. Matter of Johnson, 10 Daly (N. Y.) 123.

83. Kentucky Nat. Bank *v.* Stone, 93 Ky. 623, 14 Ky. L. Rep. 645, 20 S. W. 1040; State *v.* Hunt, 46 Mo. App. 616; Matter of Clute, 14 N. Y. App. Div. 234, 43 N. Y. Suppl. 573; Matter of Maxwell, 66 Hun (N. Y.) 151, 21 N. Y. Suppl. 209, 49 N. Y. St. 154; Winn *v.* Crosby, 52 How. Pr. (N. Y.) 174. *Contra,* Morris *v.* Ellis, (Tenn. Ch. 1901) 62 S. W. 250; Thompson *v.* Childress, 1 Tenn. Ch. 369.

84. Devries *v.* Hiss, 72 Md. 560, 20 Atl. 131. See also Murray *v.* De Rottenham, 6 Johns. Ch. (N. Y.) 52, wherein it appeared that a debtor assigned property in trust for the payment of debts and covenanted with the trustee to pay the taxes on the property assigned. It was held that this was in effect a covenant to the *cestuis que trustent,* and that the trustee having paid the taxes in good faith was entitled to be reimbursed by the *cestuis que trustent.* But see Matter of Cornell, 110 N. Y. 351, 18 N. E. 142, 18 N. Y. St. 200, holding that the payment of taxes and interest on property of the assignors mortgaged for more than its value, one of the mortgages being held by the assignee, is a payment for his individual benefit, for which he is not entitled to credit.

85. Payments.— *Alabama.*— Cummings *v.* McCullough, 5 Ala. 324.

Georgia.—An assignee who took possession of the assigned property and disposed of part of it before the assignor's death is not liable as executor *de son tort,* though the assignment is void; it appearing that it was not attacked as fraudulent, and that the assignee acted in good faith in executing the trust. Chattanooga Stove Co. *v.* Adams, 81 Ga. 319, 6 S. E. 695.

Maine.— Wheeler *v.* Evans, 26 Me. 133.

Massachusetts.—Grocers' Bank *v.* Simmons, 12 Gray (Mass.) 440. See also Hopkins *v.* Ray, 1 Metc. (Mass.) 79.

New York.— Barney *v.* Griffin, 2 N. Y. 365 [*affirming* 4 Sandf. Ch. (N. Y.) 552]; Colburn *v.* Morton, 1 Abb. Dec. (N. Y.) 378, 3 Keyes (N. Y.) 296, 1 Transcr. App. (N. Y.) 145, 5 Abb. Pr. N. S. (N. Y.) 308, 36 How. Pr. (N. Y.) 150; Coope *v.* Bowles, 42 Barb. (N. Y.) 87, 18 Abb. Pr. (N. Y.) 442, 28 How. Pr. (N. Y.) 10; Averill *v.* Loucks, 6 Barb. (N. Y.) 470; Strong *v.* Skinner, 4 Barb. (N. Y.) 546; Havemeyer *v.* Loeb, 5 Abb. N. Cas. (N. Y.) 338; Bostwick *v.* Beizer, 10 Abb. Pr. (N. Y.) 197; Wakeman *v.* Grover, 4 Paige (N. Y.) 23.

Pennsylvania.— Weber *v.* Samuel, 7 Pa. St. 499; Matter of Wilson, 4 Pa. St. 430, 45 Am. Dec. 701; Stewart *v.* McMinn, 5 Watts & S. (Pa.) 100, 39 Am. Dec. 115.

Tennessee.— Young *v.* Gillespie, 12 Heisk. (Tenn.) 239; Peacock *v.* Tompkins, Meigs (Tenn.) 317.

Vermont.— Therasson *v.* Hickok, 37 Vt. 454; Stickney *v.* Crane, 35 Vt. 89.

costs and expenses incurred in administering the estate [86] down to the time that suit is brought attacking the validity of the assignment.

E. Debits — 1. INTEREST. An assignee is not chargeable with interest on the funds of the estate in his hands [87] unless he is guilty of some breach of trust,[88] such as failing to pay when he should,[89] using the funds for his own benefit,[90] or

United States.— An assignee under an assignment is not liable for the value of the property received under the deed where, subsequent to his qualifying as assignee, bankruptcy proceedings were brought in the federal court, and before the assignee in bankruptcy began suit against him he had, while acting under orders of the state court, sold the property and paid over the proceeds to the creditors. Cregin *v.* Thompson, 2 Dill. (U. S.) 513, 6 Fed. Cas. No. 3,320, 12 Nat. Bankr. Reg. 81.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1149.

Assignee participating in fraud.—Where an assignment has been set aside as fraudulent, and the court has found that the assignee confederated with the assignor to defraud his creditors, the assignee is not entitled on an accounting to debts paid to preferred creditors of the assignor. Smith *v.* White, 4 Silv. Supreme (N. Y.) 356, 7 N. Y. Suppl. 373, 27 N. Y. St. 227 [*affirmed* in 132 N. Y. 172, 30 N. E. 229, 43 N. Y. St. 719].

Assignment fraudulent on face.— The assignee, under an assignment fraudulent on the face of it, will be responsible for property disposed of by him only so far as creditors have been actually defrauded by his disposition of the property. Ames *v.* Blunt, 5 Paige (N. Y.) 13.

86. Costs and expenses.— *Kentucky.*—Calloway *v.* Calloway, 19 Ky. L. Rep. 870, 39 S. W. 241.

Maryland.— Slingluff *v.* Smith, 76 Md. 558, 25 Atl. 674.

Massachusetts.— White *v.* Hill, 148 Mass. 396, 19 N. E. 407; Bartlett *v.* Bramhall, 3 Gray (Mass.) 257.

New Hampshire.—Brown *v.* Silsby, 10 N. H. 521.

New York.—Colburn *v.* Morton, 1 Abb. Dec. (N. Y.) 378, 3 Keyes (N. Y.) 296, 1 Transcr. App. (N. Y.) 145, 5 Abb. Pr. N. S. (N. Y.) 308, 36 How. Pr. (N. Y.) 150; Coope *v.* Bowles, 42 Barb. (N. Y.) 87, 18 Abb. Pr. (N. Y.) 442, 28 How. Pr. (N. Y.) 10; Strong *v.* Skinner, 4 Barb. (N. Y.) 546; Havemeyer *v.* Loeb, 5 Abb. N. Cas. (N. Y.) 338.

Wisconsin.— T. T. Haydock Carriage Co. *v.* Pier. 78 Wis. 579, 47 N. W. 945.

United States.—See Hunker *v.* Bing, 9 Fed. 277.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1150.

Assignee participating in fraud.— Where an assignment for the benefit of creditors is made with an actual fraudulent intent, in which the assignee participates, and the assignment is set aside at the suit of creditors, the assignee is chargeable with all money paid out by him for appraising the property, for counsel fees, and for expenses of conducting the business after the assignment. Smith *v.* Wise, 132 N. Y. 172, 30 N. E. 229, 43 N. Y. St. 719. See also Solinsky *v.* Lincoln Sav. Bank, 85 Tenn. 368, 4 S. W. 836; Hastings *v.* Spenser, 1 Curt. (U. S.) 504, 11 Fed. Cas. No. 6,201.

Assignment superseded by bankruptcy.— The common-law assignee is entitled to credit for his expenses when proceedings in bankruptcy are had subsequent to the assignment and an assignee in bankruptcy appointed. Wald *v.* Wehl, 18 Blatchf. (U. S.) 495, 6 Fed. 163; *In re* Kurth, 14 Fed. Cas. No. 7,948, 17 Nat. Bankr. Reg. 573.

87. Assignee not chargeable with interest. — *Illinois.*— J. I. Case Plow Works *v.* Edwards, 71 Ill. App. 655.

Minnesota.—*In re* Shotwell, 49 Minn. 170, 51 N. W. 909, 52 N. W. 1078.

New Jersey.— See Blauvelt *v.* Ackerman, 23 N. J. Eq. 495.

New York.— Matter of Barnes, 140 N. Y. 468, 35 N. E. 653, 55 N. Y. St. 790.

Pennsylvania. — *Compare* Hower's Appeal, 22 Wkly. Notes Cas. (Pa.) 536, 15 Atl. 687.

Tennessee.— Stratton *v.* Thompson, 10 Lea (Tenn.) 229.

Virginia.— Griffin *v.* Macaulay, 7 Gratt. (Va.) 476.

West Virginia.— Darby *v.* Gilligan, 37 W. Va. 59, 16 S. E. 507.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1135.

88. Breach of trust.— Asay *v.* Allen, 124 Ill. 391, 16 N. E. 865; *In re* Shotwell, 49 Minn. 170, 51 N. W. 909, 52 N. W. 1078.

89. Failure to pay.— *Alabama.*— Royall *v.* McKenzie, 25 Ala. 363.

Illinois.—McCune *v.* Hartman Steel Co., 87 Ill. App. 162.

Indiana.— Manhattan Cloak, etc., Co. *v.* Dodge, 120 Ind. 1, 21 N. E. 344.

Kentucky.— Moffat *v.* Ingham, 7 Dana (Ky.) 495.

Missouri.— *In re* Murdoch, 129 Mo. 488, 31 S. W. 942.

New Jersey.—*Compare* Tomlinson *v.* Smallwood, 15 N. J. Eq. 286.

New York.— Gray *v.* Thompson, 1 Johns. Ch. (N. Y.) 82.

Ohio.— *In re* Purcell, 9 Ohio Dec. (Reprint) 602, 15 Cinc. L. Bul. 311.

Pennsylvania.— Truitt's Estate, 10 Phila. (Pa.) 16, 30 Leg. Int. (Pa.) 84.

Tennessee.— Faust *v.* Levy, 4 Lea (Tenn.) 320; Morris *v.* Ellis, (Tenn. Ch. 1901) 62 S. W. 250.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1136.

90. Using funds for own benefit.— *In re* Murdoch, 129 Mo. 488, 31 S. W. 942; Matter of Dyott, 2 Watts & S. (Pa.) 557; Conrad's Appeal, 11 Wkly. Notes Cas. (Pa.) 521.

mingling them with his own funds.[91] In such event he is liable for the legal rate of interest.

2. Losses — a. In General. In the management of the estate the assignee is bound to exercise the care of a prudent man in his own affairs,[92] and is chargeable, on accounting, with losses resulting from the want of such care.[93]

b. Depreciation in Value. A loss on the appraised value of the assets does not constitute a *prima facie* case against the assignee,[94] nor is he liable for depreciation unless it be shown that he is in some way at fault.[95]

c. Failure to Collect Debts. As it is the duty of an assignee to use all necessary means by action or otherwise to realize the debts, he is personally responsible for the loss of a debt by his neglect of this duty.[96]

d. Failure to Recover Property. An assignee is bound to account, not only for the property which he has received, but for such as might have been recovered by him from the debtor by the use of due diligence.[97]

Indirect benefit.—The fact that an assignee, as member of a private banking firm, with whom he deposits the trust fund as assignee, distinct from his own moneys, and on which he draws no interest, will receive profit from deposits generally does not make him liable for interest on the fund. Hess' Estate, 68 Pa. St. 454.

91. Mingling funds.— Asay *v.* Allen, 124 Ill. 391, 16 N. E. 685; *In re* Murdoch, 129 Mo. 488, 31 S. W. 942; Bruen *v.* Gillet, 115 N. Y. 10, 21 N. E. 676, 23 N. Y. St. 780, 12 Am. St. Rep. 764, 4 L. R. A. 529; Duffy *v.* Duncan, 35 N. Y. 187.

92. See *supra*, XII, F.

93. *Alabama.*—Royall *v.* McKenzie, 25 Ala. 363; Harrison *v.* Mock, 16 Ala. 616.

Massachusetts.— Scudder *v.* Crocker, 1 Cush. (Mass.) 323; Pingree *v.* Comstock, 18 Pick. (Mass.) 46.

Michigan.— Matter of Joslin, 101 Mich. 499, 60 N. W. 762.

New York.— Matter of Cornell, 110 N. Y. 351, 18 N. E. 142, 18 N. Y. St. 200; Matter of Leventritt, 40 N. Y. App. Div. 429, 58 N. Y. Suppl. 256; Matter of Carpenter, 45 Hun (N. Y.) 552.

Pennsylvania.— *In re* Baily, 188 Pa. St. 590, 41 Atl. 747; Schofield's Estate, 167 Pa. St. 479, 31 Atl. 742; Breneman's Estate, 150 Pa. St. 494, 24 Atl. 633; McKesson's Estate, 142 Pa. St. 538, 21 Atl. 994; Chambersburg Sav. Fund Assoc.'s Appeal, 76 Pa. St. 203; Blackburne's Appeal, 39 Pa. St. 160.

Texas.— Alcott *v.* Spencer Optical Mfg. Co., (Tex. Civ. App. 1894) 31 S. W. 833.

Virginia.— Wimbish *v.* Blanks, 76 Va. 365.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1132.

An assignee who neglects to sell at a favorable and seasonable time should be charged with the estimated value of the goods as if they had been so sold, less the estimated expenses which would have been incurred in so selling. Matter of Rice, 10 Daly (N. Y.) 1. But an assignee who refuses in good faith to offer for sale property in relation to which a writ of estrepement had been served, being advised by counsel that the writ was valid, will not be surcharged for negligence. Trevose Model Brick Mfg. Co.'s Estate, 159 Pa. St. 496, 28 Atl. 1023. See also Hamaker's Appeal, 1 Wkly. Notes Cas. (Pa.) 452.

94. Skinner *v.* Browne, 94 Iowa 761, 64 N. W. 787; Matter of Joslin, 101 Mich. 499, 60 N. W. 762; *In re* Powel's Estate, 163 Pa. St. 349, 35 Wkly. Notes Cas. (Pa.) 237, 30 Atl. 373, 381; Sprenkle's Appeal, (Pa. 1885) 1 Atl. 51; Wimbish *v.* Blanks, 76 Va. 365.

95. J. I. Case Plow Works *v.* Edwards, 176 Ill. 34, 51 N. E. 618; Scudder *v.* Crocker, 1 Cush. (Mass.) 323; Hubbard *v.* Smith, 10 Lea (Tenn.) 252.

Where the assignee unnecessarily discounts notes due the estate for less than their face value he is properly chargeable with the face value of the notes. Matter of Felt, 52 Hun (N. Y.) 60, 4 N. Y. Suppl. 754, 22 N. Y. St. 124.

96. Royall *v.* McKenzie, 25 Ala. 363; McCune *v.* Hartman Steel Co., 87 Ill. App. 162.

Burden of proof.— In order that a trustee may be charged with claims belonging to the trust estate, which at the date of the assignment were reported by the commissioners as "doubtful," the burden is upon the *cestui que trust* to show that such claims might have been collected by proper diligence. Wimbish *v.* Blanks, 76 Va. 365.

Failure to prosecute action.—Assignees will not be charged with a loss resulting from their failure to prosecute an action, where it is not clearly shown that they had knowledge of the existence of the cause of action, or that the action would have been successful if prosecuted. Matter of Gerry, 13 Daly (N. Y.) 373.

Sale of accounts.— Where an assignee has collected as many book-accounts as possible himself, then turned them over to his attorney, and put up at public sale all which the latter failed for any reason to recover, the assignee should not be surcharged for what the purchaser was able to collect afterward. Sprenkle's Appeal, (Pa. 1885) 1 Atl. 51.

97. Scudder *v.* Crocker, 1 Cush. (Mass.) 323; Pingree *v.* Comstock, 18 Pick. (Mass.) 46.

Property deposited as collateral security.— The assignee is liable for negligently failing to take steps to recover the surplus of property deposited by the assignors as collateral

3. Profits. An assignee is chargeable with all profits that he realizes on funds of the estate in his hands.[98]

F. Compensation of Assignee — 1. Right to Compensation — a. In General. An assignee is entitled to compensation for his services,[99] though no provision therefor is made in the instrument of assignment.[1]

b. Assignment Superseded or Set Aside. An assignee is not entitled to compensation from the assigned estate for his services if the assignment is superseded by bankruptcy proceedings,[2] or is set aside as fraudulent.[3]

security for debts. Matter of Carpenter, 45 Hun (N. Y.) 552.

Property not included in inventory.— An assignee will be charged with notes not included in the inventory, and which never came into his hands, unless he shows either that he made diligent efforts to obtain possession of and collect them, or that he had reasonable grounds for believing that they were uncollectible, and that such efforts would be unavailing. *In re* Fuller, 4 Kulp (Pa.) 479.

98. The fund being held in trust, the assignee is not entitled to make a profit on it himself. Brown *v.* Silsby, 10 N. H. 521. See also *In re* Mansfield, 113 Iowa 104, 84 N. W. 967.

Failure to realize profits.— A grantee who accepts a conveyance, agreeing to pay the grantor's debts with the proceeds of the property and return the remainder to him, is guilty of neglect of duty if he allows the grantor to remain in possession and take the profits, and is chargeable at the suit of creditors with the rental value less expenses and the cost of necessary improvements. Ely *v.* Turpin, 75 Mo. 83. So an assignee who allows creditors to hold, as collateral, securities on which interest is collectible is liable on accounting for such interest. Matter of Carpenter, 45 Hun (N. Y.) 552. But an assignee is not responsible for estimated rents when he has received none (Griffin *v.* Macaulay, 7 Gratt. (Va.) 476); nor is he liable for the appropriation by the assignor of crops grown on the land assigned, but excepted from the assignment (Creager *v.* Creager, 87 Ky. 449, 10 Ky. L. Rep. 424, 9 S. W. 380).

99. Right to compensation.—*Iowa.*—Where a debtor conveyed to his creditor a farm, and authorized him to sell it and apply the proceeds to the payment of the debt and the discharge of prior liens, returning the surplus, in the absence of any proof that the parties contemplated any charge for the transaction the creditor is not entitled to a commission therefore. Marshalltown First Nat. Bank *v.* Owen, 23 Iowa 185.

Kentucky.— Columbia Finance, etc., Co. *v.* Morgan, 19 Ky. L. Rep. 1761, 44 S. W. 389, 628, 45 S. W. 65.

Massachusetts.— Guild *v.* Holbrook, 11 Pick. (Mass.) 101, holding that assignees have a right to compensation simultaneously with the services performed.

New Hampshire.— Brown *v.* Silsby, 10 N. H. 521.

New York.— Matter of Hulbert, 10 Abb. N. Cas. (N. Y.) 284; Hendricks *v.* Robinson, 2 Johns. Ch. (N. Y.) 283; Jewett *v.* Woodward, 1 Edw. (N. Y.) 195.

Pennsylvania.— Lane's Estate, 3 Pa. Dist. 162.

Tennessee.— State *v.* McFarland, (Tenn. Ch. 1895) 35 S. W. 1007.

Wisconsin.— Geisse *v.* Beall, 3 Wis. 367. See also *In re* H. Penner Co., 93 Wis. 655, 68 N. W. 396.

United States.— Williams *v.* Neely, 46 Fed. 450.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1152.

Assignee as creditor.— The fact that the assignee is himself a creditor does not forfeit his right to compensation. Fahey *v.* Clarke, 80 Ky. 613; Bloch *v.* Spruance, 12 Tex. Civ. App. 309, 33 S. W. 1002; Williams *v.* Neely, 46 Fed. 450. But see Greeley *v.* Percival, 21 Fla. 535, holding that where the assignee is the first preferred creditor in an assignment giving preferences in the order named, and the assets are insufficient to pay all, he is not entitled to compensation from the fund for his services.

Waiver of compensation.— Where an assignee, after the assignment, agreed with one who had a lien on the goods for advances made, to sell the goods, and pay over the money when received without expense to the lienor, he cannot recover for his services. Moors *v.* Wyman, 146 Mass. 60, 15 N. E. 104. So where duties usually performed by an assignee personally are delegated to lawyers and agents, who are allowed compensation for their services, he cannot have compensation therefor as though performed by him. Powel's Estate, 163 Pa. St. 349, 35 Wkly. Notes Cas. (Pa.) 237, 30 Atl. 373, 381.

1. Deed silent as to compensation.—Menke *v.* Miller, 56 Cal. 628; Fahey *v.* Clarke, 80 Ky. 613; Sherrill *v.* Shuford, 41 N. C. 228.

2. Assignment superseded.— *In re* Kurth, 14 Fed. Cas. No. 7,948, 17 Nat. Bankr. Reg. 573; *In re* Cohen, 6 Fed. Cas. No. 2,966, 19 Nat. Bankr. Reg. 133. But see Wald *v.* Wehl, 18 Blatchf. (U. S.) 495, 6 Fed. 163, holding that where an assignment for benefit of creditors is rendered void by a subsequent filing of a petition in bankruptcy, the assignee for the benefit of creditors should be allowed for services under the assignment prior to the bringing of a suit to avoid it.

3. Assignment set aside.— *Arkansas.*— See Hunt *v.* Weiner, 39 Ark. 70.

Kentucky.— Scott *v.* Strauss, 14 Ky. L. Rep. 892. *Compare* Calloway *v.* Calloway, 19 Ky. L. Rep. 870, 39 S. W. 241.

Maryland.— Slingluff *v.* Smith, 76 Md. 558, 25 Atl. 674.

Massachusetts.— Bartlett *v.* Bramhall, 3 Gray (Mass.) 257.

c. Fraud or Misconduct of Assignee. An assignee guilty of fraud or misconduct in the management of the estate is not entitled to compensation.[4]

2. Amount of Compensation. An assignee, in the absence of a statute fixing the amount of his compensation,[5] is entitled to a reasonable allowance, regard being had to the size of the assigned estate and the amount of labor involved in its administration.[6]

New York.— Leavitt *v.* Yates, 4 Edw. (N. Y.) 134. See also Dexter *v.* Adler, 1 N. Y. Suppl. 684.

South Carolina.— *Ex p.* Spragins, 44 S. C. 65, 21 S. E. 543.

Tennessee.— If an assignment for the payment of debts embrace some effects which are liable to execution at law, and some which are not, and it is set aside for constructive fraud at the suit of a judgment creditor of the assignor, the assignee will be allowed for his reasonable charges. Peacock *v.* Tompkins, Meigs (Tenn.) 317.

Wisconsin.— T. T. Haydock Carriage Co. *v.* Pier, 78 Wis. 579, 47 N. W. 945.

United States.— Hunker *v.* Bing, 9 Fed. 277; Hastings *v.* Spenser, 1 Curt. (U. S.) 504, 11 Fed. Cas. No. 6,201.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1162.

4. *Kentucky.*— Kentucky Nat. Bank *v.* Louisville Bagging Co., 98 Ky. 371, 17 Ky. L. Rep. 983, 33 S. W. 101. See also Caumiser *v.* Humpich, (Ky. 1901) 64 S. W. 851.

Louisiana.— Vincent *v.* Gandolfo, 12 La. Ann. 526.

New York.— Matter of Danzig, (N. Y. 1888) 18 N. E. 483, 16 N. Y. St. 708; Matter of MacFarlane, 65 N. Y. App. Div. 93, 72 N. Y. Suppl. 723; Matter of Leventritt, 40 N. Y. App. Div. 429, 58 N. Y. Suppl. 256; Dorney *v.* Thacher, 76 Hun (N. Y.) 361, 27 N. Y. Suppl. 787, 58 N. Y. St. 466; Matter of Hyman, 14 Daly (N. Y.) 375, 13 N. Y. St. 136; Matter of Wolff, 13 Daly (N. Y.) 481; Matter of Rauth, 10 Daly (N. Y.) 52; Matter of Coffin, 10 Daly (N. Y.) 27; Matter of Hulbert, 10 Abb. N. Cas. (N. Y.) 284; Ireland *v.* Potter, 16 Abb. Pr. (N. Y.) 218, 25 How. Pr. (N. Y.) 175; *In re* Marquand, 57 How. Pr. (N. Y.) 477; Hendricks *v.* Robinson, 2 Johns. Ch. (N. Y.) 283.

Ohio.—*In re* Purcell, 9 Ohio Dec. (Reprint) 602, 15 Cinc. L. Bul. 311.

Pennsylvania.— Stehman's Appeal, 5 Pa. St. 413; Powell's Estate, 7 Pa. Dist. 27.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1160.

An assignee removed merely because his relation to the parties renders his retention of the position improper is entitled to compensation. Matter of Schlang, 66 How. Pr. (N. Y.) 199.

An assignee will not be deprived of compensation on a mere showing of loose methods in conducting sales and a failure to preserve the original inventory of the goods. Matter of Joslin, 101 Mich. 499, 60 N. W. 762. See also Hamaker's Appeal, 1 Wkly. Notes Cas. (Pa.) 452.

Failure to obey order of court.— Where an assignee has failed to comply with the order of court to turn over all property in his hands to his successor, the court properly refused to pass on and allow his account for services and disbursements until compliance with the order. *In re* State Bank, 57 Minn. 361, 59 N. W. 315.

5. Statutory regulations.— Emig *v.* Barnes, 77 Ill. App. 616; Gaillard *v.* His Creditors, 19 La. Ann. 87; *In re* Shotwell, 49 Minn. 170, 51 N. W. 909, 52 N. W. 1078; Matter of Talmage, 161 N. Y. 643, 57 N. E. 1126; McCann *v.* O'Brien, 40 N. Y. App. Div. 193, 57 N. Y. Suppl. 897; Matter of Hulbert, 9 Abb. N. Cas. (N. Y.) 132.

Tenn. Act (Feb. 14, 1860), providing that the compensation of a trustee under a trust for the benefit of creditors shall not exceed five per cent commissions does not apply, as against the corporation creating the trust, to a case where the business is carried on by the trustee to enable the corporation to resume business and prevent an agreement by the corporation for a greater compensation from being binding. State *v.* McFarland, (Tenn. Ch. 1895) 35 S. W. 1007.

6. Assignee entitled to reasonable compensation.— *Kansas.*— Branch *v.* American Nat. Bank, 57 Kan. 282, 46 Pac. 305.

Kentucky.— Pickerell *v.* Thompson, 22 Ky. L. Rep. 1382, 59 S. W. 751; Citizens Nat. Bank *v.* Calloway, 19 Ky. L. Rep. 1630, 44 S. W. 104.

Massachusetts.— Moors *v.* Wyman, 146 Mass. 60, 15 N. E. 104.

Missouri.— Flaine Bldg., etc., Assoc.'s Assignment, 82 Mo. App. 317.

New Jersey.— Sliker *v.* Fisher, 45 N. J. Eq. 132, 17 Atl. 549.

New York.— Matter of Hulburt, 89 N. Y. 259; Matter of Dean, 86 N. Y. 398; Duffy *v.* Duncan, 35 N. Y. 187; Matter of Fulton, 30 Hun (N. Y.) 258; Matter of Shaw, 18 Hun (N. Y.) 195; Matter of Bassford, 13 Daly (N. Y.) 22; Meacham *v.* Sternes, 9 Paige (N. Y.) 398.

Oregon.—*Re* Woodall, 33 Oreg. 382, 54 Pac. 209; *Re* Bank, 32 Oreg. 84, 51 Pac. 87.

Pennsylvania.— Coleman's Estate, 200 Pa. St. 29, 49 Atl. 798; Tustin's Account, 176 Pa. St. 382, 38 Wkly. Notes Cas. (Pa.) 421, 35 Atl. 199; Breneman's Estate, 150 Pa. St. 494, 24 Atl. 633; Brice's Appeal, 95 Pa. St. 145; Burkholder's Appeal, 94 Pa. St. 522; Sprenkel's Appeal, 16 Wkly. Notes Cas. (Pa.) 402; Matter of Gump, 13 Phila. (Pa.) 495, 34 Leg. Int. (Pa.) 150; *In re* Bordman's Estate, 1 Phila. (Pa.) 384, 9 Leg. Int. (Pa.) 130; Windle's Estate, 2 Chest. Co. Rep. (Pa.) 255.

South Carolina.— See Mann *v.* Poole, 48 S. C. 154, 26 S. E. 229.

Tennessee.— German Bank *v.* Haller, 103

XIV. RIGHTS AND REMEDIES OF CREDITORS.

A. In Aid of Assignment — 1. Attacking Prior Conveyance — a. In General. Creditors may sue to set aside fraudulent conveyances made by the assignor before assignment[7] unless the statute specifically vests the right to avoid such conveyances in the assignee.[8] Creditors may proceed, however, in states where such statutes exist, if the assignee is himself a party to the fraud,[9] or neglects or refuses to institute suit when requested to do so.[10] Where the creditors thus act in place of

Tenn. 73, 52 S. W. 288; Morris *v.* Ellis, (Tenn. Ch. 1901) 62 S. W. 250.

Washington.— Slater *v.* Stevens County Bank, 12 Wash. 488, 41 Pac. 168.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1153.

An agreement between assignor and assignee for an extra compensation agreed on between them is entitled to no weight in fixing the assignee's compensation. Boegler *v.* Eppley, 40 Hun (N. Y.) 523. But see Matter of Hulbert, 10 Abb. N. Cas. (N. Y.) 452, holding that as between the assignee and the assignor an agreement made by them before acceptance of the assignment as to the amount of compensation in case of a composition is valid.

Moneys not belonging to estate.— An assignee cannot charge a commission on moneys coming into his hands which do not belong to the trust funds. *In re* Commercial Bank, 4 Ohio S. & C. Pl. Dec. 440.

Several sales.—When several sales are made at different times, the commissions of the trustee should be calculated upon each sale separately, and the sales are not to be treated as if made at one time. Goodburn *v.* Stevens, 1 Md. Ch. 420.

7. Creditors' right to attack.— *Alabama.*— Creditors cannot maintain a bill to set aside a conveyance as fraudulent, or in the alternative have it declared to constitute a general assignment for the benefit of all creditors. Moog *v.* Talcott, 72 Ala. 210; Lehman *v.* Meyer, 67 Ala. 396 [*overruling* Crawford *v.* Kirksey, 50 Ala. 590].

California.— Miller *v.* Kehoe, 107 Cal. 340, 40 Pac. 485.

Illinois.— Bouton *v.* Dement, 123 Ill. 142, 14 N. E. 62.

Kentucky.— Maiders *v.* Culver, 1 Duv. (Ky.) 164.

Minnesota.— Flower *v.* Cornish, 25 Minn. 473.

Missouri.— Roan *v.* Winn, 93 Mo. 503, 4 S. W. 736; Harris *v.* Harris, 25 Mo. App. 496.

Texas.— Dittman *v.* Weiss, 87 Tex. 614, 30 S. W. 863; Keller *v.* Smalley, 63 Tex. 512.

United States.— Clapp *v.* Nordmeyer, 25 Fed. 71; Sandwich Mfg. Co. *v.* Wright, 22 Fed. 631.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 845.

8. Assignee's right to attack.—*Colorado.*— Bailey *v.* American Nat. Bank, 12 Colo. App. 66, 54 Pac. 912.

Indiana.— Voorhees *v.* Carpenter, 127 Ind. 300, 26 N. E. 838; Cooper *v.* Perdue, 114 Ind. 207, 16 N. E. 140; Seibert *v.* Milligan, 110 Ind. 106, 10 N. E. 929.

Iowa.— Mehlhop *v.* Ellsworth, 95 Iowa 657, 64 N. W. 638; Schaller *v.* Wright, 70 Iowa 667, 28 N. W. 460.

Kansas.— Walton *v.* Eby, 53 Kan. 257, 36 Pac. 332.

Maine.— Simpson *v.* Warren, 55 Me. 18.

Michigan.— Kinter *v.* Pickard, 67 Mich. 125, 34 N. W. 535; Sweetzer *v.* Higby, 63 Mich. 13, 29 N. W. 506; Scott *v.* Chambers, 62 Mich. 532, 29 N. W. 94; Angell *v.* Pickard, 61 Mich. 561, 28 N. W. 680; Root *v.* Potter, 59 Mich. 498, 26 N. W. 682.

Mississippi.— Allen *v.* Montgomery, 48 Miss. 101.

New Jersey.— Pillsbury *v.* Kingon, 33 N. J. Eq. 287, 36 Am. Rep. 556.

New York.— McNaney *v.* Hall, 159 N. Y. 544, 54 N. E. 1093; Prentiss *v.* Bowden, 145 N. Y. 342, 40 N. E. 13, 64 N. Y. St. 811; Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. 99, 18 N. Y. St. 110, 1 L. R. A. 250; Spring *v.* Short, 90 N. Y. 538; Sullivan *v.* Miller, 40 Hun (N. Y.) 516; Swift *v.* Hart, 35 Hun (N. Y.) 128; Childs *v.* Kendall, 30 Hun (N. Y.) 227; Strickland *v.* Laraway, 9 N. Y. Suppl. 761, 29 N. Y. St. 873.

Rhode Island.— Hamilton *v.* Colt, 14 R. I. 209.

Washington.— Mansfield *v.* Whatcom First Nat. Bank, 5 Wash. 665, 32 Pac. 789, 999.

Wisconsin.— Valley Lumber Co. *v.* Hogan, 85 Wis. 366, 55 N. W. 415.

See also *supra*, XII, C, 3.

9. Participation in fraud.— Doherty *v.* Holliday, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907; Wright *v.* Mack, 95 Ind. 332; Burnham *v.* Haskins, 72 Mich. 235, 40 N. W. 327; Terhune *v.* Sibbald, 55 N. J. Eq. 236, 37 Atl. 454; Markell *v.* Hill, 34 Misc. (N. Y.) 133, 69 N. Y. Suppl. 537; Kendall *v.* Mellen, 13 N. Y. Suppl. 207, 36 N. Y. St. 805.

10. Neglect or refusal to act.— *Illinois.*— Preston *v.* Spaulding, 120 Ill. 208, 10 N. E. 903.

Kentucky.— West *v.* Gribben, (Ky. 1901) 62 S. W. 869; Hall *v.* Rothchild, 102 Ky. 582, 19 Ky. L. Rep. 1621, 44 S. W. 108; Wisdom *v.* Russell, 21 Ky. L. Rep. 881, 53 S. W. 284.

Michigan.— Burnham *v.* Dillon, 100 Mich. 352, 59 N. W. 176; Funke *v.* Cone, 65 Mich. 581, 32 N. W. 826.

New Jersey.— Kalmus *v.* Ballin, 52 N. J. Eq. 290, 28 Atl. 791, 46 Am. St. Rep. 520; White *v.* Davis, 48 N. J. Eq. 22, 21 Atl. 187; Lee *v.* Cole, 44 N. J. Eq. 318, 15 Atl. 531.

New York.— Spelman *v.* Freedman, 130

the assignee, whatever is recovered is impressed with the trust for the benefit of all creditors, not merely for those who institute suit.[11]

b. What Creditors May Attack. As a general rule only judgment creditors may sue to set aside a fraudulent conveyance by an assignor.[12] There are decisions, however, supporting the right of a simple contract creditor to maintain such suit.[13]

c. Time to Sue. A creditor's proceeding to attack a transfer by his debtor must be brought within the time limited by statute.[14]

2. ENFORCEMENT OF TRUST — a. In General. A creditor of one who has made an assignment for the benefit of creditors may maintain a suit to have the trusts under the assignment enforced.[15]

N. Y. 421, 29 N. E. 765, 42 N. Y. St. 531; Crouse *v.* Frothingham, 97 N. Y. 105; Markell *v.* Hill, 34 Misc. (N. Y.) 133, 69 N. Y. Suppl. 537; Kessell *v.* Drucker, 6 N. Y. Suppl. 945, 23 Abb. N. Cas. (N. Y.) 1.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 847.

Until an assignee for the benefit of creditors has qualified his refusal to sue to set aside as fraudulent a conveyance by the debtor cannot give the judgment creditors the right to maintain such suit. Mills *v.* Goodenough, 9 N. Y. Suppl. 764, 18 N. Y. Civ. Proc. 151.

11. Rights in proceeds.— Roberts *v.* Phillips, 11 Bush (Ky.) 11; Smith *v.* Craft, 22 Ky. L. Rep. 643, 58 S. W. 500; Hamlen *v.* Bennett, 52 N. J. Eq. 70, 27 Atl. 651; Crouse *v.* Frothingham, 97 N. Y. 105; Symons *v.* Reid, 58 N. C. 327. But see Greffet *v.* Goessling, 81 Mo. App. 633, holding that where the holder of an allowed claim against an insolvent's estate sued for himself and any other creditors who might come in, to set aside a conveyance by the insolvent as in fraud of creditors, but no other creditors came in, he was entitled to apply a sum recovered by compromise to his debt, as against the insolvent's assignee, though he had made him party defendant to the suit; the assignee not being a necessary or proper party, and the amount recovered being in no event part of the assigned assets.

12. Judgment creditors.—Roan *v.* Winn, 93 Mo. 503, 4 S. W. 736; Dunlevy *v.* Tallmadge, 32 N. Y. 457; Birdsall, etc., Mfg. Co. *v.* Schwarz, 3 N. Y. App. Div. 298, 38 N. Y. Suppl. 368, 74 N. Y. St. 24; Vanhuskirk *v.* Warren, 34 Barb. (N. Y.) 457, 13 Abb. Pr. (N. Y.) 145; Willetts *v.* Vandenburgh, 34 Barb. (N. Y.) 424; Beekman *v.* Kirk, 15 How. Pr. (N. Y.) 228; Rhodes *v.* Cousins, 6 Rand. (Va.) 188, 18 Am. Dec. 715.

A judgment creditor of a firm cannot maintain a suit to have a mortgage made by one of the partners to secure his individual debt declared a general assignment for the benefit of all the mortgagor's creditors. Evans *v.* Winston, 74 Ala. 349.

13. Simple contract creditors.— Mott *v.* Dunn, 10 How. Pr. (N. Y.) 225; Woodrow *v.* Sargent, 5 Ohio Dec. (Reprint) 209, 3 Am. L. Rec. 522; Austin *v.* Morris, 23 S. C. 393; Dahlman *v.* Jacobs, 5 McCrary (U. S.) 230, 16 Fed. 614 [*vacating* order in 5 McCrary (U. S.) 130, 15 Fed. 863]; Clapp *v.* Dittman, 21 Fed. 15.

A creditor, after the allowance of his claim by the assignee, has such an interest in the assets of the insolvent that he may maintain a creditor's bill to reach property fraudulently transferred by the assignor before the assignment. Dawson *v.* Coffey, 12 Oreg. 513, 8 Pac. 838.

14. Cogar *v.* Stewart, 78 Ky. 59; Given *v.* Gordon, 3 Metc. (Ky.) 538; Zeman *v.* Steinberg, 21 Ky. L. Rep. 1152, 54 S. W. 178.

After discharge of assignee.— A creditor cannot sue to set aside a fraudulent conveyance made by his debtor, when the latter has afterward assigned all his property for the benefit of his creditors, where the trust has been executed and the assignee discharged, though neither the assignee nor the creditor had any knowledge of the fraudulent conveyance till after the assignee's discharge. Voorhees *v.* Carpenter, 127 Ind. 300, 26 N. E. 838.

Where there are several conveyances, only those within the period fixed by statute can be attacked. Whitehead *v.* Woodruff, 11 Bush (Ky.) 209.

15. *Alabama.*— Colgin *v.* Redman, 20 Ala. 650.

Georgia.— Bell *v.* McGrady, 32 Ga. 257; McDougald *v.* Dougherty, 11 Ga. 570.

Kentucky.— Gerst *v.* Turley, 7 Ky. L. Rep. 217; Dobyns *v.* Dobyns, 1 Ky. L. Rep. 400.

Massachusetts.— Noyes *v.* West, 3 Cush. (Mass.) 423; Pingree *v.* Comstock, 18 Pick. (Mass.) 46.

Michigan.— Pickersgill *v.* Riker, 50 Mich. 98, 14 N. W. 713.

Minnesota.—Goncelier *v.* Foret, 4 Minn. 13.

Mississippi.— Wright *v.* Henderson, 7 How. (Miss.) 539.

Nebraska.— Nuckolls *v.* Tomlin, 9 Nebr. 353, 2 N. W. 875.

New Jersey.— Loucheim *v.* Casperson, (N. J. 1901) 48 Atl. 1107; White *v.* Davis, 48 N. J. Eq. 22, 21 Atl. 187; Hays *v.* Doane, 11 N. J. Eq. 84.

New York.— Cunningham *v.* Freehorn, 3 Paige (N. Y.) 557 [*affirmed* in 11 Wend. (N. Y.) 240]; Lawton *v.* Levy, 2 Edw. (N. Y.) 197.

North Carolina.— Symons *v.* Reid, 58 N. C. 327; Smith *v.* Turrentine, 43 N. C. 185; Ingram *v.* Kirkpatrick, 41 N. C. 463, 51 Am. Dec. 428.

Ohio.— Maas *v.* Miller, 58 Ohio St. 483, 51 N. E. 158; Brinkerhoff *v.* Smith, 57 Ohio St. 610, 49 N. E. 1025.

b. Parties. A creditor who seeks to carry into effect an assignment in trust for the benefit of creditors and to obtain his share of the trust fund must make all the creditors parties,[16] or he must sue for himself and the other creditors who may come in, and satisfy their demands.[17]

c. Pleading. A creditors' bill filed by the beneficiaries for the settlement of a deed of trust executed by the debtor, which required that the secured creditors should assent to its provisions within a certain time, must allege that complainants assented to the deed.[18]

d. Extent of Relief. Plaintiffs in a bill to carry out the trusts of an assignment for the benefit of creditors, where the bill is not a general creditors' bill, are not entitled to have the interests of a debtor who is not included in the assignment defined.[19] The trust estate, however, will be administered for the best interests of all creditors.[20]

Pennsylvania.— Fallon's Appeal, 42 Pa. St. 235.

Rhode Island.— Peabody *v.* Tenney, 18 R. I. 498, 30 Atl. 456.

South Carolina.— Brooks *v.* Brooks, 12 S. C. 422.

Tennessee.— Galt *v.* Dibrell, 10 Yerg. (Tenn.) 146; Weir *v.* Tannehill, 2 Yerg. (Tenn.) 57.

Texas.— A creditor of one who has made a statutory assignment cannot sue the assignee for conversion of property upon allegations that he converted the assigned property and failed to pay plaintiff's debt, though the property was sufficient to pay all the debts of the assignor. Such an action must be brought for the benefit of all the creditors. De Walt *v.* Zeigler, 9 Tex. Civ. App. 82, 29 S. W. 60.

United States.— Putnam *v.* Timothy Dry-Goods, etc., Co., 79 Fed. 454.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 850.

Protection of trust property.— Where the assignee neglects to take proper proceedings to protect the trust property a creditor may maintain a bill in equity for that purpose. Preston *v.* Spaulding, 18 Ill. App. 341; Shyer *v.* Lockhard, 2 Tenn. Ch. 365.

16. Haughton *v.* Davis, 23 Me. 28; Bryant *v.* Russell, 23 Pick. (Mass.) 508; Dimmock *v.* Bixby, 20 Pick. (Mass.) 368; Symons *v.* Reid, 58 N. C. 327. But see Dorr *v.* Gibboney, 3 Hughes (U. S.) 382, 7 Fed. Cas. No. 4,006, holding that where a deed of trust to secure creditors with ascertained debts marshaled them into four classes, a bill will lie by one of the fourth class for breach of the trust without making the others parties. To same effect is Patton *v.* Bencini, 41 N. C. 204. And see Lochte *v.* Blum, 10 Tex. Civ. App. 385, 30 S. W. 925, holding that in a suit by creditors to have a certain instrument declared a statutory assignment it is sufficient if a representative number of the creditors and the grantee in the instrument are made parties.

Assignee and beneficiaries as parties.— In a suit to enforce a trust for the benefit of creditors the trustees and *cestuis que trustent* are all necessary parties, except where the trustee has assets sufficient to satisfy all the creditors in full and has paid all but plaintiff. Barrett *v.* Brown, 86 N. C. 556. See also Hamlen *v.* Bennett, 52 N. J. Eq. 70, 27 Atl. 651, holding that where a creditor of one who has made an assignment institutes proceedings for the discovery of assets, and succeeds therein, it is proper to bring in the assignee as a party before making a final decree as to distribution of such newly discovered assets.

17. Haughton *v.* Davis, 23 Me. 28; Bouvé *v.* Cottle, 143 Mass. 310, 9 N. E. 654; Bryant *v.* Russell, 23 Pick. (Mass.) 508.

18. Colgin *v.* Redman, 20 Ala. 650, holding that an allegation that complainants "have consented to the provisions of said deed" is sufficient as an allegation of consent. But see Shyer *v.* Lockhard, 2 Tenn. Ch. 365, holding that if a bill to enforce a conveyance in trust for creditors state that the trustee qualified as such according to law, demurrer will not lie on the ground that the trust was not accepted by all the creditors.

In an action by creditors against an assignee for conversion, the petition need not allege that the debtor placed the property converted upon the schedule of his property, or that the debtor's estate, exclusive of such property, is insufficient to satisfy the creditors' claims, where it states that the value of such property is much larger than the assignee's bond. Blum *v.* Wettermark, 56 Tex. 80.

Presentation of claim.— In Rhode Island a bill against an assignee for the benefit of creditors, by a creditor of the assignor, to enforce the trusts under the assignment, which does not allege that complainant presented his claim within the six months is defective. Peabody *v.* Tenney, 18 R. I. 498, 30 Atl. 456.

19. Brooks *v.* Brooks, 12 S. C. 422. See also Spindle *v.* Fletcher, 93 Va. 186, 24 S. E. 910, holding that under a bill filed by general contract creditors asking the court to administer the trust created by a general assignment of their debtor for the benefit of creditors the court has no jurisdiction to subject property not included in the assignment and on which plaintiffs have acquired no lien.

20. Keller *v.* Smalley, 63 Tex. 512. See also Davis *v.* White, 49 N. J. Eq. 567, 25 Atl. 936, holding that where a bill by a judgment creditor to set aside transfers of his debtor as fraudulent, and also an assignment by him for benefit of creditors, contains a general prayer for relief, it is proper to retain and

3. Examination of Assignor. In some states an assignor, on the application of a party in interest, may be ordered to appear and submit to an examination as to matters relating to the assigned estate.[21]

4. Examination of Books and Witnesses. Provision is also made in some jurisdictions for an examination of witnesses and the production of books and papers relating to the assigned estate.[22]

B. Presentation, Proof, and Payment of Claims — 1. Creditors Entitled to Participate — a. Assenting Creditors. A creditor who does not, within the time limited, assent to an assignment which provides that no creditor shall share in it who does not assent to it within a certain time is not entitled to the benefit of it.[23] But a creditor who, from want of notice or mistake, is unable to comply with the terms within the time limited will be admitted to his share of the fund, if in a reasonable time he signify that such is his desire, and he has done nothing inconsistent with an acceptance of the provision made in his favor.[24]

b. Estoppel of Creditors to Participate. A creditor who repudiates an assignment, or who persists in seeking remedies adverse to it, forfeits the right to claim thereunder.[25] Thus an attack on the assignment has been held to bar all right of

enforce the assignment as being the best means to effect an equitable distribution of the debtor's property.

One suing to enforce a trust created by a general assignment will be deemed to take under the assignment. He shall not say that the fund should be otherwise distributed. Zaring *v.* Cox, 78 Ky. 527, 1 Ky. L. Rep. 161.

Though creditors seek to have a deed of assignment set aside they are entitled to the enforcement of the trust and a recovery of their share of the trust fund, where they ask such relief in case the assignment is held valid. Lexington L., etc., Ins. Co. *v.* Page, 17 B. Mon. (Ky.) 412, 457, 66 Am. Dec. 165.

21. Matter of Wilkinson, 36 Hun (N. Y.) 134; Matter of Strauss, 1 Abb. N. Cas. (N. Y.) 402.

Property acquired since assignment.— Examination of one who has assigned for benefit of creditors need not be restricted to property acquired since assignment. Selligman *v.* Wallach, 67 How. Pr. (N. Y.) 514. But see Wilson Bros. Woodenware, etc., Co. *v.* Daggett, 9 N. Y. Civ. Proc. 408, holding that a judgment debtor having elected to take under an assignment for benefit of creditors can examine the debtor in proceedings only as to after-acquired property.

Property passing by assignment.— An assignor may be examined for the purpose of ascertaining whether a certain trade-mark does or does not pass under the assignment. Matter of Swezey, 62 How. Pr. (N. Y.) 215.

22. Matter of Holbrook, 99 N. Y. 539, 2 N. E. 887; Matter of Workingmen's Pub. Assoc., 62 N. Y. App. Div. 604, 71 N. Y. Suppl. 248; Matter of Meyer, 29 N. Y. App. Div. 394, 51 N. Y. Suppl. 1054; Matter of Herrmann Lumber Co., 21 N. Y. App. Div. 514, 48 N. Y. Suppl. 509; Matter of Bryce, 10 Daly (N. Y.) 18, 56 How. Pr. (N. Y.) 359; *In re* Farmer, 56 N. Y. Suppl. 328; Matter of Isidor, 59 How. Pr. (N. Y.) 98.

In New York the examination is restricted to search for information in aid of the assignment. The process cannot be used to base an attack on the assignment or to aid the creditor in establishing his claim against the assignor. Matter of Holbrook, 99 N. Y. 539, 2 N. E. 887; Matter of Brown, 10 Daly (N. Y.) 115; Matter of Goldsmith, 10 Daly (N. Y.) 112; Matter of Everit, 10 Daly (N. Y.) 99; Matter of Burtnett, 8 Daly (N. Y.) 363.

In Pennsylvania under the act of March 24, 1818, "to compel assignees to settle their accounts," the court of common pleas has power to make an order requiring the assignees in a voluntary assignment for the benefit of creditors to produce, and to submit to the inspection of a creditor, any books, papers, or documents which are in their possession and which came to them from the assignor. Ingraham *v.* Coxe, 1 Ashm. (Pa.) 38.

In Wisconsin under Rev. Stat. § 1693*b*, and also aside from any statute, by virtue of his relations to the estate a creditor of an assigned estate has a right to the examination of the assignee, under oath, as to his dealings with the estate, under reasonable restrictions. State *v.* Johnson, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33.

23. Dedham Bank *v.* Richards, 2 Metc. (Mass.) 105; Battles *v.* Fobes, 21 Pick. (Mass.) 239. *Compare* Hudson *v.* J. B. Parker Mach. Co., 173 Mass. 242, 53 N. E. 867.

Mere delay in accepting the provisions of a trust deed for the benefit of creditors will not bar a creditor where the deed fixes no time for acceptance. Beall *v.* Lowndes, 4 S. C. 258. See also Tennant *v.* Stoney, 1 Rich. Eq. (S. C.) 222, 44 Am. Dec. 213, holding that under a trust deed for benefit of creditors they may assent at any time before distribution if they have done nothing inconsistent with the deed.

Preferred creditors may claim under an assignment without signing or assenting to the instrument of assignment which did not require their assent. New England Bank *v.* Lewis, 8 Pick. (Mass.) 113.

24. De Caters *v.* Le Ray de Chaumont, 2 Paige (N. Y.) 490.

25. Repudiation or pursuit of adverse remedy.—*Arkansas.*—Adler-Goldman Commission

the attacking creditor to claim under the assignment.[26] Another line of authorities, however, holds that an unsuccessful attack is no bar to a claim under the assignment after the termination of the attack.[27]

2. Claims Provable — a. In General. In the absence of statutory provisions to the contrary only such as are creditors at the time of an assignment for the benefit of creditors can claim thereunder.[28] Claims omitted from the instrument

Co. *v.* Peoples' Bank, 65 Ark. 380, 46 S. W. 536.

Colorado.— Beifeld *v.* Martin, 4 Colo. App. 578, 37 Pac. 32.

Indiana.— Combs *v.* Union Trust Co., 146 Ind. 688, 46 N. E. 16.

Massachusetts.— New England Bank *v.* Lewis, 8 Pick. (Mass.) 113.

Michigan.—Farwell *v.* Myers, 59 Mich. 179, 26 N. W. 328.

Missouri.—Valentine *v.* Decker, 43 Mo. 583.

New Hampshire.— Fellows *v.* Greenleaf, 43 N. H. 421.

Pennsylvania.— Geist's Appeal, 104 Pa. St. 351; Williams' Appeal, 101 Pa. St. 474.

Tennessee.— Farquharson *v.* McDonald, 2 Heisk. (Tenn.) 404.

Texas.— Moody *v.* Templeman, 23 Tex. Civ. App. 374, 56 S. W. 588.

Vermont.— Therasson *v.* Hickok, 37 Vt. 454.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 871.

Property not covered by assignment.— A creditor may pursue remedies against the debtor's property not covered by the assignment without forfeiting his rights under the assignment. Miller *v.* Byers, 99 Va. 163, 37 S. E. 782. See also Patty Joiner Co. *v.* Sherman City Bank, (Tex. Civ. App. 1897) 41 S. W. 173, holding that attachment of property exempted from an assignment is not of itself an election by the attaching creditor not to take by the assignment.

Recovery of judgment.— A creditor, by merging his claim in judgment after an assignment by his debtor for benefit of creditors, does not lose his right to file his claim with the assignee and share in the assets. Richmond Second Nat. Bank *v.* Townsend, 114 Ind. 534, 17 N. E. 116.

26. Attacking assignment.— *Georgia.*— Wright *v.* Zeigler, 70 Ga. 501.

Kentucky.— Vernon *v.* Morton, 8 Dana (Ky.) 247.

New York.— *Compare* Mills *v.* Parkhurst, 126 N. Y. 89, 26 N. E. 1041, 36 N. Y. St. 512, 13 L. R. A. 472.

Oregon.— Kerslake *v.* Brower, etc., Lumber Co., (Oreg. 1901) 66 Pac. 437.

Tennessee.— O'Bryan *v.* Glenn, 91 Tenn. 106, 17 S. W. 1030, 30 Am. St. Rep. 862.

Texas.— Lovenberg *v.* National Bank, 67 Tex. 440, 2 S. W. 874, 5 S. W. 816.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 872.

27. Unsuccessful attack.—*Alabama.*—Jones *v.* Burgess, 115 Ala. 700, 19 So. 851.

Iowa.— Matter of Hobson, 81 Iowa 392, 46 N. W. 1095, 11 L. R. A. 255.

Massachusetts.— New England Bank *v.* Lewis, 8 Pick. (Mass.) 113.

Minnesota.— Matter of Van Norman, 41 Minn. 494, 43 N. W. 334.

Missouri.— Eppright *v.* Kauffman, 90 Mo. 25, 1 S. W. 736.

New York.— Sternfeld *v.* Simonson, 44 Hun (N. Y.) 429; Jewett *v.* Woodward, 1 Edw. (N. Y.) 195.

Virginia.— Clark *v.* Ward, 12 Gratt. (Va.) 440.

Washington.—Anderson *v.* Risdon-Cahn Co., 13 Wash. 494, 43 Pac. 337.

United States.— A suit on a note secured by an assignment for the benefit of creditors which is not prosecuted to final judgment is not a waiver of the benefit of the assignment. Clark *v.* Gibboney, 3 Hughes (U. S.) 391, 5 Fed. Cas. No. 2,821.

28. Creditors at time of assignment.—*Alabama.*— Danner *v.* Brewer, 69 Ala. 191.

Colorado.—An assessment on a stockholder, made after his assignment for creditors, is provable as a claim against the assigned estate, the corporation's debts having been contracted and its insolvency accruing prior to the assignment. Hill *v.* Graham, 11 Colo. App. 536, 53 Pac. 1060.

Connecticut.— Though no part of a claim presented against an insolvent estate is due, still, it being fixed and certain and bearing interest, it is a proper subject of allowance. Robinson's Appeal, 63 Conn. 290, 28 Atl. 40.

Minnesota.— Wilder *v.* Peabody, 37 Minn. 248, 33 N. W. 852.

New Jersey.—Where a covenant against encumbrances has been broken before an assignment by the grantor, though the amount of the claim is not ascertained till after the assignment, yet, if it is fixed in time for the grantee to exhibit it within the time limited by the statute, it will be received. Stewart *v.* Drake, 9 N. J. L. 139.

New York.— Rome Exch. Bank *v.* Eames, 4 Abb. Dec. (N. Y.) 83, 1 Keyes (N. Y.) 588.

Pennsylvania.— Weinmann's Estate, 164 Pa. St. 405, 35 Wkly. Notes Cas. (Pa.) 321, 30 Atl. 389; Jordan's Appeal, 107 Pa. St. 75.

South Carolina.— Ragsdale *v.* Winnsboro Bank, 45 S. C. 575, 23 S. E. 947.

West Virginia.— The holder of a judgment based on an injunction bond, payable on a specified contingency, and given before the execution of a deed fraudulent as a preference of creditors, and which stands for the benefit of all creditors, is a creditor entitled to share, though the judgment on the bond was not recovered until after the making of such deed. Cumberland First Nat. Bank *v.* Parsons, 45 W. Va. 688, 32 S. E. 271.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 875.

No private agreement between an assignee and one of his assignors will authorize the

of assignment by mistake may be paid by the assignee out of the funds of the assigned estate.[29]

b. Claims For Rent. Rent owed by the assignor at the date of the assignment may be allowed;[30] but rent accruing after the date of the assignment is not provable as a debt or claim against the estate,[31] unless the assignee elects to enter under the lease.[32]

c. Claims of Indorsers. The holder of a promissory note on which the indorser's liability is absolute can prove the whole debt against the assignment of maker and indorser for the benefit of creditors.[33] A prior partial payment by

allowance in his final account of a claim which would be unauthorized under the assignment. Clark *v.* Stanton, 24 Minn. 232.

Promise without consideration.— A promise by a husband to pay his wife certain money, being without consideration, cannot be included in the debts of the husband on assignment. Farmers', etc., Nat. Bank *v.* Jenkins, 65 Md. 245, 3 Atl. 302.

Ultra vires acts of corporation.— The fact that a corporation may not have been authorized to deal in certain goods does not justify an assignee for creditors of the corporation in refusing payment for such goods; the goods themselves, or proceeds therefrom, forming a part of the estate. *Re* Pendleton Hardware Co., 24 Oreg. 330, 33 Pac. 544.

29. Claims omitted by mistake.— Guittard *v.* Robinson, 29 Nebr. 400, 45 N. W. 476. See also Griffin *v.* Macaulay, 7 Gratt. (Va.) 476, holding that a creditor of the grantor in a deed to secure creditors may show that his debt was intended to be secured under a provision made for another creditor.

Mistake in description.— Where a debt intended to be secured by a deed of trust is not correctly described in the deed, the creditor, by identifying it, may recover it of the trust fund, while that remains. Allmand *v.* Russell, 40 N. C. 183. See also Commercial Bank *v.* Clapier, 3 Rawle (Pa.) 335.

Payment from surplus.— If there is a surplus the creditors not provided for in the assignment are entitled to payment therefrom. Skipwith *v.* Cunningham, 8 Leigh (Va.) 271, 31 Am. Dec. 642. See also Price *v.* Merchants' Bank, 29 Md. 369.

30. Rent due at assignment.—*Ex p.* Houghton, 1 Lowell (U. S.) 554, 12 Fed. Cas. No. 6,725.

Damages for breach of lease.— Where an assignee elects not to accept a lease as an asset of an estate, the claim for damages for breach of its terms, while not entitled to priority over other debts of the assignor, may be proven and paid like the other debts. Smith *v.* Goodman, 149 Ill. 75, 36 N. E. 621.

31. Rent subsequently accruing.— *Illinois.* — Smith *v.* Goodman, 149 Ill. 75, 36 N. E. 621.

Maryland.— Horwitz *v.* Davis, 16 Md. 313.

Massachusetts.— Deane *v.* Caldwell, 127 Mass. 242.

Minnesota.— Wilder *v.* Peabody, 37 Minn. 248, 33 N. W. 852.

Ohio.— An assignment does not terminate a lease belonging to the assignor, nor discharge the obligations of the lessee, but the lessor is entitled to have his claim for rent allowed by the assignee, so that it may participate, in its proper order, in the trust fund; and it is not a valid objection to such allowance or participation that the rent, or any part of it, is not then due. Wilder *v.* McDonald, 63 Ohio St. 383, 59 N. E. 106.

Pennsylvania.— Weinmann's Estate, 164 Pa. St. 405, 35 Wkly. Notes Cas. (Pa.) 321, 30 Atl. 389; Matter of Snyder, 8 Phila. (Pa.) 302.

United States.— *In re* Commercial Bulletin Co., 2 Woods (U. S.) 220, 6 Fed. Cas. No. 3,060, 8 Chic. Leg. N. 330, 1 Pa. L. J. 176, 14 Nat. Bankr. Reg. 286, 3 N. Y. Wkly. Dig. 12.

32. As to election of assignee to enter under lease see *supra*, XII, D. 1.

33. Beals *v.* Mayher, 174 Mass. 470, 54 N. E. 857, 75 Am. St. Rep. 367; National Bank *v.* Porter, 122 Mass. 308; Matter of Bicknell, 31 Misc. (N. Y.) 302, 64 N. Y. Suppl. 360; *In re* Pulsifer, 9 Biss. (U. S.) 487, 14 Fed. 247; Downing *v.* Traders' Bank, 2 Dill. (U. S.) 136, 7 Fed. Cas. No. 4,046, 11 Nat. Bankr. Reg. 371; *Ex p.* Harris, 2 Lowell (U. S.) 568, 11 Fed. Cas. No. 6,109, 16 Nat. Bankr. Reg. 432; *In re* Souther, 2 Lowell (U. S.) 320, 22 Fed. Cas. No. 13,184, 9 Nat. Bankr. Reg. 502; *Ex p.* Wildman, 1 Atk. 109; *Ex p.* Turquand, 3 Ch. D. 445, 45 L. J. Bankr. 153; *Ex p.* Tayler, 1 De G. & J. 302, 3 Jur. N. S. 753, 26 L. J. Bankr. 58, 5 Wkly. Rep. 669, 58 Eng. Ch. 234; *In re* Oriental Commercial Bank, L. R. 6 Eq. 582. See also *In re* Sherry, 101 Wis. 11, 76 N. W. 611, holding that where an assignor for creditors is contingently liable as indorser on commercial paper which is not due at the time of his assignment, but becomes due during the pendency of the assignment proceedings, the creditor may prove such claim when it becomes due and share in all subsequent dividends. But see Farmers' Bank *v.* Gilpin, 1 Del. Ch. 409, holding that an indorser of a note, though his liability has been fixed by protest, is not entitled as a creditor to a share of the estate of the maker under an assignment for the benefit of creditors.

A surety on a guardian's bond, though he has paid his liability, is not entitled to share in an assignment made by the guardian before breach of the bond. Church's Petition, 16 R. I. 231, 14 Atl. 874. But see Boltz's Estate, 133 Pa. St. 77, 19 Atl. 303, holding that in the distribution of an insolvent estate by the assignee, the sureties of the assignor, on an official bond on which they have been compelled to pay a deficit in his accounts, are

the maker of the note of course diminishes the dividend allowed on the claim.[34]

3. PRESENTATION, CONTEST, AND ALLOWANCE — a. Presentation — (I) *NOTICE TO PRESENT.* Where the assignee is required to give formal notice to creditors to present claims, claims are not barred until such notice is given in strict compliance with requirements.[35]

(II) *MANNER OF PRESENTATION.* Statutory requirements as to the manner of presentation of a claim must be observed.[36]

(III) *TIME OF PRESENTATION.* Creditors must present their claims against the assigned estate within the time prescribed by statute[37] or the instrument of assignment,[38] or be barred from participation in dividends until after payment of all claims presented within such time,[39] unless the time of presentation has been

entitled to be subrogated to the rights of the obligee in the bond.

34. Beals *v.* Mayher, 174 Mass. 470, 54 N. E. 857, 75 Am. St. Rep. 367; Sohier *v.* Loring, 6 Cush. (Mass.) 537.

35. *Illinois.*— National Bank *v.* Chicago First Nat. Bank, 37 Ill. App. 296.

Iowa.— The right of a creditor to except to allowances to other creditors, limited by statute to three months after filing of the list of allowances by the assignee, of which he must give prescribed notice, may be exercised more than three months after the allowances are filed where the prescribed notice has not been given. Matter of Cadwell's Bank, 89 Iowa 533, 56 N. W. 672. See also Lacey *v.* Newcomb, 95 Iowa 287, 63 N. W. 704.

Kansas.— Myers *v.* Board of Education, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263.

Nebraska.— Elwood *v.* Marsh, 31 Nebr. 134, 47 N. W. 639.

New Jersey.— Matter of Elmer, 60 N. J. Eq. 343, 46 Atl. 206; Morehead *v.* New York Metropolitan Nat. Bank, 41 N. J. Eq. 664, 7 Atl. 643.

New York.— Ludington's Petition, 5 Abb. N. Cas. (N. Y.) 307. See also Matter of Schaller, 62 How. Pr. (N. Y.) 40, holding that a referee's report upon the claims of creditors under an assignment for their benefit cannot be confirmed where no notice to creditors to produce their claims was given as prescribed by rule of court.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 885.

Manner of notice.— In New York, where an accounting in the supreme court is substituted for one under a general assignment act, it is proper that the same rules providing for advertising for claims, and notice to creditors, should be followed. Dickinson *v.* Earle, 31 N. Y. App. Div. 236, 52 N. Y. Suppl. 615.

Service by mail.— Service of notice to creditors to produce their claims under an assignment for their benefit cannot be made by mail without authority from the court. Matter of Schaller, 62 How. Pr. (N. Y.) 40.

36. Garner *v.* Fry, (Iowa 1898) 73 N. W. 1079; McKindley *v.* Nourse, 67 Iowa 118, 24 N. W. 750; Detroit Third Nat. Bank *v.* Haug, 82 Mich. 607, 47 N. W. 33, 11 L. R. A. 327; Mitchell *v.* Powers, 17 Oreg. 491, 21 Pac. 451.

Mailing claim.— In New York sending a claim to an assignee by mail is a sufficient presentation. Matter of Wiltse, 5 Misc. (N. Y.) 105, 25 N. Y. Suppl. 733.

Service on assignee's attorney.— It is competent for an assignee to accept service of a claim on his attorney, and if he does so, and reports the claim to the court, he is estopped to deny the validity of the service. *In re* Marley, 7 N. J. L. J. 48.

37. Computation of time.— The day on which an assignment is made is to be excluded in computing in what time creditors are to file their claims. Pearpoint *v.* Graham, 4 Wash. (U. S.) 232, 19 Fed. Cas. No. 10,877. In Iowa the three months allowed by Iowa Code (1873), §§ 2119, 2126, in which creditors may file claims against an insolvent debtor, begin to run from the first publication of the notice of assignment, and not from the time of mailing notice to the creditor. Scott *v.* Thomas, 94 Iowa 442, 62 N. W. 790. In New Hampshire the assignment does not take effect until delivered, and a creditor's proof of claim is seasonably made, if filed within six months of the delivery, although the assignment was executed and sworn to before delivery. Hill *v.* Rolfe, 61 N. H. 351.

Preference of claim.— Though the statute requires the claim to be filed in three months, an application to have a claim duly filed preferred may be made later. Matter of Knapp, 101 Iowa 488, 70 N. W. 626.

38. Time prescribed by deed.—Phenix Bank *v.* Sullivan, 9 Pick. (Mass.) 410. But see Peck *v.* Stimpson, 20 Pick. (Mass.) 312, holding that a creditor who became a party to an assignment after the first dividend was paid, but before the second was declared, is entitled to the full amount of the first dividend if the assignees have unappropriated funds enough to enable them to make such payment without disturbing the first dividend paid.

39. Time prescribed by statute.— *Illinois.* — Rassieur *v.* Jenkins, 170 Ill. 503, 48 N. E. 976; Snydacker *v.* Swan Land, etc., Co., 154 Ill. 220, 40 N. E. 466; Kean *v.* Lowe, 147 Ill. 564, 35 N. E. 350; Suppiger *v.* Seybt, 23 Ill. App. 468. *Compare* Joliet Nat. Bank *v.* O'Donnell, 165 Ill. 32, 45 N. E. 984.

Iowa.— Budd *v.* King, 83 Iowa 97, 48 N. W.

extended by the court,[40] or a sufficient excuse for the delay in presentation is made.[41]

b. Contest of Claims — (I) *WHO MAY CONTEST.* As a general rule all parties in interest have a standing to resist the allowance of claims in an assignment.[42]

975; Carter *v.* Lee, 82 Iowa 26, 47 N. W. 1014; Loomis *v.* Griffin, 78 Iowa 482, 43 N. W. 296; Conlee Lumber Co. *v.* Meyer, 74 Iowa 403, 38 N. W. 117; Smith *v.* Wheeler, 58 Iowa 659, 12 N. W. 626; Matter of Holt, 45 Iowa 301. *Compare* Brooke *v.* King, 111 Iowa 607, 82 N. W. 1021.

Kansas.— Barton *v.* Sticher, 5 Kan. App. 577, 48 Pac. 920.

Michigan.—Under How. Stat. (Mich.) c. 303, a creditor who establishes his claim after the payment of a dividend to other creditors is entitled to be placed on a footing of equality with other creditors, and to have his proportion of the dividend already declared paid out of the surplus in the assignee's hands before the declaration of any further dividend. Farwell *v.* Myers, 66 Mich. 678, 33 N. W. 760.

Nebraska.— Commercial Nat. Bank *v.* Lipp, 46 Nebr. 595, 65 N. W. 777; Clendenning *v.* Perrine, 32 Nebr. 155, 49 N. W. 334.

New Hampshire.—Nichols *v.* Cass, 65 N. H. 212, 23 Atl. 430; Tucker *v.* Beacham, 65 N. H. 119, 18 Atl. 234.

New Jersey.— New York Metropolitan Nat. Bank *v.* Morehead, 38 N. J. Eq. 493; Matter of Fogg, 37 N. J. Eq. 238; Ellison *v.* Lindsley, 33 N. J. Eq. 258.

New York.—A creditor may file a claim with the assignee after distribution and before final decree. Matter of Bowlby, 34 Misc. (N. Y.) 311, 69 N. Y. Suppl. 783. *Compare* Matter of Carter, 21 N. Y. App. Div. 118, 47 N. Y. Suppl. 383.

Ohio.—A creditor who does not present his claim prior to the payment of a dividend and within six months after publication of the notice of assignment may afterward present his claim and receive a dividend thereon equal to that paid to other creditors, in case there is money or assets remaining in the hands of the assignee sufficient to make such payment. Carpenter *v.* Dick, 41 Ohio St. 295; Owens *v.* Ramsdell, 33 Ohio St. 439.

Texas.— Lovenberg *v.* National Bank, 67 Tex. 440, 2 S. W. 874, 5 S. W. 816; Wynne *v.* Simmons Hardware Co., 67 Tex. 40, 1 S. W. 568.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 882.

40. Extension of time.— Nichols *v.* Cass, 65 N. H. 212, 23 Atl. 430; Tucker *v.* Beacham, 65 N. H. 119, 18 Atl. 234; Matter of Elmer, 60 N. J. Eq. 343, 46 Atl. 206; New York Metropolitan Nat. Bank *v.* Morehead, 38 N. J. Eq. 493.

41. Excuse for delay.— *Iowa.*— Scott *v.* Thomas, 94 Iowa 442, 62 N. W. 790.

Michigan.— Farwell *v.* Myers, 64 Mich. 234, 31 N. W. 128.

Missouri.— National Bank of Commerce *v.* Ripley, 161 Mo. 126, 61 S. W. 587; Maverick *v.* Heard, 99 Mo. 581, 12 S. W. 892; Fourth Nat. Bank *v.* Scudder, 15 Mo. App. 463; Matter of Joseph Uhrig Brewing Co., 11 Mo. App. 387.

Nebraska.— Elwood *v.* Marsh, 31 Nebr. 134, 47 N. W. 639.

New York.— Downey *v.* May, 19 Abb. N. Cas. (N. Y.) 177.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 884.

The fact that the claim is in litigation is no excuse for failure to present it in time. H. B. Claflin Co. *v.* Kelley, 169 Ill. 20, 48 N. E. 176.

Loss in mail.— Equity will not relieve against the statute of limitations, in favor of a creditor who failed to discover for several months that his claim had miscarried in transmission by mail. Smith *v.* Wheeler, 58 Iowa 659, 12 N. W. 626. See also Conlee Lumber Co. *v.* Meyer, 74 Iowa 403, 38 N. W. 117; Ellison *v.* Lindsley, 33 N. J. Eq. 258.

42. *Colorado.*— An assignee may except to a claim on behalf of the creditors, though not a creditor himself. Beifeld *v.* Martin, 4 Colo. App. 578, 37 Pac. 32.

Illinois.— An assignee and creditors who have proved their claims may object to the allowance of another claim. Dreyfus *v.* Union Nat. Bank, 164 Ill. 83, 45 N. E. 408. See also Seiter *v.* Mowe, 182 Ill. 351, 55 N. E. 526.

Iowa.— Where the assignee's report shows that a claim was filed after the expiration of three months from the publication of notice, it is the duty of the assignee to resist the allowance of such claim, as filed within that time, though no objection was made at the time it was filed. Conlee Lumber Co. *v.* Meyer, 74 Iowa 403, 38 N. W. 117.

Kentucky.— McNamara *v.* Schwaniger, 20 Ky. L. Rep. 1667, 49 S. W. 1061.

Maryland.— Luckemeyer *v.* Seltz, 61 Md. 313; Reiff *v.* Eshleman, 52 Md. 582; Mackintosh *v.* Corner, 33 Md. 598; Starr *v.* Dugan, 22 Md. 58.

Pennsylvania.— Wright's Estate, 182 Pa. St. 90, 38 Atl. 151; Jordan's Appeal, 107 Pa. St. 75.

United States.—An assignee may object to claims on the ground of fraud or want of consideration. Whetmore *v.* Murdock, 3 Woodb. & M. (U. S.) 380, 29 Fed. Cas. No. 17,509.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 890.

Agreement not to contest.— Where the claim of a creditor is excepted to, such creditor cannot object that the exceptant has no right to so object because, in consideration of a dividend in advance to him by the assignee, he agreed with the assignee to waive his right to except to the claims of other creditors. Lippincott *v.* Snowden, 48 N. J. Eq. 257, 22 Atl. 194.

Waiver of objections.— After going to trial

Usury will be disallowed even though the point is made by one who is adjudged to have no valid claim.[43]

(II) *HEARING AND DETERMINATION.* Under a statute which gives each creditor of an insolvent who has made an assignment the right to contest the claims of every other creditor, the validity of a lien given by the debtor in fraud of his creditors may be inquired into in such contest.[44]

c. Allowance of Claims — (I) *IN GENERAL.* A statutory power given to an assignee to adjust and allow demands against the estate of the assignor is a power to adjust according to law.[45]

(II) *DECISION.* The decision of the assignee in adjusting claims against the estate is generally made final by statute unless appealed from.[46]

(III) *REVIEW.* The method pointed out by statute for the review of the decision of the assignee on the allowance or disallowance of a claim must be observed.[47]

4. DISTRIBUTION AND PRIORITIES — a. Proceedings For Distribution — (I) *PARTIES.* All the creditors must be made parties to a bill for an account to fix the amount of a trust fund for creditors.[48]

on exceptions to a claim, claimant cannot object that his adversary has no standing to except to the claim. Crandall *v.* Carey-Lombard Lumber Co., 164 Ill. 474, 45 N. E. 988.

43. Hill *v.* Cornwall, 95 Ky. 512, 16 Ky. L. Rep. 97, 26 S. W. 540.

44. Union Trust Co. *v.* Trumbull, (Ill. 1890) 23 N. E. 355. See also Moore *v.* Williamson, 44 N. J. Eq. 496, 15 Atl. 587, 1 L. R. A. 336, holding that on exceptions to a claim the validity of a chattel mortgage upon which the claim is founded may be determined.

Burden of proof.— On the hearing of exceptions to a claim, the burden of proof is on claimant to establish the claim. Crandall *v.* Carey-Lombard Lumber Co., 164 Ill. 474, 45 N. E. 988; Rippelmeyer *v.* P. Hanson Hiss Mfg. Co., 90 Md. 386, 45 Atl. 529. See also Matter of Jeselson, 10 Daly (N. Y.) 104.

Docketing of contest.— In Illinois a contest on a claim need not be docketed under the general title of the assignment proceedings, but may be docketed as a separate proceeding. Crandall *v.* Carey-Lombard Lumber Co., 164 Ill. 474, 45 N. E. 988.

A judicial finding that a claim is valid precludes the assignee from resisting its payment on the ground that it was not properly filed. Brooke *v.* King, 111 Iowa 607, 82 N. W. 1021.

45. Board St. Louis Public Schools *v.* Broadway Sav. Bank, 12 Mo. App. 104 [*affirmed* in 84 Mo. 56]. See also Matter of Carter, 98 Iowa 261, 67 N. W. 239, holding that the distribution should be made in accordance with the legal rights of the creditors; and the fact that one does not petition specially for a separate dividend from the estate of a firm and of its members, to which he is entitled, or files his claim against the partnership only, where all are covered by the same assignment, does not relieve the court of the duty of ordering such dividends paid him as his proof entitles him to receive.

An assignee has no power to disallow a valid claim against the assignor for the reason that the owner of the claim has committed a fraud upon another creditor. Kohn *v.* Hine, 7 Kan. App. 776, 54 Pac. 117.

The mere fabrication of written evidence to support a lawful claim does not destroy the right to allowance of the claim if it is substantiated by other evidence. Lippincott *v.* Snowden, 48 N. J. Eq. 257, 22 Atl. 194.

46. American Nat. Bank *v.* Branch, 57 Kan. 27, 45 Pac. 88; State *v.* Kansas Ins. Co., 32 Kan. 655, 5 Pac. 190; Oberlin Loan, etc., Co. *v.* Kitchen, 8 Kan. App. 445, 57 Pac. 494.

In Missouri the assignee's allowance is likened to a judgment *in rem* (Eppright *v.* Kauffman, 90 Mo. 25, 1 S. W. 736) and merges the original demand to the extent that suit cannot be brought against the debtor on the original demand after the assignee has allowed it (Elsea *v.* Pryor, 87 Mo. App. 157; Rice *v.* McClure, 74 Mo. App. 379; Kendrick *v.* Guthrie Mfg. Co., 60 Mo. App. 22).

47. In Kansas upon an appeal to the district court from the decision of an assignee the jurisdiction of the district court is appellate only. Kohn *v.* Hine, 7 Kan. App. 776, 54 Pac. 117.

In Missouri appeals from allowances made by an assignee are governed by the statute relating to appeals from justices of the peace. Hayward *v.* Graham Book, etc., Co., 59 Mo. App. 453; Board St. Louis Public Schools *v.* Broadway Sav. Bank, 12 Mo. App. 104; Matter of Joseph Uhrig Brewing Co., 11 Mo. App. 387. On appeal from the action of an assignee the latter cannot testify as to the contents of the claim originally presented before him, as the claim itself should be introduced. Real Estate Sav. Inst. *v.* Fisher, 9 Mo. App. 593.

In Rhode Island a bill in equity is the proper method to enforce the allowance of a creditor's claim against an assignee, under R. I. Pub. Laws (July 30, 1889), c. 820, §§ 1, 3, providing for suits by creditors against assignees to test the validity of disallowed claims. Osborn *v.* Colwell, 17 R. I. 196, 21 Atl. 103.

48. Greene *v.* Sisson, 2 Curt. (U. S.) 171, 10 Fed. Cas. No. 5,768. See also Conrey *v.*

(II) *APPEAL.* An assignee has no beneficial interest in the funds reported for distribution, and no standing as assignee to appeal from the decree distributing the funds.[49]

b. Allowance of Interest. Where the assignment contains no restriction on the subject interest is paid on the claims if there are sufficient assets.[50]

c. Priorities Between Creditors — (I) *IN GENERAL.* Where property is held in trust for the benefit of creditors generally, one creditor cannot, to the exclusion of all others, secure the payment of his debt where he can establish no prior lien.[51]

(II) *EXPENSES OF ASSIGNMENT.* It is proper to place the indebtedness incurred by the assignee, and his proper charges as assignee, paramount to the claims of general creditors.[52]

(III) *PARTNERSHIP AND INDIVIDUAL CREDITORS.* If there be partnership property, and also separate property of a partner, the partnership debts are to be

His Creditors, 8 La. Ann. 371, holding that all the creditors, both privileged and ordinary, must be made parties to the tableau and notified. A separate tableau of distribution among a particular class of creditors is unlawful.

Cross-bill.— Where the assets to be distributed are the proceeds of sale of the property of an insolvent corporation, conveyed by general assignment, and sold under the order of the court in a suit instituted by the trustees, the creditors having come in and proved their claims, no cross-bill is necessary to enable the court to distribute the money among all the creditors, disregarding the preferences declared by the assignment. Lehman *v.* Tallassee Mfg. Co., 64 Ala. 567.

49. Ahl's Estate, 15 Pa. Super. Ct. 224. But see Clark *v.* Burke, 163 Ill. 334, 45 N. E. 235, holding that where the assignee of an insolvent estate is ordered by the court to pay a certain claim, and objects to the order as erroneous, his remedy is by appeal or writ of error.

Supersedeas.— An appeal from an order by a county court to an assignee to pay over the moneys in his hands to persons appointed by creditors to receive them suspends further proceedings under such order, and suspends the effect of an alternative order for commitment of the assignee for non-payment. People *v.* Prendergast, 117 Ill. 588, 6 N. E. 695.

50. Matter of Duncan, 10 Daly (N. Y.) 95; Matter of Fay, 6 Misc. (N. Y.) 462, 27 N. Y. Suppl. 910; Matter of Shipman, 61 How. Pr. (N. Y.) 515; Scott *v.* Morris, 9 Serg. & R. (Pa.) 123; Lloyd *v.* Preston, 146 U. S. 630, 13 S. Ct. 131, 36 L. ed. 1111.

A creditor who comes in after a dividend has been declared and receives such dividend is not entitled to interest thereon. Peck *v.* Stimpson, 20 Pick. (Mass.) 312.

Assignee as creditor.—On sale of real estate by the assignee discharged of liens, under an order of the court, the assignee received the proceeds in trust for the lien creditors; the balance, after payment of the others, to be distributed among the general creditors. It was held that such assignee could not hold the money as assignee after confirmation of the sale, and as creditor recover interest on his debt pending distribution. Wilhelm's Estate, 182 Pa. St. 281, 37 Atl. 819.

Where the assignment is inconsistent with such interest, as where it provides for all debts as cash on the day of assignment, with provision for returning any surplus to the assignor, no interest can be allowed after the assignment. Home Sav. Bank *v.* Peirce, 156 Mass. 307, 31 N. E. 483.

51. Antignance *v.* Georgia Cent. Bank, 26 Miss. 110. See also Mobile Branch Bank *v.* Robertson, 19 Ala. 798, holding that where a debtor executes a trust deed to secure certain of his creditors a court of chancery will make a *pro rata* distribution of the proceeds among all the creditors who are provided for, if the deed creates no preference among them.

A judgment obtained subsequent to an assignment for the benefit of creditors has no priority over other claims existing before the assignment, but not in judgment. McCallie *v.* Walton, 37 Ga. 611, 95 Am. Dec. 369.

Where chattel mortgages by assignor are void as to assignee, and the mortgagees file their claims as general creditors, one mortgagee is entitled to no priority in dividends over the others on the ground that his mortgage was prior to the other mortgages. Besuden *v.* Besuden, 57 Ohio St. 508, 49 N. E. 1024.

52. Hooven, etc., Co. *v.* Burdette, 51 Ill. App. 115; Ætna Nat. Bank *v.* Shotwell, 13 N. Y. Suppl. 828, 37 N. Y. St. 253; Harper *v.* Dennis, 17 R. I. 9, 20 Atl. 96; Akers *v.* Rowan, 36 S. C. 87, 15 S. E. 350.

As to allowances to assignee see *supra*, XIII, D.

A creditor at whose suit property is secured for the benefit of all the creditors is entitled, out of the trust fund, to the expenses incurred by him in the suit. Merwin *v.* Richardson, 52 Conn. 223.

Continuance of business.— When an assignment has been made for the benefit of creditors, and an order is made by the probate court authorizing the assignee to continue the business, a creditor who thereafter sells stock to the assignee to be used and which is used in the prosecution of the business under said order is entitled to be paid out of the funds in the hands of the assignee in full. Cincinnati Ice Co. *v.* Pfau, 6 Ohio Dec. (Re-

paid out of the proceeds of the joint estate, and the individual debts are to be paid out of the proceeds of the separate estate.[53]

(IV) *PREFERENCES IN ASSIGNMENT.* In jurisdictions permitting preferences[54] the assignee, on distribution, must pay claims in the order of their preference.[55] So far as statutes do not otherwise provide, the benefited creditor must know of the debtor's fraudulent intent, or at least have the means of knowing, in order to render him subject to attack of other creditors or the assignee.[56]

print) 969, 5 Cinc. L. Bul. 710, 9 Am. L. Rec. 306.

53. Joint creditors have no claim on the fund arising from the separate estate until the individual debts are satisfied; and separate creditors can only seek payment out of the surplus of the partnership effects after the satisfaction of the joint liability.

Illinois.— Preston *v.* Colby, 117 Ill. 477, 4 N. E. 375; Rainey *v.* Nance, 54 Ill. 29; Pahlman *v.* Graves, 26 Ill. 405; Weil *v.* Jaeger, 73 Ill. App. 271.

Iowa.— Matter of Cadwell's Bank, 89 Iowa 533, 56 N. W. 672; Budd *v.* King, 83 Iowa 97, 48 N. W. 975; Miller *v.* Clarke, 37 Iowa 325; Switzer *v.* Smith, 35 Iowa 269.

Maryland.— Dodge *v.* Doub, 8 Gill (Md.) 16.

New Jersey.— Scull *v.* Alter, 16 N. J. L. 147.

New York.— Where an individual assigns for the benefit of individual creditors and also the creditors of a firm to which he belongs all share equally. Mills *v.* Parkhurst, 9 N. Y. Suppl. 109, 30 N. Y. St. 138.

Pennsylvania.— Houseal's Appeal, 45 Pa. St. 484.

Rhode Island.— Colwell *v.* Weybosset Nat. Bank, 16 R. I. 288, 15 Atl. 80, 17 Atl. 913.

United States.—Drake *v.* Taylor, 6 Blatchf. (U. S.) 14, 7 Fed. Cas. No. 4,067.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 921.

A claim will be allowed against the partnership assignment if really a firm debt, though in form the debt of the individual members. Green *v.* Walker, 5 Del. Ch. 26; Union Nat. Bank *v.* Dreyfus, 61 Ill. App. 323.

Where there are no partnership funds, and no solvent partner, the partnership creditors are entitled, *pro rata* with the separate creditors, to payment from the assignee of one of the partners under an assignment for the equal benefit of his creditors. Alexander *v.* Gorman, 15 R. I. 421, 7 Atl. 243; Swearingen *v.* Hendley, 1 Tex. Unrep. Cas. 639.

54. As to validity of assignment giving preferences see *supra*, IV.

Illegal preference.— Creditors whom the debtor has attempted to prefer, but whose preferences are void under the insolvent act, are entitled to share *pro rata* with all the other creditors. White *v.* Cotzhausen, 129 U. S. 329, 9 S. Ct. 309, 32 L. ed. 677; Comer *v.* Tabler, 44 Fed. 467. See also Howland *v.* Mosher, 12 Cush. (Mass.) 357.

55. U. S. Bank *v.* Stewart, 4 Dana (Ky.) 27; Pratt *v.* Adams, 7 Paige (N. Y.) 615. See also Matter of Sisson, 59 Hun (N. Y.) 330, 12 N. Y. Suppl. 820, 36 N. Y. St. 290, holding that where an assignor prefers several creditors to the extent of one third of his estate, designating the order in which the preferred creditors shall be paid, and such one third proves insufficient to pay them in full, they will take in the order designated and not *pro rata*.

Mistake in schedule.— The fact that the assignment was made with preferences, and refers to "Schedule A," annexed, as containing the preferences, when in fact the schedule of preferences annexed is called "B," does not entitle plaintiff to an order requiring the assignee to pay the creditors *pro rata*, instead of by preferences, where there is only one schedule annexed to such assignment. Kleinschmidt *v.* Steele, 15 Mont. 181, 38 Pac. 827.

Usury in preference.— Though a preference in a general assignment is made up in part of usurious interest, the other creditors are precluded by the assignment from questioning the validity of the preference. Peyser *v.* Myers, 56 Hun (N. Y.) 175, 9 N. Y. Suppl. 229, 30 N. Y. St. 837.

Waiver of preference.— Where one entitled to have his claim preferred files it with the county judge in the regular way, and it is allowed like that of an ordinary creditor, no preference being given, from which allowance no appeal is taken, and he afterward accepts from the assignee two dividends declared, he waives his right to afterward insist on the payment of his claim in full. Anheuser-Busch Brewing Assoc. *v.* Morris, 36 Nebr. 31, 53 N. W. 1037. So a trustee who is entitled to a preference as to certain claims under a trust deed waives such preference by admitting in his answer, in an action by a creditor for an accounting, that he is not entitled thereto. French *v.* Townes, 10 Gratt. (Va.) 513.

56. *Illinois.*— Geneser *v.* Telgman, 37 Ill. App. 374; *In re* Geohegan, 24 Ill. App. 157.

Indiana.—Fuller, etc., Co. *v.* Mehl, 134 Ind. 60, 33 N. E. 733.

Iowa.— Bolles *v.* Creighton, 73 Iowa 199, 34 N. W. 815; Van Patten *v.* Burr, 55 Iowa 224, 7 N. W. 522.

Michigan.— Field *v.* Fisher, 65 Mich. 606, 32 N. W. 838.

Nebraska.— Banks *v.* Omaha Barb Wire Co., 30 Nebr. 128, 46 N. W. 251; Nelson *v.* Garey, 15 Nebr. 531, 19 N. W. 630.

New York.— Central Nat. Bank *v.* Seligman, 138 N. Y. 435, 34 N. E. 196, 53 N. Y. St. 14. See also Knower *v.* Central Nat. Bank, 124 N. Y. 552, 27 N. E. 247, 37 N. Y. St. 89, 21 Am. St. Rep. 700.

(v) *Statutory Preferences.* By statute in many states certain claims, such as wages due employees,[57] claims of a fiduciary character,[58] or taxes due by the assignor[59] are entitled to preferential payment out of the assets of the assigned estate.

(vi) *Trust Funds.* The equitable right to follow a special deposit or trust fund into the hands of the assignee as being a claim superior to that of a general creditor under the assignment is recognized.[60] Some decisions, however,

Oregon.— O'Connell *v.* Hansen, 29 Oreg. 173, 44 Pac. 387.

Pennsylvania.— Lake Shore Banking Co. *v.* Fuller, 110 Pa. St. 156, 1 Atl. 731; Hutchinson *v.* McClure, 20 Pa. St. 63.

Rhode Island.— Goldsworthy *v.* Roger Williams' Nat. Bank, 15 R. I. 586, 10 Atl. 632.

South Carolina.— Haynes *v.* Hoffman, 46 S. C. 157, 24 S. E. 103; Akers *v.* Rowan, 33 S. C. 451, 12 S. E. 165, 10 L. R. A. 705.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1011.

57. Wages.—*Illinois.*—A bookkeeper (Signor *v.* Webb, 44 Ill. App. 338) or a traveling salesman (Eppstein *v.* Webb, 44 Ill. App. 341) is not a laborer, servant, or employee within the meaning of the statute authorizing preferential payment out of the assets of his insolvent employer's estate.

Indiana.— Eversole *v.* Chase, 127 Ind. 297, 26 N. E. 835; Bass *v.* Doerman, 112 Ind. 390, 14 N. E. 377.

Iowa.— Laborers who work in a coal mine after a sale thereof under order of court, by an assignee for the benefit of creditors, are not entitled to preference for their claims out of the proceeds of such sale in the hands of the assignee. Haw *v.* Burch, (Iowa 1898) 77 N. W. 461.

Kentucky.— Winter *v.* Howell, 22 Ky. L. Rep. 697, 58 S. W. 591; Cornell Wind Engine, etc., Co. *v.* Breed, 13 Ky. L. Rep. 365. But a laundry is not a "manufacturing establishment," within the meaning of Ky. Stat. § 2487, providing that the employees of such an establishment shall have a lien upon the property employed in the business when assigned for the benefit of creditors. Muir *v.* Samuels, (Ky. 1901) 62 S. W. 481.

Maryland.— Hess *v.* Jewell, 85 Md. 235, 36 Atl. 758.

Montana.— Marshall *v.* Livingston Nat. Bank, 11 Mont. 351, 28 Pac. 312; Flanders *v.* Murphy, 10 Mont. 398, 25 Pac. 1052.

New York.— Matter of Scott, 148 N. Y. 588, 42 N. E. 1079; Spencer *v.* Hodgman, 57 Hun (N. Y.) 490, 11 N. Y. Suppl. 241, 33 N. Y. St. 33; Matter of Heath, 46 Hun (N. Y.) 114; Matter of Fowler, 29 Misc. (N. Y.) 425, 60 N. Y. Suppl. 545; Matter of Jacobs, 27 Misc. (N. Y.) 757, 59 N. Y. Suppl. 549; *In re* Sawyer, 29 N. Y. Suppl. 1097, 61 N. Y. St. 736, 31 Abb. N. Cas. (N. Y.) 342. A salesman on commission is an employee within the statute. Matter of Ginsburg, 27 Misc. (N. Y.) 745, 59 N. Y. Suppl. 656; *In re* Smith, 59 N. Y. Suppl. 799. *Compare* Matter of Fowler, 29 Misc. (N. Y.) 425, 60 N. Y. Suppl. 545. But a claim for cartage due to one engaged in a general trucking business, the work being done by the piece and monthly bills rendered, it not appearing that claimant personally performed the services, is not entitled to preference. Matter of Kimberly, 37 N. Y. App. Div. 106, 55 N. Y. Suppl. 1024.

Ohio.—*In re* Lowry, 7 Ohio S. & C. Pl. Dec. 282; *In re* Evans, 3 Ohio S. & C. Pl. Dec. 166, 2 Ohio N. P. 77; *In re* Engle, 1 Ohio S. & C. Pl. Dec. 101, 1 Ohio N. P. 110; *In re* Reefer, 6 Ohio N. P. 338. But one employed by the publisher of a legal directory as traveling agent in obtaining subscriptions and in selling the directory to attorneys and others, and collecting accounts, is not an "operative," within Ohio Rev. Stat. § 6355. Matter of Sloan, 60 Ohio St. 472, 54 N. E. 516.

Oregon.— Falconio *v.* Larsen, 31 Oreg. 137, 48 Pac. 703, 37 L. R. A. 254.

Pennsylvania.— Matter of Thompson Glass Co., 186 Pa. St. 383, 40 Atl. 526; Fair Hope North Savage Fire Brick Co.'s Estate, 183 Pa. St. 96, 38 Atl. 519; Child's Estate, 135 Pa. St. 214, 19 Atl. 897; Roberts' Appeal, 110 Pa. St. 325, 5 Atl. 618. But Pa. Act (May 12, 1891), which provides that all moneys that may hereafter become due for labor and services of any clerk employed in stores or elsewhere, and all other tradesmen hired for wages or salary, from any person or persons, shall be preferred, etc., does not apply to a traveling salesman whose compensation is a commission on sales made. Mulholland *v.* Wood, 166 Pa. St. 536, 36 Wkly. Notes Cas. (Pa.) 140, 31 Atl. 248.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 902; and *supra*, IV, A, 2, c.

58. In Kentucky debts due by an assignor as guardian, committee, trustee, or personal representative will be paid in full before general creditors receive anything. Weiser *v.* Muir, 103 Ky. 499, 20 Ky. L. Rep. 179, 45 S. W. 512; Calloway *v.* Calloway, 19 Ky. L. Rep. 870, 39 S. W. 241.

In New York, in making distribution of the estate of an absconding, concealed, or nonresident debtor, the trustees are bound to prefer debts owing by him as guardian, executor, etc., and payments made to an executor before he qualified will be within the meaning of the statute. Matter of Faulkner, 7 Hill (N. Y.) 181, 1 How. Pr. (N. Y.) 207.

59. Taxes.— Huiscamp *v.* Albert, 60 Iowa 421, 15 N. W. 264; Matter of Ripsom, etc., Fur Co., 32 Misc. (N. Y.) 56, 66 N. Y. Suppl. 113; Matter of Ginsburg, 27 Misc. (N. Y.) 745, 59 N. Y. Suppl. 656; *In re* Riddell, 93 Wis. 564, 67 N. W. 1135.

60. *Iowa.*— Matter of Knapp, 101 Iowa 488, 70 N. W. 626; Davenport Plow Co. *v.*

limit the doctrine to cases where the identical property or its proceeds can be traced.[61]

5. Payment and Release — a. Payment — (I) *Order For Payment.* Under a statute vesting the court with supervisory jurisdiction over an assigned estate, claims against an assigned estate should be paid by the assignee only on direction of the court.[62]

(II) *Amount of Claim* — (A) *In General.* The date of the assignment is the date at which claims are to be taken, in calculating their amount for the purpose of declaring dividends.[63]

(B) *Deduction of Security.* Where the creditor has security the weight of authority authorizes him to prove up his whole claim, undiminished by the value of the security or the amount realized thereon, the limitation being the satisfaction of his claim.[64] But in several jurisdictions it is held that such creditor can

Lamp, 80 Iowa 722, 45 N. W. 1049, 20 Am. St. Rep. 442; Boyer Independent Dist. *v.* King, 80 Iowa 497, 45 N. W. 908.

Kansas.— Myers *v.* Board of Education, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263; Peak *v.* Ellicott, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90; Wallace *v.* Caldwell, 9 Kan. App. 538, 59 Pac. 379.

Missouri.— Harrison *v.* Smith, 83 Mo. 210, 53 Am. Rep. 571; *In re* Schwartz Bros. Commission Co., 85 Mo. App. 671. *Compare* Stoller *v.* Coates, 88 Mo. 514.

New York.—People *v.* Rochester City Bank, 96 N. Y. 32; Matter of Mumford, 5 N. Y. St. 303; Kip *v.* State Bank, 10 Johns. (N. Y.) 63.

Texas.— Continental Nat. Bank *v.* Weems, (Tex. 1888) 6 S. W. 802.

Wisconsin.— Francis *v.* Evans, 69 Wis. 115, 33 N. W. 93; McLeod *v.* Evans, 66 Wis. 401, 28 N. W. 173, 214, 57 Am. Rep. 287.

United States.— Peters *v.* Bain, 133 U. S. 670, 10 S. Ct. 354, 33 L. ed. 696.

See, generally, Trusts; and 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 912½.

61. *Illinois.*— Seiter *v.* Mowe, 182 Ill. 351, 55 N. E. 526; Lanterman *v.* Travous, 174 Ill. 459, 51 N. E. 805; Bayor *v.* American Trust, etc., Bank, 157 Ill. 62, 41 N. E. 622; Wetherell *v.* O'Brien, 140 Ill. 146, 29 N. E. 904, 33 Am. St. Rep. 221.

Kansas.— Travellers Ins. Co. *v.* Caldwell, 59 Kan. 156, 52 Pac. 440; Burrows *v.* Johntz, 57 Kan. 778, 48 Pac. 27; Wallace *v.* Caldwell, 9 Kan. App. 538, 59 Pac. 379.

Kentucky.— See Woodring *v.* White, 12 Ky. L. Rep. 505.

Maryland.— Drovers', etc., Nat. Bank *v.* Roller, 85 Md. 495, 37 Atl. 30, 60 Am. St. Rep. 344, 36 L. R. A. 767.

New Jersey.— Vanlieu *v.* Disborough, 13 N. J. L. 343.

New York.— Cavin *v.* Gleason, 105 N. Y. 256, 11 N. E. 504; Person *v.* Oberteuffer, 59 How. Pr. (N. Y.) 339; Kip *v.* State Bank, 10 Johns. (N. Y.) 63.

Pennsylvania.— Jamison's Estate, 163 Pa. St. 143, 34 Wkly. Notes Cas. (Pa.) 481, 29 Atl. 100.

62. Clendenning *v.* Perrine, 32 Nebr. 155, 49 N. W. 334, holding, however, that where claims have been paid without a dividend being declared, and the account of the assignee, which includes such payments, is approved by the court, the error is cured.

The court may order a dividend without a formal application therefor. *In re* Hooker, 75 Iowa 377, 39 N. W. 652.

Notice of dividend.—The assignee need not notify a creditor that a dividend is payable, but the creditor should apply to the assignee therefor. Tomlinson *v.* Smallwood, 15 N. J. Eq. 286. But see Dobyns *v.* Dobyns, 1 Ky. L. Rep. 400, 2 Ky. L. Rep. 274, holding that the assignee should ascertain in person, or by authority of the court, the extent to which the assets will discharge the debts, and without demand pay the creditors *pro rata* according to their rights of equality and equity.

Time of order.— An order of distribution made before the expiration of the time limited by statute for the presentation and filing of claims is a nullity. Union Nat. Bank *v.* Doane, 140 Ill. 193, 29 N. E. 906.

63. Jamison's Estate, 163 Pa. St. 143, 34 Wkly. Notes Cas. (Pa.) 481, 29 Atl. 100. See also *supra*, XIV, B, 2, a.

64. No deduction.—*Colorado.*—Erle *v.* Lane, 22 Colo. 273, 44 Pac. 591; Hendrie *v.* Graham, 14 Colo. App. 13, 59 Pac. 219.

Connecticut.— Findlay *v.* Hosmer, 2 Conn. 350.

Illinois.— Yates *v.* Dodge, 123 Ill. 50, 13 N. E. 847; Matter of Bates, 118 Ill. 524, 9 N. E. 257, 59 Am. Rep. 383; Mechanics' L. & T. Co. *v.* American Exch. Nat. Bank, 27 Ill. App. 154. *Compare* Peoria First Nat. Bank *v.* Commercial Nat. Bank, 151 Ill. 308, 37 N. E. 1019.

Michigan.— Matter of Scofield Buggy Co., 89 Mich. 15, 50 N. W. 753; Detroit Third Nat. Bank *v.* Haug, 82 Mich. 607, 47 N. W. 33, 11 L. R. A. 327; Southern Michigan Nat. Bank *v.* Byles, 67 Mich. 296, 34 N. W. 702.

New Hampshire.— Moses *v.* Ranlet, 2 N. H. 488.

New York.— People *v.* Remington, 121 N. Y. 328, 24 N. E. 793, 31 N. Y. St. 289, 8 L. R. A. 458; *In re* Ives, 11 N. Y. Suppl. 650, 655, 25 Abb. N. Cas. (N. Y.) 63; Jervis *v.* Smith, 7 Abb. Pr. N. S. (N. Y.) 217.

North Carolina.— Brown *v.* Merchants', etc., Nat. Bank, 79 N. C. 244.

Oregon.— Kellogg *v.* Miller, 22 Oreg. 406, 30 Pac. 229, 29 Am. St. Rep. 618.

only receive a dividend on the balance of his claim after the security has been deducted.[65] Should the security more than satisfy the claim after the dividend has been paid the excess goes to the assignee.[66]

(III) *APPLICATION OF PAYMENT.* Where an assignee, acting under an assignment by the debtor for the benefit of creditors generally, makes payments to a creditor who holds several obligations against the debtor, some of which are unsecured, others of which are secured, the payments must be applied *pro rata* to all of the obligations, secured as well as unsecured, and without regard to any seniority as between the obligations in date of maturity.[67]

(IV) *EFFECT OF PAYMENT*—(A) *In General.* A general assignment with no provision for a release by creditors accepting its benefits does not preclude

Pennsylvania.— Jamison's Estate, 163 Pa. St. 143, 34 Wkly. Notes Cas. (Pa.) 481, 29 Atl. 100; Miller's Estate, 82 Pa. St. 113, 22 Am. Rep. 754; Graeff's Appeal, 79 Pa. St. 146; Brough's Estate, 71 Pa. St. 460; Patten's Appeal, 45 Pa. St. 151, 84 Am. Dec. 479; Keim's Appeal, 27 Pa. St. 42; Morris *v.* Olwine, 22 Pa. St. 441; Shunk's Appeal, 2 Pa. St. 304.

Rhode Island.— Greene *v.* Jackson Bank, 18 R. I. 779, 30 Atl. 963; Allen *v.* Danielson, 15 R. I. 480, 8 Atl. 705 [*overruling* Knowles' Petition, 13 R. I. 90].

South Carolina.— Ragsdale *v.* Winnsboro Bank, 45 S. C. 575, 23 S. E. 947; Tennant *v.* Stoney, 1 Rich. Eq. (S. C.) 222, 44 Am. Dec. 213.

Tennessee.— Citizens' Bank *v.* Kendrick, 92 Tenn. 437, 21 S. W. 1070, 36 Am. St. Rep. 96.

Vermont.— West *v.* Rutland Bank, 19 Vt. 403.

West Virginia.— Williams *v.* Overholt, 46 W. Va. 339, 33 S. E. 226.

Wisconsin.— *In re* Meyer, 78 Wis. 615, 48 N. W. 55, 23 Am. St. Rep. 435, 11 L. R. A. 841.

United States.— Chemical Nat. Bank *v.* Armstrong, 59 Fed. 372, 16 U. S. App. 465, 8 C. C. A. 155, 28 L. R. A. 231; Kortlander *v.* Elston, 52 Fed. 180, 6 U. S. App. 283, 2 C. C. A. 657.

England.— *In re* Barned's Banking Co., L. R. 3 Ch. 769, 39 L. J. Ch. 759, 22 L. T. Rep. N. S. 895, 18 Wkly. Rep. 944; Greenwood *v.* Taylor, 1 Russ. & M. 185.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 937.

65. Must deduct.— *Arkansas.*— Jamison *v.* Adler-Goldman Commission Co., 59 Ark. 548, 28 S. W. 35.

Indiana.— Beardsley *v.* Marsteller, 120 Ind. 319, 22 N. E. 315; Wheeler *v.* Hawkins, 116 Ind. 515, 19 N. E. 470; Stix *v.* Sadler, 109 Ind. 254, 9 N. E. 905.

Iowa.— Matter of Doolittle, 104 Iowa 403, 73 N. W. 867; Wurtz *v.* Hart, 13 Iowa 515.

Kansas.— Security Invest. Co. *v.* Richmond Nat. Bank, 58 Kan. 414, 49 Pac. 521; American Nat. Bank *v.* Branch, 57 Kan. 27, 45 Pac. 88.

Kentucky.— If a creditor has a lien he shall not share in the assignment till other creditors have received an amount equal to what he realizes on his security. Louisville Bank *v.* Lockridge, 92 Ky. 472, 13 Ky. L. Rep. 673, 18 S. W. 1; Fishback *v.* Ambrose, 13 Ky. L. Rep. 303.

Maryland.— National Union Bank *v.* National Mechanics' Bank, 80 Md. 371, 30 Atl. 913, 45 Am. St. Rep. 350, 27 L. R. A. 476.

Massachusetts.— Merchants Nat. Bank *v.* Eastern R. Co., 124 Mass. 518; Farnum *v.* Boutelle, 13 Metc. (Mass.) 359; Armory *v.* Francis, 16 Mass. 308.

New Jersey.— Bell *v.* Fleming, 12 N. J. Eq. 13.

Ohio.— Searle *v.* Brumback, 2 Ohio Dec. (Reprint) 653, 4 West. L. Month. 330; *In re* Spence, 7 Ohio S. & C. Pl. Dec. 386.

Washington.— Neufelder *v.* North British, etc., Ins. Co., 10 Wash. 393, 39 Pac. 110, 45 Am. St. Rep. 793; Matter of Frasch, 5 Wash. 344, 31 Pac. 755, 32 Pac. 771.

66. Excess of security.— Matter of Bates, 118 Ill. 524, 9 N. E. 257, 59 Am. Rep. 383; Allen *v.* Danielson, 15 R. I. 480, 8 Atl. 705.

67. Cohen *v.* L'Engle, 29 Fla. 655, 11 So. 44. See also Commercial Bank *v.* Cunningham, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; Scott *v.* Ray, 18 Pick. (Mass.) 360, which cases hold that where an insolvent assigns all his property for the benefit of those creditors who become parties to the assignment and thereby release their claims, and a dividend is received by one of the creditors, it must be appropriated ratably to all his claims against the debtor — as well to those upon which other parties are liable or which are otherwise secured as to those which are not so secured. But see Bailey *v.* Bergen, 4 Thomps. & C. (N. Y.) 642, wherein it appeared that plaintiff held three notes made by C, and indorsed by B, and falling due at various times. Before either came due, C made a general assignment for the benefit of his creditors to plaintiff, in which assignment these notes were preferred. Plaintiff collected, as assignee, enough money to pay the notes in part. It was held that the application of the sum received in payment of the notes first falling due was proper. The assignee was not obliged to apply it upon each note *pro rata*.

An assignor cannot object to a creditor's application of a payment by the assignee, if such application is to the assignor's advantage. Buell *v.* Burlingame, 11 Colo. 164, 17 Pac. 509.

such creditors from collecting by suit balances remaining due upon their claims after they have received their dividends from the assignee.[68]

(B) *Payment by Mistake.* A creditor who accepts payment of his claim made by mistake of the assignee becomes a party to the assignment and subjects himself to the jurisdiction of the court, so that restitution may be ordered in the assignment proceeding.[69]

(V) *Proceedings to Enforce Payment*—(A) *Right to Sue.* A creditor for whom property is assigned may sue the assignee to recover his dividend.[70]

(B) *Parties.* In a suit to compel an assignee to pay the *pro rata* due on a claim the assignor is not a necessary party.[71]

(C) *Personal Liability of Assignee.* An assignee who applies the trust fund to the payment of one creditor, leaving the remainder entitled to a *pro rata* share wholly unpaid, is personally responsible to them.[72]

68. Sanborn *v.* Norton, 59 Tex. 308.

Payment by the assignee to a preferred creditor as directed in the assignment vests title in such creditor to the money so paid, though the assignment is, in an action afterward begun, declared fraudulent as to creditors, where such preferred creditor has not participated in the fraud. Knower *v.* Central Nat. Bank, 124 N. Y. 552, 27 N. E. 247, 37 N. Y. St. 89, 21 Am. St. Rep. 700. But see Johns *v.* Erb, 5 Pa. St. 232, holding that where the assignee of a debtor for the benefit of creditors pays a judgment preferred by the assignment, taking an indemnity for so doing, such payment does not preclude the other creditors from contesting the validity of the judgment.

Payment of a dividend by an assignee on a claim duly proved or admitted before the auditor of his account establishes the *bona fides* of the claim. Sheppard's Estate, 180 Pa. St. 57, 36 Atl. 422.

69. Matter of Morgan, 99 N. Y. 145, 1 N. E. 406. See also Matter of Wiltse, 5 Misc. (N. Y.) 105, 25 N. Y. Suppl. 733, holding that the court has power, at the instance of the assignee, to amend a decree of distribution theretofore made, and to compel creditors who were paid under it to refund so much as they received in excess of their proper shares. And see Lyons-Thomas Hardware Co. *v.* Perry Stove Mfg. Co., 88 Tex. 468, 27 S. W. 100, holding that where, in an action by creditors of an insolvent corporation to set aside a trust deed for the benefit of creditors, money has been paid by the trustee to a creditor, who has intervened, under a void order of the court, the court may order the creditor to return into court such money, the case not having been fully adjudicated.

An assignee paid out of the trust funds a portion of a mortgage debt before foreclosure proceedings, under an agreement with the mortgagee that if the general creditors should become dissatisfied the money would be repaid. It was held that the assignee could recover back the money so paid. Beardsley *v.* Marsteller, 120 Ind. 319, 22 N. E. 315; Wheeler *v.* Hawkins, 116 Ind. 515, 19 N. E. 470.

Refund for expenses.— Where the trust estate has been exhausted by the trustee, and proper expenses incurred by the trustee remain unpaid, but large dividends have been paid by the trustee to the beneficiaries, the trustee may in equity require the beneficiaries to refund sufficient from the dividends so received to reimburse him for such expenses. Wells-Stone Mercantile Co. *v.* Aultman, 9 N. D. 520, 84 N. W. 375.

70. *California.*— Where a creditor is assignee for the benefit of himself and another creditor, the law creates the privity necessary to enable such second creditor to sue the first directly for his proportion of the funds. Lockwood *v.* Canfield, 20 Cal. 126.

Maine.— Where an agent having authority merely to sign a creditor's name to an assignment under seal affixed his seal also to the signature, the creditor did not become a party to the assignment so that he could maintain covenant broken against the assignees for his proportion of the dividends. Baker *v.* Freeman, 35 Me. 485.

Massachusetts.— Ward *v.* Lewis, 4 Pick. (Mass.) 518.

New York.— Keyes *v.* Brush, 2 Paige (N. Y.) 311.

Pennsylvania.— Rush *v.* Good, 14 Serg. & R. (Pa.) 226; Matter of Latimer, 2 Ashm. (Pa.) 520.

United States.— U. S. *v.* Clark, 1 Paine (U. S.) 629, 25 Fed. Cas. No. 14,807.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 943.

71. Scarf *v.* Johnson, 3 Tex. App. Civ. Cas. § 399.

In an action against the assignee in a general assignment, to obtain payment of one of several preferred claims, if defendant may insist that the other creditors be made defendants he must object to the omission of such defendants by demurrer or answer, or he can take no advantage of it. Gundry *v.* Vivian, 17 Wis. 436.

72. Pinkston *v.* Brewster, 14 Ala. 315; Frost *v.* Gage, 1 Allen (Mass.) 262; Fitch *v.* Workman, 9 Metc. (Mass.) 517; New England Bank *v.* Lewis, 8 Pick. (Mass.) 113; Clark *v.* Craig, 29 Mich. 398; Ludington's Petition, 5 Abb. N. Cas. (N. Y.) 307.

As to liability of assignee for negligent management of estate see *supra*, XII, F.

It is no defense to an action by a creditor against the assignee that the latter has, by

b. Release — (I) *In General.* A creditor who claims under an assignment, which by its terms or by statute requires the creditor who seeks to share to release the assigning debtor, must comply with the condition.[73] He must release within the limit of time and in the manner required.[74]

(II) *Effect of Release.* A release affects only the future liability of the assignor and does not operate to release sureties or others jointly liable with him.[75]

misapprehension, paid over all the funds to other creditors. New England Bank *v.* Lewis, 8 Pick. (Mass.) 113; Ward *v.* Lewis, 4 Pick. (Mass.) 518.

Mistake in deed.— Where a debt intended to be secured by a deed of trust is not correctly described in the deed, and the trustee has *bona fide* paid out the trust fund to discharge other debts, without any notice of the mistake by the creditor to the trustee, the creditor cannot make the trustee personally liable. Allmand *v.* Russell, 40 N. C. 183.

A trustee cannot be charged individually with a judgment recovered against him individually in replevin for goods withheld by him as trustee, and paid by him out of the trust fund by order of the court, where it appears that, though sued individually in the replevin suit, he was treated as trustee. Weil *v.* Lehmayer, 74 Md. 81, 21 Atl. 563.

73. Necessity of release.—*Massachusetts.*— Hewlett *v.* Cutler, 137 Mass. 285; Battles *v.* Fobes, 21 Pick. (Mass.) 239.

Minnesota.— Though the statute warrants a condition for releases in assignment, unless the instrument contains that condition the creditor is not bound to release, and may nevertheless share in the assigned estate. Matter of Fuller, 42 Minn. 22, 43 N. W. 486; Matter of Bird, 39 Minn. 520, 40 N. W. 827.

New York.— Spaulding *v.* Strang, 37 N. Y. 135, 38 N. Y. 9, 4 Transcr. App. (N. Y.) 80; Jewett *v.* Woodward, 1 Edw. (N. Y.) 195.

Pennsylvania.— Lea's Appeal, 9 Pa. St. 504; Steel *v.* Tuttle, 15 Serg. & R. (Pa.) 210; Stoddart *v.* Allen, 1 Rawle (Pa.) 258.

South Carolina.— Pfeifer *v.* Dargan, 14 S. C. 44.

Texas.— The creditor who accepts discharges the debtor, but he is not bound to accept. Roberson *v.* Tonn, 76 Tex. 535, 13 S. W. 385.

Virginia.— Where a deed of conveyance does not in terms provide for the execution by the creditors of formal technical releases under seal, such releases are unnecessary, and the discharge of the debtor results from the taking the benefit of the trust by the creditors. Robinson *v.* Mays, 76 Va. 708.

United States.— Mather *v.* Pratt, 4 Dall. (U. S.) 224, 1 L. ed. 810; Pearpoint *v.* Graham, 4 Wash. (U. S.) 232, 19 Fed. Cas. No. 10,877. *Compare* Manhattan L. Ins. Co. *v.* Hennessy, 99 Fed. 64, 39 C. C. A. 625.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 952.

As to validity of assignment requiring release see *supra*, VII, B.

As to validity of preferences conditioned upon releases see *supra*, IV, B.

Assignment not requiring release.— Where a tripartite assignment for the benefit of creditors contains no stipulation as to a release or discharge of the debts, a creditor who signs the assignment and afterward receives a dividend from the assignee does not thereby release his claim. Hammond *v.* Pinkham, 149 Mass. 356, 21 N. E. 871.

74. Time and manner of release.— *Massachusetts.*— Battles *v.* Fobes, 21 Pick. (Mass.) 239.

New York.—A substantial compliance is sufficient. Hosack *v.* Rogers, 6 Paige (N. Y.) 415. See also De Caters *v.* Le Ray de Chaumont, 2 Paige (N. Y.) 490.

Pennsylvania.—Agnew *v.* Dorr, 5 Whart. (Pa.) 131, 34 Am. Dec. 539; Sheepshanks *v.* Cohen, 14 Serg. & R. (Pa.) 35; Wilson *v.* Kneppley, 10 Serg. & R. (Pa.) 439; Cheever *v.* Imlay, 7 Serg. & R. (Pa.) 510; Coe *v.* Hutton, 1 Serg. & R. (Pa.) 398.

South Carolina.— Armstrong *v.* Hurst, 39 S. C. 498, 18 S. E. 150; Jaffray *v.* Steedman, 35 S. C. 33, 14 S. E. 632.

United States.— Pearpoint *v.* Graham, 4 Wash. (U. S.) 232, 19 Fed. Cas. No. 10,877.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 953.

Delivery to assignee.— A voluntary assignment provided that the assignee should make payment to such creditors as "execute and deliver to me a valid release." A creditor delivered such a release to the assignee, instead of the assignor; the former being authorized to receive it. It was held that there was no breach of the condition of payment. Allen *v.* Gardiner, 7 R. I. 22.

Release by telegraph.— An acceptance of assignment and release of debtor was mailed in time but arrived too late. The creditor telegraphed his acceptance in time. The transaction was held to be in time, allowing the creditor to participate. Atlantic Phosphate Co. *v.* Law, 45 S. C. 606, 23 S. E. 955.

Seal.— Where an assignment requires the creditors to accept it and release the debtor within a certain time, an acceptance, not under seal, stating that the creditor "agrees" to accept the assignment in discharge of his claim, is sufficient. Hewitt *v.* Darlington Phosphate Co., 43 S. C. 5, 20 S. E. 804; Burgiss *v.* Westmoreland, 38 S. C. 425, 17 S. E. 56.

75. Ragsdale *v.* Winnsboro Bank, 45 S. C. 575, 23 S. E. 947.

Where an indorser assigns, the holder of the note who has released the indorser can still proceed against the maker. Commercial Bank *v.* Cunningham, 24 Pick. (Mass.) 270, 35 Am. Dec. 322. So a later indorser who has released the maker in assignment can sue a prior indorser. Ludwig *v.* Iglehart, 43 Md. 39.

C. Claims and Liens Superior to Assignment — 1. In General. An assignment for the benefit of creditors does not defeat preëxisting liens.[76] The creditor, notwithstanding the assignment, can enforce his judgment lien,[77] or his mortgage,[78] even though such mortgage has not been recorded.[79] Likewise it

76. Preëxisting liens. — *Alabama.* — Walker *v.* Miller, 11 Ala. 1067.

Florida. — Lockett *v.* Robinson, 31 Fla. 134, 12 So. 649, 20 L. R. A. 67.

Georgia. — Seay *v.* Rome Bank, 66 Ga. 609.

Illinois. — Knapp, etc., Co. *v.* McCaffrey, 178 Ill. 107, 52 N. E. 898, 62 Am. St. Rep. 290.

Indiana. — Graydon *v.* Barlow, 15 Ind. 197.

Kentucky. — Zaring *v.* Cox, 78 Ky. 527, 1 Ky. L. Rep. 161.

Maryland. — Brown *v.* De Ford, 83 Md. 297, 34 Atl. 788; G. Ober, etc., Co. *v.* Keating, 77 Md. 100, 26 Atl. 501.

Missouri. — Jacobi *v.* Jacobi, 101 Mo. 507, 14 S. W. 736.

Montana. — Durfee *v.* Harper, 22 Mont. 354, 56 Pac. 582.

New Jersey. — Skillman *v.* Teeple, 1 N. J. Eq. 232.

New York. — Matter of Mumford, 5 N. Y. St. 303; McDermutt *v.* Strong, 4 Johns. Ch. (N. Y.) 687.

Ohio. — Bloom *v.* Noggle, 4 Ohio St. 45.

Oregon. — Gammons *v.* Holman, 11 Oreg. 284, 3 Pac. 676.

Pennsylvania. — Matter of Neff, 185 Pa. St. 98, 39 Atl. 830.

South Carolina. — Harth *v.* Gibbes, 4 McCord (S. C.) 8.

See also *supra*, X, D, 1; and 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 965.

The lien of an attorney for costs and compensation on a judgment recovered by him is not affected by a general assignment by the judgment creditor. Merchant *v.* Sessions, 5 N. Y. Civ. Proc. 24.

77. Judgment lien. — *Connecticut.* — Beardsley *v.* Beecher, 47 Conn. 408.

Delaware. — Green *v.* Walker, 5 Del. Ch. 26.

Illinois. — Marder *v.* Filkins, 51 Ill. App. 587; Sparre *v.* Abbott, 40 Ill. App. 646.

Indiana. — Marsh *v.* Vawter, 71 Ind. 22; Griffin *v.* Wallace, 66 Ind. 410.

Maryland. — Moale *v.* Buchanan, 11 Gill & J. (Md.) 314.

Missouri. — Swearingen *v.* Slicer, 5 Mo. 241.

New Jersey. — Van Waggoner *v.* Moses, 26 N. J. L. 570.

New York. — Siegel *v.* Anger, 13 Abb. N. Cas. (N. Y.) 362; Crosby *v.* Hillyer, 24 Wend. (N. Y.) 280; Hadden *v.* Spader, 20 Johns. (N. Y.) 554; Seaving *v.* Brinkerhoff, 5 Johns. Ch. (N. Y.) 329.

Ohio. — Scott *v.* Dunn, 26 Ohio St. 63.

Pennsylvania. — Shaeffer's Appeal, 101 Pa. St. 45; Ritter *v.* Brendlinger, 58 Pa. St. 68; Matter of Fulton, 51 Pa. St. 204.

South Carolina. — Akers *v.* Rowan, 33 S. C. 451, 12 S. E. 165, 10 L. R. A. 705.

Tennessee. — Miller *v.* O'Bannon, 4 Lea (Tenn.) 398.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 989.

78. Mortgage. — *Alabama.* — Walker *v.* Miller, 11 Ala. 1067.

Florida. — Shad *v.* Livingston, 31 Fla. 89, 12 So. 646.

Iowa. — Independence First Nat. Bank *v.* Sweet, (Iowa 1899) 81 N. W. 238; Matter of Windhorst, 107 Iowa 58, 77 N. W. 513; *In re* Guyer, 69 Iowa 585, 29 N. W. 826.

Massachusetts. — Housatonic Bank *v.* Martin, 1 Metc. (Mass.) 294. *Compare* Dole *v.* Bodman, 3 Metc. (Mass.) 139.

Michigan. — Dupont *v.* McCorkle, 76 Mich. 676, 43 N. W. 582; Wakeman *v.* Barrows, 41 Mich. 363, 2 N. W. 50.

Minnesota. — Mann *v.* Flower, 25 Minn. 500.

Missouri. — Jacobi *v.* Jacobi, 101 Mo. 507, 14 S. W. 736; Splint *v.* Sullivan, 58 Mo. App. 582; Jewet *v.* Preist, 34 Mo. App. 509.

New Jersey. — Arnett *v.* Trimmer, 43 N. J. Eq. 488, 11 Atl. 487; Shaw *v.* Glen, 37 N. J. Eq. 32.

New York. — Dorthy *v.* Servis, 46 Hun (N. Y.) 628; Steward *v.* Cole, 43 Hun (N. Y.) 164; Crisfield *v.* Bogardus, 18 Abb. N. Cas. (N. Y.) 334; Wyckoff *v.* Remsen, 11 Paige (N. Y.) 564.

Oregon. — Helm *v.* Gilroy, 20 Oreg. 517, 26 Pac. 851; J. I. Case Threshing Mach. Co. *v.* Campbell, 14 Oreg. 460, 13 Pac. 324.

Pennsylvania. — Morris' Appeal, 88 Pa. St. 368; Luckenbach *v.* Brickenstein, 5 Watts & S. (Pa.) 145.

Rhode Island. — Wilson *v.* Esten, 14 R. I. 621; Williams *v.* Winsor, 12 R. I. 9.

Tennessee. — Stainback *v.* Junk Bros. Lumber, etc., Co., 98 Tenn. 306, 39 S. W. 530.

Texas. — Simmons Hardware Co. *v.* Kaufman, 77 Tex. 131, 8 S. W. 283.

Virginia. — Ott *v.* King, 8 Gratt. (Va.) 224.

Washington. — Gilbert Hunt Mfg. Co. *v.* Wheeler, 15 Wash. 594, 47 Pac. 26.

United States. — Gilmour *v.* Ewing, 50 Fed. 656.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 972.

Want of seal. — An instrument intended for a mortgage, but ineffectual for want of a seal, creates no lien in favor of the mortgagee, as against the assignee under a subsequent general assignment by the mortgagor. Erwin *v.* Shuey, 8 Ohio St. 509.

79. Unrecorded mortgage. — *Alabama.* — Walker *v.* Miller, 11 Ala. 1067.

Kansas. — A chattel mortgage given by an insolvent debtor is void as against his assignee who obtains possession of the mortgaged property under the assignment prior to the recording of the mortgage. Withrow *v.* Citizens' Bank, 55 Kan. 378, 40 Pac. 639.

Michigan. — Brown *v.* Brabb, 67 Mich. 17, 34 N. W. 403, 11 Am. St. Rep. 549.

has been held that he may enforce his mechanic's lien,[80] his vendor's lien,[81] and his landlord's lien.[82]

2. Actions to Enforce — a. Demand. An assignee for the benefit of creditors is entitled to a demand before a suit can be brought against him for the recovery of goods obtained by his assignor by false representations.[83]

Missouri.— Jewet *v.* Preist, 34 Mo. App. 509.

New Jersey.— Shaw *v.* Glen, 37 N. J. Eq. 32.

New York.— Dorthy *v.* Servis, 46 Hun (N. Y.) 628; Steward *v.* Cole, 43 Hun (N. Y.) 164; Crisfield *v.* Bogardus, 18 Abb. N. Cas. (N. Y.) 334; Wyckoff *v.* Remsen, 11 Paige (N. Y.) 564.

Ohio.— Canfield *v.* Lathrop, 4 Ohio Dec. (Reprint) 51, Clev. L. Rec. 67.

Rhode Island.— Commercial Nat. Bank *v.* Colton, 17 R. I. 226, 21 Atl. 349; Wilson *v.* Esten, 14 R. I. 621.

South Carolina.— Grube *v.* Lilienthal, 51 S. C. 442, 29 S. E. 230.

Texas.— Keller *v.* Smalley, 63 Tex. 512.

Wisconsin.— Hawks *v.* Pritzlaff, 51 Wis. 160, 7 N. W. 303.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 973.

80. Mechanic's lien.— *Illinois.*— Where a contractor makes an assignment before the subcontractor has acquired a lien by service of notice on the owner, the assignee takes the estate free from any lien of the subcontractor on the amount due from the owner. Ryerson *v.* Smith, 152 Ill. 641, 38 N. E. 1032.

Indiana.—Where a contractor makes a general assignment before notice to the landowner from materialmen that they claim a lien for materials furnished the contractor, the contractor's creditors have a superior claim to the amount due on the contract to that of the materialmen. Kulp *v.* Chamberlin, 4 Ind. App. 560, 31 N. E. 376.

Missouri.— Barnes *v.* Fisher, 9 Mo. App. 574.

Ohio.— Hart *v.* Globe Iron Works, 37 Ohio St. 75; Williams *v.* Miller, 2 Ohio Dec. (Reprint) 119, 1 West. L. Month. 409.

Pennsylvania.— Clark *v.* Miller, 14 Pa. Co. Ct. 227.

Tennessee.— Steger *v.* Arctic Refrigerating Co., 89 Tenn. 453, 14 S. W. 1087, 11 L. R. A. 580.

Washington.— An assignment for the benefit of creditors prevents the enforcement of a mechanic's lien on the debtor's property without leave of court. Quinby *v.* Slipper, 7 Wash. 475, 35 Pac. 116, 38 Am. St. Rep. 899.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 970.

81. Vendor's lien.— *Alabama.*— Janney *v.* Habbeler, 101 Ala. 577, 14 So. 624.

Arkansas.— A vendor's lien will not be enforced against trustees for creditors without notice. Pettit *v.* Johnson, 15 Ark. 55.

Illinois.— Hooven, etc., Co. *v.* Burdette, 51 Ill. App. 115.

Iowa.— An assignment for the benefit of creditors defeats a vendor's lien, unless such lien is reserved by conveyance duly acknowledged and recorded. Prouty *v.* Clark, 73 Iowa 55, 34 N. W. 614.

Kentucky.— Zaring *v.* Cox, 78 Ky. 527, 1 Ky. L. Rep. 161.

Missouri.—*Compare* Knoxville Mantel, etc., Co. *v.* Coon, 61 Mo. App. 151.

New Jersey.— Vandoren *v.* Todd, 3 N. J. Eq. 397.

New York.— Shirley *v.* Congress Steam Sugar Refinery, 2 Edw. (N. Y.) 505; Haggerty *v.* Palmer, 6 Johns. Ch. (N. Y.) 437.

Tennessee.— Green *v.* Demoss, 10 Humphr. (Tenn.) 371. *Compare* Nailer *v.* Young, 7 Lea (Tenn.) 735; Tharpe *v.* Dunlap, 4 Heisk. (Tenn.) 674.

West Virginia.— See Baer Sons Grocer Co. *v.* Williams, 43 W. Va. 323, 27 S. E. 345.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 969.

82. Landlord's lien.— *Illinois.*— O'Hara *v.* Jones, 46 Ill. 288; Powell *v.* Daily, 61 Ill. App. 552. *Compare* Rand *v.* Francis, 168 Ill. 444, 48 N. E. 159.

Kentucky.— Loth *v.* Carty, 85 Ky. 591, 9 Ky. L. Rep. 131, 4 S. W. 314; Petry *v.* Randolph, 85 Ky. 351, 9 Ky. L. Rep. 14, 3 S. W. 420.

Mississippi.— Paine *v.* Sykes, 72 Miss. 351, 16 So. 903.

New Jersey.— Hoskins *v.* Paul, 9 N. J. L. 110, 17 Am. Dec. 455.

New York.— *Compare* Reynolds *v.* Ellis, 103 N. Y. 115, 8 N. E. 392, 57 Am. Rep. 701.

Pennsylvania.—Cooper *v.* Rose Valley Mills, 174 Pa. St. 302, 34 Atl. 559.

South Carolina.— *Contra*, Dial *v.* Levy, 39 S. C. 265, 17 S. E. 776; Bischoff *v.* Trenholm, 36 S. C. 75, 15 S. E. 346; *Ex p.* Knobeloch, 26 S. C. 331, 2 S. E. 612.

Texas.— Rosenberg *v.* Shaper, 51 Tex. 134.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 967.

Removal of goods.— While the goods of the assignor remain on the premises, they are liable for rent in arrear; but when no rent is in arrear, or if the goods are *bona fide* sold and removed from the demised premises, the landlord has no specific lien for his rent on such goods, or preferred claim on the avails of them in the hands of the assignee. Morris *v.* Parker, 1 Ashm. (Pa.) 187. See also Hastings *v.* Belknap, 1 Den. (N. Y.) 190.

83. Goodwin *v.* Goldsmith, 49 N. Y. Super. Ct. 101 [*affirmed* in 99 N. Y. 149, 1 N. E. 404]; Cumiskey *v.* Lewis, 14 Daly (N. Y.) 466, 15 N. Y. St. 364. But see Koch *v.* Lyon, 82 Mich. 513, 46 N. W. 779, holding that where one purchases goods with the fraudulent intent not to pay for them, and afterward makes an assignment for the benefit of creditors, the vendor can replevy them without first making a demand upon the assignee. See also Hall *v.* Peckham, 8 R. I. 370, hold-

b. Parties. A preferred creditor, in an assignment for benefit of creditors, should be permitted to be joined as a defendant in an action against the assignee to establish a lien which would absorb all the assigned property.[84]

c. Pleading. In an action against an assignee to recover property fraudulently bought of plaintiff by the assignor, and held by defendant under the assignment, it is not necessary to aver any wrongful act on defendant's part in receiving the property.[85]

D. Setting Aside Assignment — 1. In General. Creditors may, in a proper case, maintain a suit to set aside an assignment.[86]

ing that moneys received by an assignee under a voluntary assignment, for goods purchased by the assignor under fraudulent representations, and with intent not to pay therefor, may be recovered of the assignee by the original vendor, in an action for money had and received to his use, even without demand of the goods or moneys, or without tender of the notes taken therefor, provided the notes are produced at the trial, so as to be impounded.

Sufficiency of demand.— Before suit to recover goods fraudulently bought, and included in an assignment, a demand on the person in charge of the goods, together with leaving a written demand to be delivered to the assignee is sufficient. Roome *v.* McGovern, 9 Daly (N. Y.) 60.

84. Davies *v.* Fish, 19 Abb. N. Cas. (N. Y.) 24. See also Mills *v.* Swearingen, 67 Tex. 269, 3 S. W. 268, holding that in a suit against assignees under a general assignment, wherein it is sought to establish a claim to priority of payment out of the general fund by virtue of an alleged trust, the general creditors are entitled to intervene.

Assignee as party.— In an action to recover back goods fraudulently purchased, and which have been transferred by the purchaser under a general assignment for benefit of creditors, the assignee may properly be made a defendant. Roome *v.* McGovern, 9 Daly (N. Y.) 60.

Assignor as party.— Where a bill is filed against an assignee to enforce a lien upon the assigned property, and no relief is prayed against the assignor, the assignor is not a necessary party to the bill. Lockett *v.* Robinson, 31 Fla. 134, 12 So. 649, 20 L. R. A. 67. See also Wells *v.* Knox, 55 Hun (N. Y.) 245, 8 N. Y. Suppl. 58, 27 N. Y. St. 585, 18 N. Y. Civ. Proc. 87.

85. King *v.* Fitch, 2 Abb. Dec. (N. Y.) 508, 1 Keyes (N. Y.) 432.

Admissions by failure to answer.— In an action against a debtor and his assignee to set aside a sale to the debtor as procured by his fraud, the assignee has no other rights than the debtor, and, on failure of defendants to answer, the bill will be taken as true. Longdale Iron Co. *v.* Swift's Iron, etc., Works, 91 Ky. 191, 12 Ky. L. Rep. 848, 15 S. W. 183.

Allegation of demand and refusal.— In an action against an assignee, for goods obtained by his assignor's fraud, of which he had no knowledge when he took possession, complainant must allege a demand of the goods, and a refusal of the assignee to deliver them. Cumiskey *v.* Lewis, 14 Daly (N. Y.) 466, 15 N. Y. St. 364.

Trover by mortgagee.— Where a mortgagor of chattels assigns the mortgaged property to an assignee, under a general assignment, who disposes of them without redeeming the mortgage, it is not necessary for the mortgagee, in an action of trover against the assignee, to allege and prove the amount due on the secured notes, the destruction of the security, and that the mortgagor is insolvent and unable to pay the secured debt; but the allegation of the mortgagee's special ownership in the property, and facts showing its character and extent, and that the assignee has wrongfully converted it, etc., are sufficient. J. I. Case Threshing Mach. Co. *v.* Campbell, 14 Oreg. 460, 13 Pac. 324.

86. *Iowa.*— Loeb *v.* Pierpoint, 58 Iowa 469, 12 N. W. 544, 43 Am. Rep. 122.

Kansas.—Marshall *v.* Shibley, 11 Kan. 114.

Maryland.— Riley *v.* Carter, 76 Md. 581, 25 Atl. 667, 35 Am. St. Rep. 443, 19 L. R. A. 489.

Massachusetts.— Hanson *v.* Paige, 3 Gray (Mass.) 239.

Michigan.— Burnham *v.* Haskins, 72 Mich. 235, 40 N. W. 327.

Missouri.—Woodson *v.* Carson, 135 Mo. 521, 35 S. W. 1005, 37 S. W. 197; Pinneo *v.* Hart, 30 Mo. 561, 77 Am. Dec. 625.

New York.— Clark *v.* MacDonald, 62 Hun (N. Y.) 149, 16 N. Y. Suppl. 493, 41 N. Y. St. 753; Genesee County Bank *v.* Batavia Bank, 43 Hun (N. Y.) 295; Dudensing *v.* Jones, 27 Misc. (N. Y.) 69, 58 N. Y. Suppl. 178; Fassett *v.* Tallmadge, 18 Abb. Pr. (N. Y.) 48; Fanshawe *v.* Lane, 16 Abb. Pr. (N. Y.) 71; O'Neil *v.* Salmon, 25 How. Pr. (N. Y.) 246; Gasper *v.* Bennett, 12 How. Pr. (N. Y.) 307; Lentilhon *v.* Moffat, 1 Edw. (N. Y.) 451.

Pennsylvania.—Weber *v.* Samuel, 7 Pa. St. 499.

South Dakota.—Wright *v.* Lee, 2 S. D. 596, 51 N. W. 706.

Tennessee.— Peacock *v.* Tompkins, Meigs (Tenn.) 317.

Texas.— Louisiana Sugar Refining Co. *v.* Harrison, 9 Tex. Civ. App. 141, 29 S. W. 500.

Wisconsin.— Norton *v.* Kearney, 10 Wis. 443.

United States.— Hahn *v.* Salmon, 20 Fed. 801.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1036.

As to right of third persons to sue to set aside assignment see *supra*, X, B, 3, a.

2. What Creditors May Attack. The general rule is that only a judgment creditor can attack an assignment.[87] But where the claim is undisputed, or where it would be inequitable to deny a diligent creditor his equitable remedy merely for want of a judgment, it has often been held that judgment at law is not a necessary prerequisite.[88] A creditor must, however, be prejudiced by the assignment to enable him to attack it.[89]

3. Estoppel to Attack. A creditor who assents to an assignment,[90] or with knowledge of all the facts accepts benefits under an assignment,[91] cannot there-

Insanity of assignor.— Creditors sustain such a relation to a debtor as entitles them to maintain a suit to set aside a deed in trust for creditors on the ground that the debtor was at the time a lunatic. Riley *v.* Carter, 76 Md. 581, 25 Atl. 667, 35 Am. St. Rep. 443, 19 L. R. A. 489.

87. Judgment creditors.— *Illinois.*—Greenway *v.* Thomas, 14 Ill. 271.

Kansas.— Tennent *v.* Battey, 18 Kan. 324.

New York.— Bowe *v.* Arnold, 31 Hun (N. Y.) 256; Knauth *v.* Bassett, 34 Barb. (N. Y.) 31; Ogden *v.* Prentice, 33 Barb. (N. Y.) 160; Cropsey *v.* McKinney, 30 Barb. (N. Y.) 47; Forbes *v.* Logan, 4 Bosw. (N. Y.) 475; Neustadt *v.* Joel, 2 Duer (N. Y.) 530; Bishop *v.* Halsey, 13 How. Pr. (N. Y.) 154; McElwain *v.* Willis, 9 Wend. (N. Y.) 548.

South Carolina.— Ryttenberg *v.* Keels, 39 S. C. 203, 17 S. E. 441.

United States.— Cates *v.* Allen, 149 U. S. 451, 13 S. Ct. 883, 977, 37 L. ed. 804.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1039.

88. Simple contract creditors.— Bromberg *v.* Heyer, 69 Ala. 22; Cohen *v.* Morris, 70 Ga. 313; Meinhard *v.* Strickland, 29 S. C. 491, 7 S. E. 838; Peters *v.* Bain, 133 U. S. 670, 10 S. Ct. 354, 33 L. ed. 696; Curtain *v.* Talley, 46 Fed. 580.

Attaching creditor.— A creditor of an insolvent debtor, who attaches his property after the commencement of proceedings in insolvency and before the assignment, has sufficient interest to maintain a bill in equity to set aside the proceedings. Merriam *v.* Sewall, 8 Gray (Mass.) 316. See also Bates *v.* Plonsky, 28 Hun (N. Y.) 112; Heye *v.* Bolles, 33 How. Pr. (N. Y.) 266.

Mortgage creditor.— In California a creditor secured by mortgage, though his claim is not due, may object to the debtor's assignment as void. Sabichi *v.* Chase, 108 Cal. 81, 41 Pac. 29.

89. Prejudiced creditors.— Powers *v.* Graydon, 10 Bosw. (N. Y.) 630; Scott *v.* Guthrie, 10 Bosw. (N. Y.) 408; Morrison *v.* Atwell, 9 Bosw. (N. Y.) 503; Haynes *v.* Brooks, 17 Abb. N. Cas. (N. Y.) 152; Fox *v.* Heath, 16 Abb. Pr. (N. Y.) 163.

90. Assenting to assignment.— *Alabama.*— Sampson *v.* Jackson, 103 Ala. 550, 15 So. 893.

Arkansas.— Martin *v.* Taylor, 52 Ark. 389, 12 S. W. 1011.

Connecticut.— Greene *v.* A. & W. Sprague Mfg. Co., 52 Conn. 330.

Iowa.— The fact that a creditor assented to an assignment preferring creditors, valid under New York laws, and became surety for the assignor does not estop him from asserting his rights under the Iowa law, which holds such assignments void as to property lying within the state of Iowa. Moore *v.* Church, 70 Iowa 208, 30 N. W. 855, 59 Am. Rep. 439.

Minnesota.— Scott *v.* Edes, 3 Minn. 377. But a creditor does not ratify a fraudulent assignment of the debtor's property by instituting garnishment proceedings to reach the property. Banning *v.* Sibley, 3 Minn. 389.

Missouri.— Burrows *v.* Alter, 7 Mo. 424.

New York.— Groves *v.* Rice, 148 N. Y. 227, 42 N. E. 664; Rapalee *v.* Stewart, 27 N. Y. 310; Levy *v.* James, 49 Hun (N. Y.) 161, 1 N. Y. Suppl. 604, 16 N. Y. St. 762; Wilson Bros. Woodenware, etc., Co. *v.* Daggett, 9 N. Y. Civ. Proc. 408; Cavanagh *v.* Morrow, 67 How. Pr. (N. Y.) 241; O'Neil *v.* Salmon, 25 How. Pr. (N. Y.) 246. *Compare* American Exch. Bank *v.* Webb, 36 Barb. (N. Y.) 291.

Pennsylvania.— Kendall *v.* McClure Coke Co., 182 Pa. St. 1, 37 Atl. 823, 61 Am. St. Rep. 688.

United States.— Johnson *v.* Rogers, 13 Fed. Cas. No. 7,408, 14 Alb. L. J. 427, 5 Am. L. Rec. 536, 15 Nat. Bankr. Reg. 1.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1043.

Acceptance of part.— A creditor cannot accept part of an assignment for the benefit of creditors and repudiate the balance of it. Hatchett *v.* Blanton, 72 Ala. 423; Frierson *v.* Branch, 30 Ark. 453; Loomis *v.* Griffin, 78 Iowa 482, 43 N. W. 296; Kleinschmidt *v.* Steele, 15 Mont. 181, 38 Pac. 827.

91. Accepting benefits.— *Alabama.*— Adler *v.* Bell, 110 Ala. 357, 20 So. 83.

Florida.— A creditor, by filing his debt with the debtor's assignee and accepting a dividend thereon, does not defeat his right to subject to his debt property reserved by the debtor from the assignment as exempt, but which is not in fact exempt. Cator *v.* Blount, 41 Fla. 138, 25 So. 283.

Kentucky.— A creditor who, as soon as the debtor asserts a homestead right, denies it by proper pleadings, is not estopped to contest the right by accepting a *pro rata* share of the proceeds of an assignment in which the homestead was reserved. Creager *v.* Creager, 87 Ky. 449, 10 Ky. L. Rep. 424, 9 S. W. 380.

Louisiana.— Wallace *v.* Cumming, 27 La. Ann. 631.

Maine.— Chafee *v.* New York Fourth Nat. Bank, 71 Me. 514, 36 Am. Rep. 345.

Maryland.— Moale *v.* Buchanan, 11 Gill & J. (Md.) 314.

after attack it, or pursue remedies against others inconsistent with the position he has assumed.[92] Thus a creditor who has filed proofs of his claim in the assignment proceedings is estopped from afterward denying the validity of the assignment.[93] But if the creditor was ignorant of the facts when accepting the assignment he may repudiate his acceptance upon discovery of the facts,[94] but must return, or offer to return, whatever he obtained under the assignment as a preliminary to an attack thereon.[95]

Minnesota.— Olson *v.* O'Brien, 46 Minn. 87, 48 N. W. 453; Richards *v.* White, 7 Minn. 345; Scott *v.* Edes, 3 Minn. 377. But creditors who received dividends and filed releases under an assignment are not estopped by their acts from petitioning for the appointment of a receiver of the debtor's property after the court has held the assignment void. Matter of Walker, 37 Minn. 243, 33 N. W. 852, 34 N. W. 591.

Missouri.— Moline Plow Co. *v.* Wenger, 95 Mo. 207, 8 S. W. 404; Nanson *v.* Jacob, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531.

New York.— Groves *v.* Rice, 148 N. Y. 227, 42 N. E. 664; Olmstead *v.* Herrick, 1 E. D. Smith (N. Y.) 310; O'Neil *v.* Salmon, 25 How. Pr. (N. Y.) 246; Mitchell *v.* Lenox, 14 Wend. (N. Y.) 662. *Compare* Benedict, etc., Mfg. Co. *v.* Hutchinson, 53 N. Y. Super. Ct. 486; Pratt *v.* Adams, 7 Paige (N. Y.) 615.

Pennsylvania.— Adlum *v.* Yard, 1 Rawle (Pa.) 163, 18 Am. Dec. 608.

South Carolina.—Arnold *v.* Bailey, 24 S. C. 493.

Texas.— Roberson *v.* Tonn, 76 Tex. 535, 13 S. W. 385; Wright *v.* Enless, 12 Tex. Civ. App. 136, 34 S. W. 302; Whitehill *v.* Shaw, (Tex. Civ. App. 1896) 33 S. W. 886.

Washington.— Cerf *v.* Wallace, 14 Wash. 249, 44 Pac. 264.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1044.

92. Pursuing inconsistent remedies.— Kennedy *v.* Thorp, 51 N. Y. 174; Young *v.* Hail, 6 Lea (Tenn.) 179.

An intervening creditor, who in his petition of intervention fails to attack an assignment made by the debtor prior to intervener's attempt to attach property covered thereby, is not entitled to an attachment on such property. Butte First Nat. Bank *v.* Boyce, 15 Mont. 162, 38 Pac. 829.

93. Filing claim with assignee.— *Iowa.*— The fact that the agents of an insolvent insurance company filed claims for unearned premiums with the assignee, after giving proper credit for the balance due the company by them, does not estop them from contesting the validity of the assignment, as affecting their right of set-off. Franzen *v.* Hutchinson, 94 Iowa 95, 62 N. W. 698.

Kentucky.— Where attaching creditors are insisting that an assignment is fraudulent and are taking evidence to support their contention they do not estop themselves from continuing the attack on the assignment by presenting their demands in a suit by the assignee for a settlement of the assigned estate. Scott *v.* Strauss, 14 Ky. L. Rep. 892.

Louisiana.— Lowry *v.* Commercial, etc., Bank, 12 Rob. (La.) 193.

Maryland.— Horsey *v.* Chew, 65 Md. 555, 5 Atl. 466.

Michigan.— Matter of George T. Smith Middlings Purifier Co., 86 Mich. 149, 48 N. W. 864.

Minnesota.— Aberle *v.* Schlichenmeir, 51 Minn. 1, 52 N. W. 972.

New York.— The mere filing of a judgment creditor's claim with the assignee, under a general assignment by the debtor, is not such a recognition of the assignment as operates to nullify his action to set it aside. Koechl *v.* Leibinger, etc., Brewing Co., 26 N. Y. App. Div. 573, 50 N. Y. Suppl. 568. So a creditor who attaches notwithstanding the debtor's assignment, charging fraud, cannot be deemed to have ratified the assignment by afterward proving his debt in proceedings thereunder, and moving that the assignee be removed, when he expressly asserts at the time that he does not recognize the validity of the assignment. Iselin *v.* Henlein, 16 Abb. N. Cas. (N. Y.) 73.

Wisconsin.—Boynton Furnace Co. *v.* Sorensen, 80 Wis. 594, 50 S. W. 773; Littlejohn *v.* Turner, 73 Wis. 113, 40 N. W. 621. *Compare* Segnitz *v.* Garden City Banking, etc., Co., 107 Wis. 171, 83 N. W. 327, 81 Am. St. Rep. 830, 50 L. R. A. 327.

United States.— Frelinghuysen *v.* Nugent, 36 Fed. 229.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1045.

94. Ignorance of fraud.— *Kansas.*— Hairgrove *v.* Millington, 8 Kan. 480.

Kentucky.— Bank of Commerce *v.* Payne, 86 Ky. 446, 10 Ky. L. Rep. 43, 8 S. W. 856.

Minnesota.— Scott *v.* Edes, 3 Minn. 377.

New York.— Stedman *v.* Davis, 93 N. Y. 32; Buffalo Third Nat. Bank *v.* Guenther, 1 N. Y. Suppl. 753, 17 N. Y. St. 403; Matter of Cook, 7 N. Y. St. 82.

United States.— Johnson *v.* Rogers, 13 Fed. Cas. No. 7,408, 14 Alb. L. J. 427, 5 Am. L. Rec. 536, 15 Nat. Bankr. Reg. 1.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1046.

95. Return of benefits.— Scott *v.* Edes, 3 Minn. 377.

Surrender of collateral.— A creditor having a pledge for the payment of a debt is not bound, if he assails as fraudulent a subsequent conveyance by the debtor to other creditors, or asserts that it is a general assignment, in the benefits of which he and all the other creditors are entitled to participate, to offer to relinquish the pledge or to bring it in as a contribution to a common fund for the equal benefit of the fraudulent donee and himself. Alabama Warehouse Co. *v.* Jones, 62 Ala. 550.

4. Actions to Set Aside Assignment — a. Jurisdiction. Unless it is so provided by statute[96] jurisdiction over proceedings to test the validity of an assignment is not limited to the court in which the assignee has filed his bond and inventory, but exists in any court of otherwise competent jurisdiction.[97]

b. Time to Sue. A creditor attempting to nullify a deed of assignment made by his debtor must take action within a reasonable time after the deed is executed.[98]

c. Injunction and Receiver. In a suit to set aside an assignment the appointment of a receiver of the assigned property and the granting of an injunction to restrain the assignee from proceeding under the assignment is within the discretion of the court.[99]

d. Parties. It is generally held that the assignor and assignee are the only necessary defendants to a suit for setting aside a general assignment as fraudulent.[1]

96. In Illinois, where a voluntary deed of assignment is duly executed and recorded in the county court, that court obtains complete and exclusive jurisdiction over the insolvent estate, and the validity of the assignment must be contested in the county court alone. Wilson *v.* Aaron, 36 Ill. App. 576 [*affirmed* in 132 Ill. 238, 23 N. E. 1037].

97. Kohn *v.* Ryan, 31 Fed. 636.

Federal court.— Where an assignment for the benefit of creditors is merely regulated, but not created, by a state law, the legality of the assignment may be contested by a creditor in a federal court. Adler *v.* Ecker, 1 McCrary (U. S.) 256, 2 Fed. 126.

Probate court.— In Ohio and Oklahoma a probate court is without jurisdiction to set aside an assignment for the benefit of creditors. Standard Home, etc., Co. *v.* Jones, 64 Ohio St. 147, 59 N. E. 885; Parlin, etc., Co. *v.* Schram, 4 Okla. 651, 46 Pac. 490; Smith *v.* Kaufman, 3 Okla. 568, 41 Pac. 722.

98. *Maryland.*— Miller *v.* Matthews, 87 Md. 464, 40 Atl. 176.

Massachusetts.— Leland *v.* Drown, 12 Gray (Mass.) 437.

New Jersey.— Kimball *v.* Lee, 40 N. J. Eq. 403, 2 Atl. 820.

New York.— Redmond *v.* Wemple, 4 Edw. (N. Y.) 221.

Wisconsin.— See Kickbusch *v.* Corwith, 108 Wis. 634, 85 N. W. 148.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1055.

After the trust has been executed it is too late to seek to set aside the assignment on the ground of fraud. Hays *v.* Doane, 11 N. J. Eq. 84; McLean *v.* Prentice, 34 Hun (N. Y.) 504. But see Knauth *v.* Bassett, 34 Barb. (N. Y.) 31, holding that an action by a creditor to set aside an assignment may be maintained, so far as concerns any money in the hands of the assignee, though he may have paid away the greater portion of the property assigned.

99. Wood *v.* Haynes, 92 Ga. 180, 18 S. E. 47; Buena Vista Mfg. Co. *v.* Chattanooga Door, etc., Co., 87 Ga. 689, 13 S. E. 684; Walker *v.* Stone, 70 Iowa 103, 30 N. W. 39; Spring *v.* Strauss, 3 Bosw. (N. Y.) 607; Hotop *v.* Durant, 6 Abb. Pr. (N. Y.) 371 note; Minzesheimer *v.* Mayer, 66 How. Pr. (N. Y.) 484; Bishop *v.* Halsey, 13 How. Pr. (N. Y.) 154.

Where the assignee is solvent, honest, and competent, and a case of real danger to the assets in his hands is not made, and where the creditors have the security of ultimate liability, the assignee will not be enjoined at the instance of the creditors from controlling the assets pending a bill to set aside the assignment; and a receiver will not be appointed to supersede the assignee before a final decree. Gresham *v.* Crossland, 59 Ga. 270. But where, in proceedings on motion for an injunction and the appointment of a receiver, by general creditors of an insolvent, against his assignee and preferred creditors, it appears that a final judgment setting aside the assignment and the preferences is probable, a receiver should be appointed and the injunction granted. People's Bank *v.* Hancher, 21 N. Y. Suppl. 545.

1. Necessary parties.— *Arkansas.*— Hunt *v.* Weiner, 39 Ark. 70.

Michigan.— Suydam *v.* Dequindre, Harr. (Mich.) 347.

Missouri.— See State *v.* Withrow, 141 Mo. 69, 41 S. W. 980.

New York.— Russell *v.* Lasher, 4 Barb. (N. Y.) 232; Smith *v.* Payne, 56 N. Y. Super. Ct. 451, 3 N. Y. Suppl. 826, 21 N. Y. St. 462; Scudder *v.* Voorhis, 5 Sandf. (N. Y.) 271; Greene County Bank *v.* Batavia Bank, 5 N. Y. St. 414; Bank of British North America *v.* Suydam, 6 How. Pr. (N. Y.) 379; Wakeman *v.* Grover, 4 Paige (N. Y.) 23; Rogers *v.* Rogers, 3 Paige (N. Y.) 379.

Pennsylvania.— Hodge's Estate, 1 Ashm. (Pa.) 63.

Vermont.— Therasson *v.* Hickock, 37 Vt. 454.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1057.

Death of assignor.— In a creditors' suit to set aside as fraudulent a general assignment, the assignor, or after his death his personal representative, is a necessary party; and when the assignor, originally a party, has died, and his representative is not brought in, a judgment rendered for plaintiff is fatally defective, though the facts of the assignor's death, the proof of his will, and the qualification of his executrix are pleaded by supplemental complaint, and the executrix is a party in her individual capacity. Amsterdam First Nat. Bank *v.* Shuler, 153 N. Y. 163, 47 N. E. 262, 60 Am. St. Rep. 601.

But where named creditors are given preferences it has been held that they should be made parties.[2]

e. Pleading — (I) *In General.* In an action to set aside an assignment as fraudulent against creditors it has been held to be sufficient to aver that the assignment was fraudulent and void, and made and accepted with intent to defraud creditors, without further averring the facts relied on to establish the intent.[3]

(II) *Bill of Particulars.* In an action to set aside as fraudulent an assignment for the benefit of creditors, plaintiff may be required to furnish a bill of particulars.[4]

f. Evidence — (I) *In General.* The fraudulent intent of an assignor for the benefit of creditors must be proved by such evidence as is required to establish any other fact — as by his acts and declarations, his circumstances and situation, and the terms and provisions of the instrument.[5]

(II) *Burden of Proof.* The burden is on a creditor attacking an assign-

Waiver of objections.— The objection that the judgment debtors are not joined as defendants in a creditors' action to set aside their assignment is waived if not taken by demurrer or answer. Hurlbert *v.* Dean, 2 Abb. Dec. (N. Y.) 428, 2 Keyes (N. Y.) 97.

2. Preferred creditors.— Stout *v.* Higbee, 4 J. J. Marsh. (Ky.) 632; Allen *v.* Union, etc., Bank, 72 Miss. 549, 17 So. 442; Hamilton Nat. Bank *v.* Halsted, 56 Hun (N. Y.) 530, 9 N. Y. Suppl. 852, 31 N. Y. St. 809; Chandler *v.* Powers, 25 Hun (N. Y.) 445. But see Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199, 11 L. R. A. 466, holding that in a suit by creditors to set aside an assignment as fraudulent a preferred creditor is not a necessary party defendant; and if, having been joined as defendant, he dies before trial, it rests in the discretion of the court whether his personal representatives should be made parties, and the trustee under the assignment cannot demand that the trial be delayed until that is done.

In an action to reform an assignment for a fraudulent provision contained therein all the creditors of the assignor must be parties to the action. Garner *v.* Wright, 24 How. Pr. (N. Y.) 144; Smith *v.* Howard, 20 How. Pr. (N. Y.) 151.

3. Stafford *v.* Merrill, 62 Hun (N. Y.) 144, 16 N. Y. Suppl. 467, 41 N. Y. St. 230; Pittsfield Nat. Bank *v.* Tailer, 60 Hun (N. Y.) 130, 14 N. Y. Suppl. 557, 38 N. Y. St. 895; National Union Bank *v.* Reed, 12 N. Y. Suppl. 920, 27 Abb. N. Cas. (N. Y.) 5, 35 N. Y. St. 572; Durant *v.* Pierson, 8 N. Y. Suppl. 904, 29 N. Y. St. 510; Hastings *v.* Thurston, 10 Abb. Pr. (N. Y.) 418, 18 How. Pr. (N. Y.) 530; Verner *v.* Davis, 26 S. C. 609, 2 S. E. 114. But see Sullivan *v.* Sullivan, Brunn. Col. Cas. (U. S.) 642, 23 Fed. Cas. No. 13,598, 21 Law Rep. 531, 3 Wkly. Gaz. 126, holding that where an assignment is attacked on the ground of fraud a general allegation of fraud is not sufficient, but particular acts must be specified.

Delivery and acceptance of deed.— A creditors' bill against a debtor and his assignees to set aside the assignment as fraudulent need not allege that the assignment was delivered, nor that the assignees accepted the trust. Gasper *v.* Bennett, 12 How. Pr. (N. Y.) 307.

Fraud of assignee.— In an action to set aside an assignment on the ground of the fraud of the assignor, the complaint is not demurrable because there is no allegation that the assignee was implicated in the fraud. Stevenson *v.* Matteson, 3 Mont. 108, 32 Pac. 291.

4. Claflin *v.* Smith, 13 Abb. N. Cas. (N. Y.) 205. But see Passavant *v.* Cantor, 48 Hun (N. Y.) 546, 1 N. Y. Suppl. 574, 16 N. Y. St. 252, 21 Abb. N. Cas. (N. Y.) 259, wherein the creditors alleged that the assignor failed to deliver to the assignee all the property owned by him or in which he was interested, and that he had secreted and reserved a large portion of his property with the intent to defraud; that the assignment was a conspiracy on the part of the assignor to fraudulently obtain goods from his creditors with the intention of fraudulently disposing of them, and to reserve them for his own benefit. The books had been turned over to the assignee. It was held that the assignee was not entitled to a bill of particulars specifying the property the assignor failed to turn over, and fraudulently concealed and reserved, and the dates of such transactions, and the parties with whom made, nor a bill specifying from whom goods were fraudulently obtained.

5. Baldwin *v.* Buckland, 11 Mich. 389.

As to proof of fraud see *supra*, IX, C.

Book entries.— In an action to set aside an assignment of a firm for creditors as fraudulent, the entries in the books of the firm, made in due course of business, prior to the assignment, are admissible to show whether the debts of the firm set out in the assignment are *bona fide* obligations. Loos *v.* Wilkinson, 10 N. Y. St. 297.

A judgment recovered after an assignment for benefit of creditors is admissible in an action to set aside the assignment as proof of the validity of the debt mentioned in the assignment, the genuineness of the judgment and the *bona fides* of the debt being open to contest. Acker *v.* Leland, 109 N. Y. 5, 15 N. E. 743, 14 N. Y. St. 23. But see Mower *v.* Hanford, 6 Minn. 535, holding that in an action to set aside as fraudulent an assignment for benefit of creditors, the record of proceedings in another action between other parties, and relating to a different subject-

ent for the benefit of preferred creditors to show that the assignment was ıecuted to defraud and delay other creditors.[6]

g. Questions For Jury. The question whether an instrument is fraudulent by ɜ terms is one of law.[7]

h. Judgment. In an action to set aside an assignment for fraud it is error to ›nder judgment against the assignee personally, where there is no finding that ɜ knew of the fraudulent intent of the assignor.[8]

5. Effect of Setting Aside Assignment. Where a deed made for the benefit of ·editors is set aside, creditors are left to enforce their claims as though no such ɜed had been made.[9] The court on setting aside an assignment will so deal

ıatter, in which such assignment was adıdged fraudulent, is inadmissible.

Proof of intent.— It is competent to show ıe motives of officers of an insolvent corpoıtion in assigning its assets on an issue as › the validity of such assignment. Covert . Rogers, 38 Mich. 363, 31 Am. Rep. 319. ınd evidence that a deed of assignment, legal n its face, was made in good faith, is admisible in defense of a suit by attachment, laiming that the assignment was made with raudulent intent to hinder and delay creditrs. McFarland *v.* Birdsall, 14 Ind. 126.

6. Guerin *v.* Hunt, 8 Minn. 477; Mack *v.* Davidson, 58 N. Y. Super. Ct. 75, 9 N. Y. ıuppl. 730, 30 N. Y. St. 805; Royster *v.* ıtallings, 124 N. C. 55, 32 S. E. 384. See lso Bernheimer *v.* Rindskopf, 116 N. Y. 428, 2 N. E. 1074, 27 N. Y. St. 648, 15 Am. St. ŧep. 414, holding that in an action to set side an assignment by a partnership as in raud of certain firm creditors, the burden is n plaintiffs to prove their allegation that a ıote preferred in the assignment was inorsed by one partner in the firm's name for ıis own private interest, without the consent f his copartners.

As to burden of proof of fraud see *supra*, X, C, 1.

In an action by partnership creditors to et aside an assignment for appropriating ›artnership property to the payment of indi·idual debts, the burden is on the defendants ›o show that enough individual property has ›een also assigned to pay such individual lebts. Knauth *v.* Bassett, 34 Barb. (N. Y.) 31.

7. Cunningham *v.* Freeborn, 3 Paige (N. Y.) 557 [*affirming* 1 Edw. (N. Y.) 256].

As to when fraud is a question of fact see *supra*, IX, D.

Fraudulent intent.— In a suit to avoid an ıssignment for the benefit of creditors on the ground of fraud, the question of fraudulent ntent is one of fact, exclusively for the jury. Wynne *v.* Glidewell, 17 Ind. 446. See also Mower *v.* Hanford, 6 Minn. 535, holding that vhere several instruments, simultaneously xecuted, are attacked as fraudulent as gainst creditors, the question whether they ›re all so related to each other that the raudulent intention in the execution of one vould avoid all is for the jury.

8. Rouse *v.* Bowers, 108 N. C. 182, 12 ·. E. 985.

Conclusiveness as to beneficiaries.— In a uit to set aside an assignment for the benefit of creditors the assignee represents all the beneficiaries of the trust; and a judgment against him is binding upon such beneficiaries, though they were not parties to the suit. Rejall *v.* Greenhood, 92 Fed. 945, 35 C. C. A. 97. See also Russell *v.* Lasher, 4 Barb. (N. Y.) 232, holding that where a suit is brought by a creditor to set aside an assignment, if the assignee acts in good faith, and a decree is fairly obtained declaring the assignment fraudulent and void, preferred creditors of the assigned estate are bound by the decree, even though they were not made parties to the suit.

Matters determinable.— In a suit by creditors to set aside an assignment by which the assignee obtained a preference, the court will not determine the validity of attachments levied in favor of the assignee, as the suit does not affect such attachments. Dudensing *v.* Jones, 27 Misc. (N. Y.) 69, 58 N. Y. Suppl. 178.

Relief under general prayer.—In Kentucky, in an action to set aside a deed of assignment as fraudulent, that relief being denied the trust may be settled under a prayer for general relief, though one fourth of the creditors did not join in the action, the deed having been made before the statute regulating assignments for creditors was passed. Hull *v.* Evans, 22 Ky. L. Rep. 1118, 59 S. W. 851.

9. Gracey *v.* Davis, 3 Strobh. Eq. (S. C.) 55, 51 Am. Dec. 663.

Effect on releases.— Where an assignment has been held void at the suit of an attaching creditor, releases filed by creditors who had received dividends do not operate to discharge their claims. Matter of Walker, 37 Minn. 243, 33 N. W. 852, 34 N. W. 591; Weber *v.* Samuel, 7 Pa. St. 499. See also Lentilhon *v.* Moffat, 1 Edw. (N. Y.) 451, holding that where an assignment for the benefit of creditors is declared fraudulent and void, a creditor who has agreed in writing to accept his share and release the debtor, but who has not executed a release, retains all his rights against the debtor unaltered.

Judgments confessed to assignee.— Where a deed of trust for the benefit of creditors is void, confessions of judgment made to the trustees, which are intended to be used only in case the deed is declared void, are also void. Mackie *v.* Cairns, 5 Cow. (N. Y.) 547, 15 Am. Dec. 477.

Priorities of creditors.— The creditor who first files his bill against the assignees of an insolvent debtor obtains a priority in the dis-

with the assets of the assignor as to protect all parties who are interested in his estate.[10]

XV. RIGHTS AND REMEDIES OF ASSIGNOR.

A. As Against Assignee. When the assignee is acting in bad faith or otherwise failing in his duties, the assignor has an interest which authorizes him to bring a bill against the trustee, to which the creditors are joined as defendants, seeking proper administration of the trust.[11]

B. As Against Third Persons. An assignor may enforce rights such as did not pass by the assignment, or such as revert to him through estoppel against the assignee and beneficiaries of the assignment, who allow him to proceed;[12] but he cannot sue on claims which have regularly passed to the assignee, even though creditors consent.[13]

C. Compositions With Creditors. The fact that a debtor has made an assignment of all his property for the benefit of all his creditors does not preclude him from settling in good faith with certain creditors by paying a certain per cent of their claims.[14]

tribution of the debtor's effects in case the assignment is declared void.

Indiana.— Butler *v.* Jaffray, 12 Ind. 504.

Kentucky.— Moffat *v.* Ingham, 7 Dana (Ky.) 495.

New York.— Scouton *v.* Bender, 3 How. Pr. (N. Y.) 185. See also Claflin *v.* Gordon, 39 Hun (N. Y.) 54.

Ohio.—Atkinson *v.* Jordan, Wright (Ohio) 246.

South Carolina.— Where a judgment creditor sues to set aside an assignment for the benefit of creditors and proves his judgment he is entitled, on the assignment being set aside, to a decree to the exclusion of other creditors who do not prove valid and subsisting judgments. Ryttenberg *v.* Keels, 39 S. C. 203, 17 S. E. 441. See also *Ex p.* Spragins, 44 S. C. 65, 21 S. E. 543.

United States.—*Contra*, Rothchild *v.* Hoge, 43 Fed. 97.

10. Mahorner *v.* Forcheimer, 73 Miss. 302, 18 So. 570; Foot *v.* Goldman, 68 Miss. 529, 10 So. 62. But see Hancock *v.* Wooten, 107 N. C. 9, 12 S. E. 199, 11 L. R. A. 466, holding that where in a suit by creditors to reduce their debts to judgment and to set aside a fraudulent assignment the assignment is set aside and a receiver of the property appointed, a preferred creditor who claimed under the assignment and united with the trustee in defending it is not entitled to prove his debt and pro-rate with plaintiffs in the proceeds of the property.

Rights of assignee.— Where an assignment is adjudged fraudulent and set aside the trustees, though creditors of the assignor, cannot retain any of the property to pay their claims. Hunt *v.* Weiner, 39 Ark. 70.

11. Rutherford *v.* Rutherford, 14 Ky. L. Rep. 397. See also Gschwend *v.* Estes, 51 Cal. 134, holding that where a debtor enters into an agreement with his creditors whereby a certain person is to take possession of the debtor's property as trustee for the creditors, to sell and dispose of the same, and apply the net proceeds to the payment of the debts, and the trustee receives money and property, but fails to apply it, the debtor is, in equity, entitled to credit on his debts for the amount so received by the trustee.

As to right of assignor to accounting by assignee see *supra*, XIII, A, 2.

Conditions precedent to action.— Where a debtor conveyed his property to a trustee to convert into money and pay the debts, and the trustee fraudulently conveyed the property to his friends and business associates for much less than it was worth, such debtor could not maintain an action at law against the trustee and his grantees for damages, without first bringing a suit in equity for an accounting and closing of the trust. Nodine *v.* Wright, 37 Oreg. 411, 61 Pac. 734.

While interested in the preservation of the fund he is not concerned as to the amounts paid the respective creditors as between themselves, and has no standing in court to complain thereof. Ashton *v.* Jones, 14 Nebr. 426, 16 N. W. 434.

12. Hauser, etc., Co. *v.* Tate, 20 Ky. L. Rep. 1716, 49 S. W. 475; Cunning *v.* Tittabawassee Boom Co., 88 Mich. 237, 50 N. W. 141.

A partner is entitled to sue to free his lands from an alleged charge, though his firm has made an assignment for benefit of creditors. Cleveland *v.* Carr, (Tex. Civ. App. 1897) 40 S. W. 406.

Recovery of omitted assets.— After an assignee's discharge, the assignor who has been discharged of his debts to accepting creditors can collect an omitted asset. Carlisle *v.* Dodds, 15 Ky. L. Rep. 784.

Suit may be brought on a note in the name of the payee who has not divested himself of the legal title by indorsement, even though such payee made a general assignment before suit brought. Packer *v.* Roberts, 140 Ill. 9, 29 N. E. 668.

13. Stoever *v.* Stoever, 9 Serg. & R. (Pa.) 434; Smith *v.* Chicago, etc., R. Co., 23 Wis. 267. But see Low *v.* Mussey, 36 Vt. 183, holding that when the assignees through lapse of time have lost the right to recover usurious payments made by the assignor, their assent to the assignor's recovery is presumed.

14. Fosdyke *v.* Nixon, 107 Ind. 138, 8 N. E.

D. Discharge. Apart from statute,[15] the mere assent of a creditor to an assignment does not discharge the debtor.[16]

E. Exemptions — 1. In General. A debtor who makes an assignment for the benefit of creditors is entitled to such exemptions as are allowed by statute.[17] Apart from statute, the assignor is not entitled to exemptions, unless claimed in the assignment.[18]

2. Nature and Amount. The nature and amount of an assignor's exemptions are controlled by statute;[19] and where the reservation[20] is of "such property as is

11. But see Dansby *v.* Frieberg, 76 Tex. 463, 13 S. W. 331, holding that a promise made by a debtor, to induce one of his creditors to accept a statutory assignment made by him that he would pay the balance of such creditor's claim remaining after the distribution of the assigned estate, is fraudulent and void, as being a secret agreement by which a preference is given by an assignor to one of his creditors.

15. Discharge by statute.— Vanderveer *v.* Conover, 16 N. J. L. 487; Hudson *v.* Willis, 65 Tex. 694; Wisconsin State Grange O. P. H. *v.* Kniffen, 90 Wis. 14, 62 N. W. 943.

In Wisconsin there is a formal hearing upon the application for discharge. *In re* Rankin, 85 Wis. 15, 54 N. W. 1010. A creditor who appears at the hearing is bound by the discharge even though a non-resident of the state. Osborn *v.* Dobrinz, 85 Wis. 252, 55 N. W. 403. A claim for taxes is not discharged. *In re* Riddell, 93 Wis. 564, 67 N. W. 1135. A corporation may be discharged. Segnitz *v.* Garden City Banking, etc., Co., 107 Wis. 171, 83 N. W. 327, 81 Am. St. Rep. 830, 50 L. R. A. 327.

16. Assent does not discharge.— Macon City Bank *v.* Crossland, 65 Ga. 734; Howlett *v.* Mills, 22 Ill. 341.

As to acceptance of assignment on condition of releasing debtor see *supra*, XV, D.

Acceptance in satisfaction.— An assignment of all of the debtors' stock in trade to their creditors, in full satisfaction of their debts, and received by the creditors as such, is a good plea of accord and satisfaction. Watkinson *v.* Inglesby, 5 Johns. (N. Y.) 386.

New promise after discharge.— The moral obligation will sustain the debtor's promise to pay a debt from which he has been discharged under an assignment. Zoebisch *v.* Von Minden, 120 N. Y. 406, 24 N. E. 795, 31 N. Y. St. 499.

17. See list of statutes cited *supra*, note 6, p. 120; and *supra*, II, C, 1; V, B, 3; and cases cited *infra*, note 18 *et seq.*

Who may claim.— Administrator of assignor may claim the exemptions against the assignee. Partridge's Estate, 19 Wkly. Notes Cas. (Pa.) 62. But where one assigns reserving exemptions, but fails to claim them at the time of appraisement, a creditor to whom he has given a judgment waiving exemptions cannot claim such exemptions in order to gain a preference. Long *v.* Wilson, 15 Pa. Co. Ct. 68.

18. Necessity of claiming.— Carroll *v.* Else, 75 Md. 301, 23 Atl. 740; Blackburne's Appeal, 39 Pa. St. 160; Strohm's Estate, 1 Pa. Co. Ct. 573. See also *supra*, II, C, 1; V, B, 3.

19. Controlled by statute.— *Alabama.*— Southern Suspender Co. *v.* Von Borries, 91 Ala. 507, 8 So. 367.

Indiana.— O'Neil *v.* Beck, 69 Ind. 239.

Kentucky.— McNamara *v.* Schwaniger, 20 Ky. L. Rep. 1667, 49 S. W. 1061; Columbia Finance, etc., Co. *v.* Morgan, 19 Ky. L. Rep. 1761, 44 S. W. 389, 628, 45 S. W. 65; Simpson *v.* Greenwell, 19 Ky. L. Rep. 1755, 44 S. W. 433; Calloway *v.* Calloway, 19 Ky. L. Rep. 870, 39 S. W. 241.

Maryland.— Muhr *v.* Pinover, 67 Md. 480, 10 Atl. 289.

Ohio.— Allowance in lieu of homestead see Aultman *v.* Wilson, 55 Ohio St. 138, 44 N. E. 1092, 60 Am. St. Rep. 677; Kelly *v.* Duffy, 31 Ohio St. 437; Starkey *v.* Wainright, 6 Ohio N. P. 32.

Pennsylvania.— Strohm's Estate, 1 Pa. Co. Ct. 573; Van Gunten's Estate, 6 Wkly. Notes Cas. (Pa.) 345. See also Wiley's Appeal, 90 Pa. St. 173.

South Carolina.— *Ex p.* Allison, 45 S. C. 338, 23 S. E. 62.

Tennessee.— Galyon *v.* Gilmore, 93 Tenn. 671, 28 S. W. 301.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1088 *et seq.*

See list of statutes cited *supra*, note 6, p. 120.

Rent accruing subsequent to assignment.— An assignor cannot claim his exemption, or any part of it, out of rent accruing after the assignment, under a contract made by the assignee. Bausman's Appeal, 90 Pa. St. 178; Lorah's Estate, 9 Lanc. Bar (Pa.) 155.

Right to money.— Under the exemption law an assignor has the right to claim his exemptions in money. Peterman's Appeal, 76 Pa. St. 116. Where an assignor for benefit of creditors by his deed expressly reserves his exemptions, and the personalty fails to satisfy them, the assignee should make up the deficiency out of the moneys realized from sale of the realty; and if the assignor elects to take the balance in money no appraisement of the realty is necessary. Larkin's Estate, 132 Pa. St. 554, 19 Atl. 283.

Where a mortgage is found to be in effect an assignment for the benefit of creditors the mortgagor is not entitled to an allowance in lieu of homestead exemption. Pease *v.* Schuh, 4 Ohio S. & C. Pl. Dec. 121, 5 Ohio N. P. 245; *In re* Schuh, 4 Ohio S. & C. Pl. Dec. 30, 2 Ohio N. P. 381. But see Calloway *v.* Calloway, 19 Ky. L. Rep. 870, 39 S. W. 241.

20. Muhr *v.* Pinover, 67 Md. 480, 10 Atl. 289. *Compare* Marcy's Assignment, 32 Cinc. L. Bul. 6. A reservation in a deed for the benefit of creditors of "a homestead exemp-

exempt from execution" without specifying it, he is entitled to retain the kind and amount of property allowed by statute in case of execution.

3. Time and Manner of Claiming. Statutory exemptions must be claimed in the time and manner pointed out by statute, otherwise they are lost.[21] But it seems that an assignment of all property which might be reached or recovered by any of the creditors reserves the statutory exemptions for debtors to the assignor.[22]

4. Waiver or Forfeiture. The assignor may waive or abandon his right to exemptions, as by failing to comply with the statutory requirements relating thereto;[23] or he may be guilty of such fraud[24] or laches[25] as will forfeit his right to exemptions.

F. Reversion of Property on Termination of Trust. When the beneficiaries have been paid in full, together with all costs of administration, there is a resulting trust as to the balance to the assignor.[26]

tion such as a *bona fide* housekeeper with a family would take under the statute laws of Kentucky," does not entitle the assignor to a homestead out of the assigned property, where he is not entitled to one under the statute. Russell *v.* Russell, 13 Ky. L. Rep. 1001, 38 S. W. 1041.

Partners assigning both their partnership and individual property for the benefit of creditors are each entitled to the statutory exemption out of their respective individual property. Matter of Lippincott, 8 Phila. (Pa.) 236.

Tenants in common, who also live together, owning their household goods in common, on executing a joint assignment for the benefit of creditors, with reservation of exemption, are entitled to a joint exemption out of the common property. *In re* Delliker, 3 Del. Co. (Pa.) 357.

21. *Arkansas.*— Lazarus *v.* Camden Nat. Bank, 64 Ark. 322, 42 S. W. 412.

California.— Gaylord *v.* Place, 98 Cal. 472, 33 Pac. 484.

Indiana.— Graves *v.* Hinkle, 120 Ind. 157, 21 N. E. 328.

Kentucky.— See Leavell *v.* Leavell, 4 Ky. L. Rep. 889.

Massachusetts.— Silloway *v.* Brown, 12 Allen (Mass.) 30.

Ohio.— Mercer *v.* Cunningham, 53 Ohio St. 353, 41 N. E. 788. See also *In re* Bremer, 4 Ohio S. & C. Pl. Dec. 80, 3 Ohio N. P. 12.

Pennsylvania.— Kreider's Estate, 135 Pa. St. 578, 26 Wkly. Notes Cas. (Pa.) 313, 19 Atl. 1073; Chilcoat's Appeal, 101 Pa. St. 22; *In re* Fuller, 4 Kulp (Pa.) 479; Harting's Estate, 9 Lanc. Bar (Pa.) 65; Afflerbach's Estate, 4 Lanc. L. Rev. 225.

Wisconsin.— Lamont *v.* Wootton, 88 Wis. 107, 59 N. W. 456; Bates *v.* Simmons, 62 Wis. 69, 22 N. W. 335.

Compare John V. Farwell Co. *v.* Patterson, 76 Ill. App. 601, as to right of appeal from order allowing exemptions.

22. In general terms.—*Alabama.*—Southern Suspender Co. *v.* Von Borries, 91 Ala. 507, 8 So. 367.

Arkansas.— Lazarus *v.* Camden Nat. Bank, 64 Ark. 322, 42 S. W. 412.

Indiana.— O'Neil *v.* Beck. 69 Ind. 239.

Maryland.— Muhr *v.* Pinover, 67 Md. 480, 10 Atl. 289.

Michigan.— Chandler *v.* Jenks, 50 Mich. 151, 15 N. W. 60.

Pennsylvania.— Morrett's Appeal, 1 Pittsb. (Pa.) 154. *Compare* Peterman's Appeal, 76 Pa. St. 116.

Tennessee.— Farquharson *v.* McDonald, 2 Heisk. (Tenn.) 404.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1094.

23. Waiver.— Graves *v.* Hinkle, 120 Ind. 157, 21 N. E. 328; Marshall *v.* Applegate, 10 Ky. L. Rep. 811, 10 S. W. 805; Shaeffer's Appeal, 101 Pa. St. 45; Jimison's Appeal, 13 Wkly. Notes Cas. (Pa.) 25; Lamont *v.* Wootton, 88 Wis. 107, 59 N. W. 456; Bates *v.* Simmons, 62 Wis. 69, 22 N. W. 335. See also Silloway *v.* Brown, 12 Allen (Mass.) 30; Mercer *v.* Cunningham, 53 Ohio St. 353, 41 N. E. 788.

For facts held not to constitute waiver see Doherty *v.* Ramsey, 1 Ind. App. 530, 27 N. E. 879; Dolson *v.* Kerr, 5 Hun (N. Y.) 643; Kelly *v.* Duffy, 31 Ohio St. 437; Hanes *v.* Tiffany, 25 Ohio St. 549; *Ex p.* Allison, 45 S. C. 338, 23 S. E. 62.

24. Fraud.—Kreider's Estate, 135 Pa. St. 578, 26 Wkly. Notes Cas. (Pa.) 313, 19 Atl. 1073.

25. Laches.— Chilcoat's Appeal, 101 Pa. St. 22.

26. Farnsworth *v.* Doom, 22 Ky. L. Rep. 1491, 60 S. W. 712; Mills *v.* Rice, 6 Gray (Mass.) 458; Lazarus *v.* Commonwealth Ins. Co., 19 Pick. (Mass.) 81; Wilkes *v.* Ferris, 5 Johns. (N. Y.) 335, 4 Am. Dec. 364; Matter of Potter, 54 Pa. St. 465; Webb *v.* Dean, 21 Pa. St. 29; Ross *v.* McJunkin, 14 Serg. & R. (Pa.) 364; Merrick's Estate, 1 Phila. (Pa.) 373, 9 Leg. Int. (Pa.) 114.

As to: Reservation of surplus see *supra*, V, D. Right of non-assenting creditor to share in surplus see *supra*, X, B, 5. Time of termination of trust and presumption of termination see *supra*, X, H.

The assignee notified the assignor that there was a balance in bank at his order. The assignor allowed the money to remain drawing interest. Upon failure of the bank it was held that the assignee was no longer liable to the assignor. Heckert's Appeal, 69 Pa. St. 264.

Shares of non-accepting creditors.— Where an assignment provides that the shares which

G. Right to Resist Levy or Sale. An assignor has such a reversionary interest in the assigned estate that he may move to vacate an attachment levied upon it [27] or to set aside a sale of it under foreclosure of a mortgage.[28]

XVI. LIABILITY ON ASSIGNEE'S BOND.

A. Nature and Extent of — 1. In General. The nature and extent of the liability is governed by the terms and the conditions of the bond itself, and the giving of the bond being a statutory requirement the liability may also depend upon the provisions of the statute, if any, relating to the contents and sufficiency of the bond.[29]

2. Adjudication Against Assignee Concludes Sureties. In an action on the bond of an assignee in the absence of fraud at least,[30] the sureties are bound by orders and judgments against their principal, the assignee,[31] and this has been

would fall to creditors who fail to accept shall revert to the assignor, the assignee must pay the assignor the shares of creditors who do not accept within the prescribed time. Ralston's Appeal, 169 Pa. St. 254, 32 Atl. 454.

27. Vacating attachment.— Winona First Nat. Bank *v.* Randall, 38 Minn. 382, 37 N. W. 799; Holland *v.* Atzerodt, 1 Walk. (Pa.) 237. See also Keith *v.* Armstrong, 65 Wis. 225, 26 N. W. 445, holding that an assignor may traverse the affidavit for an attachment. But see Quebec Bank *v.* Carroll, 1 S. D. 372, 47 N. W. 397, holding that an assignor is not entitled to ask for the discharge of an attachment on account of the assignment as a means of protecting the property assigned.

The action for damages for wrongful attachment vests in the assignee. The assignor cannot sue therefor. Cleveland Coal Co. *v.* Sloan, 90 Ky. 308, 12 Ky. L. Rep. 223, 14 S. W. 279; Roby *v.* Meyer, 84 Tex. 386, 19 S. W. 557; Fechheimer *v.* Ball, 1 Tex. App. Civ. Cas. § 766.

28. Setting aside foreclosure sale.— Delaware, etc., R. Co. *v.* Scranton, 34 N. J. Eq. 429. But see Monteith *v.* Hogg, 17 Oreg. 270, 20 Pac. 327, holding that one who has assigned land subject to a mortgage has no such interest remaining therein as will give force to a contract with the holder of the mortgage that the latter shall bid the land in and hold it as security for his own demand and to pay other debts of the assignor.

29. See list of statutes cited *supra*, note 6, p. 120; and Moulding *v.* Wilhartz, 169 Ill. 422, 48 N. E. 189 [*affirming* 67 Ill. App. 659]; Cook *v.* Lehmer, 2 Ohio S. & C. Pl. Dec. 111, 1 Ohio N. P. 146 (where sureties were held not to be liable on account of a confusion of several trusts, their bond being only to enforce performance of one of the trusts); Rhawn *v.* Com., 102 Pa. St. 450.

As to the necessity and sufficiency of assignee's bond see *supra*, XI, B.

For liabilities on bonds, generally, see Bonds.

Although the statutory requirements are not complied with, the bond may be binding as a common-law obligation, and as such be enforced. Andrews *v.* Ford, 106 Ala. 173, 17 So. 446.

Personal acts of assignee outside the assignment and not done in his representative capacity are not within the obligation of his bond. Israel *v.* Jordan, 12 Misc. (N. Y.) 552, 34 N. Y. Suppl. 21, 67 N. Y. St. 888; Yeaman *v.* Payne, 9 Ohio Cir. Ct. 192. See also People *v.* Chalmers, 1 Hun (N. Y.) 683, 4 Thomps. & C. (N. Y.) 185. But it has been held that the sureties are liable for failure of assignee to pay over the amount allowed on a creditor's claim, which the trustee was employed as attorney to establish, if he was not also employed to collect the same, and made no separation of the fund in his hands. Taylor *v.* State, 73 Md. 208, 20 Atl. 914, 11 L. R. A. 852.

Sureties on new or additional bond are liable for the fiduciary conduct of the assignee to the extent of the conditions of their bond from the time he first qualified. Thorne *v.* Megrue, 5 Ohio Dec. (Reprint) 131, 3 Am. L. Rec. 140.

The payment of the amount found to be due upon a settlement is within the obligation of his bond, conditioned for the faithful discharge of his duties as assignee. National Surety Co. *v.* Arterburn, (Ky. 1901) 62 S.W. 862.

30. In the absence of fraud.— State *v.* National Surety Co., 76 Mo. App. 227; Walsh *v.* Miller, 51 Ohio St. 462, 38 N. E. 381; Cook *v.* Lehmer, 9 Ohio Cir. Ct. 632.

Collusion between a creditor and an assignee, with a fraudulent purpose of recovering a fraudulent claim from the surety, can be defeated by the surety; but the collusive intent of the assignor and the assignee to defraud the former's creditors does not concern the surety, so long as the judgment for the payment of which it is sought to charge the surety is not procured by fraud. State *v.* National Surety Co., 76 Mo. App. 227.

31. Bound by orders and judgments.— *Indiana.*— State *v.* Musser, 4 Ind. App. 407, 30 N. E. 944, order and judgment approving report of assignee at time of his resignation.

Kentucky.— National Surety Co. *v.* Arterburn, (Ky. 1901) 62 S. W. 862, 864.

Missouri.— State *v.* National Surety Co., 76 Mo. App. 227.

New York.— In a suit against the sureties to recover an amount which the assignee had been ordered to pay, the order made in the proceedings against him is *prima facie,* but not conclusive, evidence of the breach of the bond. People *v.* White, 28 Hun (N. Y.) 289.

held to be true whether the sureties have a right to appeal from such orders or judgments or not.[32]

3. Discharge of Sureties. An assignee and his sureties will be discharged only upon a regular proceeding for an accounting;[33] and this has been held to be true even where the accounting is wholly formal.[34]

4. What Constitutes Breach. A failure on the part of an assignee to properly discharge his duties as such will constitute a breach of his bond.[35] So it has been held that a breach of the bond may result from a failure to make proper payments of money to persons entitled thereto,[36] from the making of improper payments or the misapplication of the assets of the estate,[37] or from a failure to comply with an order of the court.[38]

Ohio.— Walsh *v.* Miller, 51 Ohio St. 462, 38 N. E. 381; Garver *v.* Tisinger, 46 Ohio St. 56, 18 N. E. 491; Cook *v.* Lehmer, 9 Ohio Cir. Ct. 632.

Pennsylvania.— Little *v.* Com., 48 Pa. St. 337 (final decree upon assignee's account); Patterson's Appeal, 48 Pa. St. 342; Com. *v.* Dumn, 17 Pa. Super. Ct. 90.

See 4 Cent. Dig. tit. "Assignments for Benefit of Creditors," § 1190.

See also, generally, Bonds. But *compare* Craddock *v.* Orand, 72 Tex. 36, 12 S. W. 208, as to effect of judgment against assignee in garnishment proceedings.

32. Right of appeal.— State *v.* National Surety Co., 76 Mo. App. 227. But see Garver *v.* Tisinger, 46 Ohio St. 56, 18 N. E. 491.

33. Necessity of an accounting.—Matter of Lewenthal, 10 Daly (N. Y.) 14; Matter of Merwin, 10 Daly (N. Y.) 13. See also Oppenheimer *v.* Hamrick, 86 Iowa 584, 53 N. W. 312. See also *supra*, XIII.

Compromise with and release of one surety will not discharge the others. Walsh *v.* Miller, 51 Ohio St. 462, 38 N. E. 381.

Declaring assignment void has been held to terminate the liability of the sureties. People *v.* Chalmers, 60 N. Y. 154 [*affirming* 1 Hun (N. Y.) 683, 4 Thomps. & C. (N. Y.) 185; *distinguishing* People *v.* Vilas, 36 N. Y. 459, 1 Transcr. App. (N. Y.) 209, 3 Abb. Pr. N. S. (N. Y.) 252, 93 Am. Dec. 520].

On a proceeding to vacate the trust and procure a reconveyance to the assignor, the court will not, in rendering a decree that the assignee file his final report, and that the trust be ended by compliance with the terms of the decree, lose its jurisdiction over the person of the assignee for the settlement of his final account; nor will the sureties on his bond, by such a termination of the trust, be released from liability for the assignee's failure to pay over when ordered by the court a balance found remaining in his hands. Garver *v.* Tisinger, 46 Ohio St. 56, 18 N. E. 491.

The mere delay of a creditor to proceed against an assignee for the benefit of creditors until he has become insolvent will not relieve the assignee's surety from liability. People *v.* White, 28 Hun (N. Y.) 289. To the same effect see Taylor *v.* State, 73 Md. 208, 20 Atl. 914, 11 L. R. A. 852.

Where, on removal of an assignee in insolvency, his account was presented, with no information as to the items thereof, and the court had no opportunity for an investigation thereof, the court will not cancel the assignee's bond and release sureties in the absence of the creditors interested, though the assignment statute provides that on such removal the bond shall be canceled. Matter of Reynolds, 30 Misc. (N. Y.) 397, 62 N. Y. Suppl. 515.

34. As where creditors have consented to a composition.— Matter of Dryer, 10 Daly (N. Y.) 8; Matter of Yeager, 10 Daly (N. Y.) 7.

35. Milburn Mfg. Co. *v.* Wayland, (Tenn. Ch. 1896) 43 S. W. 129. Thus an assignee who neglects to use ordinary diligence to procure or to keep up insurance on the assigned property is liable on his official bond for resulting damages. Hill *v.* American Surety Co., 107 Wis. 19, 81 N. W. 1024, 82 N. W. 691.

After settlement and discharge.— Where an assignee after bringing suit to settle the assigned estate, but before a report of claims was filed, resigns, he is not liable on his bond for failing to make a creditor a party to the suit, for the reason, if for no other, that the creditor had not been damaged when he resigned; it being then still possible for the new trustee to make him a party, and for him to have his claim allowed. Long *v.* Merchants' Nat. Bank, 21 Ky. L. Rep. 571, 52 S. W. 822; German Bank *v.* Haller, 103 Tenn. 73, 52 S. W. 288, holding sureties liable for an item of credit on the assignee's account, which on appeal was held to have been erroneously charged in the final settlement.

36. Failure to make proper payments.— Milburn Mfg. Co. *v.* Wayland, (Tenn. Ch. 1896) 43 S. W. 129. But this does not apply to usurious claims against the estate. Powers *v.* Bibee, (Tenn. Ch. 1895) 35 S. W. 448.

37. Improper payments and misapplication of assets.— Foster *v.* Mix, 20 Conn. 395; Milburn Mfg. Co. *v.* Wayland, (Tenn. Ch. 1896) 43 S. W. 129; Becker *v.* Shayne, 77 Tex. 260, 13 S. W. 1027; Maverick *v.* Skinner, (Tex. Civ. App. 1899) 50 S. W. 640.

38. Non-compliance with order of court.— Van Slyke *v.* Bush, 123 N. Y. 47, 25 N. E. 196, 33 N. Y. St. 65 [*reversing* 56 N. Y. Super. Ct. 478, 4 N. Y. Suppl. 710, 24 N. Y. St. 822]; Garver *v.* Tisinger, 46 Ohio St. 56, 18 N. E. 491; Phillips *v.* Ross, 36 Ohio St. 458. But see People *v.* Chalmers, 60 N. Y. 154; and *supra*, note 29.

There can be no recovery on an assignee's bond for his failure to deliver to the purchaser property sold by such assignee under

B. Actions to Enforce[39]— **1. In General.** Unless otherwise authorized by statute[40] it seems that in cases of voluntary assignments the assignee and his sureties cannot be sued on the assignee's bond by a creditor until it has been ascertained by proper proceeding to what part of the trust fund the creditor is entitled.[41]

2. Parties. It has been held that any creditor,[42] any debtor,[43] or any person aggrieved or injured by a breach of the condition of the assignee's bond[44] may sue thereon. It is sometimes proper to bring the action in the name of the state.[45]

3. Pleading. In an action on an assignee's bond it is necessary to allege a breach of the bond and such breach must be well assigned.[46] The plea must not omit material allegations,[47] and must be good as against an objection for uncertainty.[48]

an order of court, unless an order of court is first obtained directing a delivery of the property to the purchaser. State *v.* Scott, 42 Mo. App. 203.

39. For actions on bonds, generally, see Bonds.

40. **Under Wis. Rev. Stat. § 1695,** authorizing actions on such bonds on conditions broken, such action may be maintained during the pendency of the assignment proceedings. Hill *v.* American Surety Co., 107 Wis. 19, 81 N. W. 1024, 82 N. W. 691.

Summary proceeding.—See Universal Lock, etc., Co. *v.* Blake, 84 Mo. App. 478, construing Mo. Rev. Stat. (1899), § 356, as to entry of judgment against a discharged assignee.

41. **Necessity of prior proceeding.**— Yarbrough *v.* Colley, 5 Ky. L. Rep. 683, 6 Ky. L. Rep. 121. But see and *compare* Berryhill *v.* Peabody, 77 Minn. 59, 79 N. W. 651. See also *supra*, XIII, XIV.

Waiver by answer on the merits.— Where an assignment is entirely closed, and the property turned over to a receiver appointed by the court, and the latter has disposed of all the property, an objection that an action on the assignee's bond for neglect to procure insurance on the property cannot be brought until after a final settlement of the assignee's accounts is waived by an answer on the merits. Hill *v.* American Surety Co., 107 Wis. 19, 81 N. W. 1024, 82 N. W. 691.

Where the assignee has been removed (Berryhill *v.* Peabody, 77 Minn. 59, 79 N. W. 651), or where, after entering upon the discharge of his duties as assignee, he abandons the execution of the trust and removes from the state (Andrews *v.* Ford, 106 Ala. 173, 17 So. 446), a creditor having rights under the assignment may sue the assignee and his sureties upon the bond.

Seizure of the assigned property by judicial proceedings, whereby the assignee is prevented from realizing anything, is a bar to an action, by a creditor not consenting to the assignment, on the bond of the assignee. Craddock *v.* Orand, 72 Tex. 36, 12 S. W. 208.

42 **Creditor.**— Best *v.* Johnson, 78 Cal. 217, 20 Pac. 415, 12 Am. St. Rep. 41, 3 L. R. A. 168; Prosser *v.* Hartley, 35 Minn. 340, 29 N. W. 156; Matter of Stockbridge, 10 Daly (N. Y.) 33; German Bank *v.* Haller, 103 Tenn. 73, 52 S. W. 288.

Any creditor may be granted leave to sue on the assignee's bond, no matter how many actions are thus authorized. Matter of Stockbridge, 10 Daly (N. Y.) 33.

Where a creditor, who has sued to set aside a conveyance as fraudulent, is paid his claim, but is required to give a refunding bond to await final decision, he still has an interest as creditor entitling him to stand as equitable plaintiff in an action on the bond of a trustee under a deed of assignment executed by the debtor. German Bank *v.* Haller, 103 Tenn. 73, 52 S. W. 288.

43. **Debtors.**— Best *v.* Johnson, 78 Cal. 217, 20 Pac. 415, 12 Am. St. Rep. 41, 3 L. R. A. 168.

44. **Any person injured.**— State *v.* Boeppler, 63 Mo. App. 151, construing statute providing that any person injured by "breach of the condition" of the bond may sue.

Insolvent corporation is not a necessary party to a suit against the assignee and the sureties on his bond. Andrews *v.* Ford, 106 Ala. 173, 17 So. 446.

Substituted assignee may sue the former assignee upon his bond for a wrongful disposition of the estate (Prosser *v.* Hartley, 35 Minn. 340, 29 N. W. 156, construing Minn. Gen. Stat. (1878), c. 41, §§ 25, 30 [but *compare* State *v.* Boeppler, 63 Mo. App. 151, construing Mo. Rev. Stat. (1889), § 438]), or for a failure to deliver over the property pursuant to order of court (Phillips *v.* Ross, 36 Ohio St. 458).

Third persons, it seems, however, are not entitled to sue. Best *v.* Johnson, 78 Cal. 217, 20 Pac. 415, 12 Am. St. Rep. 41, 3 L. R. A. 168.

45. **In name of state.**— An action on the bond executed under Ind. Rev. Stat. (1876), p. 142, can only be brought in the name of the state. Jackson *v.* Rounds, 59 Ind. 116. To the same effect see State *v.* Boeppler, 63 Mo. App. 151. *Compare* Prosser *v.* Hartley, 35 Minn. 340, 29 N. W. 156.

46. **Breach must be well assigned.**— Mills *v.* Skinner, 13 Conn. 436 (breach not well assigned); Craddock *v.* Orand, 72 Tex. 36, 12 S. W. 208 (suit by non-consenting creditor).

47. **Plea or answer.**—Morrill *v.* Richardson, 9 Pick. (Mass.) 84.

Pleading to the merits may waive the objection that the action cannot be maintained till the breach of the bond has been determined in the assignment proceedings. Hill *v.* American Surety Co., 107 Wis. 19, 81 N. W. 1024, 82 N. W. 691.

48. **Plea bad for uncertainty.**— Morrill *v.* Richardson, 9 Pick. (Mass.) 84.

4. EVIDENCE. In respect of presumptions and burden of proof,[49] the admissibility of evidence,[50] the sufficiency of proof,[51] and variance[52] in actions upon bonds of assignees for creditors, the general rules of evidence have been applied.

5. AMOUNT OF RECOVERY. It seems that in an action by a creditor to recover upon the official bond of an assignee for a breach of the condition of the obligation, the proper measure of damages is the amount of the demand allowed by the assignee in favor of plaintiff as creditor of the estate,[53] together with interest[54] and costs.[55]

ASSIGNMENTS OF ERRORS. See APPEAL AND ERROR; CRIMINAL LAW; JUSTICES OF THE PEACE; NEW TRIAL.

ASSIGNOR. One who transfers property to another;[1] one who transfers a right of action not transferable at common law.[2]

ASSIGNS. All those who take, either immediately or remotely, from or under the assignor, whether by conveyance, devise, descent, or act of law;[3] those to whom rights have been transferred by particular title, such as sale, gift, transfer, or cession;[4] a person to whom any property or right is transferred by a deceased person in his lifetime.[5] (See also ASSIGNEE; ASSIGNMENTS; ASSIGNMENTS FOR BENEFIT OF CREDITORS; DEEDS; WILLS.)

ASSISE. See ASSIZE.

ASSISTANCE. See AID; ARREST; ASSISTANCE, WRIT OF; POOR PERSONS.

49. Presumptions and burden of proof.— Hill *v.* American Surety Co., 107 Wis. 19, 81 N. W. 1024, 82 N. W. 691.

50. Admissibility of evidence.— Clark *v.* Mix, 15 Conn. 152; State *v.* McFarland, (Tenn. Ch. 1895) 35 S. W. 1007; Hill *v.* American Surety Co., 107 Wis. 19, 81 N. W. 1024, 82 N. W. 691.

51. Sufficiency of proof.— Hill *v.* American Surety Co., 107 Wis. 19, 81 N. W. 1024, 82 N. W. 691.

Where the deed of assignment offered in evidence by the plaintiff purported to have been executed by one of the assignors, by attorney, and the defendants objected that there was no proof of the execution of the power, it was held that the acknowledgment of the deed in the bond extended to everything necessary to prove the due execution of the deed, and superseded the necessity of offering further proof of the power. Clark *v.* Mix, 15 Conn. 152.

52. Variance.— Clark *v.* Mix, 15 Conn. 152; State *v.* McFarland, (Tenn. Ch. 1895) 35 S. W. 1007.

53. Measure of damages.— State *v.* Hart, 38 Mo. 44. But in Lahm *v.* Johnston, 32 Ohio St. 590, it is held that in an action by a creditor, for a failure to account for any of the property assigned, the amount of recovery must be controlled by the proportionate amount of such creditor's claims allowed to the whole amount of those claims only which have been presented and allowed pursuant to the statute.

After damages have been assessed the surety cannot have the amount of a creditor's claim deducted therefrom, on the ground that it was not presented to the assignee under oath, where such claim was allowed and included in all of the assignee's accounts, and no creditor objects. *In re* Stelle, 34 N. J. Eq. 199.

54. Interest.— State *v.* Hart, 38 Mo. 44, construing special statute.

55. Costs.— Boland *v.* Benson, 50 Wis. 225, 6 N. W. 819. But where a creditor brought suit to establish his claim, making both the assignors and assignee parties, and judgment was entered against the assignee establishing the claim, but without costs, and against the assignors for the amount of the claim and costs, it was held that the creditor was entitled to dividends only upon the claim without costs, but that, the assignee failing to pay dividends upon it, his sureties were liable for the cost of establishing it against them. Merchants' Bank *v.* Chapin, 4 Ohio Dec. (Reprint) 403, 2 Clev. L. Rep. 114.

1. Clement *v.* Adams, 12 How. Pr. (N. Y.) 163, 164.

2. Clement *v.* Adams, 12 How. Pr. (N. Y.) 163, 164; Potter *v.* Bushnell, 10 How. Pr. (N. Y.) 94, 96 [*quoted* in Hicks *v.* Wirth, 4 E. D. Smith (N. Y.) 78, 80].

3. Brown *v.* Crookston Agricultural Assoc., 34 Minn. 545, 546, 26 N. W. 907; Baily *v.* De Crespigny, L. R. 4 Q. B. 180, 186, 38 L. J. Q. B. 98, 19 L. T. Rep. N. S. 681, 17 Wkly. Rep. 494.

Its use is now confined to conveyancing, in which branch of the law it has been employed from a very remote period. Burrill L. Dict.

"The word 'assigns' includes the assignee of an assignee, *in perpetuam*, the heir of an assignee, and the assignee of an heir." Cumberland *v.* Graves, 7 N. Y. 305, 312 [*citing* Jacob L. Dict.]. See also Bennington Iron Co. *v.* Rutherford, 18 N. J. L. 158, 164.

4. Bouvier L. Dict. [*quoted* in McRee *v.* Means, 34 Ala. 349, 356; Watson *v.* Donnelly, 28 Barb. (N. Y.) 653, 658.

5. Ripley *v.* Seligman, 88 Mich. 177, 189, 50 N. W. 143 [*quoted* in Bailey *v.* Holden, 113 Mich. 402, 404, 71 N. W. 841].

ASSISTANCE, WRIT OF

EDITED BY HENRY C. McWHORTER

Associate Judge Supreme Court of Appeals of West Virginia

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I. DEFINITION.

The term "writ of assistance" has been applied to three distinct classes of process: (1) It was a writ issuing from the court of exchequer, addressed to the sheriff, commanding him to be in aid of the king's tenants by knight service, or the king's collectors, debtors, or accountants, to enforce payment of their own dues, in order to enable them to pay their dues to the king;[1] (2) a writ issuing out of the exchequer[2] to authorize any person to take a constable, or other public officer, to seize goods or merchandise prohibited and uncustomed, etc.;[3] (3) a writ issuing out of chancery to the sheriff to assist a receiver, sequestrator,[4] or other party to a suit in chancery, to get possession, under a decree of the court, of lands withheld from him by another party to the suit.[5] It is only in the last sense that the writ will be treated at length.

II. NATURE AND PROPRIETY OF WRIT.

A. Original Writ — 1. Issues in What Suits — a. In General. The cases in which writs of assistance are proper are such as determine the question of title to the specific piece of real property involved in that particular case,[6] or in which the interest of defendant has been directed by the judgment or decree to be sold,[7] the writ being part of the process employed in enforcing the judgment itself.[8] The issuance of the writ has been held to rest in the discretion of the

1. Quincy (Mass.) 395.

For form of this writ see Quincy (Mass.) 395, note 1.

In aid of attachment.— No instance has been found in which a writ of assistance has been granted when the attachment is directed to the sheriff (Mahony *v.* Aylward, 1 Hogan 474; Meagher *v.* Meagher, 1 Jones & L. 31), but when the attachment was directed to the pursuivant the writ issued (Mahony *v.* Aylward, 1 Hogan 474).

2. In Massachusetts the superior court of judicature had power to issue general writs of assistance to officers of the customs. Paxton's Case, Quincy (Mass.) 51.

3. Jacob L. Dict.; Quincy (Mass.) 397.

For forms of this writ see Quincy (Mass.) 398, note 6.

This writ was introduced by 12 Car. II, c. 19, and authorized the person to whom it was issued, with the assistance of the sheriff, justice of the peace, or constable, to enter into any house where the goods were suspected of being concealed; but one acting under this writ and finding nothing was not justified. Bouvier L. Dict. See also Boyd *v.* U. S., 116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746.

4. **In Ireland** it was held that such a writ would not issue to sequestrators. Browne *v.* Cuffe, 1 Hogan 145.

5. Quincy (Mass.) 396, where it is said that, whether from the odium attached to the name in Massachusetts or from the practice in that state to conform processes in equity to those at law, no instance is known of such a writ having been issued in that commonwealth.

In England, under Ord. XLVIII, this writ is no longer used, the writ of possession having been substituted therefor. Hall *v.* Hall, 47 L. J. Ch. 680.

Origin of writ.— It is sometimes said that this writ had its origin in the reign of James I (Bouvier L. Dict.; Wharton L. Lex.), but in Jones Mortg. § 1663 [*quoted* in Voigtlander *v.* Brotze, 59 Tex. 286, 288], the origin of the writ is placed as early as the reign of Henry VIII.

6. *California.*— People *v.* Doe, 31 Cal. 220.

Maryland.—Garretson *v.* Cole, 1 Harr. & J. (Md.) 370.

New York.— Matter of New York Cent., etc., R. Co., 60 N. Y. 116.

Pennsylvania.— Com. *v.* Dieffenbach, 3 Grant (Pa.) 368; Kelsey *v.* Church, 4 C. Pl. Rep. (Pa.) 105.

Tennessee.— Irvine *v.* McRee, 5 Humphr. (Tenn.) 553, 42 Am. Dec. 468.

England.— Consol. Ord. XXIX, r. 5 [*cited* in Wharton L. Lex.].

7. *California.*— People *v.* Doe, 31 Cal. 220.

Florida.— Keil *v.* West, 21 Fla. 508.

Mississippi.— Jones *v.* Hooper, 50 Miss. 510.

New York.— Matter of New York Cent., etc., R. Co., 60 N. Y. 116.

North Carolina.— Knight *v.* Houghtalling, 94 N. C. 408.

Statute prohibiting in certain cases not retroactive.— Mich. Pub. Acts (1897), No. 229, § 140, which prohibits the issuance of the writ for the possession of any land the title to which has been obtained "in pursuance of any tax sale hereafter made," does not preclude the issuance of such a writ where the land was bid off for taxes before the act took effect, though the conveyance by the auditor-general was made after the act took effect. Pierpont *v.* Osmun, 118 Mich. 472, 76 N. W. 1044.

8. San Jose *v.* Fulton, 45 Cal. 316; People *v.* Doe, 31 Cal. 220; Knight *v.* Houghtalling,

court,[9] and a question of legal or equitable title will not be tried on an application therefor,[10] nor will it be granted in cases of doubt.[11]

b. Divorce. The writ will issue in an action or suit for divorce to put a party in possession of land which the judgment or decree vested absolutely in him.[12]

c. Establishing Title Under Burnt-Record Act. Where a petitioner, by decree under a burnt-record act, has established his title to land in the adverse possession of defendant, the writ may issue to put the former into possession.[13]

d. Foreclosure. This writ is also the appropriate remedy and is most commonly used for placing in possession the purchaser at a foreclosure sale.[14]

2. Issues in Whose Favor. It has been held that the writ cannot be regularly issued at the instance of one not a party to the cause;[15] but it is now clear that

94 N. C. 408; Com. *v.* Dieffenbach, 3 Grant (Pa.) 368.

"**It may be termed** an equitable habere facias possessionem." Knight *v.* Houghtalling, 94 N. C. 408, 410.

The writ is founded on the principle that a court of equity will carry its decrees into complete execution, without the aid of other tribunals, when it can do so justly. Beatty *v.* De Forest, 27 N. J. Eq. 482 [*affirming* Frazier *v.* Beatty, 25 N. J. Eq. 343], wherein Beardsley, C. J., said that he saw no reason to regard the remedy as an "extraordinary relief," as it was termed in Blauvelt *v.* Smith, 22 N. J. Eq. 31. See also Kershaw *v.* Thompson, 4 Johns. Ch. (N. Y.) 609; Com. *v.* Ragsdale, 2 Hen. & M. (Va.) 8; Newman *v.* Chapman, 2 Rand. (Va.) 93, 14 Am. Dec. 766; Trimble *v.* Patton, 5 W. Va. 432; Root *v.* Woolworth, 150 U. S. 401, 14 S. Ct. 136, 37 L. ed. 1123.

9. Barton *v.* Beatty, 28 N. J. Eq. 412; Vanmeter *v.* Borden, 25 N. J. Eq. 414; Schenck *v.* Conover, 13 N. J. Eq. 220, 78 Am. Dec. 95; Hagerman *v.* Heltzel, 21 Wash. 444, 58 Pac. 580.

10. *Arizona.*— Godchaux *v.* Demarboix, (Ariz. 1886) 11 Pac. 45; Asher *v.* Cox, (Ariz. 1886) 11 Pac. 44.

California.— Langley *v.* Voll, 54 Cal. 435; Henderson *v.* McTucker, 45 Cal. 647.

Indiana.— Roach *v.* Clark, 150 Ind. 93, 48 N. E. 796, 65 Am. St. Rep. 353.

New Jersey.— Barton *v.* Beatty, 28 N. J. Eq. 412; Thomas *v.* De Baum, 14 N. J. Eq. 37; Schenck *v.* Conover, 13 N. J. Eq. 220, 78 Am. Dec. 95.

New York.— Stillwell *v.* Hart, 40 N. Y. App. Div. 112, 57 N. Y. Suppl. 639; Frelinghuysen *v.* Colden, 4 Paige (N. Y.) 204.

North Carolina.—Exum *v.* Baker, 115 N. C. 242, 20 S. E. 448, 44 Am. St. Rep. 449.

South Carolina.— *Ex p.* Jenkins, 48 S. C. 325, 26 S. E. 686.

Washington.— Hagerman *v.* Heltzel, 21 Wash. 444, 58 Pac. 580.

Wisconsin.— Stanley *v.* Sullivan, 71 Wis. 585, 37 N. W. 801, 5 Am. St. Rep. 245.

11. Wiley *v.* Carlisle, 93 Ala. 237, 9 So. 288; Barton *v.* Beatty, 28 N. J. Eq. 412; Vanmeter *v.* Borden, 25 N. J. Eq. 414; Blauvelt *v.* Smith, 22 N. J. Eq. 31; Schenck *v.* Conover, 13 N. J. Eq. 220, 78 Am. Dec. 95; Knight *v.* Houghtalling, 94 N. C. 408; Hagerman *v.* Heltzel, 21 Wash. 444, 58 Pac. 580.

Where the sale was not sufficiently advertised as to one of the tracts sold the writ will be refused. Vanmeter *v.* Borden, 25 N. J. Eq. 414.

12. Kirsch *v.* Kirsch, 113 Cal. 56, 45 Pac. 164.

13. Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053; Gormley *v.* Clark, 134 U. S. 338, 10 S. Ct. 554, 33 L. ed. 909.

14. *Arkansas.*— Bright *v.* Pennywit, 21 Ark. 130.

California.— Hibernia Sav., etc., Soc. *v.* Lewis, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; Trope *v.* Kerns, 83 Cal. 553, 23 Pac. 691 (holding that the right to the writ does not deprive a party of the right to ejectment); Montgomery *v.* Middlemiss, 21 Cal. 103, 81 Am. Dec. 146; Montgomery *v.* Tutt, 11 Cal. 190.

Illinois.— Jackson *v.* Warren, 32 Ill. 331. See also Carpenter *v.* White, 43 Ill. App. 448.

Kansas.— Watkins *v.* Jerman, 36 Kan. 464, 13 Pac. 798.

Michigan.— Ketchum *v.* Robinson, 48 Mich. 618, 12 N. W. 877; Ramsdell *v.* Maxwell, 32 Mich. 285.

Mississippi.— Jones *v.* Hooper, 50 Miss. 510.

New Jersey.—Beatty *v.* De Forest, 27 N. J. Eq. 482; Schenck *v.* Conover, 13 N. J. Eq. 220, 78 Am. Dec. 95.

New York.— Connor *v.* Schaeffel, 11 N. Y. Suppl. 737, 19 N. Y. Civ. Proc. 378, 25 Abb. N. Cas. (N. Y.) 344 (foreclosure of mechanic's lien); Bell *v.* Birdsall, 19 How. Pr. (N. Y.) 491; New York L. Ins., etc., Co. *v.* Rand, 8 How. Pr. (N. Y.) 35 [*affirmed* in 8 How. Pr. (N. Y.) 352]; Ludlow *v.* Lansing, Hopk. (N. Y.) 231; Frelinghuysen *v.* Colden, 4 Paige (N. Y.) 204; Kershaw *v.* Thompson, 4 Johns. Ch. (N. Y.) 609.

North Carolina.— Knight *v.* Houghtalling, 94 N. C. 408.

Texas.— Voigtlander *v.* Brotze, 59 Tex. 286.

Washington.— London Debenture Corp. *v.* Warren, 9 Wash. 312, 37 Pac. 451.

Wisconsin.— Diggle *v.* Boulden, 48 Wis. 477, 4 N. W. 678; Loomis *v.* Wheeler, 18 Wis. 524.

United States.—Terrell *v.* Allison, 21 Wall. (U. S.) 289, 22 L. ed. 634; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 44 Fed. 653.

Contra, Armstrong *v.* Humphreys, 5 S. C. 128.

15. Wilson *v.* Polk, 13 Sm. & M. (Miss.)

the purchaser under a decree for sale is entitled to the writ even though a stranger to the record,[16] and, by the weight of authority, it will issue in favor of such purchaser's assignee or grantee,[17] unless it appears that the granting of the writ would do injustice to the party in possession.[18] It will also issue to put a receiver in possession,[19] but not to aid him in levying a distress for rent.[20]

3. Issues Against Whom. The writ of assistance will issue against a party to the suit or his representatives,[21] or a person coming into possession under

131, 51 Am. Dec. 151 [*citing* 2 Smith Ch. Pr. 214], holding that a purchaser of land under a decree of the court of chancery, who is not a party to the original suit in which the decree of sale was made, can only proceed by getting the vendor to make application for the process. See also Stephenson *v.* Gillenan, 5 Ohio N. P. 419. But *compare* Gibson *v.* Marshall, 64 Miss. 72, 8 So. 205.

16. *Alabama.*— Wiley *v.* Carlisle, 93 Ala. 237, 9 So. 288; Johnston *v.* Smith, 70 Ala. 108; Chapman *v.* Gibbs, 51 Ala. 502; Trammel *v.* Simmons, 8 Ala. 271; Creighton *v.* Paine, 2 Ala. 158.

California.— Hibernia Sav., etc., Soc. *v.* Lewis, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; Montgomery *v.* Middlemiss, 21 Cal. 103, 81 Am. Dec. 146; Montgomery *v.* Tutt, 11 Cal. 190.

Illinois.— Lambert *v.* Livingston, 131 Ill. 161, 23 N. E. 352; Jackson *v.* Warren, 32 Ill. 331.

Kansas.— Watkins *v.* Jerman, 36 Kan. 464, 13 Pac. 798.

Mississippi.— Gibson *v.* Marshall, 64 Miss. 72, 8 So. 205.

New Jersey.— Beatty *v.* De Forest, 27 N. J. Eq. 482; Schenck *v.* Conover, 13 N. J. Eq. 220, 78 Am. Dec. 95.

New York.— Lynde *v.* O'Donnell, 12 Abb. Pr. (N. Y.) 286; Bell *v.* Birdsall, 19 How. Pr. (N. Y.) 491; Ludlow *v.* Lansing, Hopk. (N. Y.) 231; Frelinghuysen *v.* Colden, 4 Paige (N. Y.) 204; Kershaw *v.* Thompson, 4 Johns. Ch. (N. Y.) 609.

North Carolina.— Knight *v.* Houghtalling, 94 N. C. 408.

Wisconsin.— Diggle *v.* Boulden, 48 Wis. 477, 4 N. W. 678. *Compare* Gelpeke *v.* Milwaukee, etc., R. Co., 11 Wis. 454, holding that one who claims adversely to all parties to the suit, but is not a party to the record, cannot of right be heard in reference to the issuance or execution of a writ of assistance.

United States.— Terrell *v.* Allison, 21 Wall. (U. S.) 289, 22 L. ed. 634.

England.— Toynbee *v.* Ducknell [*cited* in 51 Am. Dec. 152, 153 note]; Wilson *v.* Angus [*cited* in 51 Am. Dec. 152, 153 note].

The existence of fiduciary relations between the parties at the time of the sale, such that equity would hold the purchaser a trustee for the possessor in the purchase on the ground of constructive fraud, will not prevent the issuance of the writ in favor of a purchaser at a tax-sale. Mills *v.* Tukey, 22 Cal. 373, 83 Am. Dec. 74.

17. Motz *v.* Henry, 8 Kan. App. 416, 54 Pac. 796; Ekings *v.* Murray, 29 N. J. Eq. 388; New York L. Ins., etc., Co. *v.* Rand, 8 How. Pr. (N. Y.) 352 [*affirming* 8 How. Pr. (N. Y.) 35]. *Contra,* Langley *v.* Voll, 54 Cal. 433; San Jose *v.* Fulton, 45 Cal. 316; People *v.* Grant, 45 Cal. 97. See also Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 44 Fed. 653.

18. New York L. Ins., etc., Co. *v.* Rand, 8 How. Pr. (N. Y.) 352 [*affirming* 8 How. Pr. (N. Y.) 35].

19. Cazet de la Borde *v.* Othon, 23 Wkly. Rep. 110; A. G. *v.* Tastett [*cited* in 51 Am. Dec. 152, 153 note].

20. Anonymous, 1 Hogan 207; White *v.* Phibbs, Sausse & Sc. 88; Robinson *v.* Wynne, Sausse & Sc. 88 note.

21. *Alabama.*— Wiley *v.* Carlisle, 93 Ala. 237, 9 So. 288; Johnston *v.* Smith, 70 Ala. 108; Hooper *v.* Yonge, 69 Ala. 484; Thompson *v.* Campbell, 57 Ala. 183; Trammel *v.* Simmons, 8 Ala. 271; Creighton *v.* Paine, 2 Ala. 158.

California.— Hibernia Sav., etc., Soc. *v.* Lewis, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; Montgomery *v.* Middlemiss, 21 Cal. 103, 81 Am. Dec. 146; Montgomery *v.* Tutt, 11 Cal. 190.

Illinois.— Brush *v.* Fowler, 36 Ill. 53, 85 Am. Dec. 382; Heffron *v.* Gage, 44 Ill. App. 147.

Kansas.— Watkins *v.* Jerman, 36 Kan. 464, 13 Pac. 798.

Mississippi.— Jones *v.* Hooper, 50 Miss. 510.

New Jersey.— Beatty *v.* De Forest, 27 N. J. Eq. 482; Blauvelt *v.* Smith, 22 N. J. Eq. 31; Schenck *v.* Conover, 13 N. J. Eq. 220, 78 Am. Dec. 95.

New York.— Meiggs *v.* Willis, 8 N. Y. Civ. Proc. 125; Bell *v.* Birdsall, 19 How. Pr. (N. Y.) 491; Lovett *v.* German Reformed Church, 9 How. Pr. (N. Y.) 220 (holding that it will issue against a tenant in possession, who has been made a party, notwithstanding he claims under an unexpired lease of several years, executed by the mortgagor several years before the date of the mortgage foreclosed); New York L. Ins., etc., Co. *v.* Rand, 8 How. Pr. (N. Y.) 35 [*affirmed* in 8 How. Pr. (N. Y.) 352]; Ludlow *v.* Lansing, Hopk. (N. Y.) 231; Boynton *v.* Jackway, 10 Paige (N. Y.) 307; Frelinghuysen *v.* Colden, 4 Paige (N. Y.) 204; Kershaw *v.* Thompson, 4 Johns. Ch. (N. Y.) 609.

North Carolina.— Knight *v.* Houghtalling, 94 N. C. 408.

Wisconsin.— Diggle *v.* Boulden, 48 Wis. 477, 4 N. W. 678.

United States.— Terrell *v.* Allison, 21 Wall. (U. S.) 289, 22 L. ed. 634; Comer *v.* Felton, 61 Fed. 731, 22 U. S. App. 313, 10 C. C. A. 28.

Parties not named in decree or deed.— The

him[22] *pendente lite*[23] or after a sale of the premises,[24] or against any person who holds possession as a mere intruder or trespasser.[25] In other words, it will operate only on those whose rights have been determined by the judgment or decree,[26] and will not issue against persons in possession before suit who were not made parties,[27] where a new and independent right to property has been acquired, or where

writ will issue against all defendants who were served with process or appeared in the action, even though not mentioned by name in the decree or sheriff's deed. Frisbie *v.* Fogarty, 34 Cal. 11.

22. Coming in under one neither party nor privy.— The writ will not issue against one coming in *pendente lite* under one who was neither a party nor privy, but who claimed an independent title to the premises in question. Ricketts *v.* Chicago Permanent Bldg., etc., Assoc., 67 Ill. App. 71; Van Hook *v.* Throckmorton, 8 Paige (N. Y.) 33.

Where the court did not acquire jurisdiction of the owner's person the writ will not issue against his grantees. Steinbach *v.* Leese, 27 Cal. 295.

23. *Alabama.*— Wiley *v.* Carlisle, 93 Ala. 237, 9 So. 288; Johnston *v.* Smith, 70 Ala. 108; Hooper *v.* Yonge, 69 Ala. 484; Thompson *v.* Campbell, 57 Ala. 183; Chapman *v.* Gibbs, 51 Ala. 502; Trammel *v.* Simmons, 8 Ala. 271; Creighton *v.* Paine, 2 Ala. 158.

California.— Hibernia Sav., etc., Soc. *v.* Lewis, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; Montgomery *v.* Byers, 21 Cal. 107; Montgomery *v.* Middlemiss, 21 Cal. 103, 81 Am. Dec. 146; Montgomery *v.* Tutt, 11 Cal. 190. But see Harlan *v.* Rackerby, 24 Cal. 561, holding that the writ will not issue against a purchaser *pendente lite* who is not a party to the suit, without actual or constructive notice of its pendency.

Florida.— Brown *v.* Marzyck, 19 Fla. 840, even though he claims under a tax-title, where it appears that such claim is made by collusion with the mortgagor.

Illinois.— Kessinger *v.* Whittaker, 82 Ill. 22 (even though others, who were not made parties, have an interest, where the decree was for a sale of the entire interest); Brush *v.* Fowler, 36 Ill. 53, 85 Am. Dec. 382; Jackson *v.* Warren, 32 Ill. 331; Heffron *v.* Gage, 44 Ill. App. 147.

Kansas.—Watkins *v.* Jerman, 36 Kan. 464, 13 Pac. 798.

Mississippi.— Jones *v.* Hooper, 50 Miss. 510.

New Jersey.— Beatty *v.* De Forest, 27 N. J. Eq. 482; Blauvelt *v.* Smith, 22 N. J. Eq. 31; Schenck *v.* Conover, 13 N. J. Eq. 220, 78 Am. Dec. 95.

New York.— Meiggs *v.* Willis, 8 N. Y. Civ. Proc. 125; Bell *v.* Birdsall, 19 How. Pr. (N. Y.) 491; New York L. Ins., etc., Co. *v.* Rand, 8 How. Pr. (N. Y.) 35 [*affirmed* in 8 How. Pr. (N. Y.) 352]; Ludlow *v.* Lansing, Hopk. (N. Y.) 231; Boynton *v.* Jackway, 10 Paige (N. Y.) 307; Frelinghuysen *v.* Colden, 4 Paige (N. Y.) 204; Kershaw *v.* Thompson, 4 Johns. Ch. (N. Y.) 609.

North Carolina.— Knight *v.* Houghtalling, 94 N. C. 408.

Wisconsin.— Diggle *v.* Boulden, 48 Wis. 477, 4 N. W. 678.

United States.— Terrell *v.* Allison, 21 Wall. (U. S.) 289, 22 L. ed. 634; Comer *v.* Felton, 61 Fed. 731, 22 U. S. App. 313, 10 C. C. A. 28.

England.— See Bird *v.* Littlehales, 3 Swanst. 299 note.

24. Jackson *v.* Warren, 32 Ill. 331.

25. Wiley *v.* Carlisle, 93 Ala. 237, 9 So. 288; Johnston *v.* Smith, 70 Ala. 108; Hooper *v.* Yonge, 69 Ala. 484; Thompson *v.* Campbell, 57 Ala. 183.

26. *Arizona.*— Godchaux *v.* Demarboix, (Ariz. 1886) 11 Pac. 45; Asher *v.* Cox, (Ariz. 1886) 11 Pac. 44.

California.— Kirsch *v.* Kirsch, 113 Cal. 56, 45 Pac. 164; Burton *v.* Lies, 21 Cal. 87.

Louisiana.— Denègre *v.* Bayhi, 35 La. Ann. 255.

Michigan.— Howard *v.* Bond, 42 Mich. 131, 3 N. W. 289.

Wisconsin.— Gelpeke *v.* Milwaukee, etc., R. Co., 11 Wis. 454. *Compare* State *v.* Giles, 10 Wis. 101, holding that the fact that defendant in the writ claims under a party having a title older than claimant's will not excuse a sheriff from executing a writ lawfully issued.

United States.— Howard *v.* Milwaukee, etc., R. Co., 101 U. S. 837, 25 L. ed. 1081.

It should not and cannot operate to establish in the one party, or to destroy in the other, any rights to the property independent of those determined by the judgment. Kirsch *v.* Kirsch, 113 Cal. 56, 45 Pac. 164; Chadwick *v.* Island Beach Co., 42 N. J. Eq. 602, 8 Atl. 650. See also Stanley *v.* Sullivan, 71 Wis. 585, 37 N. W. 801, 5 Am. St. Rep. 245, holding that it will not issue to remove the claimant of a homestead.

Where a title could not be litigated in a suit the writ will not issue against one holding thereunder. Hayward *v.* Kinney, 84 Mich. 591, 48 N. W. 170.

The person in possession cannot collaterally attack a judgment, valid on its face, in proceedings for the writ. Hibernia Sav., etc., Soc. *v.* Lewis, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714. See also Newmark *v.* Chapman, 53 Cal. 557.

27. *Alabama.*— Wiley *v.* Carlisle, 93 Ala. 237, 9 So. 288.

Illinois.— Gilcreest *v.* Magill, 37 Ill. 300; Root *v.* Paine, 22 Ill. App. 349 [*affirmed* in 121 Ill. 77, 13 N. E. 541].

Kentucky.—McChord *v.* McClintock, 5 Litt. (Ky.) 304.

Louisiana.— Copley *v.* Conine, 3 La. Ann. 206.

New York.— Boynton *v.* Jackway, 10 Paige (N. Y.) 307.

a *prima facie* showing of the acquirement of such a right is made,[28] or against a sheriff merely because he failed to execute a writ of possession.[29] The rule that the writ will issue only against parties to the suit or their representatives, or those who came into possession under either of the parties while the suit was pending, is not infringed by its issuance against privies to the original parties in the suit, though such privies may not have been named therein.[30]

B. Alias Writ. An alias writ may properly be issued where the return of the first writ does not disclose clearly that it has been fully executed,[31] and it is made to appear by affidavit that it has not been.[32]

III. ISSUANCE OF WRIT.

A. Who May Issue. There can be no question of the power of a court of chancery to issue the writ,[33] and it has been said that it can issue only from such a court;[34] but, in some jurisdictions, its issuance by a judge[35] or clerk[36] is authorized. The writ being only the execution of the final decree, it can issue only from the court in which the decree was rendered.[37]

South Carolina.— *Ex p.* Jenkins, 48 S. C. 325, 26 S. E. 686.

United States.—Terrell *v.* Allison, 21 Wall. (U. S.) 289, 22 L. ed. 634; Thompson *v.* Smith, 1 Dill. (U. S.) 458, 23 Fed. Cas. No. 13,977.

The validity of claimant's title is immaterial in such case. Thompson *v.* Smith, 1 Dill. (U. S.) 458, 23 Fed. Cas. No. 13,977.

Widow not joined with husband's executors. — Where suit to foreclose was commenced after the mortgagor's death against his executors, but his widow was not made a party, the writ will not issue against the widow, who retains possession of a portion of the premises, which, on demand, she refuses to surrender. Burton *v.* Lies, 21 Cal. 87.

28. Kirsch *v.* Kirsch, 113 Cal. 56, 45 Pac. 164; Langley *v.* Voll, 54 Cal. 435; San Jose *v.* Fulton, 45 Cal. 316; Autenreith *v.* Hessenauer, 43 Cal. 356 (holding that, on the foreclosure of a mortgage given by one partner where the other partner was not made a party, one obtaining a deed for an undivided interest in the partnership property is not entitled to the writ as against a receiver who has been appointed by the court at the instance of the other partner in an action commenced by him to dissolve the partnership and have the property sold to pay the debts); Ramsdell *v.* Maxwell, 32 Mich. 285; Bell *v.* Birdsall, 19 How. Pr. (N. Y.) 491 (holding that it will not issue to remove persons who go into possession after the purchaser has received his deed and conveyed the premises to another); Toll *v.* Hiller, 11 Paige (N. Y.) 228.

29. Copley *v.* Conine, 3 La. Ann. 206.

30. Hagerman *v.* Heltzel, 21 Wash. 444, 58 Pac. 580.

31. Where the writ has been returned executed it would seem that an alias writ cannot be issued, for, by the execution and return of the original, the decree is satisfied and the court in which it was rendered loses control of the same. *Ex p.* Forman, (Ala. 1901) 30 So. 480, holding that an alias writ should be refused where the purchaser, seeking its aid to enforce the delivery of the possession of land purchased by him under a decree of the court, has suffered several years to elapse after his purchase, and after the original writ of assistance, issued to place him in possession, has been returned executed, before filing his application for the alias writ, especially when the petition asking for the alias writ does not negative the presumption, arising from the delay, that the party in possession holds as tenant of the purchaser or under some claim of right.

32. Tevis *v.* Hicks, 38 Cal. 234.

33. *Alabama.*— Wiley *v.* Carlisle, 93 Ala. 237, 9 So. 288; Johnston *v.* Smith, 70 Ala. 108; Hooper *v.* Yonge, 69 Ala. 484; Trammel *v.* Simmons, 8 Ala. 271; Creighton *v.* Paine, 2 Ala. 158.

California.— Montgomery *v.* Tutt, 11 Cal. 190.

Florida.— Gorton *v.* Paine, 18 Fla. 117.

New York.— Valentine *v.* Teller, Hopk. (N. Y.) 422; Ludlow *v.* Lansing, Hopk. (N. Y.) 231; Kershaw *v.* Thompson, 4 Johns. Ch. (N. Y.) 609.

Virginia.— Newman *v.* Chapman, 2 Rand. (Va.) 93, 14 Am. Dec. 766.

United States.— Gormley *v.* Clark, 134 U. S. 338, 10 S. Ct. 554, 33 L. ed. 909.

See 4 Cent. Dig. tit. "Assistance, Writ of," § 6.

The city court of New York was held to have jurisdiction to issue the writ. Connor *v.* Schaeffel, 11 N. Y. Suppl. 737, 19 N. Y. Civ. Proc. 378, 25 Abb. N. Cas. (N. Y.) 344.

The district court may issue the writ in all cases within the scope of its jurisdiction. Voigtlander *v.* Brotze, 59 Tex. 286.

34. Knight *v.* Houghtalling, 94 N. C. 408.

35. Chapman *v.* Thornburg, 23 Cal. 48; Kessinger *v.* Whittaker, 82 Ill. 22.

36. Com. *v.* Dieffenbach, 3 Grant (Pa.) 368; Loomis *v.* Wheeler, 21 Wis. 271; Atty.-Gen. *v.* Lum, 2 Wis. 507; U. S. Equity Rules, No. 9. *Compare* Goit *v.* Dickerman, 20 Wis. 630.

37. People *v.* Doe, 31 Cal. 220; Ryerson *v.* Eldred, 18 Mich. 195; Harney *v.* Morton,

B. Proceedings to Procure — 1. Application.[38] One seeking a writ of assistance should make application[39] to the proper court or officer,[40] presenting facts showing its necessity,[41] and, according to the better practice, notice of the motion requesting the issuance of the writ should be given to the adverse party.[42]

2. Order For Delivery of Possession. The tendency of the courts is to dispense with other formalities and to immediately issue the writ;[43] but, by the

39 Miss. 508; Terry *v.* Clark, 4 Lea (Tenn.) 186.

38. For form of petition for writ see Tucker *v.* Stone, 99 Mich. 419, 58 N. W. 318.

39. Order for writ inserted in decree.— It has been held that the decree may include a provision that the writ may issue without further notice (Sichler *v.* Look, 93 Cal. 600, 29 Pac. 220; Bird *v.* Belz, 33 Kan. 391, 6 Pac. 627); but, on the other hand, a decree which directed the clerk to issue a writ, on application of plaintiff, without further order of the court, was held to be improper (Bruce *v.* Roney, 18 Ill. 67; Smith *v.* Brittenham, 3 Ill. App. 62. See also Landon *v.* Burke, 36 Wis. 378). However, a decree providing "that, in default of surrendering such possession, a writ of assistance may issue in accordance with the practice of the court," gives no right to the writ without further action by the court, and is not a violation of the rule that, before a writ can issue, there must be a judicial investigation ascertaining the facts justifying such writ. Cook *v.* Moulton, 68 Ill. App. 480.

40. Who may issue see *supra*, III, A.

An objection that the papers were wrongfully entitled in the names of both defendants, where proceedings by writ of assistance on foreclosure were taken against the wife, leave being taken to discontinue as against the husband, was held to be a mere technicality. Howe *v.* Lemon, 47 Mich. 544, 11 N. W. 379.

41. *Alabama.*— Hooper *v.* Yonge, 69 Ala. 484 (holding that applicant should show due service of the decree or order of the court sought to be enforced, and that it has not been obeyed); Creighton *v.* Paine, 2 Ala. 158 (holding that he should set forth his purchase, the deed under which he claims, particularly describing the land purchased, and by whom the possession is withheld).

Idaho.— Vermont L. & T. Co. *v.* McGregor, (Ida. 1897) 51 Pac. 104, holding that the applicant must show a valid judgment.

Illinois.— Oglesby *v.* Pearce, 68 Ill. 220 (holding that a petition which fails to show that defendants against whom the proceeding is brought are in possession of the land is fatally defective); Bruce *v.* Roney, 18 Ill. 67; Smith *v.* Brittenham, 3 Ill. App. 62.

Michigan.— Howard *v.* Bond, 42 Mich. 131, 3 N. W. 289, holding that demand and refusal must be shown.

Mississippi.— Jones *v.* Hooper, 50 Miss. 510, holding that the petition should show the sale under the decree, the purchase, the deed by the commissioner, and payment of the money, if the sale was made for cash, and also that the deed was exhibited to defendant, and possession demanded.

Wisconsin.— Loomis *v.* Wheeler, 21 Wis. 271, holding that the affidavits must show a demand made upon a party to the action who has possession, and a refusal to surrender.

Evidence.— On an application for a writ of assistance to place a party in possession of land purchased at a sheriff's sale made under a judgment rendered by a justice of the peace, the sheriff's deed is not admissible in evidence without first producing the judgment and execution. People *v.* Doe, 31 Cal. 220.

42. *Alabama.*— Wiley *v.* Carlisle, 93 Ala. 237, 9 So. 288 (whenever the application shows on its face that a party is in possession); Hooper *v.* Yonge, 69 Ala. 484; Creighton *v.* Paine, 2 Ala. 158.

California.— San Jose *v.* Fulton, 45 Cal. 316, holding that notice should be given to defendant and also the ter-tenant on application under a sheriff's sale enforcing a tax-lien. See also Miller *v.* Bate, 56 Cal. 135, holding that an order for the writ, made upon an *ex parte* application against defendant, is inoperative against any other person.

Florida.— McLane *v.* Piaggio, 24 Fla. 71, 3 So. 823.

Illinois.— O'Brian *v.* Fry, 82 Ill. 87; Oglesby *v.* Pearce, 68 Ill. 220.

Michigan.— Benhard *v.* Darrow, Walk. (Mich.) 519, where the person in possession was not a party to the suit.

Mississippi.— Jones *v.* Hooper, 50 Miss. 510. *Contra*, Harney *v.* Morton, 39 Miss. 508.

New Jersey.— Blauvelt *v.* Smith, 22 N. J. Eq. 31; Fackler *v.* Worth, 13 N. J. Eq. 395.

New York.—Rawiszer *v.* Hamilton, 51 How. Pr. (N. Y.) 297. *Contra*, New York L. Ins., etc., Co. *v.* Cutler, 9 How. Pr. (N. Y.) 407; New York L. Ins., etc., Co. *v.* Rand, 8 How. Pr. (N. Y.) 35 [*affirmed* in 8 How. Pr. (N. Y.) 352].

North Carolina.— Knight *v.* Houghtalling, 94 N. C. 408. *Compare* Coor *v.* Smith, 107 N. C. 430, 11 S. E. 1089, holding that where, at the same time as that at which final judgment is rendered in a foreclosure proceeding, confirming the sale and directing the execution of a deed to plaintiff, a motion and order for writ of assistance is made, no actual notice to defendant of the motion is necessary, defendant being presumed to have notice of all motions made at such term.

Waiver.— On motion for an order of possession in the summary proceeding given an execution purchaser by Ark. Rev. Stat. c. 60, § 68, where defendant appears and disclaims he waives his right to notice in writing to appear and show cause why the order should not be made against him. Ferguson *v.* Blakeney, 6 Ark. 296.

43. *Alabama.*— Hooper *v.* Yonge, 69 Ala. 484.

earlier, and what is said to be the better, practice,[44] the court, on examination and after satisfying itself that possession is withheld by someone concluded by the decree, will make a decretal order that the possession be delivered to the purchaser, unless the decree directed that he should be put in possession.[45]

3. ATTACHMENT AND INJUNCTION. According to the old chancery practice, the order for possession, not being complied with, was followed by an attachment, but this was seldom served and could be dispensed with.[46] This was followed by an injunction commanding the party in possession forthwith to deliver it up,[47] after which, a refusal being duly made known, the writ of assistance issued to the sheriff — of course, on motion.[48]

California.— Montgomery *v.* Byers, 21 Cal. 107; Montgomery *v.* Middlemiss, 21 Cal. 103, 81 Am. Dec. 146, which hold that all that is necessary is to furnish the court proper evidence of the deed to defendant or those claiming under him, a demand of possession, and refusal to surrender it. But see Montgomery *v.* Tutt, 11 Cal. 190, holding that the order to deliver possession should be first made unless a direction to that effect is contained in the decree.

Michigan.— Hart *v.* Linsday, Walk. (Mich.) 144.

Mississippi.— Jones *v.* Hooper, 50 Miss. 510; Griswold *v.* Simmons, 50 Miss. 123.

New York.— Connor *v.* Schaeffel, 11 N. Y. Suppl. 737, 19 N. Y. Civ. Proc. 378, 25 Abb. N. Cas. (N. Y.) 344; Valentine *v.* Teller, Hopk. (N. Y.) 422 [*criticizing* Kershaw *v.* Thompson, 4 Johns. Ch. (N. Y.) 609], holding that, in ordinary cases, the writ is the first and only process. See also Getting *v.* Mohr, 34 Hun (N. Y.) 340; Devaucene *v.* Devaucene, 1 Edw. (N. Y.) 272.

North Carolina.— Knight *v.* Houghtalling, 94 N. C. 408 [*quoting* Herman Executions, § 354].

Pennsylvania.— Com. *v.* Dieffenbach, 3 Grant (Pa.) 368, where the decree or order is for the delivery of possession.

Wisconsin.— Atty.-Gen. *v.* Lum, 2 Wis. 507.

United States.— U. S. Equity Rules, No. 9.

44. Kemp *v.* Lyon, 76 Ala. 212.

45. *Alabama.*— Trammel *v.* Simmons, 8 Ala. 271; Creighton *v.* Paine, 2 Ala. 158.

California.— Montgomery *v.* Tutt, 11 Cal. 190.

Illinois.— O'Brian *v.* Fry, 82 Ill. 87; Kessinger *v.* Whittaker, 82 Ill. 22; Oglesby *v.* Pearce, 68 Ill. 220; Jackson *v.* Warren, 32 Ill. 331; Aldrich *v.* Sharp, 4 Ill. 261.

New Jersey.— Schenck *v.* Conover, 13 N. J. Eq. 220, 78 Am. Dec. 95.

New York.— New York L. Ins., etc., Co. *v.* Rand, 8 How. Pr. (N. Y.) 35 [*affirmed* in 8 How. Pr. (N. Y.) 352].

Pennsylvania.— Kelsey *v.* Church, 4 C. Pl. Rep. (Pa.) 105.

England.— Dove *v.* Dove, 1 Bro. Ch. 375, 1 Dick. 617.

Canada.— Adamson *v.* Adamson, 12 Ont. Pr. 21.

46. Montgomery *v.* Tutt, 11 Cal. 190; New York L. Ins., etc., Co. *v.* Rand, 8 How. Pr. (N. Y.) 35 [*affirmed* in 8 How. Pr. (N. Y.) 352]: Dove *v.* Dove, 1 Bro. Ch. 375, 1 Dick. 617; Adamson *v.* Adamson, 12 Ont. Pr. 21. But see Venables *v.* Foyle, 1 Ch. Rep. 178, holding that all process of contempt ought to issue out in course before any injunction.

47. *Alabama.*— Trammel *v.* Simmons, 8 Ala. 271; Creighton *v.* Paine, 2 Ala. 158.

California.— Montgomery *v.* Tutt, 11 Cal. 190.

Illinois.— Oglesby *v.* Pearce, 68 Ill. 220; Jackson *v.* Warren, 32 Ill. 331; Aldrich *v.* Sharp, 4 Ill. 261.

Maryland.—Garretson *v.* Cole, 1 Harr. & J. (Md.) 370.

New Jersey.— Schenck *v.* Conover, 13 N. J. Eq. 220, 78 Am. Dec. 95.

New York.— New York L. Ins., etc., Co. *v.* Rand, 8 How. Pr. (N. Y.) 35 [*affirmed* in 8 How. Pr. (N. Y.) 352]; Ludlow *v.* Lansing, Hopk. (N. Y.) 231; Kershaw *v.* Thompson, 4 Johns. Ch. (N. Y.) 609.

England.— Stribley *v.* Hawkie, 3 Atk. 275; Roberdeau *v.* Rous, 1 Atk. 543; Dove *v.* Dove, 1 Bro. Ch. 375, 1 Dick. 617; Huguenin *v.* Baseley, 15 Ves. Jr. 180, 9 Rev. Rep. 148, 276. But see Sharp *v.* Carter, 3 P. Wms. 374, 379 note, to the effect that the court will put a receiver in possession in a summary way, and will order the tenants to attorn to him, and grant the writ without first awarding an injunction for the possession, which is the usual way.

Canada.— Adamson *v.* Adamson, 12 Ont. Pr. 21.

Form of injunction see Garretson *v.* Cole, 1 Harr. & J. (Md.) 370.

48. *Alabama.*— Trammel *v.* Simmons, 8 Ala. 271; Creighton *v.* Paine, 2 Ala. 158.

California.— Montgomery *v.* Tutt, 11 Cal. 190.

Illinois.— Oglesby *v.* Pearce, 68 Ill. 220; Jackson *v.* Warren, 32 Ill. 331; Aldrich *v.* Sharp, 4 Ill. 261.

Maryland.—Garretson *v.* Cole, 1 Harr. & J. (Md.) 370.

New Jersey.— Schenck *v.* Conover, 13 N. J. Eq. 220, 78 Am. Dec. 95.

New York.— New York L. Ins., etc., Co. *v.* Rand, 8 How. Pr. (N. Y.) 35 [*affirmed* in 8 How. Pr. (N. Y.) 352]; Ludlow *v.* Lansing, Hopk. (N. Y.) 231; Kershaw *v.* Thompson, 4 Johns. Ch. (N. Y.) 609.

England.— Stribley *v.* Hawkie, 3 Atk. 275; Dove *v.* Dove, 1 Bro. Ch. 375, 1 Dick. 617.

Canada.— Adamson *v.* Adamson, 12 Ont. Pr. 21.

C. Defenses to Application — 1. In General. On application for a writ of assistance objections must be made in some more formal way than by verbal statement of the claim,[49] and cannot be received to affect the decree determining the rights of defendants.[50]

2. Commencement of Suit. The mere commencement of an action for the recovery of possession by a purchaser at a judicial sale is not, of itself, sufficient to bar the court decreeing such sale from putting him in possession of the property purchased, by a writ of assistance against a party to the decree.[51]

3. Laches. The right to the writ may be lost by laches.[52]

D. Claims of Third Persons. On a petition seeking the aid of the court to place the purchaser of land at judicial sale in possession, a stranger to the record cannot maintain a counter-petition to have the land sold and applied to his debt, on the ground that he had recovered judgment against one holding a mortgage on the land executed prior to the sale, and had garnished the owner in that suit.[53]

E. Appeal. It has been held that an appeal will not lie from an order awarding or denying the writ,[54] and, even though appealable, one not a party to the record cannot take an appeal.[55]

IV. EXECUTION OF WRIT.

The writ must be executed[56] in the time allowed for executing other writs of execution.[57] In the execution of the writ, the sheriff should place the purchaser on foreclosure of a mortgage of an estate in common in possession of every part and parcel of the land jointly with the other tenants in common, but he cannot remove any of the tenants in common who hold under a title independent of him through whom the purchaser claims.[58]

V. VACATING WRIT.

A. In General. Where the writ was improperly issued or executed[59] the

Form of order for writ see Miller *v.* Bate, 56 Cal. 135.

Form of writ see Garretson *v.* Cole, 1 Harr. & J. (Md.) 370.

49. Aldrich *v.* Donovan, 111 Mich. 525, 69 N. W. 1108.

50. White *v.* White, (Cal. 1900) 62 Pac. 34 [*reversed*, on other grounds, in (Cal. 1900), 62 Pac. 1062]; Howe *v.* Lemon, 47 Mich. 544, 11 N. W. 379. But *compare* Peters *v.* Youngs, 122 Mich. 484, 81 N. W. 263, holding that it was competent for the opposing party to show that the decree on which such application was based was void for want of jurisdiction.

51. Keil *v.* West, 21 Fla. 508 (ejectment); Kessinger *v.* Whittaker, 82 Ill. 22 (forcible detainer).

52. Hooper *v.* Yonge, 69 Ala. 484; Langley *v.* Voll, 54 Cal. 435; Planters' Bank *v.* Fowlkes, 4 Sneed (Tenn.) 461.

53. Gibson *v.* Marshall, 64 Miss. 72, 8 So. 205.

54. Bryan *v.* Sanderson, 3 MacArthur (D. C.) 402. *Contra*, Baker *v.* Pierson, 5 Mich. 456.

55. People *v.* Grant, 45 Cal. 97.

Where an order refusing to vacate has not been appealed from, an order granting the writ is not appealable. Horn *v.* Volcano, 18 Cal. 141.

56. Form of return executed see *Ex p.* Forman, (Ala. 1901) 30 So. 480.

57. Adamson *v.* Adamson, 12 Ont. Pr. 21, holding that, under Ont. Rev. Stat. c. 66, the writ is not in force after one year from teste, if unexecuted, unless renewed.

58. Tevis *v.* Hicks, 38 Cal. 234.

59. The writ should be vacated where petitioner was neither a party, a purchaser *pendente lite*, nor a trespasser (Wiley *v.* Carlisle, 93 Ala. 237, 9 So. 288), or where he had no notice of the application (Waters *v.* Duvall, 6 Gill & J. (Md.) 76, holding that the fact that an injunction had been granted, in favor of the tenant, against the issuance of the writ was no bar to the motion after the injunction had been dissolved).

The writ should not be vacated because of a prior foreclosure entitling the person in possession to such possession, where, being a party, he stood by without apprising the court of the foreclosure or objecting to the writ of assistance, but permitted the court to treat such mortgage as an existing prior lien, the granting of the writ not affecting the validity of such foreclosure (Herr *v.* Sullivan, 26 Colo. 133, 56 Pac. 175); or, on the application of a mortgagor and his wife, on the ground that they moved upon and occupied the premises as a homestead before the execution of the mortgage by the husband, where it appears that the mortgage was given for the purchase-money of the premises, even though the wife was not a party to the foreclosure (Skinner *v.* Beatty, 16 Cal. 156).

court can, on summary motion, set it aside,[60] and such motion may be made by a stranger to the record.[61]

B. Effect of. Where a writ of assistance is set aside, the party dispossessed under it is entitled to be restored to possession of the premises.[62]

C. Appeal. An appeal lies from an order refusing to vacate an order granting a writ of assistance.[63]

ASSISTANT. One who stands by and helps or aids another.[1] (Assistant: Officers, see OFFICERS.)

ASSIZE or **ASSISE.** A species of jury;[2] a species of writ or real action, having for its object to determine the right of possession of lands and to recover the possession;[3] the whole proceedings in court upon a writ of assize;[4] a court;[5] a legislative enactment.[6] (Assize: Courts of, see COURTS. See also AFFORCE.)

ASSOCIATES. Persons united, acting together by mutual consent or by compact, to the promotion of some common object.[7]

60. Skinner *v.* Beatty, 16 Cal. 156; Meiggs *v.* Willis, 8 N. Y. Civ. Proc. 125.

The question whether the writ was properly awarded cannot be reviewed collaterally in another court. Rawiszer *v.* Hamilton, 51 How. Pr. (N. Y.) 297.

61. People *v.* Grant, 45 Cal. 97. See also McChord *v.* McClintock, 5 Litt. (Ky.) 304.

62. Chamberlain *v.* Choles, 35 N. Y. 477, 3 Abb. Pr. N. S. (N. Y.) 118. But see Lombard *v.* Atwater, 46 Iowa 501, holding that it is not matter of course to direct that a party who has been put out by a writ of possession shall be restored because the writ is held to have been irregularly issued, but the question of the right of possession must be first determined. See, generally, APPEAL AND ERROR, 3 Cyc. 462.

63. San Jose *v.* Fulton, 45 Cal. 316. See also Tucker *v.* Stone, 99 Mich. 419, 58 N. W. 318.

1. U. S. *v.* Adams, 24 Fed. 348, 351.

2. Burrill L. Dict.

In Scotch law, the jury in criminal cases is still technically called the assize. Wharton L. Lex.

3. 3 Bl. Comm. 184, where the writ is said to have been invented by Glanvil, chief justice to Henry II.

The principal assizes were those of novel disseisin, mort d'ancestor, darrein presentment, and utrum. Burrill L. Dict. The first three were abolished by 3 & 4 Wm. IV, c. 27, and the last is also obsolete. Wharton L. Lex.

Assize of darrein presentment, or last presentation, was a real action which lay where a man (or his ancestors under whom he claimed) had presented a clerk to a benefice, who was instituted, and afterward, upon the next avoidance, a stranger presented a clerk, and thereby disturbed the real patron. Sweet L. Dict.

Assize of mort d'ancestor was a writ which lay where a man's father, mother, brother, sister, uncle, aunt, etc., died seized of lands, tenements, rents, etc., that were held in fee, and after their death a stranger abated. Jacob L. Dict.

Assize of novel disseisin was a writ which lay where a tenant in fee simple, fee tail, or for life was disseized of his lands, tenements, or hereditaments. Burrill L. Dict.

Assize of utrum was a writ which lay for a parson to recover lands which his predecessor had improperly allowed the church to be deprived of. Bouvier L. Dict.

4. Coke Litt. 159*b*.

5. 3 Bl. Comm. 57.

6. Sweet L. Dict., where it is said that some old statutes and ordinances are still so called.

7. Lechmere Bank *v.* Boynton, 11 Cush. (Mass.) 369, 382. See also State *v.* Sibley, 25 Minn. 387, 399.

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Religious Societies, see RELIGIOUS SOCIETIES.
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I. DEFINITION.

An association may be defined to be a body of persons acting together, without a charter, but upon the methods and forms used by incorporated bodies, for the prosecution of some common enterprise.[1]

II. MEMBERSHIP.

A. Arises When — 1. In General. The rules and by-laws of the association must govern absolutely as to the question of admission to membership, and hence, in determining whether membership exists, reference must be had, in every instance, to the particular circumstances of the case.[2]

1. Black L. Dict.; Ebbinghousen *v.* Worth Club, 4 Abb. N. Cas. (N. Y.) 300.

"It is a generic term, and may indifferently comprehend a voluntary confederacy, which is a partnership dissoluble by the persons who formed it, or a corporate confederacy, deriving its existence from a statute, and dissoluble only by law." Thomas *v.* Dakin, 22 Wend. (N. Y.) 9, 104.

Distinguished from "corporation."— While the term "association" is sometimes used as synonymous with the term "corporation" (U. S. *v.* Trinidad Coal, etc., Co., 137 U. S. 161, 11 S. Ct. 57, 34 L. ed. 640), and has been applied to an organization whose attempted incorporation had been unauthorized and ineffectual (State *v.* Steele, 37 Minn. 428, 34 N. W. 903. But see Coleman *v.* Coleman, 78 Ind. 344, in which it was stated that a corporation improperly organized was a partnership pure and simple), yet, as pointed out in Niagara County *v.* People, 7 Hill (N. Y.) 504, 507, "these institutions differ from corporations in this respect, that the individuals composing the association act by an agency authorized and sanctioned by the law. A 'corporation or body politic' acts in its own person." See also Davison *v.* Holden, 55 Conn. 103, 10 Atl. 515, 3 Am. St. Rep. 40 (holding that, by association under Conn. Gen. Stat. p. 417, § 7, the associates do not acquire corporate powers); Nightingale *v.* Barney, 4 Greene (Iowa) 106 (holding that a voluntary unincorporated association is not a person); State *v.* Steele, 37 Minn. 428, 34 N. W. 903.

Distinguished from "partnership."— Voluntary associations not having any well-defined legal status have, under the pressure of necessity, been treated by learned jurists as partnerships (Pipe *v.* Bateman, 1 Iowa 369 [except charitable associations]; The Swallow, Olc. Adm. 334; 23 Fed. Cas. No. 13,665; Beaumont *v.* Meredith, 3 Ves. & B. 180), and it has been held that, in their relation to third persons, their members are to be regarded as partners (Babb *v.* Reed, 5 Rawle (Pa.) 151, 28 Am. Dec. 650); but, since the death of a member does not, of necessity, work a dissolution of the association and there exists no authority in a single associate to bind the others, whatever may be their relation and liability to third persons, they are not partners *inter sese* (Burke *v.* Roper, 79 Ala. 138; White *v.* Brownell, 3 Abb. Pr. N. S. (N. Y.) 318; Thomas *v.* Ellmaker, 1 Pars. Eq. Cas. (Pa.) 98; Leech *v.* Harris, 2 Brewst. (Pa.) 571; Tenney *v.* New England Protective Union, 37 Vt. 64). See also Burt *v.* Lathrop, 52 Mich. 106, 17 N. W. 716 (holding that an association in which the conditions of membership are the payment of an entry-fee and of *pro rata* assessments, but which does no business involving profit or loss, is not a partnership); Ash *v.* Guré, 97 Pa. St. 493, 39 Am. Rep. 818 (holding that the members of a Masonic lodge are presumptively not partners).

Synonymous with "company."— The term "association" is often used as synonymous with "company." Lee Mut. F. Ins. Co. *v.* State, 60 Miss. 395; Mills *v.* State, 23 Tex. 295.

Use in corporate names.— The term "association" also enters into the names bestowed by the legislature upon many corporations. In this connection, it is used without any very uniform discrimination as to its precise meaning, but seems to be, on the whole, preferred for bodies which are not vested with full and perfect corporate rights and powers; also for organizations formed to promote the improvement, welfare, or advantage of the public as distinguished from those whose object is the improvement of members, for which "society" is preferred, or the making of profits, for which "company" is the better term. Abbott L. Dict.

2. Chamberlain *v.* Lincoln, 129 Mass. 70; Mayer *v.* Journeymen Stonecutters' Assoc., 47 N. J. Eq. 519, 20 Atl. 492; McKane *v.* Adams, 123 N. Y. 609, 25 N. E. 1057, 34 N. Y. St. 259, 20 Am. St. Rep. 785 [*affirming* 51 Hun (N. Y.) 629, 4 N. Y. Suppl. 401, 22 N. Y. St. 112 (*affirming* 21 Abb. N. Cas. (N. Y.) 459)].

Membership a question of fact for jury.— Whether parties have performed acts which constitute them members of an association is a question of fact for the jury, the intent and understanding of the parties being a material consideration. Murray *v.* Walker, 83 Iowa 202, 48 N. W. 1075; Smith *v.* Hollister, 32 Vt. 695.

Evidence sufficient to show membership.— Evidence that, after the death of the treasurer of an association, in 1868, a person called himself a surviving partner of the treasurer, in an answer to a bill in equity brought by the administrator against the other members and the original member whose interest such

2. SIGNING ARTICLES OF ASSOCIATION. While, as a general rule, signing the articles of association is necessary to constitute membership,[3] yet, where it is shown that a person paid in the prescribed amount of money and was treated and considered as a member, he will be so regarded although he never signed the constitution, which provided that any person wishing to become a member should subscribe it on receiving the approval of the board of directors.[4]

B. Power of Court to Compel Admission. Associations have absolute control over their rolls, and no power exists in courts to compel an admission to membership.[5]

C. Termination of Membership — 1. WITHDRAWAL. Associations are of so diverse a character that no definite rule can be laid down as to what will constitute a voluntary withdrawal therefrom. While the transfer of a member's interest will usually be deemed sufficient, regard must be had to the constitution, by-laws, and articles of agreement under which the association was organized, and, in order that a withdrawal may be deemed effectual, it must be accomplished in the manner therein prescribed.[6]

2. EXPULSION — a. Grounds — (1) *VIOLATION OF RULES.* The right of expulsion may be based upon a violation of such of the established rules of the association as have been subscribed or assented to by the members[7] and expressly

person had bought; also that, to raise money for the business, he, with the other members, afterward signed a note, and a power of attorney authorizing the agent to sell real estate, and that he subsequently attended a meeting of the association in 1871, is sufficient to warrant a finding that he was a member thereof in 1875. Machinists' Nat. Bank *v.* Dean, 124 Mass. 81.

3. Dennis *v.* Kennedy, 19 Barb. (N. Y.) 517.

4. Tyrrell *v.* Washburn, 6 Allen (Mass.) 466.

5. Richardson *v.* Francestown Union Cong. Soc., 58 N. H. 187; Mayer *v.* Journeymen Stonecutters' Assoc., 47 N. J. Eq. 519, 20 Atl. 492; McKane *v.* Adams, 123 N. Y. 609, 612, 25 N. E. 1057, 34 N. Y. St. 259, 20 Am. St. Rep. 785 [*affirming* 51 Hun (N. Y.) 629, 4 N. Y. Suppl. 401, 22 N. Y. St. 112 (*affirming* 21 Abb. N. Cas. (N. Y.) 459)] (in which case the court said: "The right to be a member is not conferred by any statute; nor is it derivable, as in the case of an incorporate body. It is by reason of the action and of the assent of members of the voluntary association that one becomes associated with them in the common undertaking, and not by any outside agency, or by the individual's action. Membership is a privilege, which may be accorded or withheld, and not a right, which can be gained independently and then enforced. So when, as by the plaintiff's own showing, the committee refused to admit him as a member, or to confirm his election, he was remediless against that refusal"); White *v.* Brownell, 2 Daly (N. Y.) 329, 4 Abb. Pr. N. S. (N. Y.) 162 [*affirming* 3 Abb. Pr. N. S. (N. Y.) 318].

6. Burt *v.* Oneida Community, 137 N. Y. 346, 33 N. E. 307, 50 N. Y. St. 722, 19 L. R. A. 297, 138 N. Y. 649, 34 N. E. 288, 53 N. Y. St. 24; Troy Iron, etc., Factory *v.* Corning, 45 Barb. (N. Y.) 231; Tenney *v.* New England Protective Union, 37 Vt. 64.

Where the articles provided that "any member of the Division by surrendering his certificate (of membership) to the storekeeper, may draw from the store in goods a sum not exceeding fo[u]r dollars, such certificate to be returned when the amount thus drawn shall have been paid, if paid within thirty days," it was held that this provision was designed to furnish a way by which a member could withdraw from the association. Stimson *v.* Lewis, 36 Vt. 91, 95.

Uniting with another association of a similar character cannot constitute a forfeiture of membership where there is no provision in the constitution forbidding it, although such a provision is contained in the constitution of the second organization. Farrell *v.* Dalzell, 5 N. Y. Suppl. 729; Farrell *v.* Cook, 5 N. Y. Suppl. 727 [*affirmed* in 11 N. Y. Suppl. 326, 33 N. Y. St. 1003].

7. Otto *v.* San Francisco Journeymen Tailors' Protective, etc., Union, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156; Durel *v.* Perseverence Fire Co., 47 La. Ann. 1101, 17 So. 591; White *v.* Brownell, 3 Abb. Pr. N. S. (N. Y.) 318.

Mere technical and unwitting violation will not justify expulsion where the word "knowingly" is used in the constitution as applied to a contravention of the rules. Worrilow's Appeal, 2 Del. Co. (Pa.) 66; Glover *v.* Farmers,' etc., Lodge, 1 Del. Co. (Pa.) 317.

Acts not required by rules.— Refusal to do an act not required by the constitution or by-laws and foreign to the objects of the association cannot be made the ground of expulsion. Gorman *v.* Russell, 14 Cal. 531. And where there is nothing in the rules compelling a member to arbitrate, nor authorizing the association to discipline a member for such conduct, an association cannot suspend a member for exercising, in good faith, his statutory right to file a mechanic's lien on the property of an associate member without first seeking to arbitrate. Miller *v.* New York

provide for the expulsion of any members who have been guilty of a violation of such rules.[8]

(II) *Violation of Associate Objects.* A member may also be expelled for such conduct as clearly violates the fundamental objects of the association, and which, if proceeded in and allowed, would thwart those objects or bring the association into disrepute.[9]

b. Procedure — (I) *In General.* In order that an expulsion may be deemed justifiable, even though it be for proper cause, notice of the charges and an opportunity to be heard thereon must be given to the delinquent member, and all rules of procedure set forth in the constitution and by-laws, and designed to safeguard his rights, carefully followed;[10] but proceedings under articles of association agreed to by all the members are to be considered without too much regard for technicalities, and substantial justice is to be kept in view rather than mere form.[11]

(II) *Waiver of Irregularities.* Where a member has appeared and examined witnesses, without objection to the irregularity of the proceedings, he thereby waives formal notice of the charges against him.[12]

(III) *Sufficiency of Charges.* Charges will be deemed sufficiently specific where they advise the member of their nature, and enable him to prepare for his defense.[13]

(IV) *Proof on Default.* A society has no right, without proving the charges against a member, to expel him merely because he does not appear. Even though he does not appear, proof of his offense should be required.[14]

D. Reinstatement — 1. In General. Where a member has been regularly tried and expelled, the judicial action of the association is not subject to review, and the courts will look at the proceedings only so far as to see that they are in accordance with the constitution and by-laws, that there has been no abuse of power, and that some evidence exists, however slight, sustaining the charge on

Builders' League, 29 N. Y. App. Div. 630, 53 N. Y. Suppl. 1016.

Causing arrest of members for violation of Sunday law will not render a member of an unincorporated barbers' protective association subject to expulsion on the ground of having been "guilty of conduct tending to the injury of his fellows." Manning *v.* Klein, 1 Pa. Super. Ct. 210 [*affirming* 4 Pa. Dist. 599, 16 Pa. Co. Ct. 609].

8. Rules must provide for expulsion.— The rules of the association must clearly provide for expulsion, and the refusal of a member to join in a strike when, by the constitution, it is punishable by fine only cannot be made ground for an expulsion. Otto *v.* San Francisco Journeymen Tailors' Protective, etc., Union, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156.

9. Otto *v.* San Francisco Journeymen Tailors' Protective, etc., Union, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156.

The receipt and appropriation of an initiation fee, together with the wrongful taking of the original roll of the organization, is sufficient to justify expulsion under a by-law providing for expelling members "guilty of improper conduct calculated to bring this society into disrepute." People *v.* Detroit St. George's Soc., 28 Mich. 261, 262.

Changing the location of an association's base-ball grounds, where neither the constitution nor by-laws forbid such change, though there is a parol agreement not to make such change, is not sufficient ground for expelling a base-ball club from the association. Metropolitan Base Ball Assoc. *v.* Simmons, 17 Wkly. Notes Cas. (Pa.) 153, 17 Phila. (Pa.) 419, 42 Leg. Int. (Pa.) 520, 1 Pa. Co. Ct. 134.

Commission of crime.— A member of an unincorporated association cannot be expelled for the commission of an indictable offense till he has been tried and convicted in a court of law. Leech *v.* Harris, 2 Brewst. (Pa.) 571.

10. *Louisiana.*— Durel *v.* Perseverence Fire Co., 47 La. Ann. 1101, 17 So. 591.

Missouri.— Farmer *v.* Kansas City Board of Trade, 78 Mo. App. 557.

New York.—Wachtel *v.* Noah Widows', etc., Benev. Soc., 84 N. Y. 28, 38 Am. Rep. 478; Fritz *v.* Muck, 62 How. Pr. (N. Y.) 69.

Pennsylvania.—Metropolitan Base Ball Assoc. *v.* Simmons, 17 Wkly. Notes Cas. (Pa.) 153, 17 Phila. (Pa.) 419, 42 Leg. Int. (Pa.) 520, 1 Pa. Co. Ct. 134.

England.— Innes *v.* Wylie, 1 C. & K. 257, 47 E. C. L. 255.

See 4 Cent. Dig. tit. "Associations," § 10.

11. Levy *v.* Magnolia Lodge No. 29, I. O. O. F., 110 Cal. 297, 42 Pac. 887; People *v.* Detroit St. George's Soc., 28 Mich. 261.

12. Durel *v.* Perseverence Fire Co., 47 La. Ann. 1101, 17 So. 591; People *v.* Coachman's Union Benev. Soc., 4 Misc. (N. Y.) 424, 24 N. Y. Suppl. 114, 53 N. Y. St. 560.

13. Levy *v.* Magnolia Lodge No. 29, I. O. O. F., 110 Cal. 297, 42 Pac. 887.

14. People *v.* Young Men's-Father Matthew Benev. Soc., 65 Barb. (N. Y.) 357.

which the expulsion was ordered.[15] Hence, the power of a court of equity to interfere in cases of expulsion is limited to those cases where the expulsion was in bad faith, or was unwarranted by the constitution and by-laws.[16] It has been held in some cases, also, that power of the courts is limited to cases where the association has been shown to possess real or personal property, or to be engaged in some pecuniary enterprise in which the members had an interest, and whereby property rights were necessarily involved.[17]

2. Necessity of Exhausting Remedies in Association. Before applying to the courts for relief, an expelled member must exhaust all remedies of appeal available to him within the association itself,[18] though it has been held that this duty arises only where the association is acting strictly within its powers.[19]

III. Rights, Powers, and Liabilities of Association.

A. Rights and Powers — 1. To Adopt Name. An association has a right to adopt a title by which it is to be known,[20] the unauthorized use of which will be restrained by a court of equity.[21]

15. *California.*—Lawson *v.* Hewell, 118 Cal. 613, 50 Pac. 763, 49 L. R. A. 400.

Connecticut.— Connelly *v.* Masonic Mut. Ben. Assoc., 58 Conn. 552, 20 Atl. 671, 18 Am. St. Rep. 296, 9 L. R. A. 428.

Michigan.— Burt *v.* Grand Lodge, F. & A. M., 44 Mich. 208.

New Jersey.— State *v.* Grand Lodge, K. P., 53 N. J. L. 536, 22 Atl. 63.

New York.— Lewis *v.* Wilson, 121 N. Y. 284, 24 N. E. 474, 30 N. Y. St. 987; People *v.* Young Men's Father Matthew Benev. Soc., 65 Barb. (N. Y.) 357; White *v.* Brownell, 2 Daly (N. Y.) 329, 4 Abb. Pr. N. S. (N. Y.) 162; Kopp *v.* White, 65 N. Y. Suppl. 1017.

Pennsylvania.—Sperry's Appeal, 116 Pa. St. 391, 9 Atl. 478; Bauer *v.* Seegar, 2 Wkly. Notes Cas. (Pa.) 242; Dodd *v.* Armstrong, 18 Phila. (Pa.) 399, 43 Leg. Int. (Pa.) 270, 2 Pa. Co. Ct. 352.

Damages for wrongful expulsion.— In Durel *v.* Perseverence Fire Co., 47 La. Ann. 1101, 17 So. 591, it was held that an action for damages would not lie, for an expulsion without proper formalities and on a charge afterward disproved, where the association had acted throughout in good faith. But see, to the contrary, Italian Union, etc., Soc. *v.* Montedonico, 5 Ky. L. Rep. 586.

16. Otto *v.* San Francisco Journeymen Tailors' Protective, etc., Union, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156; Savannah Cotton Exch. *v.* State, 54 Ga. 668; Olery *v.* Brown, 51 How. Pr. (N. Y.) 92; Leech *v.* Harris, 2 Brewst. (Pa.) 571; Metropolitan Base Ball Assoc. *v.* Simmons, 17 Wkly. Notes Cas. (Pa.) 153, 17 Phila. (Pa.) 419, 42 Leg. Int. (Pa.) 520, 1 Pa. Co. Ct. 134.

The admission of hearsay evidence in regard to a fact which has been admitted by the defendant member is no ground for setting aside the expulsion. Kopp *v.* White, 65 N. Y. Suppl. 1017.

Refusal to permit preliminary examination of members constituting the association tribunal, for the purpose of determining their competency to try the question of expulsion, is no ground for the interference of a court of law. Kopp *v.* White, 65 N. Y. Suppl. 1017.

Notice of inability to appear at the time and place fixed for the trial of the charges does not oust the association of jurisdiction, but it may proceed to a trial of the charges, and an expulsion founded thereon will be sustained. Robinson *v.* Yates City Lodge No. 448, A. F. & A. M., 86 Ill. 598; Kopp *v.* White, 65 N. Y. Suppl. 1017.

Where a member refused to appear before the committee appointed to try charges against him, and was expelled for contempt, mandamus will not lie to restore him to membership. Levy *v.* Magnolia Lodge No. 29, I. O. O. F., 110 Cal. 297, 42 Pac. 887.

17. *California.*—Lawson *v.* Hewell, 118 Cal. 613, 50 Pac. 763, 49 L. R. A. 400.

Illinois.—People *v.* Chicago Board of Trade, 80 Ill. 134.

Ohio.— Hershiser *v.* Williams, 6 Ohio Cir. Ct. 147, 4 Ohio Dec. 17, 11 Ohio Dec. (Reprint) 76, 24 Cinc. L. Bul. 314.

Pennsylvania.— Smith *v.* Hollis, 33 Wkly. Notes Cas. (Pa.) 485.

Tennessee.— Robertson *v.* Walker, 3 Baxt. (Tenn.) 316.

18. Levy *v.* Magnolia Lodge No. 29, I. O. O. F., 110 Cal. 297, 42 Pac. 887; Lafond *v.* Deems, 81 N. Y. 507; Holomany *v.* National Slavonic Soc., 39 N. Y. App. Div. 573, 57 N. Y. Suppl. 720; White *v.* Brownell, 2 Daly (N. Y.) 329, 4 Abb. Pr. N. S. (N. Y.) 162; Olery *v.* Brown, 51 How. Pr. (N. Y.) 92. See also Oliver *v.* Hopkins, 144 Mass. 175, 10 N. E. 776, holding that the action of a superior lodge in declaring forfeited the charter of a subordinate lodge cannot be reviewed in equity until the relief prayed for has been sought from the tribunals provided by the association.

19. Mulroy *v.* Supreme Lodge, K. H., 28 Mo. App. 463.

20. Black Rabbit Assoc. *v.* Munday, 21 Abb. N. Cas. (N. Y.) 99, wherein it was held that dissatisfied members of an association cannot deprive the voluntary association of the right of using its own name by incorporating themselves thereunder. See also Pease *v.* Pease, 35 Conn. 131, 95 Am. Dec. 225.

21. Thus, where certain dissatisfied members of an association have incorporated them-

2. TO ADOPT CONSTITUTION AND BY-LAWS — a. In General. An association being solely a creature of convention between the members, no check exists upon its power to enact such constitution or by-laws as the associates may choose to adopt, so long as they do not provide for the commission of illegal acts,[22] are not in themselves contrary to public policy,[23] or do not affect vested interests.[24] Such constitution and by-laws constitute a contract between the members,[25] and are binding alike on the association and its members.[26] The courts possess no power to pass on the question of the reasonableness of such rules and regulations as are agreed to by the associates for the conducting of their joint affairs.[27] It has

selves under the name thereof, an injunction has been granted restraining their use of such name (Rudolph *v.* Southern Beneficial League, 7 N. Y. Suppl. 135, 23 Abb. N. Cas. (N. Y.) 199; McGlynn *v.* Post, 21 Abb. N. Cas. (N. Y.) 97), and an injunction has issued to restrain a corporation from making use of the title of an association where it was alleged that plaintiffs were well known as a dramatic club, and that defendants' wrongful appropriation of the association name had caused and would cause them loss and damage (Aiello *v.* Montecalfo, 21 R. I. 496, 44 Atl. 931).

22. Weatherly *v.* Montgomery County Medical, etc., Soc., 76 Ala. 567.

Expulsion involving battery.— Thus, a member is not bound by a rule of the society governing expulsion when it involves the commission of a battery. State *v.* Williams, 75 N. C. 134.

Agricultural purposes and improvement of stock.— Under 1 Ind. Rev. Stat. (1876), p. 923, § 2, concerning voluntary associations, an association is properly organized for the purpose of purchasing suitable grounds for a driving park, for the promotion of agriculture, for the improvement of horses in speed, style, action, and blood, and for the health and recreation of its members. Mullen *v.* Beech Grove Driving Park, 64 Ind. 202.

Profits dependent on forfeitures of membership.—An investment association, wherein the profits are dependent on the failure of a large number of the members to meet their subscriptions, and thus forfeit their membership, is not illegal. Union Invest. Assoc. *v.* Lutz, 50 Ill. App. 176.

Surrender of property, with right of survivorship.—An association by which each member surrendered his property into one common stock for the mutual benefit of all, during their joint lives, with the right of survivorship, reserving to each the privilege to secede at any time during his life, was not unlawful. Schriber *v.* Rapp, 5 Watts (Pa.) 351, 30 Am. Dec. 327.

23. Weatherly *v.* Montgomery County Medical, etc., Soc., 76 Ala. 567.

Providing method for redressing grievances. — Though a by-law may provide a method for redressing grievances to which members will be compelled to resort before invoking the aid of a court, yet, where it contains a provision submitting matters in controversy to the exclusive cognizance of a body created by the association or prohibiting resort by a member to legal tribunals, it is void as tending to oust the courts of jurisdiction. Bauer *v.* Samson Lodge, K. P., 102 Ind. 262, 1 N. E. 571; Austin *v.* Searing, 16 N. Y. 112, 69 Am. Dec. 665; Sweeney *v.* Rev. Hugh McLaughlin Beneficial Soc., 14 Wkly. Notes Cas. (Pa.) 466, 486.

Repair and preservation of canal.—Where a canal was out of repair, and, the trustees being unprepared to make the necessary repairs, a number of persons interested in the navigation of the canal formed an association for the special purpose of advancing the necessary funds and keeping the canal in repair, under a contract with the trustees, delegating the management of the canal and the collection of the tolls to them, there was nothing in the organization or objects of this association, or in its contract with the trustees, which was contrary to public policy. Weaver *v.* Trustees Wabash, etc., Canal, 28 Ind. 112.

Restraint of trade.—A constitutional provision forbidding members to teach their trade to others without the permission of the association is not contrary to public policy as being in unlawful restraint of trade (Snow *v.* Wheeler, 113 Mass. 179); but a by-law of a liverymen's association which binds the members not to do business with any person who does not patronize its members exclusively, and prevents any of them from letting a hearse to a private party for a funeral where the undertaker in charge is reputed to patronize non-union liveries, or to any person whose family for the occasion patronizes a non-union livery, is unlawful as against public policy (Gatzow *v.* Buening, 106 Wis. 1, 81 N. W. 1003, 80 Am. St. Rep. 17, 49 L. R. A. 475).

24. Thus, if a member has become entitled to sick benefits or to endowments, no by-law is valid which restricts his right to recovery (Hogan *v.* Pacific Endowment League, 99 Cal. 248, 33 Pac. 924; People *v.* McDonough, 8 N. Y. App. Div. 591, 35 N. Y. Suppl. 214, 40 N. Y. Suppl. 1147, 69 N. Y. St. 593; Gundlach *v.* Germania Mechanics' Assoc., 4 Hun (N. Y.) 339; Poultney *v.* Bachman, 10 Abb. N. Cas. (N. Y.) 252), unless there is an express provision in the constitution that the already existing by-laws may be changed (Fugure *v.* Burlington St. Joseph's Mut. Soc., 46 Vt. 362).

25. Levy *v.* Magnolia Lodge No. 29, I. O. O. F., 110 Cal. 297, 42 Pac. 887; Hammerstein *v.* Parsons, 38 Mo. App. 332.

26. Weatherly *v.* Montgomery County Medical, etc., Soc., 76 Ala. 567; Bauer *v.* Samson Lodge, K. P., 102 Ind. 261, 1 N. E. 571.

27. Weatherly *v.* Montgomery County Medical, etc., Soc., 76 Ala. 567; Levy *v.* Magnolia Lodge No. 29, I. O. O. F., 110 Cal. 297, 42

been uniformly held, however that the courts may, in a proper case, construe and fix their meaning.[28]

b. Amendments. A rule or by-law intended merely to regulate a question of procedure at future meetings is subject to amendment or repeal at any time, at the mere will of a majority of the members present.[29]

3. To Hold Property — a. Realty. Except where so provided by statute,[30] a mere voluntary association is incapable of holding realty in its society name,[31]

Pac. 887; Hammerstein *v.* Parsons, 38 Mo. App. 332; Hess *v.* Johnson, 41 N. Y. App. Div. 465, 58 N. Y. Suppl. 983; Kehlenbeck *v.* Logeman, 10 Daly (N. Y.) 447; Cunniff *v.* Jamour, 31 Misc. (N. Y.) 729, 65 N. Y. Suppl. 317; Ulmer *v.* Minster, 16 Misc. (N. Y.) 42, 37 N. Y. Suppl. 679, 73 N. Y. St. 260; Levy *v.* U. S. Grand Lodge, I. O. S. B., 9 Misc. (N. Y.) 633, 30 N. Y. Suppl. 885; Elsas *v.* Alford, 1 N. Y. City Ct. 123.

It was at first a matter of some doubt whether the courts would take cognizance of the regulations of unincorporated associations. Thus, in Lloyd *v.* Loaring, 6 Ves. Jr. 773, which was a suit brought by some of the members of a Masonic lodge to compel the delivery of certain property belonging to it which the defendant had wrongfully taken, Lord Eldon, after quoting a statement by Chancellor Thurlow in Cullen *v.* Queensberry, 1 Bro. Ch. 101, to the effect that he would convince the parties that they had no laws and constitutions, proceeded to say that he was alarmed at the notion that these voluntary societies should be permitted to state all their laws, forms, and constitutions upon the record, and then to tell the court that they were individuals. See also People *v.* Chicago Board of Trade, 80 Ill. 134; Kentucky Lodge No. 39, I. O. O. F. *v.* White, 5 Ky. L. Rep. 418. There is now, however, little doubt but that, subject to the exceptions mentioned, courts will enforce all rules and regulations, properly adopted, on the ground that they constitute agreements by the members *inter sese*.

28. *Alabama.*— Weatherly *v.* Montgomery County Medical, etc., Soc., 76 Ala. 567.

Massachusetts.— Dolan *v.* Court Good Samaritan No. 5910, A. O. F., 128 Mass. 437.

Michigan.— Meurer *v.* Detroit Musicians' Benev., etc., Assoc., 95 Mich. 451, 54 N. W. 954.

New York.— Brendon *v.* Worley, 8 Misc. (N. Y.) 253, 28 N. Y. Suppl. 557, 59 N. Y. St. 237.

United States.— Wiggin *v.* Knights of Pythias, 31 Fed. 122.

Opinion of officers inadmissible.— The opinion of officers of an association as to how certain provisions of the by-laws should be construed is inadmissible in evidence. Brendon *v.* Worley, 8 Misc. (N. Y.) 253, 28 N. Y. Suppl. 557, 59 N. Y. St. 237.

Evidence of uniform custom.— Evidence of the established method of doing business adopted by an association is admissible for the purpose of showing that a by-law has been abrogated. Henry *v.* Jackson, 37 Vt. 431.

A rule "that no officer be permitted to occupy his chair while under charges, in any temple of our order" will not be broadly construed so as to exclude him from the performance of all duties of his office, but in its literal meaning and so as merely to prevent his occupying the chair at meetings. Potter *v.* Search, 7 Phila. (Pa.) 443.

29. Richardson *v.* Francestown Union Cong. Soc., 58 N. H. 187 (deciding that a by-law regulating the admission of members is subject to amendment by majority vote, although a further by-law provided that amendments might be made by two thirds only); Com. *v.* Lancaster, 5 Watts (Pa.) 152; Smith *v.* Nelson, 18 Vt. 511. But *compare* Torrey *v.* Baker, 1 Allen (Mass.) 120, holding that, where it was provided in the articles of association that amendments were valid only when passed by a two-thirds vote, an amendment passed by less than two thirds of the members present is invalid, and this even though, after the meeting is over, enough other members to make up the requisite number request, in writing, to be allowed to record their votes in the affirmative. It must be noted, however, that the question really involved in this case was as to the propriety of dissolving the association.

30. **Power to hold real estate is conferred,** for example, by Mass. Gen. Stat. c. 30, § 24 [Pub. Stat. (1882), c. 39, §§ 9, 10] upon unincorporated religious societies. Hamblett *v.* Bennett, 6 Allen (Mass.) 140.

See, generally, Religious Societies.

Statutes giving associations power to hold land will be construed liberally. Miller *v.* Chance, 3 Edw. (N. Y.) 399, wherein authority to mortgage, for the purpose of erecting buildings, was held to extend to a mortgage for painting.

31. *Connecticut.*—East Haddam Cent. Baptist Church *v.* East Haddam Baptist Ecclesiastical Soc., 44 Conn. 259.

Minnesota.— German Land Assoc. *v.* Scholler, 10 Minn. 331.

Missouri.— Douthitt *v.* Stinson, 73 Mo. 199.

Oregon.— Liggett *v.* Ladd, 17 Oreg. 89, 21 Pac. 133.

United States.— Goesele *v.* Bimeler, 5 McLean (U. S.) 223, 10 Fed. Cas. No. 5,503, 8 West. L. J. 385 [*affirmed* in 14 How. (U. S.) 589, 14 L. ed. 554].

See 4 Cent. Dig. tit. "Associations," § 24.

Right to be cestui que trust.— In German Land Assoc. *v.* Scholler, 10 Minn. 331, it was held that an unincorporated association of persons could not, in its associate name, be a *cestui que trust* of real estate; but in Lig-

and consequently such society has no power to receive real property either by grant[32] or devise.[33]

b. Personalty. There is no legal impediment to the holding of personalty by an association, though the title thereto must perforce vest in the individual members;[34] but an association is disqualified from receiving a legacy bequeathed to it in its organization name.[35]

B. Liabilities. The association will be liable for articles received and used by its agents in its business[36] and for the conversion of property intrusted to its president as such, where it has negligently allowed such president to appropriate the property to his own use.[37]

IV. MEETINGS.

A. In General — 1. By What Governed. If the articles of association, the constitution, or by-laws regulate the time, place, and manner of holding meetings, their provisions must be conformed to in all respects;[38] but if no rules or regu-

gett *v.* Ladd, 17 Oreg. 89, 21 Pac. 133, it was held that land might be held for the use and benefit of a voluntary association through the intervention of a trustee, who might be either a natural or artificial person.

32. Hornbeck *v.* Westbrook, 9 Johns. (N. Y.) 73; Jackson *v.* Cory, 8 Johns. (N. Y.) 385; Goesele *v.* Bimeler, 5 McLean (U. S.) 223, 10 Fed. Cas. No. 5,503, 8 West. L. J. 385 [*affirmed* in 14 How. (U. S.) 589, 14 L. ed. 554].

Deed construed as grant to members.— In Byam *v.* Bickford, 140 Mass. 31, 2 N. E. 687, it was held that a deed of land to a voluntary unincorporated association which was well known, and all of whose members might be ascertained, would be construed as a grant to those who were properly described by the title used in the deed, and that such persons were tenants in common of the land conveyed.

33. Brewster *v.* McCall, 15 Conn. 274; Greene *v.* Dennis, 6 Conn. 293, 16 Am. Dec. 58; Barker *v.* Wood, 9 Mass. 419; Marx *v.* McGlynn, 88 N. Y. 357; White *v.* Howard, 46 N. Y. 144 [*affirming* 52 Barb. (N. Y.) 294]; Downing *v.* Marshall, 23 N. Y. 366, 80 Am. Dec. 290; Philadelphia Baptist Assoc. *v.* Hart, 4 Wheat. (U. S.) 1, 4 L. ed. 499. But see Baker *v.* Fales, 16 Mass. 488, which, while affirming the general rule, applied a different doctrine to church lands.

The subsequent incorporation of an association will not render it capable of receiving real property previously devised. White *v.* Howard, 46 N. Y. 144 [*affirming* 52 Barb. (N. Y.) 294]; Owens *v.* Methodist Episcopal Missionary Soc., 14 N. Y. 380, 67 Am. Dec. 160; Philadelphia Baptist Assoc. *v.* Hart, 4 Wheat. (U. S.) 1, 4 L. ed. 499.

34. *Connecticut.*—Curtiss *v.* Hoyt, 19 Conn. 154, 48 Am. Dec. 149.

Massachusetts.— Austin *v.* Shaw, 10 Allen (Mass.) 552.

Michigan.— Allen *v.* Duffie, 43 Mich. 1, 4 N. W. 427, 38 Am. Rep. 159; Whipple *v.* Parker, 29 Mich. 369.

New Hampshire.— Danbury Cornet Band *v.* Bean, 54 N. H. 524.

New York.— American Silk Works *v.* Salomon, 4 Hun (N. Y.) 135, 6 Thomps. & C. (N. Y.) 352.

35. White *v.* Howard, 46 N. Y. 144; Downing *v.* Marshall, 23 N. Y. 366, 80 Am. Dec. 290; Owens *v.* Methodist Episcopal Missionary Soc., 14 N. Y. 380, 67 Am. Dec. 160; Sherwood *v.* American Bible Soc., 4 Abb. Dec. (N. Y.) 227, 1 Keyes (N. Y.) 561; Matter of Waterford Y. M. C. A., 22 N. Y. App. Div. 325, 47 N. Y. Suppl. 854; Pratt *v.* Roman Catholic Orphan Asylum, 20 N. Y. App. Div. 352, 46 N. Y. Suppl. 1035; Chili First Presb. Soc. *v.* Bowen, 21 Hun (N. Y.) 389; Betts *v.* Betts, 4 Abb. N. Cas. (N. Y.) 317; Leonard *v.* Davenport, 58 How. Pr. (N. Y.) 384; McKeon *v.* Kearney, 57 How. Pr. (N. Y.) 349; Carpenter *v.* Westchester County Historical Soc., 2 Dem. Surr. (N. Y.) 574; Riley *v.* Diggs, 2 Dem. Surr. (N. Y.) 184.

Direction that legacy go to particular officer.—Where a legacy is given to an association, and the will further directs that it shall go to a particular officer for the time being, it will be sustained. Tucker *v.* Seaman's Aid Soc., 7 Metc. (Mass.) 188; Burr *v.* Smith, 7 Vt. 241, 29 Am. Dec. 154.

The trustees of an unincorporated society, organized for a lawful purpose, may receive gifts and promises on its behalf. Allen *v.* Duffie, 43 Mich. 1, 4 N. W. 427, 38 Am. Rep. 159.

36. Allen *v.* Clark, 65 Barb. (N. Y.) 563. See also Fox *v.* Naramore, 36 Conn. 376 (holding that, where the commanding officer of a company in a militia regiment received money from the state with which to pay the rent of the armory occupied by the company, and expended it for the benefit of the company, in another way, the company was liable to the lessor, for money had and received, for the money so received by the commanding officer); Shaker Soc. *v.* Watson, 68 Fed. 730, 37 U. S. App. 141, 15 C. C. A. 632 (holding that an obligation, executed in behalf of a society of Shakers, whose property is held in common and managed by trustees, without individual interest in the members, such obligation being given in return for money added to the funds of the society, creates an equitable lien on its property).

37. Cutting *v.* Marlor, 78 N. Y. 454 [*affirming* 17 Hun (N. Y.) 573].

38. Cogswell *v.* Bullock, 13 Allen (Mass.) 90; Kuhl *v.* Meyer, 42 Mo. App. 474.

lations exist, common parliamentary principles in use by all deliberative assemblies may be resorted to in considering the regularity of the proceedings.[39]

2. NOTICE — a. In General. All the members must be notified of the time and place of a special meeting, and of the particular purpose for which it is called,[40] and, where no length of time is prescribed, reasonable notice must be given.[41]

b. Waiver of Irregularities. If, however, all the members appear at the meeting and, without objection, participate in the proceedings thereof, it will be deemed a waiver of any defect due to insufficiency of notice.[42]

3. SUNDAY MEETINGS. In the absence of a positive statutory prohibition, the mere fact that the meeting is held on Sunday does not invalidate the proceedings thereof.[43]

4. PROCEEDINGS — a. In General. — (I) *WHEN RULES EXIST.* No definite principle can be laid down, as to the business which may properly be brought before the meeting, further than to say that such only may be transacted thereat as is within the scope permitted by the constitution and by-laws of the association, the decision in each case turning upon a construction of the particular provision involved.[44]

(II) *IN ABSENCE OF RULES.* An association without articles, constitution, or rules is subject to no check upon its powers, but can make changes at will at any meeting duly held, except that it cannot expel a member without notice, or adopt any measure subversive of the objects for which the association was formed.[45]

b. Voting. A member present at a meeting is under obligation to vote, for if he does not, he will be counted with the majority, such being the general rule of parliamentary assemblies.[46]

B. Adjourned Meetings. In the absence of a prohibitory rule, a meeting may properly be adjourned to a future date by those persons thereat, even though they constitute less than the required quorum, and notice of such adjourned meeting need not be given where the first meeting has been regularly called. At such adjourned meeting all business may be transacted which might have been brought before the original meeting, the former being regarded as a mere continuation of the latter.[47]

V. OFFICERS AND COMMITTEES.

A. Election. The election of officers is ordinarily regulated by the constitution and by-laws of the association,[48] but in the absence thereof common parliamentary rules control.[49]

B. Power to Bind Association. The powers and authorities of the officers of an association are generally regulated by the constitution and by-laws, in the

39. Ostrom *v.* Greene, 161 N. Y. 353, 55 N. E. 919.

40. Kuhl *v.* Meyer, 42 Mo. App. 474; St. Mary's Benev. Assoc. *v.* Lynch, 64 N. H. 213, 9 Atl. 98; Rudolph *v.* Southern Beneficial League, 7 N. Y. Suppl. 135, 23 Abb. N. Cas. (N. Y.) 199.

41. Buck *v.* Spofford, 31 Me. 34.

42. Kuhl *v.* Meyer, 42 Mo. App. 474; Fischer *v.* Raab, 57 How. Pr. (N. Y.) 87.

43. People *v.* Young Men's Father Matthew Benev. Soc., 65 Barb. (N. Y.) 357.

44. Torrey *v.* Baker, 1 Allen (Mass.) 120; St. Mary's Benev. Assoc. *v.* Lynch, 64 N. H. 213, 9 Atl. 98; Rudolph *v.* Southern Beneficial League, 7 N. Y. Suppl. 135, 23 Abb. N. Cas. (N. Y.) 199; Fischer *v.* Raab, 57 How. Pr. (N. Y.) 87.

45. Ostrom *v.* Greene, 161 N. Y. 353, 55 N. E. 919.

46. Richardson *v.* Francestown Union Cong. Soc., 58 N. H. 187; Abels *v.* McKeen, 18 N. J. Eq. 462.

47. Ostrom *v.* Greene, 161 N. Y. 353, 55 N. E. 919.

48. Grand Rapids Guard *v.* Bulkley, 97 Mich. 610, 57 N. W. 188; Strempel *v.* Rubing, 4 N. Y. Suppl. 534, 21 N. Y. St. 483.

Filing certificate with recorder.— Compliance with Ind. Rev. Stat. (1894), § 5019, requiring the clerk of a lodge of Free Masons, within ten days of the election of trustees, to file in the office of the recorder a certificate of their election, is not a prerequisite to the exercise of their duties by such trustees. Roberts *v.* Hill, 137 Ind. 215, 36 N. E. 843.

49. Ostrom *v.* Greene, 161 N. Y. 353, 55 N. E. 919.

absence of which regard will be had to the objects of the organization and the manner in which its affairs are conducted, the principles applicable to the question of agency being permitted to govern.[50] Where the officers act under special and limited powers, their acts must be in strict conformity therewith or the association will not be bound thereby.[51]

C. Liability — 1. To Members. An officer is liable to his co-members for all injury caused to the joint interest through unauthorized acts on his part which the society has never ratified,[52] as well as where he refuses to surrender property intrusted to him.[53]

2. To Third Persons. Aside from their general liability as members, it has been held that officers are, as a rule, personally responsible on contracts which they have entered into, on behalf of the association, with third parties,[54] and this

50. *Connecticut.*— Davison *v.* Holden, 55 Conn. 103, 10 Atl. 515, 3 Am. St. Rep. 40.

Georgia.— Augusta Amateur Musical Club *v.* Cotton States Mechanics', etc., Fair Assoc., 50 Ga. 436.

Iowa.— Reding *v.* Anderson, 72 Iowa 498, 34 N. W. 300.

Maine.— Beaman *v.* Whitney, 20 Me. 413; Robinson *v.* Robinson, 10 Me. 240.

Missouri.— Heath *v.* Goslin, 80 Mo. 310, 50 Am. Rep. 505.

New Hampshire.— Dow *v.* Moore, 47 N. H. 419.

New York.—Wells *v.* Gates, 18 Barb. (N. Y.) 554; Fowler *v.* Kennedy, 2 Abb. Pr. (N. Y.) 347; Skinner *v.* Dayton, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286.

Pennsylvania.— Ridgely *v.* Dobson, 3 Watts & S. (Pa.) 118.

In the absence of all authority on the part of the managers to borrow money or increase the capital, a ratification by them of the purchase of property by the president and other members is not sufficient to bind the association. Crum's Appeal, 66 Pa. St. 474.

Power to incorporate.— The executive board has no power to convert the association into a corporation, in the absence of a provision in the constitution or by-laws giving them authority so to do or of a resolution of the members to that effect. Rudolph *v.* Southern Beneficial League, 7 N. Y. Suppl. 135, 23 Abb. N. Cas. (N. Y.) 199; Southern Steam Packet Co. *v.* Magrath, McMull. Eq. (S. C.) 98.

51. Sullivan *v.* Campbell, 2 Hall (N. Y.) 271.

Action as a board.—When the constitution provides that certain acts shall be done by and with the authority of the board of directors, the authority of the directors acting as a board is required, and, hence, the assent of the individuals composing it, given separately, is not sufficient. Skinner *v.* Dayton, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286; Pease *v.* Sandusky Steamboat Co., 1 Ohio Dec. (Reprint) 150, 2 West. L. J. 550. In Miller *v.* Chance, 3 Edw. (N. Y.) 399, the board of directors consisted of eleven members, two of whom were *ex officio* members, and it was held that the action of five of the appointed members was sufficient to bind the society, under a statute which permitted the board to mortgage the realty of the association.

52. Boody *v.* Drew, 2 Thomps. & C. (N. Y.) 69.

Ratification of unauthorized acts.— The directors of a union store will not be held accountable for losses occasioned by permitting sales on credit, selling at too low a figure, depreciation of the stock, or error in estimating current expenses, the subject having been discussed at meetings and all the members, in proportion to their purchases, having shared in the advantage of buying cheaply. Henry *v.* Jackson, 37 Vt. 431.

53. Gieske *v.* Anderson, 77 Cal. 247, 19 Pac. 421; Dennis *v.* Kennedy, 19 Barb. (N. Y.) 517; Strebe *v.* Albert, 1 N. Y. City Ct. 376.

Objects of association completed.— Where an association was formed for the purpose of providing a fund out of which to pay each member drafted into the army a certain sum or to furnish him with a substitute, and, no draft having taken place, a resolution of the society directed the treasurer to return to each member the amount contributed by the latter to the original fund, it was held that an action for money had and received might be maintained by a member against the treasurer to recover the amount of a contribution. Koehler *v.* Brown, 2 Daly (N. Y.) 78. But see Murray *v.* McHugh, 9 Cush. (Mass.) 158, where, an association having been formed for the purpose of aiding the people of Ireland in their struggle against England, the object of which failed, the plaintiff brought an action to recover the amount of his contribution as money had and received, and, it being shown that there were some incidental charges and expenses, also losses by bad investment, it was held that the proper form of action must be for an accounting.

54. *Iowa.*— Comfort *v.* Graham, 87 Iowa 295, 54 N. W. 242; Reding *v.* Anderson, 72 Iowa 498, 34 N. W. 300.

Maine.— Kierstead *v.* Bennett, 93 Me. 328, 45 Atl. 42.

Missouri.— Heath *v.* Goslin, 80 Mo. 310, 50 Am. Rep. 505.

New York.— Bartholomae *v.* Kauffmann, 47 N. Y. Super. Ct. 552 [*affirmed* in 91 N. Y. 654]; Lincoln *v.* Crandell, 21 Wend. (N. Y.) 101; McCartee *v.* Chambers, 6 Wend. (N. Y.) 649, 22 Am. Dec. 556; Sullivan *v.* Campbell, 2 Hall (N. Y.) 271.

Pennsylvania.—Eichbaum *v.* Irons, 6 Watts & S. (Pa.) 67, 40 Am. Dec. 540.

is true unless the agreement itself clearly indicates an intention to look to the association solely.[55]

D. Removal. In the absence of a definite provision concerning the tenure of office, an officer holds his position merely at the pleasure of the association, and may be removed without either cause or notice,[56] though where such provision exists it is controlling.[57]

VI. RIGHTS, POWERS, AND LIABILITIES OF MEMBERS.

A. Rights in Associate Property. As a voluntary association has no separate entity, its property is deemed to be in the joint ownership of the members, who have, consequently, the right to manage, control, and dispose of it at their pleasure, subject, however, to the provisions and stipulations of the contract under which it is held, as contained in the constitution, by-laws, or other rules and regulations adopted by the society.[58]

B. Power to Bind Association — 1. Single Member. In the absence of authority specially conferred, a single member has no power to bind the association.[59]

2. Majority of Members. A majority of members, however, possess authority to control the action of the association as to all matters within the scope of the objects for which the association was formed, whether such objects are mentioned in the articles of association or are necessarily implied therefrom.[60]

C. Liability of Members — 1. For Debts of Association — a. In General.

South Dakota.— Winona Lumber Co. *v.* Church, 6 S. D. 498, 62 N. W. 107.

Wisconsin.— Fredendall *v.* Taylor, 23 Wis. 538, 99 Am. Dec. 203.

England.— Doubleday *v.* Muskett, 7 Bing. 110, 9 L. J. C. P. O. S. 35, 4 M. & P. 750, 20 E. C. L. 58; Cullen *v.* Queensberry, 1 Bro. Ch. 101.

The principle is well stated by Paine, J., in Fredendall *v.* Taylor, 23 Wis. 538, 540, 99 Am. Dec. 203, when he observes: "It is conceded that the State Fireman's Association was not incorporated at this time, and had no legal existence, so that it could contract or be sued as such. And where such is the case, a committee which assumes to contract for services for such an irresponsible, intangible association, must become personally liable, else there is no liability whatever. One professing to act as agent, if he does not bind his principal, binds himself. . . . And it can make no difference that the reason why he does not bind his principal, is because the principal for whom he professes to act has no existence."

55. Dow *v.* Moore, 47 N. H. 419.

56. Ostrom *v.* Greene, 161 N. Y. 353, 55 N. E. 919.

The action of members will not be sustained where such members, having withdrawn from a regular meeting merely on account of opposition to the duly elected officers, met and passed a resolution expelling the latter from office, and constituting themselves their successors. McCallion *v.* Hibernia Sav., etc., Soc., 70 Cal. 163, 12 Pac. 114. But, when officers themselves secede, with no intention of further continuing to hold their positions, the remaining members, though a minority of the old association, are at liberty to consider the offices vacant and fill the same by election. McFadden *v.* Murphy, 149 Mass. 341, 21 N. E. 868.

57. Whitty *v.* McCarthy, 20 R. I. 792, 36 Atl. 129.

58. Ahlendorf *v.* Barkons, 20 Ind. App. 656, 50 N. E. 887; Torrey *v.* Baker, 1 Allen (Mass.) 120; Duke *v.* Fuller, 9 N. H. 536, 32 Am. Dec. 392.

Rights of suspended members.—Where, under the constitution and by-laws, all members in good standing had sole control of the funds, an assignment of the property of the association, executed pursuant to a vote at a regular meeting by all the members in good standing, will be sufficient to vest complete title thereto in the assignee. While suspended members who had the right to be reinstated on payment of arrearages of dues may have had a contingent interest in the funds, they were not necessary parties to the assignment. Brown *v.* Stoerkel, 74 Mich. 269, 41 N. W. 921, 3 L. R. A. 430.

59. Burt *v.* Lathrop, 52 Mich. 106, 17 N. W. 716; Ostrom *v.* Greene, 161 N. Y. 353, 55 N. E. 919; Skinner *v.* Dayton, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286.

60. Manning *v.* Shoemaker, 7 Pa. Super. Ct. 375; Horton *v.* Chester Baptist Church, 34 Vt. 309; Penfield *v.* Skinner, 11 Vt. 296.

Funds cannot be diverted to foreign use.— A majority of the members of an association formed for the purpose of freeing a city ward from a conscription cannot, after the war has ceased and all danger of a draft removed, devote the surplus left in the treasury to the establishment of a dispensary, the funds not having been contributed for any such purpose. Abels *v.* McKeen, 18 N. J. Eq. 462.

Each member of an association is liable for the debts thereof[61] incurred during his period of membership,[62] and which have been necessarily contracted for the purpose of carrying out the objects for which the association was formed.[63]

b. Dehors Associate Scope. If the debt is contracted in a transaction entirely *dehors* the scope of the association, only those members who assent, participate, or ratify, are liable.[64]

61. *Connecticut.*— Bennett *v.* Lathrop, 71 Conn. 613, 42 Atl. 634, 71 Am. St. Rep. 222; Lawler *v.* Murphy, 58 Conn. 294, 20 Atl. 457, 8 L. R. A. 113; Davison *v.* Holden, 55 Conn. 103, 10 Atl. 515, 3 Am. St. Rep. 40.

Illinois.— Hodgson *v.* Baldwin, 65 Ill. 532.

Iowa.— Reding *v.* Anderson, 72 Iowa 498, 34 N. W. 300; Lewis *v.* Tilton, 64 Iowa 220, 19 N. W. 911, 52 Am. Rep. 436.

Louisiana.— English *v.* Wall, 12 Rob. (La.) 132; Lynch *v.* Postlethwaite, 7 Mart. (La.) 69, 12 Am. Dec. 495.

Maine.— Chick *v.* Trevett, 20 Me. 462, 37 Am. Dec. 68.

Missouri.— Heath *v.* Goslin, 80 Mo. 310, 50 Am. Rep. 505.

New York.— Troy Iron, etc., Factory *v.* Corning, 45 Barb. (N. Y.) 231; Wells *v.* Gates, 18 Barb. (N. Y.) 554; Fowler *v.* Kennedy, 2 Abb. Pr. (N. Y.) 347.

Pennsylvania.— Hess *v.* Werts, 4 Serg. & R. (Pa.) 356.

South Dakota.— Winona Lumber Co. *v.* Church, 6 S. D. 498, 62 N. W. 107.

United States.— *In re* Mendenhall, 17 Fed. Cas. No. 9,425, 9 Nat. Bankr. Reg. 497.

England.— Maudslay *v.* Le Blanc, 2 C. & P. 409, 12 E. C. L. 643; Keasley *v.* Codd, 2 C. & P. 408, 12 E. C. L. 643.

Grounds of liability.— In Lewis *v.* Tilton, 64 Iowa 220, 223, 19 N. W. 911, 52 Am. Rep. 436, Seevers, J., said: "It is immaterial whether they be so held because they held themselves out as agents for a principal that had no existence, or on the ground that they must, under the contract, be regarded as principals, for the simple reason that there is no other principal in existence."

Intent of members immaterial.— In Lawler *v.* Murphy, 58 Conn. 294, 313, 20 Atl. 457, 8 L. R. A. 113, Seymour, J., said: "Individual members of an unincorporated association are liable for contracts made in the name of the association, without regard to the question whether they so intended or so understood the law, and even if the other party contracted in form with the association and was ignorant of the names of the individual members composing it." To same effect see Bennett *v.* Lathrop, 71 Conn. 613, 42 Atl. 634, 71 Am. St. Rep. 222.

Exemption clause in articles.— The eleventh article of an association known as the Union Bank of Georgetown provided that every person dealing with it "disavows having recourse, on any pretence whatever, to the person, or separate property of any present or future member of this company." This, it was held, did not prevent a laborer from recovering against the individual members. Davis *v.* Beverly, 2 Cranch C. C. (U. S.) 35, 7 Fed. Cas. No. 3,627. So, too, the individual members of an association are personally responsible for the amount of certain promissory notes, illegally issued, containing, in addition to the promise to pay, a stipulation that such notes were to be met from "their joint funds, according to their articles of association," even though such articles contain a provision exempting the members from liability. Hess *v.* Werts, 4 Serg. & R. (Pa.) 356.

Death or withdrawal of other members.— The death or withdrawal of a member of the association does not affect the liability of those who remain for the debts of the organization when it was not designed that the death or withdrawal should have such an effect, the organization being intended to be perpetual. Troy Iron, etc., Factory *v.* Corning, 45 Barb. (N. Y.) 231; Tenney *v.* New England Protective Union, 37 Vt. 64. If, however, an association is insolvent, it may refuse to accept the surrender of a certificate of membership and insist that the holder pay his proportion of the loss. Stimson *v.* Lewis, 36 Vt. 91.

Shipping associations.— Certain shippers on Lake Ontario formed an association with the owners of canal-boats running between Albany and Oswego for the transportation of merchandise between the city of New York and certain ports on the St. Lawrence river and Lake Ontario. Plaintiff shipped certain goods from the city of New York directed to Ogdensburg, and they were lost on the lake passage after leaving Oswego. The members of the association were, it was held, jointly liable for the value of the goods, though the owners of the canal-boats had no interest in the vessels on the lake. Slocum *v.* Fairchild, 7 Hill (N. Y.) 292.

62. *Mississippi.*— Lake *v.* Munford, 4 Sm. & M. (Miss.) 312.

Nebraska.— Hornberger *v.* Orchard, 39 Nebr. 639, 58 N. W. 425.

New York.— Fuller *v.* Rowe, 57 N. Y. 23.

Pennsylvania.— Rhoads *v.* Fitzpatrick, 166 Pa. St. 294, 36 Wkly. Notes Cas. (Pa.) 48, 31 Atl. 79.

Tennessee.— Barry *v.* Nuckolls, 2 Humphr. (Tenn.) 324.

Except by express contract, based on good consideration, which must be alleged and proved, a member is not liable for debts contracted before his membership. Hornberger *v.* Orchard, 39 Nebr. 639, 58 N. W. 425.

63. McCabe *v.* Goodfellow, 133 N. Y. 89, 30 N. E. 728, 44 N. Y. St. 253, 17 L. R. A. 204 [*reversing* 15 N. Y. Suppl. 377, 39 N. Y. St. 941, 21 N. Y. Civ. Proc. 65]; Devoss *v.* Gray, 22 Ohio St. 159; Ash *v.* Guie, 97 Pa. St. 493, 39 Am. Rep. 818.

64. Ray *v.* Powers, 134 Mass. 22; Volger *v.* Ray, 131 Mass. 439; Newell *v.* Borden, 128 Mass. 31; Devoss *v.* Gray, 22 Ohio St. 159;

2. FOR TORTS OF ASSOCIATION. A member is responsible for tortious acts committed by the association when it can fairly be assumed that they were within the scope of the purposes for which the organization was formed.[65]

VII. ACTIONS BY AND AGAINST ASSOCIATIONS.

A. In General — 1. By Association — a. In General — (I) *In Names of Individual Members.* An association being only a collection of individuals, it could not, at common law, sue by its own name,[66] and an action brought by such an association was necessarily brought in the names of all the individual members.[67]

(II) *By One or More* — (A) *As Trustees.* A modification of the common-law rule, however, introduced by equity in the interest of practical convenience and now generally recognized, allows suits to be brought by one or more members for the use and benefit of all;[68] but it has been held that, in order that a

Ash *v.* Guie, 97 Pa. St. 493, 39 Am. Rep. 818. See also Sizer *v.* Daniels, 66 Barb. (N. Y.) 426, 433, wherein Mullin, P. J., said: "There are cases, doubtless, in which the act done is so clearly in furtherance of the objects for which the association was organized that all will be presumptively bound by it. When such is not the case, consent or ratification must be proved."

Members of a college class voting, or assenting to the vote whereby the publication of a class book was ordered, are personally liable for the expense at the suit of one who prints it under a contract with a member of the class, alleged to be the business manager of the publication. Willcox *v.* Arnold, 162 Mass. 577, 39 N. E. 414.

Determinate membership necessary.— Members of an association can be held liable to contribution in equity for debts and expenses authorized at meetings of the association only where it appears that the association is one with a determinate membership differentiated from the general public, and that the meetings authorizing the expenditure were limited in participation to such members. Cheney *v.* Goodwin, 88 Me. 563, 34 Atl. 420.

65. Blacklisting.— Members of a merchants' protective association are responsible in an action for libel on account of its acts in wrongfully publishing plaintiff's name in a blacklist as one who refused to pay his honest debts. White *v.* Parks, 93 Ga. 633, 20 S. E. 78; Muetze *v.* Tuteur, 77 Wis. 236, 46 N. W. 123, 20 Am. St. Rep. 115, 9 L. R. A. 86.

Boycotting.—Where an association effects a withdrawal of patronage by means of a coercive by-law imposing a fine or penalty for its violation, the members are liable as for an unlawful conspiracy. April *v.* Baird, 32 N. Y. App. Div. 226, 52 N. Y. Suppl. 973, 28 N. Y. Civ. Proc. 29; Boutwell *v.* Marr, 71 Vt. 1, 42 Atl. 607, 76 Am. St. Rep. 746, 43 L. R. A. 803.

Personal injuries.— In Vredenburg *v.* Behan, 33 La. Ann. 627, it was held that members of an unincorporated rifle club were responsible for keeping a ferocious bear which broke loose and killed plaintiff's husband, and the mere fact that some of them had no knowledge that the bear was kept on the association grounds was insufficient to exempt them from liability.

66. Detroit Schuetzen Bund *v.* Detroit Agitations Verein, 44 Mich. 313, 6 N. W. 675, 38 Am. Rep. 270.

67. *Florida.*— Richardson *v.* Smith, 21 Fla. 336.

Indiana.— Mackenzie *v.* Edinburg Bd. School Trustees, 72 Ind. 189.

Iowa.— Pipe *v.* Bateman, 1 Iowa 369; Nightingale *v.* Barney, 4 Greene (Iowa) 106.

Louisiana.— Workingmen's Accommodation Bank *v.* Converse, 29 La. Ann. 369; Soller *v.* Mouton, 3 La. Ann. 541.

Maine.—McGreary *v.* Chandler, 58 Me. 537.

Maryland.— Mears *v.* Moulton, 30 Md. 142.

New York.— Williams *v.* Michigan Bank, 7 Wend. (N. Y.) 539.

United States.— Metal Stamping Co. *v.* Crandall, 17 Fed. Cas. No. 9,493c, 18 Off. Gaz. 1531.

England.—Lloyd *v.* Loaring, 6 Ves. Jr. 773.

68. *California.*— Gieske *v.* Anderson, 77 Cal. 247, 19 Pac. 421.

Iowa.— Laughlin *v.* Greene, 14 Iowa 92; Keller *v.* Tracy, 11 Iowa 530; Pipe *v.* Bateman, 1 Iowa 369; McConnell *v.* Gardner, Morr. (Iowa) 272.

Massachusetts.— Snow *v.* Wheeler, 113 Mass. 179; Birmingham *v.* Gallagher, 112 Mass. 190.

New York.— Dennis *v.* Kennedy, 19 Barb. (N. Y.) 517; Bloete *v.* Simon, 12 N. Y. Civ. Proc. 114, 19 Abb. N. Cas. (N. Y.) 88.

North Carolina.— Marshall *v.* Lovelass, 1 N. C. 325.

Oregon.— Liggett *v.* Ladd, 17 Oreg. 89, 21 Pac. 133.

Pennsylvania.— Liederkranz Singing Soc. *v.* Germania Turn-Verein, 163 Pa. St. 265, 29 Atl. 918, 43 Am. St. Rep. 798.

United States.— Beatty *v.* Kurtz, 2 Pet. (U. S.) 566, 7 L. ed. 521.

England.— Lloyd *v.* Loaring, 6 Ves. Jr. 773.

Making remaining members defendants.— In cases of voluntary associations equity will not sustain a bill filed by a portion of the members unless the others are made defendants. Whitney *v.* Mayo, 15 Ill. 251.

Death of members pending suit.— It is im-

suit may be brought in this form, it must appear that the members of the association have such a common interest that, were they all before the court, they would be entitled to bring the action in their individual names.[69]

(B) *As Owner of Res or Person With Whom Contract Was Made.* Where the cause of action has vested in one or more of the officers, suit may be brought in the name of the individual holder or holders of the title to the *res* in controversy, or with whom the agreement sued upon was made.[70]

b. Statutory Regulations. In some of the states, moreover, statutes have been passed providing that actions may be brought by the association, either in its own name[71] or in the name of one or more of its officers.[72] These statutes have been held to apply to foreign associations.[73]

2. Against Association. Similarly, in absence of statutory provisions, suits against associations should be brought against the individual members;[74] but by

material that while such suit was pending the number of members was reduced to less than a quorum, as the right of the association to sue in this form must be determined by its status when the action was brought. Lilly *v.* Tobbein, (Mo. 1890) 13 S. W. 1060; Kuehl *v.* Meyer, 50 Mo. App. 648.

69. Habicht *v.* Pemberton, 4 Sandf. (N. Y.) 657.

70. Corbett *v.* Schumacker, 83 Ill. 403; Martin *v.* Dryden, 6 Ill. 187; Waugh *v.* Andel, 21 Ill. App. 389; Whitcomb *v.* Smart, 38 Me. 264; Kuehl *v.* Meyer, 50 Mo. App. 648; Sangston *v.* Gordon, 22 Gratt. (Va.) 755.

Action by holder of legal title to realty.— An action to collect a subscription to enable a designated committee to erect one building and repair another was held to be properly brought in the name of the official in whom was vested the title to the real estate sought to be improved by the fund subscribed. Egan *v.* Bonacum, 38 Nebr. 577, 57 N. W. 288.

Suit by acting treasurer.— The constitution of an association providing that the treasurer should have the custody of its personalty, it was held that an acting treasurer, who had not been elected, was not competent to sue, although the original appointee had gone out of office. Dwelle *v.* Plummer, 5 Colo. App. 113, 37 Pac. 947.

71. Powhatan Steamboat Co. *v.* Potomac Steamboat Co., 36 Md. 238.

Illegal association.— But the above provision does not apply to an association formed for an illegal purpose or for a purpose against public policy. Hence, an organization created for the purpose of controlling the price of brick, in the interest of its members, will not be permitted to sue in the name adopted for the transaction of its business, though an action may be brought by the individual members. Jackson *v.* Akron Brick Assoc., 53 Ohio St. 303, 41 N. E. 257, 57 Am. St. Rep. 637, 35 L. R. A. 287.

72. Thus, under N. Y. Code Civ. Proc. § 1919, the president or treasurer of an unincorporated association consisting of seven or more persons is permitted to bring an action or special proceeding "to recover any property or upon any cause of action for or upon which all the associates may maintain such an action or special proceeding by reason of their interest or ownership therein, either jointly or in common." Ostrom *v.* Greene, 161 N. Y. 353, 55 N. E. 919; Tibbetts *v.* Blood, 21 Barb. (N. Y.) 650; McGlynn *v.* Post, 21 Abb. N. Cas. (N. Y.) 97; Masterson *v.* Botts, 4 Abb. Pr. (N. Y.) 130; Bridenbeker *v.* Hoard, 32 How. Pr. (N. Y.) 289.

Composition of association.— The statute does not apply to an association composed, not of legal or natural persons, but of other unincorporated societies. Ruhl *v.* Ware, 56 N. Y. Super. Ct. 473, 4 N. Y. Suppl. 624, 22 N. Y. St. 423.

Cause of action must vest in association.— In order that the statute may apply the cause of action must vest in the association as such. It is not sufficient that the property sued for belongs severally to the members. Corning *v.* Greene, 23 Barb. (N. Y.) 33.

Situs of action.— Under the foregoing statute, the *situs* of the action is to be regarded as fixed by the residence of the officer bringing suit. Brooks *v.* Dinsmore, 15 Daly (N. Y.) 428, 8 N. Y. Suppl. 103, 28 N. Y. St. 421, 18 N. Y. Civ. Proc. 98; Bacon *v.* Dinsmore, 42 How. Pr. (N. Y.) 368.

73. Clancy *v.* Terhune, 1 N. Y. City Ct. 239; King *v.* Nichols, 2 Ohio Dec. (Reprint) 564, 4 West. L. J. 25.

74. *Connecticut.*— Davison *v.* Holden, 55 Conn. 103, 10 Atl. 515, 3 Am. St. Rep. 40.

Maine.— Robinson *v.* Robinson, 10 Me. 240.

New York.— Hanke *v.* Cigar Makers' International Union, 27 Misc. (N. Y.) 529, 58 N. Y. Suppl. 412; Schwartz *v.* Wechler, 2 Misc. (N. Y.) 67, 20 N. Y. Suppl. 861, 49 N. Y. St. 145, 23 N. Y. Civ. Proc. 21, 29 Abb. N. Cas. (N. Y.) 332; Hudson *v.* Spalding, 6 N. Y. Suppl. 877, 25 N. Y. St. 256; Williams *v.* Michigan Bank, 7 Wend. (N. Y.) 539.

Ohio.— Gigdon *v.* Gardner, 2 Ohio Cir. Ct. 340.

United States.— American Steel, etc., Co. *v.* Wire Drawers', etc., Union Nos. 1 & 2, 90 Fed. 598.

An apparent member, whose name was signed to the articles of association without authority, may properly be omitted as a defendant. Boyd *v.* Merriell, 52 Ill. 151.

Where it is impracticable or inconvenient to join all the members, it is not necessary to make all the members parties, but it is enough if so many be made parties as to insure a fair and honest trial. Gorman *v.* Russell, 14

statute in some states an association may be sued by its association name,[75] while in others the action may be brought against one or more designated officers.[76]

B. Between Association and Members. As the common law considered an association wholly in the light of a partnership, the organization could neither sue nor be sued at law by a member;[77] but, by statute, such actions are per-

Cal. 531; Van Houten *v.* Pine, 36 N. J. Eq. 133. But see Davison *v.* Holden, 55 Conn. 103, 10 Atl. 515, 3 Am. St. Rep. 40, wherein Pardee, J., said: "A suit may be instituted against them [the members] as individuals, as at common law, if the plaintiff will take the risk of naming all and of naming them correctly. If he names only a part of those who should be named, a plea in abatement may be interposed, specifying omitted names; if no such plea is interposed those who are named are properly sued and must submit to judgment."

Members not served.—Where suit was brought against the members of an association and only one was served with process, issue was joined, and trial had at which defendant's subscription to the articles of association was proved, it was held that plaintiff was under no obligation to prove the signatures of the other members. Ridgely *v.* Dobson, 3 Watts & S. (Pa.) 118.

Where one of the defendants was defaulted, the remainder appearing and denying liability, and plaintiff proved on the trial that the contract sued upon was made by the association and that the answering defendants were members, it was held not necessary to prove that the defaulting defendant was likewise a member. Downing *v.* Mann, 3 E. D. Smith (N. Y.) 36, 9 How. Pr. (N. Y.) 204.

Delaying suit to determine ultimate liability.— In an action on a promissory note signed by the managing agent of the association, certain defendants filed a cross-complaint against plaintiff and those of the defendants who had held the position of directors, setting up that the goods had been bought on credit, in violation of articles of association, and asking that, if judgment were recovered, execution might be first directed against the property of the directors. The court, however, declined to delay the relief to which plaintiff was entitled pending an inquiry to ascertain which of the defendants, as between themselves, was primarily liable for the debt. Manning *v.* Gasharie, 27 Ind. 399.

75. Huth *v.* Humboldt Stamm No. 153, 61 Conn. 227, 23 Atl. 1084; Davison *v.* Holden, 55 Conn. 103, 10 Atl. 515, 3 Am. St. Rep. 40; Fox *v.* Naramore, 36 Conn. 376; Cornfield *v.* Order Brith Abraham, 64 Minn. 261, 66 N. W. 970; Mayer *v.* Journeymen Stonecutters' Assoc., 47 N. J. Eq. 519, 20 Atl. 492.

Effect of incorporation pending action.— It has been held that where the association has subsequently become incorporated, an amendment will not be permitted substituting the title of the corporation for that of the association. Marsh River Lodge, F. & A. M. *v.* Brooks, 61 Me. 585. But see Lilly *v.* Tobbein, (Mo. 1890) 13 S. W. 1060, intimating a contrary rule.

76. Cohn *v.* Borst, 36 Hun (N. Y.) 562. See also Fitzpatrick *v.* Rutter, 160 Ill. 282, 43 N. E. 392; Camden, etc., R. Co. *v.* Pennsylvania Guarantors, 59 N. J. L. 328, 35 Atl. 796.

Only designated officers may be sued.— N. Y. Code Civ. Proc. § 1919, permits the maintenance of an action or special proceeding against the president or treasurer of an association composed of seven or more members upon any cause of action for which the plaintiff could have proceeded against all the associates, and suit against the president, secretary, and treasurer is improperly brought. Schmidt *v.* Gunther, 5 Daly (N. Y.) 452.

Joinder of members not necessary.— It is sufficient to bring the action against the president of the association as such, and it is not necessary to make the members additional parties. New York Bd. Fire Underwriters *v.* Whipple, 36 N. Y. App. Div. 49, 55 N. Y. Suppl. 188; Olery *v.* Brown, 51 How. Pr. (N. Y.) 92.

Joint liability must be shown.— But the right to sue the officer is merely for the convenience of plaintiff and in order that he may more speedily reach the personal property of the association. In order to recover, he must both allege and prove that all the members are liable for the claim either jointly or severally. McCabe *v.* Goodfellow, 133 N. Y. 89, 30 N. E. 728, 44 N. Y. St. 253, 17 L. R. A. 204 [*reversing* 15 N. Y. Suppl. 377, 39 N. Y. St. 941, 21 N. Y. Civ. Proc. 65].

Parol evidence is admissible in an action against the president for the purpose of proving that the association consists of seven or more members when, on notice, defendant fails to produce the constitution and by-laws. Haden *v.* Clarke, 10 N. Y. Suppl. 291, 32 N. Y. St. 478.

Statutory remedy not exclusive.— The mere fact that the statute gives a right to bring suit against the association by name or against a particular officer thereof will not prevent the maintenance of an action against the individual members. Mokelumne, etc., Co. *v.* Knox, (Cal. 1885) 7 Pac. 415; Davidson *v.* Knox, 67 Cal. 143, 7 Pac. 413; Humbert *v.* Abeel, 7 N. Y. Civ. Proc. 417.

77. *California.*—Bullard *v.* Kinney, 10 Cal. 60.

Connecticut.— Huth *v.* Humboldt Stamm No. 153, 61 Conn. 227, 23 Atl. 1084.

Massachusetts.— Warren *v.* Stearns, 19 Pick. (Mass.) 73.

New York.— McMahon *v.* Rauhr, 47 N. Y. 67. See also Troy Iron, etc., Factory *v.* Corning, 45 Barb. (N. Y.) 231.

Vermont.— Cheeny *v.* Clark, 3 Vt. 431, 23 Am. Dec. 219.

mitted,[78] and a member is not precluded from maintaining an action at law against the committee who ordered certain work to be done by him for the association.[79]

VIII. TERMINATION OF ASSOCIATION.

A. In General. It has been intimated that the existence of a state of facts sufficient to constitute the termination of an ordinary partnership will justify the court in assuming that there has been a dissolution of the association, the same principles applying in both instances,[80] but such a statement is scarcely accurate. Thus, while dissolution may always be had upon the unanimous consent of the members,[81] unlike a partnership, the death of a member will not work the dissolution of an association unless such an intent appears to have existed at the time of its organization,[82] nor will the mere withdrawal of members, *ipso facto*, be sufficient if it is evident that the association was designed to have a continuing existence.[83] The sole rule which can be laid down appears to be, therefore, that an

78. Westcott *v.* Fargo, 61 N. Y. 542, 19 Am. Rep. 300; Saltsman *v.* Shults, 14 Hun (N. Y.) 256; Sander *v.* Edling, 13 Daly (N. Y.) 238; McCabe *v.* Goodfellow, 15 N. Y. Suppl. 377, 39 N. Y. St. 941, 21 N. Y. Civ. Proc. 65; Winter *v.* Hamm, 5 N. Y. Civ. Proc. 194; Poultney *v.* Bachman, 10 Abb. N. Cas. (N. Y.) 252; Fritz *v.* Muck, 62 How. Pr. (N. Y.) 69; Mangels *v.* Schoen, 2 N. Y. City Ct. 192. But it has been held that the Pennsylvania act of April 14, 1838, section 1, allowing suits to be brought by one firm against another though there are members common to both, does not authorize the bringing of an action by an association against one of its members, the party sued being named both as plaintiff and defendant. Scott *v.* Gunnison, 4 Brewst. (Pa.) 101.

79. Caldicott *v.* Griffiths, 1 C. L. R. 715, 8 Exch. 898, 23 L. J. Exch. 54, 22 Eng. L. & Eq. 527.

80. Gorman *v.* Russell, 14 Cal. 531.

In case of violent dissensions and irreconcilable differences between the members of a voluntary association, judgment will be rendered at the suit of one or against all the others, dissolving the society (Lafond *v.* Deems, 52 How. Pr. (N. Y.) 41); but no action will be entertained for such a purpose upon mere proof of differences of opinion, bad temper, the ordinary disputes common to such societies, nor upon proof of injuries or injustice sustained by one through the vote or action of the society, if he have another remedy (Fischer *v.* Raab, 57 How. Pr. (N. Y.) 87).

Where the association unlawfully expelled a member, it has been held that, while grounds are afforded for subsequent proceedings to compel reinstatement, a court of equity is not justified in decreeing a dissolution. Burke *v.* Roper, 79 Ala. 138. But a contrary doctrine was enunciated in Gorman *v.* Russell, 14 Cal. 531, where the fact that the association had expelled a member because he refused to take an oath not required by the constitution and by-laws, and foreign to its objects, was held sufficient reason why a dissolution should be decreed. The association afterward rescinded its order of expulsion, whereupon (Gorman *v.* Russell, 18 Cal. 688) the court took the view that no cause then existed why it should be terminated.

81. *Alabama.*— Burke *v.* Roper, 79 Ala. 138.

California.— Von Schmidt *v.* Huntington, 1 Cal. 55.

Michigan.— Brown *v.* Stoerkel, 74 Mich. 269, 41 N. W. 921, 3 L. R. A. 430; Butterfield *v.* Beardsley, 28 Mich. 412.

New Hampshire.— Duke *v.* Fuller, 9 N. H. 536, 32 Am. Dec. 392.

South Carolina.— Stemmermann *v.* Lilienthal, 54 S. C. 440, 32 S. E. 535.

England.— Brown *v.* Dale, 9 Ch. D. 78, 27 Wkly. Rep. 149.

The methods pointed out by the constitution or by-laws must be carefully observed. Hence, where it was provided that no dissolution could be effected while ten members were willing to have the society continue in existence, and a special meeting was held at which less than ten members voted against a dissolution, the court took the view that such dissolution was invalid when the notice of meeting failed to specify the purpose for which it was held. St. Mary's Benev. Assoc. *v.* Lynch, 64 N. H. 213, 9 Atl. 98.

82. Burke *v.* Roper, 79 Ala. 138; White *v.* Brownell, 3 Abb. Pr. N. S. (N. Y.) 318; Thomas *v.* Ellmaker, 1 Pars. Eq. Cas. (Pa.) 98; Tenney *v.* New England Protective Union, 37 Vt. 64.

83. Troy Iron, etc., Factory *v.* Corning, 45 Barb. (N. Y.) 231; Harper *v.* Raymond, 3 Bosw. (N. Y.) 29; Swoope *v.* Wakefield, 10 Pa. Super. Ct. 342, 44 Wkly. Notes Cas. (Pa.) 209. Even though the seceders, among which are included the society's officers, be in the majority. McFadden *v.* Murphy, 149 Mass. 341, 21 N. E. 868; Schiller Commandery No. 1, U. F. M. *v.* Jaennichen, 116 Mich. 129, 74 N. W. 458.

Effect of incorporation.— The mere fact that a corporation is formed under the same name, for the same purposes, and by many of the members of the association, will not work a dissolution of the society where each is distinct in meetings, officers, property, and other incidents, even though the association had voted to accept the charter and, in some respects, assumed to be a corporation, provided

association is to be regarded as dissolved only when the objects of the society have been entirely abandoned and the power to resume business does not exist.[84]

B. Effect. As long as the association continues in existence and with the purposes for which it was organized unfulfilled, its funds are impressed with a *quasi* trust, terminable only by unanimous consent of the members; but, upon its dissolution, the property held by it becomes subject to division among the associates in proportion to the amount contributed by each,[85] provided the rights of third parties have not intervened and the association does not partake of the nature of a charity.[86] On the other hand, when assets fail to equal debts, courts will apportion the liabilities among the members.[87]

ASSOILE. See ABSOILE.

ASSORTED. Miscellaneous; of various sorts, kinds, or classes.[1]

ASSUME. To take upon one's self;[2] to undertake; to engage; to promise;[3] to pretend to possess; to take in appearance; to arrogate; to usurp; to affect; to pretend; to presume.[4]

it did, in fact, continue to act as a voluntary association. McFadden *v.* Murphy, 149 Mass. 341, 21 N. E. 868; Mason *v.* Finch, 28 Mich. 282; Rudolph *v.* Southern Beneficial League, 7 N. Y. Suppl. 135, 23 Abb. N. Cas. (N. Y.) 199.

84. *Alabama.*— Burke *v.* Roper, 79 Ala. 138.

Michigan.— Butterfield *v.* Beardsley, 28 Mich. 412.

Missouri.— Kuehl *v.* Meyer, 50 Mo. App. 648.

New Jersey.— Grand Lodge, K. P. *v.* Germania Lodge No. 50, 56 N. J. Eq. 63, 38 Atl. 341; Abels *v.* McKeen, 18 N. J. Eq. 462.

New York.— Koehler *v.* Brown, 2 Daly (N. Y.) 78.

Effect of provision for holding over of officers.—An association of Free Masons in 1836 disposed of their hall, furniture, and equipment pursuant to a vote of the chapter. For twenty-three years it held no meetings, elected no officers, performed no acts as an association and, in fact, ceased to have any visible existence. It was held that the society had ceased to exist, although one of its rules provided that its officers should hold over until their successors were elected. Strickland *v.* Prichard, 37 Vt. 324.

85. *Alabama.*— Burke *v.* Roper, 79 Ala. 138.

Michigan.— Butterfield *v.* Beardsley, 28 Mich. 412.

New Jersey.— Abels *v.* McKeen, 18 N. J. Eq. 462.

New York.— Koehler *v.* Brown, 2 Daly (N. Y.) 78.

England.—*In re* Printers', etc., Soc., [1899] 2 Ch. 184, 68 L. J. Ch. 537, 47 Wkly. Rep. 619; *In re* Jones, [1898] 2 Ch. 83, 67 L. J. Ch. 504, 78 L. T. Rep. N. S. 639; *In re* Russell Literary, etc., Inst., [1898] 2 Ch. 72, 67 L. J. Ch. 41, 78 L. T. Rep. N. S. 588.

86. Matter of Proprietors New South Meeting House, 13 Allen (Mass.) 497; Duke *v.* Fuller, 9 N. H. 536, 32 Am. Dec. 392; Grand Lodge, K. P. *v.* Germania Lodge No. 50, 56 N. J. Eq. 63, 38 Atl. 341; Thomas *v.* Ellmaker, 1 Pars. Eq. Cas. (Pa.) 98.

Thus, funds of a lodge, accumulated pursuant to a by-law providing for their use "for the good of the craft, or for the relief of indigent and distressed worthy masons, their widows and orphans," cannot, upon the dissolution of the society by vote of the acting members, be divided among themselves. Duke *v.* Fuller, 9 N. H. 536, 32 Am. Dec. 392.

87. Hodgson *v.* Baldwin, 65 Ill. 532 (holding that, where an association has been dissolved and its assets are insufficient to meet its liabilities, an action is properly brought by a portion of the members to obtain an account and compel each solvent member to pay his *pro rata* share of the indebtedness, and that equity will not require that complainants shall have first paid the debts and thus assumed the risk of making the defendants contribute); Henry *v.* Jackson, 37 Vt. 431 (holding that, in apportioning such liability, those members should be excluded from computation who are beyond the process of the court, and hence from whom there is no practical means of enforcing contribution to which the plaintiffs can be compelled to resort).

Authority of commissioners to wind up.— Commissioners appointed to wind up the affairs of a dissolved association have no authority to bind the members by a new undertaking. Lake *v.* Munford, 4 Sm. & M. (Miss.) 312.

1. Roberts *v.* Opdyke, 40 N. Y. 259, 262 [*affirming* 1 Rob. (N. Y.) 287].

2. Springer *v.* De Wolf, 93 Ill. App. 260, 263. See also Braman *v.* Dowse, 12 Cush. (Mass.) 227, 229.

The word "assumed" is employed in the sense of "claimed." Jenkins *v.* State, 62 Wis. 49, 64, 21 N. W. 232.

3. Petteys *v.* Comer, 34 Oreg. 36, 39, 54 Pac. 813 [*quoting* Black L. Dict.].

4. Sharon *v.* Sharon, 75 Cal. 1, 73, 16 Pac. 345 [*quoting* Stormouth Dict.; Webster Dict.].

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*Sometime Chief Judge of the Supreme Court of Vermont.

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I. DEFINITIONS.

A. Assumpsit. Assumpsit is an undertaking, either express or implied, to perform an oral or written agreement.[1]

B. Action of Assumpsit — 1. IN GENERAL. The action of assumpsit is an

1. Assumpsit, in the law of contracts, is a promise or undertaking, either express or implied, made either orally or in writing not under seal. Rapalje & L. L. Dict.

Assumpsit is founded upon an undertaking or promise of defendant not under seal. Hurlock *v.* Murphy. 2 Houst. (Del.) 550.

Express assumpsit is an undertaking made orally, by writing not under seal, or by matter of record, to perform an act or to pay a sum of money to another. Bouvier L. Dict.

Implied assumpsit is an undertaking presumed in law to have been made by a party from his conduct, though he has not made an express promise. Willenborg *v.* Illinois Cent. R. Co., 11 Ill. App. 298.

action for the recovery of damages for the non-performance of an oral or simple written contract.[2]

2. SPECIAL ASSUMPSIT. Special assumpsit is an action of assumpsit brought upon an express contract or promise.[3]

3. GENERAL ASSUMPSIT OR INDEBITATUS ASSUMPSIT. General assumpsit or *indebitatus assumpsit* is an action of assumpsit brought upon the promise or contract implied by law in certain cases.[4]

II. NATURE AND SCOPE OF REMEDY.

A. In General. Assumpsit is an action of an equitable character,[5] liberal in form,[6] and greatly favored by the courts as a remedy.[7] Though founded upon contract,[8] it has been held to be a species of the action on the case,[9] as it was, in

2. *Alabama.*— Hill *v.* Nichols, 50 Ala. 336; Morgan *v.* Patrick, 7 Ala. 185; Westmoreland *v.* Davis, 1 Ala. 299.

Indiana.— Russell *v.* Branham, 8 Blackf. (Ind.) 277.

Kentucky.— Ellis *v.* Henry, 5 J. J. Marsh. (Ky.) 247.

Maine.— Wass *v.* Bucknam, 40 Me. 289.

West Virginia.—State *v.* Harmon, 15 W. Va. 115.

Distinguished from "case."— The allegations which distinguish counts in case from those in assumpsit are the omission of the consideration and the averment of negligence. Wheeler *v.* Wilson, 57 Vt. 157; Wright *v.* McKee, 37 Vt. 161. See also Robinson *v.* Welty, 40 W. Va. 385, 22 S. E. 73.

Distinguished from "covenant."—Assumpsit differs from covenant since it does not require a contract under seal to support it. Bouvier L. Dict.

Distinguished from "debt."— Assumpsit differs from debt in that the amount claimed need not be liquidated. Bouvier L. Dict.; Weiss *v.* Mauch Chunk Iron Co., 58 Pa. St. 295. Assumpsit is founded upon a promise; debt upon a contract. Metcalf *v.* Robinson, 2 McLean (U. S.) 363, 17 Fed. Cas. No. 9,497. In the former the word "promised" is used; in the latter the word "agreed." McGinnity *v.* Laguerenne, 10 Ill. 101. They are concurrent remedies in cases of a simple contract, either express or implied, for the payment of money. Thompson *v.* French, 10 Yerg. (Tenn.) 452; Hickman *v.* Searcy, 9 Yerg. (Tenn.) 47. See also Mahaffey *v.* Petty, 1 Ga. 261. By the code, the distinction existing at common law between the actions is abolished. Knapp *v.* Kingsbury, 51 Ala. 563; Reed *v.* Scott, 30 Ala. 640.

Distinguished from "replevin."—Assumpsit differs from replevin, which seeks the recovery of specific property, if attainable, rather than of damages. Black L. Dict.

Distinguished from "trespass" or "trover."—Assumpsit differs from trespass and trover, which are founded on a tort, and not upon a contract. Black L. Dict.

3. Bouvier L. Dict.; Thompson *v.* French, 10 Yerg. (Tenn.) 452.

4. Bouvier L. Dict.

The action is founded upon what the law terms an implied promise, on the part of defendant, to pay what, in good conscience, he is bound to pay to plaintiff. Bailey *v.* New York Cent., etc., R. Co., 22 Wall. (U. S.) 604, 22 L. ed. 840; Fiedler *v.* Curtis, 2 Black (U. S.) 461, 17 L. ed. 273. See also Chicago *v.* Chicago, etc., R. Co., 186 Ill. 300, 57 N. E. 795.

5. *Alabama.*— Westmoreland *v.* Davis, 1 Ala. 299; Duncan *v.* Ware, 5 Stew. & P. (Ala.) 119, 24 Am. Dec. 772.

Connecticut.— Guthrie *v.* Wheeler, 51 Conn. 207; Brainard *v.* Colchester, 31 Conn. 407.

Delaware.— Hall *v.* Cannon, 4 Harr. (Del.) 360.

Illinois.— Smith *v.* Riddell, 87 Ill. 165; Sandoval Coal, etc., Co. *v.* Main, 23 Ill. App. 395.

Kentucky.— Hackley *v.* Swigert, 5 B. Mon. (Ky.) 86, 41 Am. Dec. 256; Cook *v.* Vimont, 6 T. B. Mon. (Ky.) 284, 17 Am. Dec. 157.

Pennsylvania.— Stoever *v.* Stoever, 9 Serg. & R. (Pa.) 434; Heck *v.* Shener, 4 Serg. & R. (Pa.) 249, 8 Am. Dec. 700.

Tennessee.— Bank of Commerce *v.* Porter, 1 Baxt. (Tenn.) 447.

Vermont.— Wheeler *v.* Shed, 1 D. Chipm. (Vt.) 208.

West Virginia.— Thompson *v.* Thompson, 5 W. Va. 190.

6. Guthrie *v.* Hyatt, 1 Harr. (Del.) 446; Mitchell *v.* Walker, 30 N. C. 243.

7. Westmoreland *v.* Davis, 1 Ala. 299; Sage *v.* Hawley, 16 Conn. 106, 41 Am. Dec. 128; Hart *v.* Smith, Kirby (Conn.) 127; Glover *v.* Collins, 18 N. J. L. 232.

Where the remedy afforded by an action of assumpsit is ample and complete, the resort must be to that action and not to a bill in equity. Wolf *v.* Irons, 8 Ark. 63. Thus, where the transaction is single, without complicated accounts, and there are no debts to be adjusted, a bill in equity is not necessary, but an action of assumpsit will lie. Canfield *v.* Johnson, 144 Pa. St. 61, 22 Atl. 974. So, after a joint adventure has been completed and the accounts of the parties have been settled, assumpsit is a proper remedy for the recovery of the balance due from one party to the other. Fanning *v.* Chadwick, 3 Pick. (Mass.) 420, 15 Am. Dec. 233.

8. See *infra*, II, B.

9. *Alabama.*— Stovall *v.* Nabors, 1 Ala. 218.

its origin, an action *ex delicto*.[10] It is now, however, strictly an action *ex contractu*.

B. Determination of Title to Land. Assumpsit is not the proper form of action to determine title to land.[11] It has been held, however, that, if the question of title arises incidentally and the rights of the parties require it, it will be passed on *ex necessitate rei*.[12]

C. Necessity of Contract — 1. In General. It is a well-settled rule of law that, in order to support an action of assumpsit, there must be a contract, express or implied in law, between the parties to the action.[13] It is a further

Hawaii.— See Wilder *v.* Hop Wo Wai Co., 6 Hawaii 652.

Illinois.— Carter *v.* White, 32 Ill. 509; Willenborg *v.* Illinois Cent. R. Co., 11 Ill. App. 298.

Kentucky.—Albert *v.* Blue, 10 B. Mon. (Ky.) 92.

Maine.— Hathorn *v.* Calef, 53 Me. 471.

New Jersey.— Bruen *v.* Ogden, 18 N. J. L. 124.

Ohio.— Williams *v.* Williams, 5 Ohio 444.

Oregon.— Baldro *v.* Tolmie, 1 Oreg. 176.

West Virginia.— Morgantown Bank *v.* Foster, 35 W. Va. 357, 13 S. E. 996.

United States.— Carrol *v.* Green, 92 U. S. 509, 23 L. ed. 738.

England.— 1 Bacon Abr. tit. Assumpsit, 395; Stephen Pl. 18.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 1.

As to action on the case, generally, see Case, Action on.

10. Dickinson *v.* Winchester, 4 Cush. (Mass.) 114, 50 Am. Dec. 760; Knight *v.* New England Worsted Co., 2 Cush. (Mass.) 271.

The express undertaking averred was the inducement, and the gist of the action was the disregard or refusal to complete or perform such undertaking by intending and continuing to deceive plaintiff in that behalf. Robinson *v.* Welty, 40 W. Va. 385, 22 S. E. 73.

Assumpsit originated under the Statute of Westminster II (13 Edw. I, c. 24, § 2). Its establishment was strenuously resisted through several reigns. It was sustained upon full consideration in Slade's Case, 4 Coke 92, which was decided in the forty-fourth year of the reign of Elizabeth. Mahaffey *v.* Petty, 1 Ga. 261; Carrol *v.* Green, 92 U. S. 509, 23 L. ed. 738.

11. *Alabama.*— Price *v.* Pickett, 21 Ala. 741.

Illinois.— Broughton *v.* Smart, 59 Ill. 440; King *v.* Mason, 42 Ill. 223, 89 Am. Dec. 426.

Michigan.— Redding *v.* Lamb, 81 Mich. 318, 45 N. W. 997.

New Hampshire.— Hill *v.* Boutell, 3 N. H. 502.

New York.— Carpenter *v.* Stilwell, 3 Abb. Pr. (N. Y.) 459.

Pennsylvania.—Lewis *v.* Robinson, 10 Watts (Pa.) 338.

United States.— Phelps *v.* Church of Our Lady, 99 Fed. 683, 40 C. C. A. 72.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 6.

Indebitatus assumpsit for rent will not lie in favor of a stranger for the purpose of trying his title, nor of one of two litigating parties claiming the land. Boston *v.* Binney, 11 Pick. (Mass.) 1, 22 Am. Dec. 353; Codman *v.* Jenkins, 14 Mass. 93. See also Sampson *v.* Schaeffer, 3 Cal. 196, wherein it is held that, in an action of *indebitatus assumpsit* for rent, the legality of the landlord's title is not in issue.

The impeachment of a deed, on the ground of fraud as against creditors, is not a question that can be settled in an action of assumpsit. Balch *v.* Patten, 45 Me. 41, 71 Am. Dec. 526.

When title is in question.—Where tenants in common sell land, and one brings assumpsit against the other for his share of the proceeds, and, in a statement of facts, the parties set forth the proportions in which they own the land, an objection that title to the land is in question does not apply. Haven *v.* Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353.

12. Lewis *v.* Robinson, 10 Watts (Pa.) 338. See also Redding *v.* Lamb, 81 Mich. 318, 45 N. W. 997, wherein it is said that there is no good reason for remitting a party to another action where the action is brought to recover the purchase-price of land sold, and there is a failure of title.

13. *Alabama.*— Fuller *v.* Duren, 36 Ala. 73, 76 Am. Dec. 318; Weaver *v.* Jones, 24 Ala. 420; Crow *v.* Boyd, 17 Ala. 51.

Delaware.— Hutton *v.* Wetherald, 5 Harr. (Del.) 38.

Kansas.— Tightmeyer *v.* Mongold, 20 Kan. 90.

Maine.— Swift River, etc., Imp. Co. *v.* Brown, 77 Me. 40; Rogers *v.* Greenbush, 57 Me. 441; Sanford *v.* Haskell, 50 Me. 86; Moody *v.* Moody, 14 Me. 307.

Massachusetts.— Mellen *v.* Whipple, 1 Gray (Mass.) 317; Jones *v.* Hoar, 5 Pick. (Mass.) 285.

Michigan.— McCormick Harvesting Mach. Co. *v.* Waldo, (Mich. 1901) 87 N. W. 55; Hallett *v.* Gordon, 122 Mich. 567, 81 N. W. 556, 82 N. W. 827; Woods *v.* Ayres, 39 Mich. 345, 33 Am. Rep. 396.

Nevada.— Carson River Lumbering Co. *v.* Bassett, 2 Nev. 249.

New Jersey.—Westcott *v.* Sharp, 50 N. J. L. 392, 13 Atl. 243; Randolph Iron Co. *v.* Elliott, 34 N. J. L. 184; Force *v.* Haines, 17 N. J. L. 385.

New York.— Osborn *v.* Bell, 5 Den. (N. Y.) 370, 49 Am. Dec. 275.

Pennsylvania.— Boyer *v.* Bullard, 102 Pa. St. 555; Bethlehem *v.* Perseverance Fire Co.,

essential to the maintenance of the action that the contract be founded upon a sufficient consideration.[14]

2. PRIVITY OF CONTRACT.[15] On the question of the right of a third person to maintain assumpsit upon a contract which may enure to his benefit, but to which he is not a party, the authorities are very discordant. The English rule requires privity of contract.[16] This rule has been followed in some courts in the United States.[17] The preponderance of American authority, however, is to the effect that a third person may enforce a contract, made by others for his benefit, if it is manifest, from the nature or terms of the contract, that the parties intended to treat him as the person primarily interested.[18]

81 Pa. St. 445; De Haven *v.* Bartholomew, 57 Pa. St. 126; Musser *v.* Ferguson Tp., 55 Pa. St. 475; Hoopes *v.* Stott, 2 Chest. Co. Rep. (Pa.) 40.

South Carolina.—Wingo *v.* Brown, 12 Rich. (S. C.) 279; Ryan *v.* Marsh, 2 Nott & M. (S. C.) 156.

Tennessee.— Stamper *v.* Temple, 6 Humphr. (Tenn.) 113, 44 Am. Dec. 296.

Vermont.— Charleston *v.* Stacy, 10 Vt. 562.

Virginia.— Spencer *v.* Pilcher, 8 Leigh (Va.) 565; Cooke *v.* Simms, 2 Call (Va.) 39.

West Virginia.— Morgantown Bank *v.* Foster, 35 W. Va. 357, 13 S. E. 996; State *v.* Harmon, 15 W. Va. 115.

United States.— Carrol *v.* Green, 92 U. S. 509, 23 L. ed. 738.

England.— Stokes *v.* Lewis, 1 T. R. 20.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 1.

As to existence of contract, express or implied, as question for jury, see *infra*, XI, B.

As to what constitutes a contract see CONTRACTS.

In assumpsit against partners under the common counts, proof of a promise by one in the firm-name is not sufficient. The existence of the partnership or a joint promise must be proved. Findlay *v.* Stevenson, 3 Stew. (Ala.) 48.

14. *Indiana.*— Farlow *v.* Kemp, 7 Blackf. (Ind.) 544.

Kansas.— Tightmeyer *v.* Mongold, 20 Kan. 90.

Kentucky.—Abby *v.* Ferguson, 1 T. B. Mon. (Ky.) 99; Stapp *v.* Anderson, 1 A. K. Marsh. (Ky.) 535; Voorhies *v.* Benham, 2 Bibb (Ky.) 572.

Maine.— Foster *v.* Tucker, 3 Me. 458, 14 Am. Dec. 243.

New York.— Powell *v.* Brown, 3 Johns. (N. Y.) 100.

Virginia.— Spencer *v.* Pilcher, 8 Leigh (Va.) 565.

As to consideration of contracts, generally, see CONTRACTS.

15. As to privity of contract, generally, see CONTRACTS.

16. Reeves *v.* Watts, L. R. 1 Q. B. 412, 7 B. & S. 523, 12 Jur. N. S. 565, 35 L. J. Q. B. 171, 14 L. T. Rep. N. S. 478, 14 Wkly. Rep. 672; Evans *v.* Hooper, 1 Q. B. D. 45, 45 L. J. Q. B. 206, 33 L. T. Rep. N. S. 374, 24 Wkly. Rep. 226; Price *v.* Easton, 4 B. & Ad. 433, 2 L. J. K. B. 51, 1 N. & M. 303, 24 E. C. L. 193; Tweddle *v.* Atkinson, 1 B. & S. 393, 8 Jur. N. S. 332, 30 L. J. Q. B. 265, 4 L. T. Rep. N. S. 468, 9 Wkly. Rep. 781, 101 E. C. L. 393; Hybart *v.* Parker, 4 C. B. N. S. 209, 4 Jur. N. S. 265, 27 L. J. C. P. 120, 6 Wkly. Rep. 364, 93 E. C. L. 209; Chesterfield, etc., Silkstone Colliery Co. *v.* Hawkins, 3 H. & C. 677; Gray *v.* Pearson, L. R. 5 C. P. 568, 23 L. T. Rep. N. S. 416; Gresty *v.* Gibson, L. R. 1 Exch. 112, 4 H. & C. 28, 12 Jur. N. S. 319, 35 L. J. Exch. 74, 13 L. T. Rep. N. S. 676, 14 Wkly. Rep. 284; Storer *v.* Gordon, 3 M. & S. 308, 15 Rev. Rep. 499.

17. *Massachusetts.*— Morrill *v.* Lane, 136 Mass. 93; Rogers *v.* Union Stone Co., 130 Mass. 581, 39 Am. Rep. 478; Gamwell *v.* Pomeroy, 121 Mass. 207; Exchange Bank *v.* Rice, 107 Mass. 37, 9 Am. Rep. 1; Dow *v.* Clark, 7 Gray (Mass.) 198. *Compare* Cabot *v.* Haskins, 3 Pick. (Mass.) 83; Hall *v.* Marston, 17 Mass. 575; Arnold *v.* Lyman, 17 Mass. 400, 9 Am. Dec. 154; Felton *v.* Dickinson, 10 Mass. 287.

New Hampshire.—Warren *v.* Batchelder, 15 N. H. 129.

Tennessee.— Wilson *v.* Greer, 7 Humphr. (Tenn.) 513.

Vermont.— Pangborn *v.* Saxton, 11 Vt. 79; Crampton *v.* Ballard, 10 Vt. 251; Warden *v.* Burnham, 8 Vt. 390.

Virginia.— Ross *v.* Milne, 12 Leigh (Va.) 204, 37 Am. Dec. 646.

18. *Alabama.*— Prater *v.* Stinson, 26 Ala. 456; Huckabee *v.* May, 14 Ala. 263; Hitchcock *v.* Lukens, 8 Port. (Ala.) 333.

California.— Morgan *v.* Overman Silver Min. Co., 37 Cal. 534.

Colorado.— Green *v.* Morrison, 5 Colo. 18; Lehow *v.* Simonton, 3 Colo. 346.

Connecticut.— Steene *v.* Aylesworth, 18 Conn. 244; Treat *v.* Stanton, 14 Conn. 445; Crocker *v.* Higgins, 7 Conn. 342.

Illinois.— Snell *v.* Ives, 85 Ill. 279; Beasley *v.* Webster, 64 Ill. 458; Bristow *v.* Lane, 21 Ill. 194; Brown *v.* Strait, 19 Ill. 88; Eddy *v.* Roberts, 17 Ill. 505.

Indiana.— Clodfelter *v.* Hulett, 72 Ind. 137; Davis *v.* Calloway, 30 Ind. 112, 95 Am. Dec. 671; Cross *v.* Truesdale, 28 Ind. 44; Raymond *v.* Pritchard, 24 Ind. 318.

Iowa.— Johnson *v.* Knapp, 36 Iowa 616.

Kansas.—Anthony *v.* Herman, 14 Kan. 494.

Kentucky.—Allen *v.* Thomas, 3 Metc. (Ky.) 198, 77 Am. Dec. 169.

Maine.— Bohanan *v.* Pope, 42 Me. 93; Todd *v.* Tobey, 29 Me. 219; Hinkley *v.* Fowler, 15 Me. 285.

III. CAUSES AND FORM OF ACTION.

A. Express Contracts[19] — **1. Contracts of Record — a. In General.** Where a claim exists only as a matter of record, the action to recover it must be debt, and not assumpsit.[20]

b. Judgments. In the absence of a statute permitting it,[21] assumpsit will not lie to enforce a domestic judgment[22] nor a judgment rendered in a sister state,[23] even though there has been an express promise to pay it.[24] The rule is otherwise, however, in the case of a judgment of a foreign court.[25]

2. Instruments Under Seal. In the absence of a statute permitting it,[26] assump-

Maryland.— Owings *v.* Owings, 1 Harr. & G. (Md.) 484.

Minnesota.—Stariha *v.* Greenwood, 28 Minn. 521, 11 N. W. 76; Follansbee *v.* Johnson, 28 Minn. 311, 9 N. W. 882.

Missouri.— Fitzgerald *v.* Barker, 70 Mo. 685; Rogers *v.* Gosnell, 58 Mo. 589; Belt *v.* McLaughlin, 12 Mo. 433.

New Jersey.— Joslin *v.* New Jersey Car Spring Co., 36 N. J. L. 141.

New York.— Vrooman *v.* Turner, 69 N. Y. 280, 25 Am. Rep. 195; Simson *v.* Brown, 68 N. Y. 355; Garnsey *v.* Rogers, 47 N. Y. 233, 7 Am. Rep. 440; Lawrence *v.* Fox, 20 N. Y. 268; Secor *v.* Lord, 4 Abb. Dec. (N. Y.) 188, 3 Keyes (N. Y.) 525, 3 Transcr. App. (N. Y.) 328; Blunt *v.* Boyd, 3 Barb. (N. Y.) 209; Wyman *v.* Smith, 2 Sandf. (N. Y.) 331; Berly *v.* Taylor, 5 Hill (N. Y.) 577; Weston *v.* Barker, 12 Johns. (N. Y.) 276, 7 Am. Dec. 319.

North Carolina.— Draughan *v.* Bunting, 31 N. C. 10.

Ohio.— Thompson *v.* Thompson, 4 Ohio St. 333.

Pennsylvania.— Wynn *v.* Wood, 97 Pa. St. 216; Merriman *v.* Moore, 90 Pa. St. 78; Justice *v.* Tallman, 86 Pa. St. 147; Beers *v.* Robinson, 9 Pa. St. 229; Blymire *v.* Boistle, 6 Watts (Pa.) 182, 31 Am. Dec. 458.

Rhode Island.— Urquhart *v.* Brayton, 12 R. I. 169.

Wisconsin.— Kollock *v.* Parcher, 52 Wis. 393, 9 N. W. 67; Bassett *v.* Hughes, 43 Wis. 319; McDowell *v.* Laev, 35 Wis. 171; Putney *v.* Farnham, 27 Wis. 187, 9 Am. Rep. 459.

United States.— St. Louis Second Nat. Bank *v.* Grand Lodge F. & A. M., 98 U. S. 123, 25 L. ed. 75; Hendrick *v.* Lindsay, 93 U. S. 143, 23 L. ed. 855; Austin *v.* Seligman, 21 Blatchf. (U. S.) 506, 18 Fed. 519.

19. As to remedy by *indebitatus assumpsit* in case of express simple contract see *infra*, III, C, 2.

20. Woods *v.* Pettis, 4 Vt. 556.

Acknowledgment of a contract made in Canada before a notary there does not make the debt one of record. Hence, assumpsit may be brought on it. Hitchcock *v.* Cloutier, 7 Vt. 22.

21. **Statutory authority for assumpsit on judgment.**—Woods *v.* Ayres, 39 Mich. 345, 33 Am. Rep. 396; Gooding *v.* Hingston, 20 Mich. 439; Hogsett *v.* Ellis, 17 Mich. 351.

In Pennsylvania an action of assumpsit will lie to collect a domestic judgment. Fullmer *v.* Pine Tp., 17 Pa. Co. Ct. 482; Alexander *v.* Arters, 11 Pa. Co. Ct. 211.

22. **Domestic judgment.**—Vail *v.* Mumford, 1 Root (Conn.) 142.

As to actions on judgments, generally, see Judgments.

Justice's judgment.—Assumpsit will not lie on a judgment of a justice of the peace. Such judgment is a specialty. James *v.* Henry, 16 Johns. (N. Y.) 233; Bain *v.* Hunt, 10 N. C. 572. *Contra*, Alexander *v.* Arters, 11 Pa. Co. Ct. 211; Green *v.* Fry, 1 Cranch C. C. (U. S.) 137, 10 Fed. Cas. No. 5,758.

23. **Judgment of sister state.**—*Arkansas.*— Morehead *v.* Grisham, 13 Ark. 431.

Kentucky.— Garland *v.* Tucker, 1 Bibb (Ky.) 361.

Maine.— McKim *v.* Odom, 12 Me. 94.

New York.—Andrews *v.* Montgomery, 19 Johns. (N. Y.) 162, 10 Am. Dec. 213.

South Carolina.— *Contra*, Lambkin *v.* Nance, 2 Brev. (S. C.) 99.

Vermont.— Boston India Rubber Factory *v.* Hoit, 14 Vt. 92.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 28.

24. Andrews *v.* Montgomery, 19 Johns. (N. Y.) 162, 10 Am. Dec. 213.

25. **Foreign judgment.**— *Massachusetts.*— Buttrick *v.* Allen, 8 Mass. 273, 5 Am. Dec. 105.

Michigan.— Gooding *v.* Hingston, 20 Mich. 439.

Vermont.— Boston India Rubber Factory *v.* Hoit, 14 Vt. 92.

United States.— Mellin *v.* Horlick, 31 Fed. 865.

England.— Harris *v.* Saunders, 4 B. & C. 411, 6 D. & R. 471, 3 L. J. K. B. O. S. 239, 28 Rev. Rep. 310, 10 E. C. L. 638; Sadler *v.* Robins, 1 Campb. 253; Walker *v.* Witter, Dougl. 1.

26. **Statutory authority for assumpsit on sealed instrument.**— Shawneetown *v.* Baker, 85 Ill. 563; Protection L. Ins. Co. *v.* Palmer, 81 Ill. 88; Rockford Ins. Co. *v.* Nelson, 65 Ill. 415; Martin *v.* Murphy, 16 Ill. App. 283; Detroit Sav. Bank *v.* Ziegler, 49 Mich. 157, 13 N. W. 496, 43 Am. Rep. 456; Woods *v.* Ayres, 39 Mich. 345, 33 Am. Rep. 396; Dalton *v.* Laudahn, 30 Mich. 349; Middle States Loan, etc., Co. *v.* Engle, 45 W. Va. 588, 31 S. E. 921; Brown *v.* Point Pleasant, 36 W. Va. 290, 15 S. E. 209; Kern *v.* Zeigler, 13 W. Va. 707.

sit cannot be maintained upon a contract under seal[27] unless there is a subsequent agreement, founded upon some new consideration to pay the debt or perform the contract,[28] or its terms are varied by a subsequent simple contract,[29] or by other

Under Mich. Comp. Laws, § 4550, a party to a sealed instrument is not compelled to resort to assumpsit thereon. Goodrich *v.* Leland, 18 Mich. 110.

What law governs.—An action of assumpsit may be brought upon an instrument made in another state, which, by the law of that state, is a specialty, if, by the law of the state in which the action is brought, it is a simple contract. McClees *v.* Burt, 5 Mete. (Mass.) 198; Douglas *v.* Oldham, 6 N. H. 150; Le Roy *v.* Beard, 8 How. (U. S.) 451, 12 L. ed. 1151. See also Trasher *v.* Everhart, 3 Gill & J. (Md.) 234.

27. *Alabama.*— Nesbitt *v.* Ware, 30 Ala. 68; McCargo *v.* Crutcher, 23 Ala. 575; Aikin *v.* Bloodgood, 12 Ala. 221; Horton *v.* Ronalds, 2 Port. (Ala.) 79; Hatch *v.* Crawford, 2 Port. (Ala.) 54; Sommerville *v.* Stephenson, 3 Stew. (Ala.) 271.

Connecticut.— New London City Nat. Bank *v.* Ware River R. Co., 41 Conn. 542; North *v.* Nichols, 39 Conn. 355; Averill *v.* Buckingham, 36 Conn. 359.

District of Columbia.— Magruder *v.* Belt, 7 App. Cas. (D. C.) 303.

Florida.— Hooker *v.* Gallagher, 6 Fla. 351.

Illinois.— Eames *v.* Preston, 20 Ill. 389.

Indiana.— Fletcher *v.* Piatt, 7 Blackf. (Ind.) 522.

Kentucky.— Hubbard *v.* Beckwith, 1 Bibb (Ky.) 492; Garland *v.* Tucker, 1 Bibb (Ky.) 361.

Maine.— Dunn *v.* Auburn Electric Motor Co., 92 Me. 165, 42 Atl. 389; Knight *v.* Trim, 89 Me. 469, 36 Atl. 912; Pope *v.* Machias Water Power, etc., Co., 52 Me. 535; Holmes *v.* Smith, 49 Me. 242; Porter *v.* Androscoggin, etc., R. Co., 37 Me. 349; Hinkley *v.* Fowler, 15 Me. 285; McKim *v.* Odom, 12 Me. 94; Bowes *v.* French, 11 Me. 182.

Maryland.— Firemen's Ins. Co. *v.* Floss, 67 Md. 403, 10 Atl. 139, 1 Am. St. Rep. 398; De Bebian *v.* Gola, 64 Md. 262, 21 Atl. 275.

Massachusetts.— Richards *v.* Killam, 10 Mass. 239; Kimball *v.* Tucker, 10 Mass. 192.

Mississippi.— Pierce *v.* Lacy, 23 Miss. 193.

Missouri.— Brown *v.* Gauss, 10 Mo. 265; Crump *v.* Mead, 3 Mo. 233; Clendennen *v.* Paulsel, 3 Mo. 230, 25 Am. Dec. 435.

New Hampshire.— Knowlton *v.* Tilton, 38 N. H. 257; Little *v.* Morgan, 31 N. H. 499; Gilman *v.* Meredith School Dist., 18 N. H. 215.

New York.— Steele *v.* Oswego Cotton Mfg. Co., 15 Wend. (N. Y.) 265; Miller *v.* Watson, 5 Cow. (N. Y.) 195; Andrews *v.* Montgomery, 19 Johns. (N. Y.) 162, 10 Am. Dec. 213; Randall *v.* Van Vechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193.

North Carolina.— Dickinson *v.* Rodman, 4 N. C. 525; Davis *v.* Gibson, 1 N. C. 233.

Ohio.— Tullis *v.* Sewell, 3 Ohio 510; Gazzam *v.* Ohio Ins. Co., Wright (Ohio) 214.

Pennsylvania.— Hamilton *v.* Hart, 109 Pa. St. 629; McManus *v.* Cassidy, 66 Pa. St. 260; Shaeffer *v.* Geisenberg, 47 Pa. St. 500; Irwin *v.* Shultz, 46 Pa. St. 74; Harley *v.* Parry, 18 Pa. St. 44; Gilson *v.* Stewart, 7 Watts (Pa.) 100; Landis *v.* Urie, 10 Serg. & R. (Pa.) 316; Rogers *v.* Burke, 2 Pearson (Pa.) 68.

South Carolina.— Strobel *v.* Large, 3 McCord (S. C.) 114.

Tennessee.— Blakemore *v.* Wood, 3 Sneed (Tenn.) 469.

Vermont.— McKay *v.* Darling, 65 Vt. 639, 27 Atl. 324; Myrick *v.* Slason, 19 Vt. 121.

United States.—Alexandria Mar. Ins. Co. *v.* Young, 1 Cranch (U. S.) 332, 2 L. ed. 126; Fresh *v.* Gilson, 5 Cranch C. C. (U. S.) 533, 9 Fed. Cas. No. 5,112; French *v.* Tunstall, Hempst. (U. S.) 204, 9 Fed. Cas. No. 5,104*a*.

England.— Foster *v.* Allanson, 2 T. R. 479.

Canada.— Tait *v.* Atkinson, 3 U. C. Q. B. 152.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 29 *et seq.*

Waiving objection.— An objection that a receipt, under seal, for attached property cannot be the foundation of an action of assumpsit is waived if defendant fails to note it in his specifications of defense, and does not object to its introduction when offered in evidence. Harris *v.* Morse, 49 Me. 432, 77 Am. Dec. 269.

28. *Massachusetts.*— Brewer *v.* Dyer, 7 Cush. (Mass.) 337.

New Hampshire.— Knowlton *v.* Tilton, 38 N. H. 257.

New York.— Miller *v.* Watson, 7 Cow. (N. Y.) 39.

England.— Reade *v.* Johnson, Cro. Eliz. 242; Foster *v.* Allanson, 2 T. R. 479.

Canada.— Tait *v.* Atkinson, 3 U. C. Q. B. 152.

A promise to pay the assignee of a chose in action entitles the assignee to sue upon it in his own name in assumpsit, although the contract assigned was a specialty. Compton *v.* Jones, 4 Cow. (N. Y.) 13.

Necessity of consideration.—Where, by an instrument under seal, one promises to pay a sum of money within a certain time, a parol promise by him, without a new consideration, to extend the time, does not change the contract to a simple one so as to make assumpsit, rather than covenant, the proper action thereon. Shaneman *v.* Core, 2 Wkly. Notes Cas. (Pa.) 540, 23 Pittsb. Leg. J. (Pa.) 176.

29. *Alabama.*—Aikin *v.* Bloodgood, 12 Ala. 221; McVoy *v.* Wheeler, 6 Port. (Ala.) 201.

Maryland.— Baltimore County Mut. F. Ins. Co. *v.* Deale, 18 Md. 26, 79 Am. Dec. 673.

Massachusetts.—Mill Dam Foundry Prop'rs *v.* Hovey, 21 Pick. (Mass.) 417; Munroe *v.* Perkins, 9 Pick. (Mass.) 298, 20 Am. Dec. 475; Richards *v.* Killam, 10 Mass. 239.

Missouri.— Benton *v.* Craig, 2 Mo. 198.

New Hampshire.— Knowlton *v.* Tilton, 38 N. H. 257.

New Mexico.—Kirchner *v.* Laughlin, 4 N. M. 218, 17 Pac. 132.

proceedings constituting an abandonment or waiver of the provisions of the sealed instrument.[30] It has been held, however, that, if a contract, under seal, is so executed that it will not authorize a party injured by its breach to sue upon it,[31] or if it is not the cause but only the inducement to the action,[32] or if it contains no covenant for payment or performance to the party to be benefited, or to some other person for his use,[33] assumpsit will lie. It has also been held that assumpsit may be maintained, against a principal, on a contract under seal of an agent who was acting under parol authority only.[34] An instrument having both the form and substance of a bond, with the exception of the seals of the parties, may be declared on as a simple contract.[35]

B. Implied Promise[36] — **1. In General.** Upon a promise arising by implication of law *indebitatus assumpsit* lies.[37] The request necessary to support such promise may be inferred from the beneficial nature of the consideration and the circumstances of the transaction.[38] The law, however, will not imply a promise

Pennsylvania.— Quigley *v.* De Haas, 98 Pa. St. 292; McGrann *v.* North Lebanon R. Co., 29 Pa. St. 82; Lehigh Coal, etc., Co. *v.* Harlan, 27 Pa. St. 429; Lawall *v.* Rader, 24 Pa. St. 283; Spangler *v.* Springer, 22 Pa. St. 454; Vicary *v.* Moore, 2 Watts (Pa.) 451, 27 Am. Dec. 323.

Vermont.— First Cong. Meeting House Soc. *v.* Rochester, 66 Vt. 501, 29 Atl. 810; Smith *v.* Smith, 45 Vt. 433; Briggs *v.* Vermont Cent. R. Co., 31 Vt. 211; Barker *v.* Troy, etc., R. Co., 27 Vt. 766; Sherwin *v.* Rutland, etc., R. Co., 24 Vt. 347.

Virginia.— Baird *v.* Blaigrove, 1 Wash. (Va.) 170.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 33.

To work this result the sealed contract must have been, in whole or in part, superseded by the new parol agreement, so that performance by the party after the parol modification is not an execution of the original contract, but an execution of the modified contract. King *v.* Lamoille Valley R. Co., 51 Vt. 369. See also Green *v.* Roberts, 5 Whart. (Pa.) 84.

30. Knowlton *v.* Tilton, 38 N. H. 257; Shaeffer *v.* Geisenberg, 47 Pa. St. 500.

Rescission of contract.—Where a contract, under seal, has been rescinded by act of the parties, an action of assumpsit will lie to recover moneys paid thereunder, and in such action the written contract, though under seal, is admissible in evidence. Daly *v.* Bernstein, 6 N. M. 380, 28 Pac. 764. See also American L. Ins. Co. *v.* McAden, 109 Pa. St. 399, 1 Atl. 256, wherein it is held that, where one party to a contract under seal wrongfully refuses to perform his part, and plaintiff rescinds and sues in assumpsit, the sealed contract is admissible in evidence, not as the foundation of the action, but as evidence to exhibit the transaction as it previously existed, and to aid in the assessment of damages.

31. Hitchcock *v.* Lukens, 8 Port. (Ala.) 333. See also Kent *v.* Edmondston, 49 N. C. 529, wherein it is held that, where a writing under seal is inoperative for the want of form, an action of assumpsit will lie on the parol contract made at the time of its execution.

Seal by inadvertence.—When what was intended to be an ordinary negotiable note was inadvertently sealed, the holder can recover in assumpsit against an indorser. Patterson *v.* Wilson, 29 Pittsb. Leg. J. (Pa.) 329. See also Excelsior Mfg. Co. *v.* Wheelock, 6 N. M. 410, 28 Pac. 772, wherein it is held that, as a written guaranty is not required by the common law to be under seal, such an instrument is not converted into a specialty by the addition of a scroll, with the word "Seal" written therein, and an action of assumpsit may be founded thereon.

32. Arnold *v.* Hickman, 6 Munf. (Va.) 15, holding that where a judgment, assigned by a sealed instrument, is afterward reversed, assumpsit is a proper action against the assignor. See also State *v.* Harmon, 15 W. Va. 115, wherein it is held that, where a preceding sealed agreement is only inducement to a subsequent parol contract, assumpsit will lie.

Admissibility of sealed instrument.—Where assumpsit lies, and the amount sought to be recovered appears by writing under seal, such writing is admissible. Gallagher *v.* Strobridge Lithographing Co., (Pa. 1887) 9 Atl. 487; Carrier *v.* Dilworth, 59 Pa. St. 406; Charles *v.* Scott, 1 Serg. & R. (Pa.) 294; Malone *v.* Philadelphia, 12 Phila. (Pa.) 323, 35 Leg. Int. (Pa.) 290; Carter *v.* Collar, 1 Phila. (Pa.) 339, 9 Leg. Int. (Pa.) 50.

33. Baldwin *v.* Emery, 89 Me. 496, 36 Atl. 994; Varney *v.* Bradford, 86 Me. 510, 30 Atl. 115.

34. Jones *v.* Horner, 60 Pa. St. 214; Strobridge Lithographing Co. *v.* Gallagher, 2 Pa. Co. Ct. 356. See also Cram *v.* Bangor House Proprietary, 12 Me. 354.

Seal of promoter of corporation.—Assumpsit lies against a corporation on a contract made and sealed by a promoter of a corporation, but not sealed with the corporate seal or with seals of any of the incorporators other than such promoter. Swisshelm *v.* Swissvale Laundry Co., 95 Pa. St. 367. See also Dubois *v.* Delaware, etc., Canal Co., 4 Wend. (N. Y.) 285.

35. Cox *v.* Vogh, 33 Miss. 187.

36. As to recovery on implied promise in case of express contract see *infra*, III, C, 2.

37. See *supra*, I, B, 3.

38. Higdon *v.* Thomas, 1 Harr. & G. (Md.) 139; Oatfield *v.* Waring, 14 Johns. (N. Y.)

against the express declarations of the party to be charged, made at the time of the supposed undertaking,[39] unless such party is under legal obligation, paramount to his will, to perform some duty.[40]

2. Performance of Obligation Created by Statute. Assumpsit lies on an implied promise to discharge a legal obligation created by statute, unless some other remedy is expressly given.[41]

C. The Common Counts[42] **— 1. Collateral Undertaking.** If the promise sued on is a collateral undertaking the declaration must be special;[43] but if an original undertaking a recovery may be had under the common counts.[44]

2. Existence of Express Simple Contract — a. In General. It is a well-settled rule that when an express simple contract is open and unexecuted, and plaintiff proceeds for a breach of it, he must declare specially. *Indebitatus*

188; Comstock *v.* Smith, 7 Johns. (N. Y.) 87; Livingston *v.* Rogers, 1 Cai. (N. Y.) 583.

As to when the law implies a promise, generally, see CONTRACTS.

A special count cannot be framed upon a promise arising by implication of law. Thompson *v.* French, 10 Yerg. (Tenn.) 452.

Whenever the circumstances create a legal liability, the law implies a promise upon which an action of assumpsit will lie. Merriwether *v.* Bell, 22 Ky. L. Rep. 844, 58 S. W. 987.

39. *Alabama.*—Meaher *v.* Pomeroy, 49 Ala. 146.

Kentucky.— The law will not imply a promise to pay money to any one who is not known to be entitled to it. Pool *v.* Adkisson, 1 Dana (Ky.) 110.

Maine.— Webster *v.* Drinkwater, 5 Me. 319, 17 Am. Dec. 238; Jewett *v.* Somerset County, 1 Me. 125.

Massachusetts.—Earle *v.* Coburn, 130 Mass. 596; Whiting *v.* Sullivan, 7 Mass. 107.

New York.— Osborn *v.* Bell, 5 Den. (N. Y.) 370, 49 Am. Dec. 275.

To justify a recovery upon an implied assumpsit, it is necessary for plaintiff to establish facts upon which a promise, on the part of defendant, to pay a certain sum of money can reasonably be presumed; but no such promise can be presumed where the act constituting the cause of action is done in defiance of plaintiff's rights or under a claim of adverse right. Carson River Lumbering Co. *v.* Bassett, 2 Nev. 249.

40. Central Bridge Corp. *v.* Abbott, 4 Cush. (Mass.) 473.

41. *Kentucky.*—Elliott *v.* Gibson, 10 B. Mon. (Ky.) 438.

Massachusetts.— Bath *v.* Freeport, 5 Mass. 325.

New Hampshire.— Hillsborough County *v.* Londonderry, 43 N. H. 451.

New York.— Arnold *v.* Suffolk Bank, 27 Barb. (N. Y.) 424.

Vermont.— Wheeler *v.* Wilson, 57 Vt. 157; Pawlet *v.* Sandgate, 19 Vt. 621. See also Danville *v.* Putney, 6 Vt. 512.

Collection of taxes.— Where the state has, by legislative enactment, imposed taxes, and no other mode of enforcing it is prescribed, an action of assumpsit will lie, on the principle that, where the law gives a claim to one against another, it raises an implied assumpsit on the legal obligation to pay. Baltimore City Appeal Tax Ct. *v.* Patterson, 50 Md. 354; Dashiell *v.* Baltimore, 45 Md. 615. See also Baltimore *v.* Howard, 6 Harr. & J. (Md.) 383; Wheeler *v.* Wilson, 57 Vt. 157; and, generally, TAXATION.

42. As to count: For goods sold and delivered see SALES. For money lent see MONEY LENT. For money paid see MONEY PAID. For money received see MONEY RECEIVED. For use and occupation see USE AND OCCUPATION. For work and labor see WORK AND LABOR. On account stated see ACCOUNTS AND ACCOUNTING, II, B, 6, a [1 Cyc. 388]. On *quantum meruit* see CONTRACTS; WORK AND LABOR. On *quantum valebat* see SALES; VENDOR AND PURCHASER.

As to use of common counts in case of implied promise see *supra*, III, B, 1.

43. *Alabama.*— Walker *v.* Forbes, 25 Ala. 139, 60 Am. Dec. 498; Smith *v.* McGehee, 14 Ala. 404.

Connecticut.— Winton *v.* Meeker, 25 Conn. 456.

Illinois.— Power *v.* Rankin, 114 Ill. 52, 29 N. E. 185; Adams *v.* Westlake, 92 Ill. App. 616.

Indiana.— Johnson *v.* Clark, 5 Blackf. (Ind.) 564.

Kentucky.— Markley *v.* Withers, 4 T. B. Mon. (Ky.) 14.

Maryland.— Elder *v.* Warfield, 7 Harr. & J. (Md.) 391.

New York.— Butler *v.* Rawson, 1 Den. (N. Y.) 105; Mason *v.* Munger, 5 Hill (N. Y.) 613; Northrup *v.* Jackson, 13 Wend. (N. Y.) 85.

Vermont.— Arbuckle *v.* Templeton, 65 Vt. 205, 25 Atl. 1095.

United States.— Douglass *v.* Reynolds, 7 Pet. (U. S.) 113, 8 L. ed. 626.

As to collateral undertakings, generally, see FRAUDS, STATUTE OF; GUARANTY; INDEMNITY; PRINCIPAL AND SURETY.

44. Ford *v.* Rockwell, 2 Colo. 376; Power *v.* Rankin, 114 Ill. 52, 29 N. E. 185; Runde *v.* Runde, 59 Ill. 98; Adams *v.* Westlake, 92 Ill. App. 616; Johnson *v.* Glover, 19 Ill. App. 585; Elder *v.* Warfield, 7 Harr. & J. (Md.) 391; Northrup *v.* Jackson, 13 Wend. (N. Y.) 85.

assumpsit will not lie.[45] The law will not imply a contract where an express one exists.[46] A cause of action under an express contract cannot be so divided that

45. *Alabama.*— Stafford *v.* Sibley, 106 Ala. 189, 17 So. 324; Ezell *v.* King, 93 Ala. 470, 9 So. 534; Jonas *v.* King, 81 Ala. 285, 1 So. 591; Beadle *v.* Graham, 66 Ala. 99; Burkham *v.* Spiers, 56 Ala. 547; Vincent *v.* Rogers, 30 Ala. 471; Smith *v.* McGehee, 14 Ala. 404; Clements *v.* Eslava, 4 Port. (Ala.) 502.

Arkansas.— Bernard *v.* Dickins, 22 Ark. 351; Jackson *v.* Jones, 22 Ark. 158; Bertrand *v.* Byrd, 5 Ark. 651.

California.— O'Connor *v.* Dingley, 26 Cal. 11; Baker *v.* Cornwall, 4 Cal. 15.

Connecticut.— Leonard *v.* Dyer, 26 Conn. 172, 68 Am. Dec. 382; Russell *v.* South Britain Soc., 9 Conn. 508; Shepard *v.* Palmer, 6 Conn. 95; Hinsdale *v.* Ells, 3 Conn. 377; Snow *v.* Chapman, 2 Root (Conn.) 99; White *v.* Woodruff, 1 Root (Conn.) 309; Carew *v.* Bond, 1 Root (Conn.) 269.

Delaware.— Hurlock *v.* Murphy, 2 Houst. (Del.) 550; Simpson *v.* Warren, 5 Harr. (Del.) 371.

Georgia.— Hancock *v.* Ross, 18 Ga. 364; Baldwin *v.* Lessner, 8 Ga. 71.

Illinois.— Russell *v.* Gillmore, 54 Ill. 147; Elder *v.* Hood, 38 Ill. 533; Cast *v.* Roff, 26 Ill. 452; Throop *v.* Sherwood, 9 Ill. 92; Stewart *v.* Carbray, 59 Ill. App. 397; Sands *v.* Potter, 59 Ill. App. 206; Wilderman *v.* Pitts, 29 Ill. App. 528; Rollins *v.* Duffy, 14 Ill. App. 69.

Indiana.— Toledo, etc., R. Co. *v.* Levy, 127 Ind. 168, 26 N. E. 773; Kerstetter *v.* Raymond, 10 Ind. 199; Swift *v.* Williams, 2 Ind. 365; Cranmer *v.* Graham, 1 Blackf. (Ind.) 406; Schaffner *v.* Kober, 2 Ind. App. 409, 28 N. E. 871.

Kentucky.— Western *v.* Sharp, 14 B. Mon. (Ky.) 144; Morford *v.* Ambrose, 3 J. J. Marsh. (Ky.) 688; Halley *v.* McCargo, 4 Bibb (Ky.) 349; Pringle *v.* Samuel, 1 Bibb (Ky.) 172.

Louisiana.— Mazureau *v.* Morgan, 25 La. Ann. 281; Willis *v.* Melville, 19 La. Ann. 13; Hogan *v.* Gibson, 12 La. 457.

Maine.— Holden Steam Mill Co. *v.* Westervelt, 67 Me. 446; Jenks *v.* Mathews, 31 Me. 318; Marshall *v.* Jones, 11 Me. 54, 25 Am. Dec. 260.

Maryland.—Consolidation Coal Co. *v.* Shannon, 34 Md. 144; Speake *v.* Sheppard, 6 Harr. & J. (Md.) 81; Watkins *v.* Hodges, 6 Harr. & J. (Md.) 38.

Massachusetts.— Moulton *v.* Trask, 9 Metc. (Mass.) 577.

Michigan.— Labadie *v.* Detroit, etc., R. Co., 125 Mich. 419, 84 N. W. 622; Pierson *v.* Spaulding, 61 Mich. 90, 27 N. W. 865; Mitchell *v.* Scott, 41 Mich. 108, 1 N. W. 968; Butterfield *v.* Seligman, 17 Mich. 95.

Mississippi.— New Orleans, etc., R. Co. *v.* Pressley, 45 Miss. 66; Fowler *v.* Austin, 1 How. (Miss.) 156, 26 Am. Dec. 701.

Missouri.— Powell *v.* Buckley, 13 Mo. 317; Chambers *v.* King, 8 Mo. 517; Stollings *v.* Sappington, 8 Mo. 118; Christy *v.* Price, 7 Mo. 430; Johnson *v.* Strader, 3 Mo. 359.

New Hampshire.— Carroll *v.* Giddings, 58 N. H. 333.

New York.— Ladue *v.* Seymour, 24 Wend. (N. Y.) 60; Peltier *v.* Sewall, 12 Wend. (N. Y.) 386; Jewell *v.* Schroeppel, 4 Cow. (N. Y.) 564; Porter *v.* Talcott, 1 Cow. (N. Y.) 359; Wood *v.* Edwards, 19 Johns. (N. Y.) 205; Clark *v.* Smith, 14 Johns. (N. Y.) 326; Jennings *v.* Camp, 13 Johns. (N. Y.) 94, 7 Am. Dec. 367; Raymond *v.* Bearnard, 12 Johns. (N. Y.) 274, 7 Am. Dec. 317.

North Carolina.—Winstead *v.* Reid, 44 N. C. 76, 57 Am. Dec. 571.

Ohio.— Hall *v.* Blake, Wright (Ohio) 489; Halloway *v.* Davis, Wright (Ohio) 129.

Pennsylvania.— Powelton Coal Co. *v.* McShain, 75 Pa. St. 238.

South Carolina.— Suber *v.* Pullin, 1 S. C. 273; Geer *v.* Brown, 11 Rich. (S. C.) 42; Barnes *v.* Gorman, 9 Rich. (S. C.) 297; Sinclair *v.* State Bank, 2 Strobh. (S. C.) 344; Stent *v.* Hunt, 3 Hill (S. C.) 223; Rye *v.* Stubbs, 1 Hill (S. C.) 384; Stoll *v.* Ryan, 3 Brev. (S. C.) 238.

Tennessee.— Wilson *v.* Smith, 5 Yerg. (Tenn.) 379.

Vermont.—Hemenway *v.* Smith, 28 Vt. 701; Camp *v.* Barker, 21 Vt. 469; Royalton *v.* Royalton, etc., Turnpike Co., 14 Vt. 311; Way *v.* Wakefield, 7 Vt. 223.

West Virginia.— Baltimore, etc., R. Co. *v.* Lafferty, 2 W. Va. 104.

Wisconsin.— Tietz *v.* Tietz, 90 Wis. 66, 62 N. W. 939; Maynard *v.* Tidball, 2 Wis. 34; Baxter *v.* Payne, 1 Pinn. (Wis.) 501.

United States.— Ingle *v.* Jones, 2 Wall. (U. S.) 1, 17 L. ed. 762; Chesapeake, etc., Canal Co. *v.* Knapp, 9 Pet. (U. S.) 541, 9 L. ed. 222; Perkins *v.* Hart, 11 Wheat. (U. S.) 237, 6 L. ed. 463; Dawes *v.* Peebles, 6 Fed. 856; Krouse *v.* Deblois, 1 Cranch C. C. (U. S.) 138, 14 Fed. Cas. No. 7,937.

England.— Weston *v.* Downes, Dougl. 23; Hulle *v.* Heightman, 2 East 145, 4 Esp. 75; Cutter *v.* Powell, 6 T. R. 320, 3 Rev. Rep. 185.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 15.

46. *Arkansas.*— Jackson *v.* Jones, 22 Ark. 158.

Maine.— Rumford Falls Power Co. *v.* Rumford Falls Paper Co., 95 Me. 186, 49 Atl. 876; Simpson *v.* Bowden, 33 Me. 549.

Massachusetts.— Brown *v.* Fales, 139 Mass. 21, 29 N. E. 211; Allen *v.* Ford, 19 Pick. (Mass.) 217; Whiting *v.* Sullivan, 7 Mass. 107.

New Jersey.—Voorhees *v.* Combs, 33 N. J. L. 494.

New York.— Harris *v.* Story, 2 E. D. Smith (N. Y.) 363; Ladue *v.* Seymour, 24 Wend. (N. Y.) 60.

Pennsylvania.— Harris *v.* Ligget, 1 Watts & S. (Pa.) 301.

South Carolina.— Stoll *v.* Ryan, 3 Brev. (S. C.) 238.

England.—Ferguson *v.* Carrington, 9 B. & C. 59, 17 E. C. L. 36, 3 C. & P. 457, 14 E. C. L.

recovery can be had partly on a general count and partly on a special.[47] If, however, there is an express contract, not under seal,[48] and, by its terms, it contains nothing more than the law would imply, it is optional with plaintiff to declare in general *indebitatus assumpsit*, or upon the express contract.[49]

b. Full Performance by Plaintiff. But where an express contract, not under seal,[50] has been fully performed on plaintiff's part, and nothing remains to be done under it but the payment of money by defendant, plaintiff may declare specially on the original contract, or generally in *indebitatus assumpsit*, at his election.[51]

661, 7 L. J. K. B. O. S. 139; Schlencker *v.* Moxsy, 3 B. & C. 789, 5 D. & R. 747, 27 Rev. Rep. 482, 10 E. C. L. 357; Strutt *v.* Smith, 1 C. M. & R. 312, 3 L. J. Exch. 357, 4 Tyrw. 1019; Cutter *v.* Powell, 6 T. R. 320, 3 Rev. Rep. 185.

47. Beecher *v.* Pettee, 40 Mich. 181.

By bringing an action of assumpsit plaintiff is held to affirm the contract, with all its incidents. He cannot maintain that the contract is relied on in part and repudiated in part. Shoninger *v.* Peabody, 57 Conn. 42, 17 Atl. 278, 14 Am. St. Rep. 88; Rutter *v.* Gable, 1 Watts & S. (Pa.) 108; Smith *v.* Hodson, 4 T. R. 211.

48. As to instruments under seal see *supra*, III, A. 2.

49. Davis *v.* Smith, 79 Me. 351, 10 Atl. 55; Gibbs *v.* Bryant, 1 Pick. (Mass.) 118; Sanborn *v.* Emerson, 12 N. H. 57; Princeton, etc., Turnpike Co. *v.* Gulick, 16 N. J. L. 161.

50. As to instruments under seal see *supra*, III, A, 2.

51. *Alabama.*— Stafford *v.* Sibley, 106 Ala. 189, 17 So. 324; Ezell *v.* King, 93 Ala. 470, 9 So. 534; Jonas *v.* King, 81 Ala. 285, 1 So. 591; Beadle *v.* Graham, 66 Ala. 99; Darden *v.* James, 48 Ala. 33; Dukes *v.* Leowie, 13 Ala. 457; Hunter *v.* Waldron, 7 Ala. 753; Givhan *v.* Dailey, 4 Ala. 336.

Arkansas.— Bernard *v.* Dickins, 22 Ark. 351; Jackson *v.* Jones, 22 Ark. 158; Wright *v.* Morris, 15 Ark. 444.

California.— O'Connor *v.* Dingley, 26 Cal. 11.

Colorado.— Ford *v.* Rockwell, 2 Colo. 376.

Connecticut.—Pinches *v.* Swedish Evangelical Lutheran Church, 55 Conn. 183, 10 Atl. 264.

Delaware.— Hurlock *v.* Murphy, 2 Houst. (Del.) 550.

District of Columbia.—Campbell *v.* District of Columbia, 2 MacArthur (D. C.) 533.

Georgia.—Dobbins *v.* Pyrolusite Manganese Co., 75 Ga. 450; Hancock *v.* Ross, 18 Ga. 364.

Illinois.— Chicago *v.* Chicago, etc., R. Co., 186 Ill. 300, 57 N. E. 795; Shepard *v.* Mills, 173 Ill. 223, 50 N. E. 709; Sands *v.* Potter, 165 Ill. 397, 46 N. E. 282, 56 Am. St. Rep. 253; Chicago Catholic Bishop *v.* Bauer, 62 Ill. 188; Madison First Nat. Bank *v.* Hart, 55 Ill. 62; Thomas *v.* Caldwell, 50 Ill. 138; Adlard *v.* Muldoon, 45 Ill. 193; Pickard *v.* Bates, 38 Ill. 40; Eggleston *v.* Buck, 24 Ill. 262; Tunnison *v.* Field, 21 Ill. 108; Lane *v.* Adams, 19 Ill. 167; Throop *v.* Sherwood, 9 Ill. 92; Rietz *v.* Siebold, 92 Ill. App. 147; Grand Co. *v.* Chicago Daily News Co., 92 Ill. App. 129; Foster *v.* McKeown, 85 Ill. App. 449; Springer *v.* Orr, 82 Ill. App. 558; Berkowsky *v.* Specter, 79 Ill. App. 215; Neagle *v.* Herbert, 73 Ill. App. 17; Streff *v.* Colteaux, 64 Ill. App. 179.

Indiana.— Brown *v.* Perry, 14 Ind. 32; Stuckey *v.* Hardy, 15 Ind. App. 19, 41 N. E. 606.

Iowa.— Buford *v.* Funk, 4 Greene (Iowa) 493.

Kansas.— Emslie *v.* Leavenworth, 20 Kan. 562.

Kentucky.— Carson *v.* Allen, 6 Dana (Ky.) 395; Arnold *v.* Paxton, 6 J. J. Marsh. (Ky.) 503; Scott *v.* Messick, 4 T. B. Mon. (Ky. 535; Stout *v.* Gallagher, 2 A. K. Marsh. (Ky.) 159.

Maryland.— Gambrill *v.* Schooley, 89 Md. 546, 43 Atl. 918; Southern Bldg., etc., Assoc. *v.* Price, 88 Md. 155, 41 Atl. 53, 42 L. R. A. 206; Walsh *v.* Jenvey, 85 Md. 240, 36 Atl. 817, 38 Atl. 938; Fairfax Forrest Min., etc., Co. *v.* Chambers, 75 Md. 604, 23 Atl. 1024; Devecmon *v.* Shaw, 69 Md. 199, 14 Atl. 464, 9 Am. St. Rep. 422; Ridgeley *v.* Crandall, 4 Md. 435; Coursey *v.* Covington, 5 Harr. & J. (Md.) 45.

Massachusetts.— Fish *v.* Gates, 133 Mass. 441; Holbrook *v.* Dow, 1 Allen (Mass.) 397; Morse *v.* Potter, 4 Gray (Mass.) 292; Canada *v.* Canada, 6 Cush. (Mass.) 15; Tebbetts *v.* Pickering, 5 Cush. (Mass.) 83, 51 Am. Dec. 48; Hunneman *v.* Grafton, 10 Metc. (Mass.) 454; Stark *v.* Parker, 2 Pick. (Mass.) 267, 13 Am. Dec. 425; Felton *v.* Dickinson, 10 Mass. 287.

Michigan.— Nicol *v.* Fitch, 115 Mich. 15, 72 N. W. 988, 69 Am. St. Rep. 542; Nugent *v.* Teachout, 67 Mich. 571, 35 N. W. 254; Begole *v.* McKenzie, 26 Mich. 470.

Mississippi.— New Orleans, etc., R. Co. *v.* Pressley, 45 Miss. 66; Fowler *v.* Austin, 1 How. (Miss.) 156, 26 Am. Dec. 701.

Missouri.— Moore *v.* H. Gaus, etc., Mfg. Co., 113 Mo. 98, 20 S. W. 975; Williams *v.* Chicago, etc., R. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. Rep. 403; Mansur *v.* Botts, 80 Mo. 651; Stout *v.* St. Louis Tribune Co., 52 Mo. 342; Ingram *v.* Ashmore, 12 Mo. 574; Kennerly *v.* Somerville, 68 Mo. App. 222.

New Hampshire.— Carroll *v.* Giddings, 58 N. H. 333; Colburn *v.* Pomeroy, 44 N. H. 19; New Hampshire Mut. F. Ins. Co. *v.* Hunt, 30 N. H. 219; Hale *v.* Handy, 26 N. H. 206.

New Jersey.—Weart *v.* Hoagland, 22 N. J. L. 517.

New York.— Hurst *v.* Litchfield, 39 N. Y. 377; Hosley *v.* Black, 28 N. Y. 438; Moffet *v.*

c. Prevention of Performance. So, also, if a special agreement has been abandoned by defendant or by mutual consent, or if plaintiff has been prevented from performing it by the act or default of defendant, plaintiff may recover under the common counts.[52]

Sackett, 18 N. Y. 522; Farron *v.* Sherwood, 17 N. Y. 227; Fort *v.* Gooding, 9 Barb. (N. Y.) 371; Atkinson *v.* Collins, 18 How. Pr. (N. Y.) 235; Ladue *v.* Seymour, 24 Wend. (N. Y.) 60; Clark *v.* Fairchild, 22 Wend. (N. Y.) 576; Peltier *v.* Sewall, 12 Wend. (N. Y.) 386; Feeter *v.* Heath, 11 Wend. (N. Y.) 477; Williams *v.* Sherman, 7 Wend. (N. Y.) 109; Dubois *v.* Delaware, etc., Canal Co., 4 Wend. (N. Y.) 285; Jewell *v.* Schroeppel, 4 Cow. (N. Y.) 564; Porter *v.* Talcott, 1 Cow. (N. Y.) 359.

Ohio.— Bagley *v.* Bates, Wright (Ohio) 705.

Pennsylvania.— Powelton Coal Co. *v.* McShain, 75 Pa. St. 238; McManus *v.* Cassidy, 66 Pa. St. 260; Weiss *v.* Mauch Chunk Iron Co., 58 Pa. St. 295; Edwards *v.* Goldsmith, 16 Pa. St. 43; Eckel *v.* Murphey, 15 Pa. St. 488, 53 Am. Dec. 607; Cooper *v.* Bickford, 3 Grant (Pa.) 69; Bomeisler *v.* Dobson, 5 Whart. (Pa.) 398; Algeo *v.* Algeo, 10 Serg. & R. (Pa.) 235; Kelly *v.* Foster, 2 Binn. (Pa.) 4; Sykes *v.* Summerel, 2 Browne (Pa.) 225.

South Carolina.— Barnes *v.* Gorman, 9 Rich. (S. C.) 297; Sinclair *v.* State Bank, 2 Strobh. (S. C.) 344.

Tennessee.— Sublett *v.* McLin, 10 Humphr. (Tenn.) 181.

Vermont.— Bradley *v.* Phillips, 52 Vt. 517; Groot *v.* Story, 41 Vt. 533; Mattocks *v.* Lyman, 16 Vt. 113; Royalton *v.* Royalton, etc., Turnpike Co., 14 Vt. 311; Way *v.* Wakefield, 7 Vt. 223.

Virginia.— Baltimore, etc., R. Co. *v.* Polly, 14 Gratt. (Va.) 447; Brown *v.* Ralston, 9 Leigh (Va.) 532; Brooks *v.* Scott, 2 Munf. (Va.) 344.

West Virginia.— Moore *v.* Wetzel County, 18 W. Va. 630; Baltimore, etc., R. Co. *v.* Lafferty, 2 W. Va. 104.

Wisconsin.— Bradley *v.* Levy, 5 Wis. 400; Maynard *v.* Tidball, 2 Wis. 34.

United States.— Ingle *v.* Jones, 2 Wall. (U. S.) 1, 17 L. ed. 762; Chesapeake, etc., Canal Co. *v.* Knapp, 9 Pet. (U. S.) 541, 9 L. ed. 222; Perkins *v.* Hart, 11 Wheat. (U. S.) 237, 6 L. ed. 463; Columbia Bank *v.* Patterson, 7 Cranch (U. S.) 299, 3 L. ed. 351; Dawes *v.* Peebles, 6 Fed. 856; Ames *v.* Le Rue, 2 McLean (U. S.) 216, 1 Fed. Cas. No. 327; Brockett *v.* Hammond, 2 Cranch C. C. (U. S.) 56, 4 Fed. Cas. No. 1,916.

England.— Studdy *v.* Sanders, 5 B. & C. 628, 11 E. C. L. 614; Streeter *v.* Horlock, 1 Bing. 34, 7 Moore C. P. 283, 25 Rev. Rep. 579, 8 E. C. L. 389; Leeds *v.* Burrows, 12 East 1; Bianchi *v.* Nash, 5 L. J. Exch. 252, 1 M. & W. 545, 1 Tyrw. & G. 916; Alcorne *v.* Westebrooke, 1 Wils. 117.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 17.

As to question of performance as one for jury see *infra*, XI, B.

52. *Alabama.*— Kirkland *v.* Oates, 25 Ala. 465.

Arkansas.— Prince *v.* Thomas, 15 Ark. 378.

California.— Reynolds *v.* Jourdan, 6 Cal. 108.

Connecticut.— *Compare* Allen *v.* Jarvis, 20 Conn. 38.

Delaware.— Hurlock *v.* Murphy, 2 Houst. (Del.) 550.

Illinois.— Guerdon *v.* Corbett, 87 Ill. 272; Sanger *v.* Chicago, 65 Ill. 506; Webster *v.* Enfield, 10 Ill. 298; Selby *v.* Hutchinson, 9 Ill. 319.

Indiana.— Barber *v.* Lyon, 8 Blackf. (Ind.) 215; Hoagland *v.* Moore, 2 Blackf. (Ind.) 167. See also Kerstetter *v.* Raymond, 10 Ind. 199.

Iowa.— Dibol *v.* Minott, 9 Iowa 403; Stewart *v.* Craig, 3 Greene (Iowa) 505. But see Lorton *v.* Agnew, Morr. (Iowa) 64, holding that where a special agreement is made to rescind a former contract, and repay a certain portion of the money advanced, such money cannot be recovered under the common counts, but the declaration must be special.

Kentucky.— *Compare* Rankin *v.* Darnell, 11 B. Mon. (Ky.) 30, 52 Am. Dec. 557, holding that, if one party to a written contract to perform work performs in part, and a full performance is prevented by the other, the remedy is still upon the written contract.

Louisiana.—Brown *v.* Bark Laura Snow, 14 La. Ann. 848.

Maine.— Wright *v.* Haskell, 45 Me. 489.

Maryland.— Bull *v.* Schuberth, 2 Md. 38; Watkins *v.* Hodges, 6 Harr. & J. (Md.) 38; Hannan *v.* Lee, 1 Harr. & J. (Md.) 131.

Massachusetts.—Johnson *v.* Trinity Church Soc., 11 Allen (Mass.) 123; Bassett *v.* Sanborn, 9 Cush. (Mass.) 58; Canada *v.* Canada, 6 Cush. (Mass.) 15; Moulton *v.* Trask, 9 Metc. (Mass.) 577.

Michigan.— Mooney *v.* York Iron Co., 82 Mich. 263, 46 N. W. 376; Mitchell *v.* Scott, 41 Mich. 108, 1 N. W. 968; McQueen *v.* Gamble, 33 Mich. 344. *Compare* Beecher *v.* Pettee, 40 Mich. 181, holding that, where one sues for not being suffered to complete a special agreement, he must declare specially, and cannot rely on the common counts.

Missouri.— McCullough *v.* Baker, 47 Mo. 401. *Compare* Clendennen *v.* Paulsel, 3 Mo. 230, 25 Am. Dec. 435.

New Hampshire.— Carroll *v.* Giddings, 58 N. H. 333.

New York.— Jones *v.* Judd, 4 N. Y. 411; Ladue *v.* Seymour, 24 Wend. (N. Y.) 60; Peltier *v.* Sewall, 12 Wend. (N. Y.) 386; Dubois *v.* Delaware, etc., Canal Co., 4 Wend. (N. Y.) 285; Linningdale *v.* Livingston, 10 Johns. (N. Y.) 36.

North Carolina.—Buffkin *v.* Baird, 73 N. C. 283.

Ohio.— Fitch *v.* Sargeant, 1 Ohio 352; Bagley *v.* Bates, Wright (Ohio) 705; Ames *v.* Sloat, Wright (Ohio) 577.

Pennsylvania.— Where there is an express agreement, the complete execution of which

d. Waiving Full Performance. In like manner, plaintiff may recover upon the common counts even though he has not strictly complied with the terms of a special contract, if that which has been done by him is beneficial to defendant, and has been accepted and enjoyed, or the default has been waived.[53]

e. Payment Otherwise Than in Money. If the agreement is to be carried out by defendant in some other way than by the payment of money, the general rule is that it must be declared on specially.[54] There are cases, however, which hold that a recovery may be had under the common counts on a note payable in specific articles of property.[55]

has been prevented by defendant, plaintiff must declare specially on the agreement. Harris *v.* Ligget, 1 Watts & S. (Pa.) 301; Algeo *v.* Algeo, 10 Serg. & R. (Pa.) 235.

South Carolina.— Suber *v.* Pullin, 1 S. C. 273; Stoll *v.* Ryan, 3 Brev. (S. C.) 238.

Tennessee.— Allen *v.* McNew, 8 Humphr. (Tenn.) 46.

Vermont.— Chamberlin *v.* Scott, 33 Vt. 80; Derby *v.* Johnson, 21 Vt. 17.

West Virginia.— Baltimore, etc., R. Co. *v.* Lafferty, 2 W. Va. 104.

United States.—Chesapeake, etc., Canal Co. *v.* Knapp, 9 Pet. (U. S.) 541, 9 L. ed. 222; Perkins *v.* Hart, 11 Wheat. (U. S.) 237, 6 L. ed. 463; Dawes *v.* Peebles, 6 Fed. 856.

England.— Franklin *v.* Miller, 4 A. & E. 599, 31 E. C. L. 268; Withers *v.* Reynolds, 2 B. & Ad. 882, 1 L. J. K. B. 30, 22 E. C. L. 370; Cooke *v.* Munstone, 4 B. & P. N. R. 351; Planche *v.* Colburn, 8 Bing. 14, 21 E. C. L. 424, 5 C. & P. 58, 24 E. C. L. 452, 1 Moore & S. 51; Hesketh *v.* Blanchard, 4 East 144; Towers *v.* Barrett, 1 T. R. 133.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 17.

53. *Arkansas.*— Bertrand *v.* Byrd, 5 Ark. 651.

Connecticut.—Pinches *v.* Swedish Evangelical Lutheran Church, 55 Conn. 183, 10 Atl. 264.

Georgia.— Hancock *v.* Ross, 18 Ga. 364.

Illinois.—Chicago Catholic Bishop *v.* Bauer, 62 Ill. 188.

Indiana.— Cosby *v.* Adams, Wils. (Ind.) 342.

Maine.— Hayden *v.* Madison, 7 Me. 76.

Massachusetts.— Reed *v.* Scituate, 5 Allen (Mass.) 120; Bee Printing Co. *v.* Hichborn, 4 Allen (Mass.) 63; Snow *v.* Ware, 13 Metc. (Mass.) 42; Hayward *v.* Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268.

Michigan.— Chapman *v.* Dease, 34 Mich. 375; Andre *v.* Hardin, 32 Mich. 324; Begole *v.* McKenzie, 26 Mich. 470; Wildey *v.* Fractional School Dist. No. 1, 25 Mich. 419; Allen *v.* McKibbin, 5 Mich. 449.

Nebraska.— West *v.* Van Pelt, 34 Nebr. 63, 51 N. W. 313.

New York.— Ladue *v.* Seymour, 24 Wend. (N. Y.) 60; Merrill *v.* Ithaca, etc., R. Co., 16 Wend. (N. Y.) 586, 30 Am. Dec. 130; Peltier *v.* Sewall, 12 Wend. (N. Y.) 386; Jewell *v.* Schroeppel, 4 Cow. (N. Y.) 564; Linningdale *v.* Livingston, 10 Johns. (N. Y.) 36.

Oregon.— Todd *v.* Huntington, 13 Oreg. 9, 4 Pac. 295.

West Virginia.— Baltimore, etc., R. Co. *v.* Lafferty, 2 W. Va. 104.

United States.— Ingle *v.* Jones, 2 Wall. (U. S.) 1, 17 L. ed. 762; Columbus Safe-Deposit Co. *v.* Burke, 88 Fed. 630, 60 U. S. App. 253, 32 C. C. A. 67; Crane Elevator Co. *v.* Clark, 80 Fed. 705, 53 U. S. App. 257, 26 C. C. A. 100; Dawes *v.* Peebles, 6 Fed. 856.

England.— Read *v.* Rann, 10 B. & C. 438, 8 L. J. K. B. O. S. 144, 21 E. C. L. 189; Denew *v.* Daverell, 3 Campb. 451; Farnsworth *v.* Gerrard, 1 Campb. 38, 10 Rev. Rep. 624.

See also CONTRACTS; MASTER AND SERVANT; SALES; WORK AND LABOR.

54. *Alabama.*— Eastland *v.* Sparks, 22 Ala. 607; Snedicor *v.* Leachman, 10 Ala. 330; Horton *v.* Ronalds, 2 Port. (Ala.) 79; Pope *v.* Robinson, 1 Stew. (Ala.) 415.

Arkansas.— Bernard *v.* Dickins, 22 Ark. 351.

Illinois.— Meyers *v.* Schemp, 67 Ill. 469.

Indiana.—Carlisle *v.* Dunn, 5 Blackf. (Ind.) 605.

Kentucky.— Carson *v.* Allen, 6 Dana (Ky.) 395; Buford *v.* Banton, 3 J. J. Marsh. (Ky.) 431; Sparks *v.* Simpson, 3 J. J. Marsh. (Ky.) 110; Lunderman *v.* Lunderman, 2 J. J. Marsh. (Ky.) 597; Wickliffe *v.* Davis, 2 J. J. Marsh. (Ky.) 69; Pritchard *v.* Ford, 1 J. J. Marsh. (Ky.) 543; Cochran *v.* Tatum, 1 J. J. Marsh. (Ky.) 394; Cochran *v.* Tatum, 3 T. B. Mon. (Ky.) 404; Spratt *v.* McKinney, 1 Bibb (Ky.) 595.

Maryland.— Coursey *v.* Covington, 5 Harr. & J. (Md.) 45. But assumpsit lies for tobacco where the contract is for payment in tobacco. Marshall *v.* McPherson, 8 Gill & J. (Md.) 333; Lyles *v.* Lyles, 6 Harr. & J. (Md.) 273.

Massachusetts.— Baylies *v.* Fettyplace, 7 Mass. 325.

Michigan.— Nugent *v.* Teachout, 67 Mich. 571, 35 N. W. 254.

New Hampshire.— Ranlett *v.* Moore, 21 N. H. 336; Mitchell *v.* Gile, 12 N. H. 390.

New Jersey.—Weart *v.* Hoagland, 22 N. J. L. 517.

Vermont.— See Wilkins *v.* Stevens, 8 Vt. 214.

Virginia.— Brooks *v.* Scott, 2 Munf. (Va.) 344.

Wisconsin.— Bradley *v.* Levy, 5 Wis. 400; King *v.* Kerr, 3 Pinn. (Wis.) 464, 4 Chandl. (Wis.) 159.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 19.

55. *Iowa.*— Payne *v.* Couch, 1 Greene (Iowa) 64, 46 Am. Dec. 497.

D. Torts[56]—**1. In General.** An express promise to pay a certain sum as damages for a tort previously committed will create a contract upon which assumpsit may be maintained.[57] Matters of aggravation set forth in a count in assumpsit do not change it to a count in tort.[58]

2. Misfeasance or Non-Feasance of Public Officer. Assumpsit, as on a promise implied by law, is not an appropriate remedy against a public officer for misfeasance or non-feasance in the execution of his official duties.[59]

3. Waiving Tort[60]**— a. Right to Waive** — (I) *In General.* Plaintiff's right to elect between an action of tort and assumpsit cannot be used when it will deprive defendant of a substantial privilege or defense.[61]

(II) *Existence of Contractual Relations.* Where a contractual relation exists between the parties[62] — such as that of agent and principal,[63] attorney and

Missouri.— St. Louis Floating Dock Ins. Co. *v.* Soulard, 8 Mo. 665.

New York.— Taplin *v.* Packard, 8 Barb. (N. Y.) 220; Crandal *v.* Bradley, 7 Wend. (N. Y.) 311; Smith *v.* Smith, 2 Johns. (N. Y.) 235, 3 Am. Dec. 410; Stever *v.* Lamoure, Lalor (N. Y.) 352.

Pennsylvania.—To render a note payable in property admissible under the common counts, it must contain a promise to pay plaintiff a sum certain, either in money or property. Weiss *v.* Mauch Chunk Iron Co., 58 Pa. St. 295.

United States.— Ames *v.* Le Rue, 2 McLean (U. S.) 216, 1 Fed. Cas. No. 327.

A demand payable in property, or in money and property, becomes a money demand on the debtor's refusing to furnish the property. Stewart *v.* Craig, 3 Greene (Iowa) 505; Short *v.* Abernathy, 42 Tex. 94. See also Kalkmann *v.* Baylis, 17 Cal. 291; Russell *v.* Branham, 8 Blackf. (Ind.) 277; Kent *v.* Bowker, 38 Vt. 148.

56. As to joining of count in tort with count in assumpsit see *infra*, IX, A, 10, a.

57. Knickerbocker, etc., Silver Min. Co. *v.* Hall, 3 Nev. 194.

Unliquidated damages for a trespass cannot be recovered in any form of assumpsit. Allen *v.* Woodward, 22 N. H. 544; Page *v.* Babbit, 21 N. H. 389.

58. Hoey *v.* Harty, 48 Mich. 191, 12 N. W. 44. See also Rich *v.* Jones, 9 Cush. (Mass.) 329, holding that, where all the counts in a declaration are proper counts in assumpsit, it is immaterial that the breach of the promise involved was caused by tortious acts which would have enabled plaintiff to sue *ex delicto*.

The words "negligent" and "negligently," applied to the conduct of defendant in the statement of claim, do not change the action from assumpsit into one *ex delicto*. Corry *v.* Pennsylvania R. Co., 10 Pa. Super. Ct. 232.

59. Sanford School Dist. No. 2 *v.* Tebbetts, 67 Me. 239; Bailey *v.* Butterfield, 14 Me. 112; McMillan *v.* Eastman, 4 Mass. 378; Charleston *v.* Stacy, 10 Vt. 562; Walbridge *v.* Griswold, 1 D. Chipm. (Vt.) 162. But see Gibson County *v.* Harrington, 1 Blackf. (Ind.) 260, holding that assumpsit will lie against a collector of county revenue for his failure to pay over taxes collected by him, even though the statute gave another form of remedy against him, and required him to give a bond with sureties for the discharge of his duties.

Refusal to levy execution.—Where an officer unlawfully refuses to levy an execution upon money in his hands, the remedy is an action on the case, and not assumpsit. Parker *v.* Dennie, 6 Pick. (Mass.) 227.

60. As to necessity of alleging tort on suing in assumpsit see *infra*, IX, A, 9.

61. Isaacs *v.* Hermann, 49 Miss. 449; Finlay *v.* Bryson, 84 Mo. 664 (wherein it is held that, where the cause of action merely sounds in tort, the tort cannot be waived in order to sue in assumpsit for the purpose of bringing the case within a statute not applicable to actions of tort); Sedgebeer *v.* Moore, Brightly (Pa.) 197.

Judgment by default.— Where plaintiff waives a tort and sues in assumpsit, he cannot claim any benefit from a statute allowing a final judgment when defendant does not appear or plead, as such statute refers only to actions *ex contractu*. Mississippi Cent. R. Co. *v.* Fort, 44 Miss. 423.

One cannot waive a tort and sue in assumpsit if the purpose of such waiving is merely to give jurisdiction to the court. Force *v.* Squier, 133 Mo. 306, 34 S. W. 574; Finlay *v.* Bryson, 84 Mo. 664; Sandeen *v.* Kansas City, etc., R. Co., 79 Mo. 278; Spencer *v.* Vance, 57 Mo. 427; Webb *v.* Tweedie, 30 Mo. 488; Ahern *v.* Carroll, 30 Mo. 200.

Right to money at time of tort.— The right to waive a conversion and sue in assumpsit applies only where the owner of the goods has a right to the money obtained from the conversion at the time the tort is committed. Jones *v.* Baird, 52 N. C. 152.

62. As to particular contractual relations see specific titles, such as Abstracts of Title; Attorney and Client; Auctions and Auctioneers; Bailments; Banks and Banking; Carriers; Factors and Brokers; Innkeepers; Master and Servant; Physicians and Surgeons; Pledges; Principal and Agent; Warehousemen; Wharves.

63. Tuttle *v.* Campbell, 74 Mich. 652, 42 N. W. 384, 16 Am. St. Rep. 652; Campbell *v.* Reeves, 3 Head (Tenn.) 226.

See, generally, Principal and Agent.

The tort of a bank cashier in fraudulently concealing the loss of money may be waived, and the amount recovered in assumpsit.

client,[64] or bailee and bailor [65] — a tort arising out of a breach of the duty imposed by the relation may be waived, and special assumpsit maintained.[66]

(III) *WRONGFUL CONVERSION* — (A) *In General.* All the authorities agree that, where personal property is tortiously taken and converted into money or money's worth, the owner may waive the tort and sue the wrong-doer in assumpsit for its value.[67] The authorities differ, however, as to the right of the owner

Vance *v.* Mottley, 92 Tenn. 310, 21 S. W. 593.

64. Special assumpsit lies against an attorney for negligence in transacting the business of his client. Ellis *v.* Henry, 5 J. J. Marsh. (Ky.) 247; Stimpson *v.* Sprague, 6 Me. 470; Church *v.* Mumford, 11 Johns. (N. Y.) 479. But see Peay *v.* Ringo, 22 Ark. 68, wherein it is held that an attorney in whose hands a note has been placed for collection, the amount to be applied by him to a special purpose, is not responsible in assumpsit for money had and received, for want of due diligence in its collection.

See, generally, ATTORNEY AND CLIENT.

65. Special assumpsit may be maintained against a bailee, upon the contract of bailment, for neglect or breach of duty.

Alabama.— Bradfield *v.* Patterson, 106 Ala. 397, 17 So. 536; Mobile Bank *v.* Huggins, 3 Ala. 206; Pope *v.* Robinson, 1 Stew. (Ala.) 415.

Arkansas.— Ferrier *v.* Wood, 9 Ark. 85.

California.— Chapman *v.* State, 104 Cal. 690, 38 Pac. 457, 43 Am. St. Rep. 158.

Connecticut.— Canfield *v.* Merrick, 11 Conn. 425.

Illinois.— Ives *v.* Hartley, 51 Ill. 520; Farson *v.* Hutchins, 62 Ill. App. 439.

Indiana.— Ferguson *v.* Dunn, 28 Ind. 58; Jones *v.* Gregg, 17 Ind. 84; Cox *v.* Reynolds, 7 Ind. 257; Smith *v.* Stewart, 5 Ind. 220; Spencer *v.* Morgan, 5 Ind. 146; Cooper *v.* Helsabeck, 5 Blackf. (Ind.) 14.

Michigan.— Tuttle *v.* Campbell, 74 Mich. 652, 42 N. W. 384, 16 Am. St. Rep. 652.

New Hampshire.— Graves *v.* Ticknor, 6 N. H. 537.

New Jersey.— Mott *v.* Pettit, 1 N. J. L. 344.

New York.— International Bank *v.* Monteath, 39 N. Y. 297; Doherty *v.* Shields, 86 Hun (N. Y.) 303, 33 N. Y. Suppl. 497, 67 N. Y. St. 211; Tryon *v.* Baker, 7 Lans. (N. Y.) 511; Berly *v.* Taylor, 5 Hill (N. Y.) 577. But see Beardslee *v.* Richardson, 11 Wend. (N. Y.) 25, 25 Am. Dec. 596, wherein it is held that special assumpsit does not lie for the negligence of a bailee without reward.

Ohio.— Barker *v.* Cory, 15 Ohio 9.

Pennsylvania.— Zell *v.* Dunkle, 156 Pa. St. 353, 27 Atl. 38; Hill *v.* Wallace, Add. (Pa.) 145.

South Carolina.— Tindall *v.* McCarthy, 44 S. C. 487, 22 S. E. 734.

Tennessee.— Mullen *v.* Ensley, 8 Humphr. (Tenn.) 427.

Virginia.— Kennaird *v.* Jones, 9 Gratt. (Va.) 183.

United States.—Collins *v.* Johnson, Hempst. (U. S.) 279, 6 Fed. Cas. No. 3,015*a*.

England.— Baker *v.* Liscoe, 7 T. R. 171.

See, generally, BAILMENTS; CARRIERS; INNKEEPERS; PLEDGES; WAREHOUSEMEN; WHARVES.

66. The reason is that the relation of the parties out of which the duty violated grew had its inception in contract.

Kentucky.— Ellis *v.* Henry, 5 J. J. Marsh. (Ky.) 247.

Maine.— Stimpson *v.* Sprague, 6 Me. 470.

Michigan.— Grinnell *v.* Anderson, 122 Mich. 533, 81 N. W. 329; St. John *v.* Antrim Iron Co., 122 Mich. 68, 80 N. W. 998; Tuttle *v.* Campbell, 74 Mich. 652, 42 N. W. 384, 16 Am. St. Rep. 652.

New York.— Butts *v.* Collins, 13 Wend. (N. Y.) 139; Church *v.* Mumford, 11 Johns. (N. Y.) 479.

England.— 1 Chitty Pl. 92; Nelson *v.* Aldridge, 2 Stark. 435.

67. *Alabama.*— Steiner *v.* Clisby, 103 Ala. 181, 15 So. 612; Blackshear *v.* Burke, 74 Ala. 239; Miller *v.* King, 67 Ala. 575; Fuller *v.* Duren, 36 Ala. 73, 76 Am. Dec. 318; Smyth *v.* Tankersley, 20 Ala. 212, 56 Am. Dec. 193; Upchurch *v.* Norsworthy, 15 Ala. 705.

Arkansas.— Chamblee *v.* McKenzie, 31 Ark. 155; Hudson *v.* Gilliland, 25 Ark. 100; Bowman *v.* Browning, 17 Ark. 599; Johnson *v.* Reed, 8 Ark. 202.

California.— Chittenden *v.* Pratt, 89 Cal. 178, 26 Pac. 626; Lehmann *v.* Schmidt, 87 Cal. 15, 25 Pac. 161; Roberts *v.* Evans, 43 Cal. 380; Fratt *v.* Clark, 12 Cal. 89.

Delaware.— Hutton *v.* Wetherald, 5 Harr. (Del.) 38.

District of Columbia.— Moses *v.* Taylor, 6 Mackey (D. C.) 255.

Georgia.— Reynolds *v.* Padgett, 94 Ga. 347, 21 S. E. 570; Cooper *v.* Berry, 21 Ga. 526, 68 Am. Dec. 468.

Hawaii.— Yong Den *v.* Hitchcock, 11 Hawaii 270.

Illinois.— Elgin *v.* Joslyn, 136 Ill. 525, 26 N. E. 1090; Toledo, etc., R. Co. *v.* Chew, 67 Ill. 378; Johnston *v.* Salisbury, 61 Ill. 316; Ives *v.* Hartley, 51 Ill. 520; Staat *v.* Evans, 35 Ill. 455; McDonald *v.* Brown, 16 Ill. 32; Gentle *v.* Stephens, 87 Ill. App. 190; Ingersoll *v.* Moss, 44 Ill. App. 72; McIntyre *v.* Thompson, 14 Ill. App. 554.

Indiana.— Morford *v.* White, 53 Ind. 547; Rush County *v.* Trees, 12 Ind. App. 479, 40 N. E. 535.

Kansas.— Hagaman *v.* Neitzel, 15 Kan. 383.

Kentucky.— Daniel *v.* Daniel, 9 B. Mon. (Ky.) 195; Pritchard *v.* Ford, 1 J. J. Marsh. (Ky.) 543; Guthrie *v.* Wickliffe, 1 A. K. Marsh. (Ky.) 83.

Maine.— Quimby *v.* Lowell, 89 Me. 547, 36 Atl. 902; Penobscot R. Co. *v.* Mayo, 67 Me. 470, 24 Am. Rep. 45; Shaw *v.* Coffin, 58 Me.

to sue in assumpsit where the wrong-doer has not sold or otherwise disposed of the property, but retains it for his own use. One line of decisions denies the

254, 4 Am. Rep. 290; Foye *v.* Southard, 54 Me. 147; Howe *v.* Clancey, 53 Me. 130.

Maryland.— Leighton *v.* Preston, 9 Gill (Md.) 201; Stockett *v.* Watkins, 2 Gill & J. (Md.) 326, 20 Am. Dec. 438.

Massachusetts.— Boston, etc., R. Corp. *v.* Dana, 1 Gray (Mass.) 83; Brigham *v.* Winchester, 6 Metc. (Mass.) 460; Gilmore *v.* Wilbur, 12 Pick. (Mass.) 120, 22 Am. Dec. 410; Jones *v.* Hoar, 5 Pick. (Mass.) 285.

Michigan.— St. John *v.* Antrim Iron Co., 122 Mich. 68, 80 N. W. 998; Nelson *v.* Kilbride, 113 Mich. 637, 71 N. W. 1089; Buckeye Tp. *v.* Clark, 90 Mich. 432, 51 N. W. 528; Aldine Mfg. Co. *v.* Barnard, 84 Mich. 632, 48 N. W. 280; Loomis *v.* O'Neal, 73 Mich. 582, 41 N. W. 701; Coe *v.* Wager, 42 Mich. 49, 3 N. W. 248; Detroit *v.* Michigan Paving Co., 36 Mich. 335; Bowen *v.* Rutland School Dist. No. 9, 36 Mich. 149; Watson *v.* Stever, 25 Mich. 386; Fiquet *v.* Allison, 12 Mich. 328, 86 Am. Dec. 54; Welch *v.* Bagg, 12 Mich. 41.

Mississippi.— Evans *v.* Miller, 58 Miss. 120, 38 Am. Rep. 313; Mhoon *v.* Greenfield, 52 Miss. 434; Isaacs *v.* Hermann, 49 Miss. 449; Mississippi Cent. R. Co. *v.* Fort, 44 Miss. 423; Jamison *v.* Moon, 43 Miss. 598; O'Conley *v.* Natchez, 1 Sm. & M. (Miss.) 31, 40 Am. Dec. 87.

Missouri.— Finlay *v.* Bryson, 84 Mo. 664; Coughlin *v.* Lyons, 24 Mo. 533; Johnson *v.* Strader, 3 Mo. 359; Floyde *v.* Wiley, 1 Mo. 643; Horine *v.* Bone, 69 Mo. App. 481; Dougherty *v.* Chapman, 29 Mo. App. 233.

New Hampshire.— Seavey *v.* Dana, 61 N. H. 339; Knapp *v.* Hobbs, 50 N. H. 476; White *v.* Brooks, 43 N. H. 402; Abbot *v.* Fremont, 34 N. H. 432; Hill *v.* Davis, 3 N. H. 384; Chauncy *v.* Yeaton, 1 N. H. 151.

New Jersey.—Westcott *v.* Sharp, 50 N. J. L. 392, 13 Atl. 243; Randolph Iron Co. *v.* Elliott, 34 N. J. L. 184; Budd *v.* Hiler, 27 N. J. L. 43.

New York.— Terry *v.* Munger, 121 N. Y. 161, 24 N. E. 272, 30 N. Y. St. 746, 18 Am. St. Rep. 803, 8 L. R. A. 216; Rothschild *v.* Mack, 115 N. Y. 1, 21 N. E. 726, 23 N. Y. St. 922; McGoldrick *v.* Willits, 52 N. Y. 612; Wigand *v.* Sichel, 4 Abb. Dec. (N. Y.) 592, 3 Keyes (N. Y.) 120, 33 How. Pr. (N. Y.) 174; Tryon *v.* Bacon, 7 Lans. (N. Y.) 511; Hawk *v.* Thorn, 54 Barb. (N. Y.) 164; Harpending *v.* Shoemaker, 37 Barb. (N. Y.) 270; Cobb *v.* Dows, 9 Barb. (N. Y.) 230; Camp *v.* Pulver, 5 Barb. (N. Y.) 91; Chambers *v.* Lewis, 2 Hilt. (N. Y.) 591; Hughes *v.* United Pipe Lines, 12 N. Y. St. 704; Hinds *v.* Tweddle, 7 How. Pr. (N. Y.) 278; Osborn *v.* Bell, 5 Den. (N. Y.) 370, 49 Am. Dec. 275; Putnam *v.* Wise, 1 Hill (N. Y.) 234, 37 Am. Dec. 309.

North Carolina.— Olive *v.* Olive, 95 N. C. 485; Wall *v.* Williams, 91 N. C. 477; Robertson *v.* Dunn, 87 N. C. 191.

North Dakota.— Braithwaite *v.* Akin, 3 N. D. 365, 56 N. W. 133.

Oregon.— Crown Cycle Co. *v.* Brown, (Oreg. 1901) 64 Pac. 451.

Pennsylvania.— Pryor *v.* Morgan, 170 Pa. St. 568, 33 Atl. 98; Kellam *v.* Kellam, 94 Pa. St. 225; Dundas *v.* Muhlenberg, 35 Pa. St. 351; Michener *v.* Dale, 23 Pa. St. 59; Gray *v.* Griffith, 10 Watts (Pa.) 431; Peter *v.* Steel, 3 Yeates (Pa.) 250; Dido *v.* Strobel, 3 Pa. Super. Ct. 522.

South Carolina.— Ford *v.* Caldwell, 3 Hill (S. C.) 248.

Tennessee.— Huffman *v.* Hughlett, 11 Lea (Tenn.) 549; McCombs *v.* Guild, 9 Lea (Tenn.) 81; Rhodes *v.* Crutchfield, 7 Lea (Tenn.) 518; Baker *v.* Huddleston, 3 Baxt. (Tenn.) 1.

Vermont.— Saville *v.* Welch, 58 Vt. 683, 5 Atl. 491; Kidney *v.* Persons, 41 Vt. 386, 98 Am. Dec. 595; Drury *v.* Douglas, 35 Vt. 474; Elwell *v.* Martin, 32 Vt. 217; Phelps *v.* Conant, 30 Vt. 277; Scott *v.* Lance, 21 Vt. 507; Wier *v.* Church, N. Chipm. (Vt.) 95.

Virginia.— Lawson *v.* Lawson, 16 Gratt. (Va.) 230, 80 Am. Dec. 702.

West Virginia.— Robinson *v.* Welty, 40 W. Va. 385, 22 S. E. 73; Maloney *v.* Barr, 27 W. Va. 381; McDonald *v.* Peacemaker, 5 W. Va. 439.

Wisconsin.— Western Assur. Co. *v.* Towle, 65 Wis. 247, 26 N. W. 104; Graham *v.* Chicago, etc., R. Co., 53 Wis. 473, 10 N. W. 609; Smith *v.* Schulenberg, 34 Wis. 41; Norden *v.* Jones, 33 Wis. 600, 14 Am. Rep. 782; Elliott *v.* Jackson, 3 Wis. 649; Mann *v.* Stowell, 3 Pinn. (Wis.) 220, 3 Chandl. (Wis.) 243.

United States.— Phelps *v.* Church of Our Lady, 99 Fed. 683, 40 C. C. A. 72; Steam Stone Cutter Co. *v.* Sheldons, 21 Blatchf. (U. S.) 260, 15 Fed. 608; Gibson *v.* Stevens, 3 McLean (U. S.) 551, 10 Fed. Cas. No. 5,401; Collins *v.* Johnson, Hempst. (U. S.) 279, 6 Fed. Cas. No. 3,015*a*; Janes *v.* Buzzard, Hempst. (U. S.) 240, 13 Fed. Cas. No. 7,206*a*.

England.— Young *v.* Marshall, 8 Bing. 43, 21 E. C. L. 437; Longchamp *v.* Kenny, Dougl. 132; Neate *v.* Harding, 6 Exch. 349, 20 L. J. Exch. 250; Foster *v.* Stewart, 3 M. & S. 191, 15 Rev. Rep. 459; Russell *v.* Bell, 10 M. & W. 340; Lightly *v.* Clouston, 1 Taunt. 112, 9 Rev. Rep. 713.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 42 *et seq.*

Justices of the peace.— In Pennsylvania a party may waive the tort and sue in assumpsit before a justice of the peace. Finney *v.* McMahon, 1 Yeates (Pa.) 248.

Larceny of goods.—Where money, or specific articles which have since been converted into money, have been stolen, the owner may maintain assumpsit against the thief. Shaw *v.* Coffin, 58 Me. 254, 4 Am. Rep. 290; Howe *v.* Clancey, 53 Me. 130 [*distinguishing* Foster *v.* Tucker, 3 Me. 458, 14 Am. Dec. 243]; Boston, etc., R. Corp. *v.* Dana, 1 Gray (Mass.) 83. But see Union Bank *v.* Baker, 8 Humphr. (Tenn.) 447.

As to suspension of civil action until institution of criminal proceedings see ACTIONS, I, J, 3, a, (III) [1 Cyc. 682].

[III, D, 3, a, (III), (A)]

right to bring an action of assumpsit in such case[68]— the other line upholds such right.[69]

(B) *As Against Infant.* An infant tortiously converting property cannot plead his infancy in bar when sued in assumpsit.[70]

b. Who May Waive. Only the owner of goods tortiously taken can waive the tort and sue in assumpsit.[71]

68. The denial of the right to waive the tort and sue in assumpsit where the wrong-doer has not sold or otherwise disposed of the property is placed upon the ground that the property remains in the hands of the wrong-doer, and, therefore, no money having been received by him in fact, an implied promise to pay over money had and received by defendant to plaintiff's use does not and cannot arise.

Alabama.— Smith *v.* Jernigan, 83 Ala. 256, 3 So. 515; Miller *v.* King, 67 Ala. 575; Fuller *v.* Duren, 36 Ala. 73, 76 Am. Dec. 318; Pike *v.* Bright, 29 Ala. 332; Crow *v.* Boyd, 17 Ala. 51.

Arkansas.— Chamblee *v.* McKenzie, 31 Ark. 155; Bowman *v.* Browning, 17 Ark. 599; Hutchinson *v.* Phillips, 11 Ark. 270.

Georgia.— Barlow *v.* Stalworth, 27 Ga. 517.

Illinois.— Johnston *v.* Salisbury, 61 Ill. 316; Creel *v.* Kirkham, 47 Ill. 344; Morrison *v.* Rogers, 3 Ill. 317.

Kentucky.— Daniel *v.* Daniel, 9 B. Mon. (Ky.) 195; Pritchard *v.* Ford, 1 J. J. Marsh. (Ky.) 543.

Maine.— Quimby *v.* Lowell, 89 Me. 547, 36 Atl. 902; Androscoggin Water Power Co. *v.* Metcalf, 65 Me. 40; Rogers *v.* Greenbush, 57 Me. 441; Balch *v.* Patten, 45 Me. 41, 71 Am. Dec. 526; Emerson *v.* McNamara, 41 Me. 565; Webster *v.* Drinkwater, 5 Me. 319, 17 Am. Dec. 238.

Massachusetts.— Berkshire Glass Co. *v.* Wolcott, 2 Allen (Mass.) 227, 79 Am. Dec. 781; Brown *v.* Holbrook, 4 Gray (Mass.) 102; Jones *v.* Hoar, 5 Pick. (Mass.) 285.

Michigan.— Grinnelle *v.* Anderson, 122 Mich. 533, 81 N. W. 329; St. John *v.* Antrim Iron Co., 122 Mich. 68, 80 N. W. 998; Williams *v.* Rogers, 110 Mich. 418, 68 N. W. 240; Tuttle *v.* Campbell, 74 Mich. 652, 42 N. W. 384, 16 Am. St. Rep. 652; McLaughlin *v.* Salley, 46 Mich. 219, 9 N. W. 256; Tolan *v.* Hodgeboom, 38 Mich. 624; Watson *v.* Stever, 25 Mich. 386.

New Hampshire.—Knapp *v.* Hobbs, 50 N. H. 476; Woodbury *v.* Woodbury, 47 N. H. 11, 90 Am. Dec. 555; Smith *v.* Smith, 43 N. H. 536; Mann *v.* Locke, 11 N. H. 246. *Compare* Hill *v.* Davis, 3 N. H. 384.

New York.— Cushman *v.* Jewell, 7 Hun (N. Y.) 525; McKnight *v.* Dunlop, 4 Barb. (N. Y.) 36, which cases, however, are *overruled* by the doctrine of Terry *v.* Munger, 121 N. Y. 161, 24 N. E. 272, 30 N. Y. St. 746, 18 Am. St. Rep. 803, 8 L. R. A. 216. See *infra*, note 69.

North Carolina.— Robertson *v.* Dunn, 87 N. C. 191.

Pennsylvania.— Weiler *v.* Kershner, 109 Pa. St. 219; Boyer *v.* Bullard, 102 Pa. St. 555; Bethlehem *v.* Perseverance Fire Co., 81 Pa. St. 445; Satterlee *v.* Melick, 76 Pa. St. 62; Willet *v.* Willet, 3 Watts (Pa.) 277; Stockham *v.* Stockham, 1 Wkly. Notes Cas. (Pa.) 84; Holmes *v.* Graham, 8 Pa. Dist. 476.

Vermont.— Winchell *v.* Noyes, 23 Vt. 303; Stearns *v.* Dillingham, 22 Vt. 624, 54 Am. Dec. 88.

69. If the wrong-doer has not sold the property, but still retains it, plaintiff has the right to waive the tort and proceed upon an implied contract of sale to the wrong-doer, and, in such event, he is not charged as for money had and received by him to the use of plaintiff. The contract implied is one to pay the value of the property as if it had been sold to the wrong-doer by the owner.

California.— Chittenden *v.* Pratt, 89 Cal. 178, 26 Pac. 626; Lehmann *v.* Schmidt, 87 Cal. 15, 25 Pac. 161; Roberts *v.* Evans, 43 Cal. 380.

Kansas.— Challiss *v.* Wylie, 35 Kan. 506, 11 Pac. 438; Tightmeyer *v.* Mongold, 20 Kan. 90.

Mississippi.—Evans *v.* Miller, 58 Miss. 120, 38 Am. Rep. 313; Isaacs *v.* Hermann, 49 Miss. 449.

Missouri.— Gordon *v.* Bruner, 49 Mo. 570.

Montana.— Galvin *v.* Mac Min., etc., Co., 14 Mont. 508, 37 Pac. 366.

New York.— Terry *v.* Munger, 121 N. Y. 161, 24 N. E. 272, 30 N. Y. St. 746, 18 Am. St. Rep. 803, 8 L. R. A. 216; Doherty *v.* Shields, 86 Hun (N. Y.) 303, 33 N. Y. Suppl. 497, 67 N. Y. St. 211. See *supra*, note 68.

North Dakota.— Braithwaite *v.* Akin, 3 N. D. 365, 56 N. W. 133.

Oregon.— Crown Cycle Co. *v.* Brown, (Oreg. 1901) 64 Pac. 451.

Tennessee.— McCombs *v.* Guild, 9 Lea (Tenn.) 81; Kirkman *v.* Philips, 7 Heisk. (Tenn.) 222; Alsbrook *v.* Hathaway, 3 Sneed (Tenn.) 454.

Wisconsin.— Norden *v.* Jones, 33 Wis. 600, 14 Am. Rep. 782 [*overruling*, by implication, Elliott *v.* Jackson, 3 Wis. 649; Kelty *v.* Owens, 3 Pinn. (Wis.) 372, 4 Chandl. (Wis.) 166].

70. Shaw *v.* Coffin, 58 Me. 254, 4 Am. Rep. 290; Elwell *v.* Martin, 32 Vt. 217; Bristow *v.* Eastman, 1 Esp. 172, Peake 223, 5 Rev. Rep. 728. *Contra*, Baker *v.* Huddleston, 3 Baxt. (Tenn.) 1.

See, generally, INFANTS.

71. Blackshear *v.* Burke, 74 Ala. 239, holding that a creditor of the owner cannot make the election.

Administrator.— If one sells the goods of an estate before administration granted, and receives the money therefor, an after-appointed administrator may waive the tort

c. Effect of Waiving. One who elects to waive a tort and sue in assumpsit is bound by his election.[72] He cannot subsequently sue for the tort,[73] even though judgment in the action of assumpsit has gone against him for want of jurisdiction.[74]

IV. DEFENSES.

Assumpsit, being an equitable action,[75] admits almost every defense to which defendant is entitled in equity and good conscience.[76]

V. CONDITIONS PRECEDENT.

A. Accrual of Cause of Action—1. In General. Assumpsit cannot be maintained on a demand not due at the commencement of the action.[77]

2. Recovery of Instalments. On a contract for the payment of money by instalments assumpsit will lie to recover each instalment as it falls due.[78]

and bring assumpsit. Upchurch *v.* Norsworthy, 15 Ala. 705.

Joint owner.—Where an officer wrongfully sells property, owned jointly by several, on an execution against one only, another of the owners may waive the tort and sue in assumpsit for the money received. Tankersley *v.* Childers, 23 Ala. 781; Smith *v.* Wiley, 22 Ala. 396, 58 Am. Dec. 262; Smyth *v.* Tankersley, 20 Ala. 212, 56 Am. Dec. 193. But see Irwin *v.* Brown, 35 Pa. St. 331, wherein it is held that where an agent of cotenants of land wrongfully sells timber, appropriating the proceeds to his own use, one of the cotenants cannot waive the tort and sue in assumpsit, it being necessary that all join.

A mortgagee of chattels cannot recover in assumpsit for their value if they are converted. Carpenter *v.* Graham, 46 Mich. 531, 9 N. W. 841; Carpenter *v.* Graham, 42 Mich. 191, 3 N. W. 974; Randall *v.* Higbee, 37 Mich. 40.

Where one partner gives away firm property without the assent of the other, the latter may recover its value in assumpsit in the name of the firm, the donee being considered as purchaser. Daniel *v.* Daniel, 9 B. Mon. (Ky.) 195; Dob *v.* Halsey, 16 Johns. (N. Y.) 34, 8 Am. Dec. 293.

72. Reynolds *v.* Fenton, 2 Phila. (Pa.) 298, 14 Leg. Int. (Pa.) 212.

See, generally, Election of Remedies.

As to what statute of limitations governs when tort is waived see *infra*, VII, B.

Joint tort-feasors.— One who has waived a conversion and recovered *ex contractu* against one tort-feasor cannot sue the others in tort. Terry *v.* Munger, 49 Hun (N. Y.) 560, 2 N. Y. Suppl. 348, 18 N. Y. St. 506. But see Huffman *v.* Hughlett, 11 Lea (Tenn.) 549, wherein it is held that the commencement of an action by the injured party against one of a number of joint tort-feasors, upon the implied promise arising from the conversion of personalty, will not be a waiving of his rights against the other tort-feasors. See also Cohn *v.* Goldman, 43 N. Y. Super. Ct. 436, wherein it is held that, though a tort is waived as to one joint conspirator by suing him in assumpsit, the others remain jointly and severally liable.

Waiving part of tort.— If a party wishes to waive a tort and avail himself of the equitable action of assumpsit, he must disaffirm the wrong *in toto*; he cannot sue in assumpsit for one part and in tort for another part. Bedier *v.* Fuller, 106 Mich. 342, 64 N. W. 331; Finlay *v.* Bryson, 84 Mo. 664.

Where one elects to sue in assumpsit, he will be held to the rules and principles which are applicable to that form of action. Hutchinson *v.* Phillips, 11 Ark. 270.

73. Ware *v.* Percival, 61 Me. 391, 14 Am. Rep. 565.

74. Nield *v.* Burton, 49 Mich. 53, 12 N. W. 906.

75. See *supra*, II, A.

76. Duncan *v.* Ware, 5 Stew. & P. (Ala.) 119, 24 Am. Dec. 772.

As to defenses admissible under the general issue see *infra*, IX, H, 1.

As to defenses which arise pending suit see *infra*, IX, H, 1, b.

Taking collateral security of a higher nature does not prevent an action of assumpsit from being brought on the original contract. Blackwell *v.* Irvin, 4 Dana (Ky.) 187; Willoughby *v.* Spear, 4 Bibb (Ky.) 397.

Where a plaintiff is entitled to two modes of redress, and elects to bring assumpsit, defendant may urge any defense peculiar to that action, although the same defense could not have been insisted on if the other action had been pursued. Meredith *v.* Richardson, 10 Ala. 828.

77. Rainey *v.* Long, 9 Ala. 754; Hamlin *v.* Race, 78 Ill. 422; Stout *v.* Hill, 45 Ill. 326; Nickerson *v.* Babcock, 29 Ill. 497; Kahn *v.* Cook, 22 Ill. App. 559; Collins *v.* Montemy, 3 Ill. App. 182; Child *v.* Eureka Powder Works, 44 N. H. 354; Gordon *v.* Kennedy, 2 Binn. (Pa.) 287.

As to accrual of cause of action, generally, see Actions, III, A, 1 [1 Cyc. 739].

As to showing premature commencement under the general issue see *infra*, IX, H, 1, a.

Where goods are sold on a definite credit, and suit is brought for the price before the credit expires, it will be premature. Daniels *v.* Osborn, 75 Ill. 615.

78. Hamlin *v.* Race, 78 Ill. 422; Tucker *v.* Randall, 2 Mass. 283; Fontaine *v.* Aresta, 2 McLean (U. S.) 127, 9 Fed. Cas. No. 4,905; 1 Chitty Pl. 116.

B. Demand. If the promise is made or the undertaking is implied in consequence of a precedent debt or duty, as in the case of the common counts, there is created *eo instante* the liability to pay or perform, and no demand before action brought is necessary.[79] But if, by the express or implied terms of the agreement, the obligation to pay or perform is to arise only upon request, the request becomes a part of the agreement and is a condition precedent to action.[80]

VI. JURISDICTION AND VENUE.

Reference should be had to the statutes of the particular state to determine the jurisdiction and venue of an action of assumpsit.[81]

VII. LIMITATIONS OF ACTION.

A. In General. Reference should also be had to the statutes of the particular state to determine the statute of limitations applicable to the action.[82]

If one contracts to do several things at several times, an action of assumpsit lies upon every default, for, although the agreement is entire, the performance is several and the contract is divisible in its nature. Knight *v.* New England Worsted Co., 2 Cush. (Mass.) 271; Badger *v.* Titcomb, 15 Pick. (Mass.) 409, 26 Am. Dec. 611.

79. *Connecticut.*—Lyon *v.* Annable, 4 Conn. 350.

Maine.—White *v.* Perley, 15 Me. 470.

New Hampshire.— Wiggin *v.* Wiggin, 43 N. H. 561, 80 Am. Dec. 192.

New York.— Locklin *v.* Moore, 57 N. Y. 360.

South Carolina.— West *v.* Murph, 3 Hill (S. C.) 284.

Vermont.— Mattocks *v.* Lyman, 16 Vt. 113.

Washington.— Chappell *v.* Woods, 9 Wash. 134, 37 Pac. 286.

England.— Birks *v.* Trippet, 2 Saund. 32.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 56.

As to demand before action, generally, see ACTIONS, I, N, 3 [1 Cyc. 694].

As to necessity of allegation of demand see *infra*, IX, A, 8.

Where a bailee converts the thing bailed to his own use, the contract of bailment ceases, and the bailor may maintain an action of assumpsit against him without any previous demand. Smith *v.* Stewart, 5 Ind. 220; Spencer *v.* Morgan, 5 Ind. 146. But see Babb *v.* Babb, 89 Ind. 281, holding that where A, without authority, sells B's property, and the latter ratifies the sale, he cannot maintain a suit for the money received without a previous demand therefor.

80. Bradley *v.* Farrington, 4 Ark. 532 (holding that, where no time or place of payment is fixed by the contract, a demand for payment is necessary before assumpsit can be brought on the contract); Byrd *v.* Cummins, 3 Ark. 592; Rose *v.* Foord, 96 Cal. 152, 30 Pac. 1114; West *v.* Murph, 3 Hill (S. C.) 284.

Certificates of deposit.— The holder of a certificate of deposit, payable on presentation, cannot maintain an action thereon until special demand has been made. Duncan *v.* Magette, 25 Tex. 245; Bellows Falls Bank *v.* Rutland County Bank, 40 Vt. 377. See also Downes *v.* Phœnix Bank, 6 Hill (N. Y.) 297.

On whom demand made.—Where two persons jointly undertake the custody of goods attached, and promise to deliver them to the sheriff on demand, a demand on one of the bailees is sufficient to maintain assumpsit against both. Griswold *v.* Plumb, 13 Mass. 298.

81. See the statutes of the several states; and also, generally, COURTS; VENUE.

In New Hampshire an action of assumpsit is properly brought in the county in which plaintiff is an inhabitant, if defendant is a non-resident, though real estate situated in another county is attached therein to preserve a mechanic's lien in favor of plaintiff for the material and labor sued for. Thayer *v.* Padelford, 69 N. H. 301, 41 Atl. 447.

Jurisdictional amount.— In *indebitatus assumpsit* jurisdiction generally depends upon the amount demanded as damages in the writ, that being regarded as the matter in demand within the meaning of the statute. But if it appear on the face of the declaration, either as originally drawn or as afterward amended, that plaintiff cannot recover all the damages laid in the *ad damnum* clause of his writ, then the matter in demand will be the highest sum which plaintiff, on the face of his declaration, appears to be entitled to recover. Grether *v.* Klock, 39 Conn. 133. But the combining of the claims in several counts will not give jurisdiction where the separate counts are not sufficient for the purpose. Davis *v.* Seymour, 59 Conn. 531, 21 Atl. 1004, 13 L. R. A. 210.

Wrong venue.— The fact that the venue in a declaration in assumpsit is laid in the wrong county will not support a motion in arrest of judgment. Gilbert *v.* Nantucket Bank, 5 Mass. 97.

82. See the statutes of the several states and the following cases:

Alabama.— Wooten *v.* Steele, 98 Ala. 252, 13 So. 563; Wilson *v.* Calvert, 18 Ala. 274.

California.— Weatherwax *v.* Cosumnes Valley Mill Co., 17 Cal. 344.

B. In Case of Waiving Tort. On waiving a tort and suing in assumpsit, the action is governed by the statute applicable to assumpsit.[83]

VIII. PARTIES.[84]

A. Plaintiffs — 1. In General. Assumpsit must be brought in the name of the party really interested, except in jurisdictions which hold that plaintiff must be privy to the express or implied promise declared upon. In these jurisdictions, assumpsit must be brought in the name of the party who is privy to the promise declared upon.[85] Non-joinder or misjoinder of parties plaintiff may, in some

Connecticut.—Ashley *v.* Hill, 6 Conn. 246; Robbins *v.* Harvey, 5 Conn. 335.

Georgia.— Harris *v.* Smith, 68 Ga. 461.

Illinois.— Ayers *v.* Richards, 12 Ill. 146; Bedell *v.* Janney, 9 Ill. 193; Tufts *v.* Rice, 1 Ill. 64.

Maryland.— Young *v.* Mackall, 3 Md. Ch. 398.

Michigan.— Christy *v.* Farlin, 49 Mich. 319, 13 N. W. 607.

Mississippi.— McCall *v.* Nave, 52 Miss. 494; Phillips *v.* Cage, 12 Sm. & M. (Miss.) 141.

New Hampshire.—Cole *v.* Putnam, 62 N. H. 616; Pickering *v.* Frink, 62 N. H. 342; Exeter Bank *v.* Sullivan, 6 N. H. 124; Shapley *v.* Felt, 3 N. H. 121; Cook *v.* Rice, 3 N. H. 60.

New York.— Brundage *v.* Port Chester, 102 N. Y. 494, 7 N. E. 398.

North Carolina.— Taylor *v.* Stedman, 35 N. C. 97; Armstrong *v.* Dalton, 15 N. C. 568.

Ohio.— Williams *v.* Williams, 5 Ohio 444; Haines *v.* Lytle, 1 Ohio Dec. (Reprint) 198, 4 West. L. J. 1.

Oregon.— Baldro *v.* Tolmie, 1 Oreg. 176.

Pennsylvania.— De Haven *v.* Bartholomew, 57 Pa. St. 126; Fox *v.* Cash, 11 Pa. St. 207; Harris *v.* Christian, 10 Pa. St. 233; Marseilles *v.* Kenton, 1 Phila. (Pa.) 181, 8 Leg. Int. (Pa.) 64.

South Carolina.— Wright *v.* Hamilton, 2 Bailey (S. C.) 51, 21 Am. Dec. 513; Williamson *v.* King, McMull. Eq. (S. C.) 41.

Vermont.— Cook *v.* Kibbee, 16 Vt. 434.

Virginia.—Butcher *v.* Hixton, 4 Leigh (Va.) 519.

United States.— Metropolitan R. Co. *v.* District of Columbia, 132 U. S. 1, 10 S. Ct. 19, 33 L. ed. 231.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 72.

See also, generally, Limitations of Actions.

Absence of one defendant.— In assumpsit against several defendants, unless regulated by statute, it is no answer to a plea of the statute of limitations that one of them, within six years from the accruing of the cause of action, departed from the state and remained absent until the commencement of the suit. All the persons liable upon a joint contract must depart from the state in order to arrest the running of the statute. Brown *v.* Delafield, 1 Den. (N. Y.) 445.

Waiving objections.— In assumpsit, when plaintiff files a replication to the plea of the statute of limitations, and defendant joins issue thereon, any irregularity in time of filing the plea is thereby waived. Stockett *v.* Sasscer, 8 Md. 374. So, though a plea of the statute of limitations is demurrable, being one of *non assumpsit infra sex annos*, instead of *non accrevit infra sex annos*, yet, issue having been joined thereon and the question litigated as though the defense on *non accrevit* were presented, the plea will be held sufficient to present that defense. Bullard *v.* Lopez, 7 N. M. 624, 41 Pac. 516.

83. Ivey *v.* Owens, 28 Ala. 641; Robertson *v.* Dunn, 87 N. C. 191; McCombs *v.* Guild, 9 Lea (Tenn.) 81.

Acknowledgment of conversion.—Although a conversion of property will warrant an implication of indebtedness and a promise to pay for which *indebitatus assumpsit* will lie, yet, if the conversion is beyond the time required for the statute to operate as a bar, a mere admission of the conversion within the period of the bar, but with no admission of indebtedness, will not take the case out of the statute. Ott *v.* Whitworth, 8 Humphr. (Tenn.) 494.

When statute begins to run.—Where the action is assumpsit for the value of goods converted by a tenant in common, or by a bailee, the cause of action is to be considered as having accrued when defendant ceased to hold consistently with, or in subordination to, plaintiff's title, and plaintiff became aware of it. Harral *v.* Wright, 57 Ga. 484. See also Ivey *v.* Owens, 28 Ala. 641.

84. See, generally, Parties.

85. Hill *v.* Nichols, 50 Ala. 336; Cummins *v.* James, 4 Ark. 616.

As to right of person not party to contract to maintain action see *supra*, II, C, 2.

Amendment as to parties.— The right to amend is regulated by statute. Generally, where the action is brought in the name of the wrong party, the writ may be amended at the trial term. Fitch *v.* Nute, 62 N. H. 700. So, where it appears at the trial that plaintiff, after his cause of action arose, assigned for the benefit of creditors who have not been paid in full, the court may, after verdict, allow the title to be amended by adding the name of plaintiff's assignor. Felty *v.* Deaven, 166 Pa. St. 640, 31 Atl. 333. And where, in an action brought by two, they fail to prove that they are jointly interested in the subject-matter of the action, the court may allow the name of the one who is not interested therein to be struck out. Winsor *v.* Lombard, 18 Pick. (Mass.) 57.

Claim of ownership.— Generally, assumpsit

jurisdictions, be shown under the general issue. In other jurisdictions the objection must be taken by plea in abatement.[86]

2. Corporations. A corporation may maintain an action of assumpsit the same as an individual.[87]

B. Defendants — 1. In General. Joint promisors should be jointly sued,[88] or a showing made that a promisor not joined is incapable of being sued.[89] Advantage can be taken of the non-joinder of defendants, however, only by a plea in abatement at common law or by answer or demurrer under the code. It cannot be shown under the general issue or the general denial.[90]

lies only on a claim of ownership. Randall *v.* Higbee, 37 Mich. 40. It has, accordingly, been held that a mortgagee of personal property cannot base the action upon his interest as such. Warner *v.* Beebe, 47 Mich. 435, 11 N. W. 258.

As to right of mortgagee to waive tort and sue in assumpsit see *supra*, III, D, 3, a, (III), (A).

Joining plaintiffs.— Two incorporated companies may unite to recover a sum of money deposited in a bank in their joint names. New-York, etc., Canal Co. *v.* Fulton Bank, 7 Wend. (N. Y.) 412. And several parties for whose benefit a contract is executed in the name of one of them may be joined in a general *indebitatus assumpsit* count to recover the money advanced by them under such contract to defendant. Cottingham *v.* Owens, 71 Ill. 397.

86. *Illinois.*— Henrichsen *v.* Mudd, 33 Ill. 476; Fairbanks *v.* Badger, 46 Ill. App. 644.

Maine.— Marshall *v.* Jones, 11 Me. 54, 25 Am. Dec. 260.

Maryland.— Hoffar *v.* Dement, 5 Gill (Md.) 132, 46 Am. Dec. 628; Mitchell *v.* Dall, 2 Harr. & G. (Md.) 159.

New Hampshire.—White *v.* Brooks, 43 N. H. 402, holding that the non-joinder of cotenants in an action of assumpsit for money received from a sale of their common property by a third person can only be taken advantage of by a plea in abatement.

United States.— Coffee *v.* Eastland, Brunn. Col. Cas. (U. S.) 216, 5 Fed. Cas. No. 2,945; Carne *v.* McLane, 1 Cranch C. C. (U. S.) 351, 5 Fed. Cas. No. 2,416, Cooke (Tenn.) 159.

See 5 Cent. Dig. tit. "Assumpsit, Action of." § 141.

87. C. J. L. Meyer, etc., Co. *v.* Black, 4 N. M. 190, 16 Pac. 620; Cincinnati M. E. Church *v.* Wood, 5 Ohio 283, Wright (Ohio) 12.

Subscriptions to stock.—A corporation may maintain assumpsit upon a contract to take its stock at a specific price. Beene *v.* Cahawba, etc., R. Co., 3 Ala. 660. See also Corporations.

88. Robertson *v.* Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227.

As to recovery against all promisors sued see *infra*, IX, H, 2, b, (II).

Attachment of seal by one defendant.— Where one of the parties signing an instrument, in form a promissory note, attached his seal, the obligation is several as to him, but joint and several as to the others, and they cannot all be joined in one action thereon under a statute authorizing the joining in one action of claims on contracts existing in favor of the same plaintiff and against the same defendant. Biery *v.* Haines, 5 Whart. (Pa.) 563.

Intervention.— To an action of assumpsit by a church against its treasurer, the general issue was pleaded, and a special plea that the money claimed belonged to another church. It was held that the latter church could not be admitted on its own petition as a party defendant unless defendant stated his willingness to pay the money to the one found entitled to recover, and prayed for the substitution. Russell *v.* Pottsville First Presb. Church, 65 Pa. St. 9.

Misjoining defendants.— Plaintiff gave A a sum of money for safe-keeping, and a sum to B for a similar purpose. A never parted with the custody or control of the deposit. It was held, in an action against both to recover the money, that there was no joint liability, and defendants were entitled to a verdict. O'Connor *v.* O'Connor, 86 Mich. 189, 48 N. W. 871.

Waiving tort.— Joint trespassers may be sued jointly in assumpsit when the tort is waived. Gilmore *v.* Wilbur, 12 Pick. (Mass.) 120, 22 Am. Dec. 410.

89. Harwood *v.* Roberts, 5 Me. 441. See also Edmondson *v.* Barrell, 2 Cranch C. C. (U. S.) 228, 8 Fed. Cas. No. 4,284.

Striking out one defendant.— In assumpsit against two defendants, plaintiff, after a verdict against him upon the ground that a joint promise was not proved, cannot amend by striking out one defendant. Griffin *v.* Simpson, 45 N. H. 18. See also Redington *v.* Farrar, 5 Me. 379. But see Robertson *v.* Thompson, 3 Ind. 190, holding that, where two persons residing in different counties are sued jointly in assumpsit, each having been served with process in his own county, the court may allow plaintiff to amend by striking out the name of one of such persons.

90. *Alabama.*—Strickland *v.* Burns, 14 Ala. 511.

Illinois.— Lurton *v.* Gilliam, 2 Ill. 577, 33 Am. Dec. 430.

New York.— Hosley *v.* Black, 28 N. Y. 438; Carter *v.* Hope, 10 Barb. (N. Y.) 180.

Vermont.— Hardy *v.* Cheney, 42 Vt. 417; Mellendy *v.* New England Protective Union, 36 Vt. 31; Ives *v.* Hulet, 12 Vt. 314; Nash *v.* Skinner, 12 Vt. 219, 36 Am. Dec. 338.

Virginia.— Wilson *v.* McCormick, 86 Va. 995, 11 S. E. 976.

2. Corporations. Assumpsit will lie on an implied promise against a corporation the same as against an individual.[91]

IX. Pleading.[92]

A. Declaration — 1. In General. Generally, it may be said that the declaration must contain all that it is necessary for plaintiff to prove under the plea of the general issue.[93] Surplusage will not vitiate a count containing sufficient averments.[94] One good count will sustain a declaration, as against a general demurrer.[95]

West Virginia.— Rutter *v.* Sullivan, 25 W. Va. 427.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 77.

The reason assigned for this rule is that evidence of a joint contract does not sustain the general issue, inasmuch as defendant in a joint undertaking is liable for the whole amount, although another person is also liable, and, as between themselves, is bound to contribute. Carter *v.* Hope, 10 Barb. (N. Y.) 180; Rice *v.* Shute, 5 Burr. 2611, 2 W. Bl. 695.

91. *California.*—Hunt *v.* San Francisco, 11 Cal. 250.

District of Columbia.— District of Columbia *v.* Washington, etc., R. Co., 1 Mackey (D. C.) 361.

Kentucky.— *Contra,* Frankfort Bank *v.* Anderson, 3 A. K. Marsh. (Ky.) 1.

Maine.— Cram *v.* Bangor House Proprietary, 12 Me. 354.

Maryland.— Cape Sable Co.'s Case, 3 Bland (Md.) 606.

Massachusetts.—Hayden *v.* Middlesex Turnpike Corp., 10 Mass. 397, 6 Am. Dec. 143.

Michigan.— Donovan *v.* Halsey Fire Engine Co., 58 Mich. 38, 24 N. W. 819.

New Jersey.— Trustees Antipœda Baptist Church *v.* Mulford, 8 N. J. L. 182.

New York.— Randall *v.* Van Vechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; Dunn *v.* Rector, etc., St. Andrews Church, 14 Johns. (N. Y.) 118; Danforth *v.* President, etc., Schoharie, etc., Turnpike Road, 12 Johns. (N. Y.) 227.

Pennsylvania.— Overseers of Poor *v.* Overseers of Poor, 3 Serg. & R. (Pa.) 117. *Compare* Breckbill *v.* Turnpike Co., 3 Dall. (Pa.) 496, 1 L. ed. 694.

South Carolina.—Garvey *v.* Colcock, 1 Nott & M. (S. C.) 231; Waring *v.* Catawba Co., 2 Bay (S. C.) 109.

Texas.— San Antonio *v.* Lewis, 9 Tex. 69.

Vermont.— Poultney *v.* Wells, 1 Aik. (Vt.) 180; Proctor *v.* Webber, 1 D. Chipm. (Vt.) 371.

United States.— Metropolis Bank *v.* Guttschlick, 14 Pet. (U. S.) 19, 10 L. ed. 335; Chesapeake, etc., Canal Co. *v.* Knapp, 9 Pet. (U. S.) 541, 9 L. ed. 222; Columbia Bank *v.* Patterson, 7 Cranch (U. S.) 299, 3 L. ed. 351; Davis *v.* Georgetown Bridge Co., 1 Cranch C. C. (U. S.) 147, 7 Fed. Cas. No. 3,637.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 67.

Municipal corporation.—Where there is a legal duty enjoined by competent authority upon a municipal corporation, assumpsit may be maintained to enforce its performance. Farwell *v.* Rockland City, 62 Me. 296. See also Brown *v.* Pomona Board of Education, 103 Cal. 531, 37 Pac. 503; Cicotte *v.* Wayne County, 44 Mich. 173, 6 N. W. 236; Endriss *v.* Chippewa County, 43 Mich. 317, 5 N. W. 632.

92. See, generally, Pleading.

93. Hill *v.* Nichols, 50 Ala. 336; Beardsley *v.* Southmayd, 14 N. J. L. 534.

The common counts, at common law, were of four descriptions: the *indebitatus* count, the *quantum meruit,* the *quantum valebat,* and the account stated. Nugent *v.* Teachout, 67 Mich. 571, 35 N. W. 254. The *quantum meruit* and *valebat* counts are, however, unnecessary. Brooke *v.* Quynn, 13 Md. 379; 1 Chitty Pl. 342.

Reference to unattached paper.— The declaration must contain all the allegations necessary to make out plaintiff's case without reference to a paper not attached. Bennett *v.* Davis, 62 Me. 544.

Where a party's right of action is statutory and depends on a special construction of facts defined in the statute, the declaration must aver the existence of such facts, and the common counts in assumpsit are insufficient. Chicago, etc., R. Co. *v.* Sturgis, 44 Mich. 538, 7 N. W. 213.

Form of declaration is set out in Smith *v.* Barker, 3 Day (Conn.) 312, 22 Fed. Cas. No. 13,013; Mahaffey *v.* Petty, 1 Ga. 261; Beardsley *v.* Southmayd, 14 N. J. L. 534; Burton *v.* Hansford, 10 W. Va. 470, 27 Am. Rep. 571.

94. Surplusage.— Montgomery Mfg. Co. *v.* Thomas, 20 Ala. 473; Mardis *v.* Shackleford, 4 Ala. 493; Williams *v.* Young, 3 Ala. 145; Lyon *v.* Alvord, 18 Conn. 66; Tucker *v.* Randall, 2 Mass. 283; Wyman *v.* Fowler, 3 McLean (U. S.) 467, 30 Fed. Cas. No. 18,114.

An allegation of duty is mere surplusage. If no facts from which the law will imply the duty are set out the allegation will not help; if such facts are set out it is unnecessary. Zjednoczenie *v.* Sadecki, 41 Ill. App. 329.

95. One good count.— Kennon *v.* McRae, 3 Stew. & P. (Ala.) 249; Gibson County *v.* Harrington, 1 Blackf. (Ind.) 260; Scott *v.* Leary, 34 Md. 389; Kennaird *v.* Jones, 9 Gratt. (Va.) 183.

One count may be abridged by reference to another. Whitwell *v.* Brigham, 19 Pick. (Mass.) 117.

Presumption on appeal.— If there is one good paragraph in the complaint, and the record does not show on which paragraph the judgment was based, the court will presume

Statutory requirements as to the manner of setting out the demand must be observed;[96] but a complaint, under the code, in the form of the common counts is good.[97]

2. ALLEGATION OF JURISDICTION. In declaring in a court of limited jurisdiction, the consideration as well as the promise must be averred to have been within the jurisdiction of the court.[98]

3. ALLEGATION OF PROMISE OR AGREEMENT — a. In General. The declaration must show in some form that a promise has been made or will be implied to have been made by defendant.[99] The authorities, however, differ as to the requisites of such allegation. According to one line of decisions it is not necessary to allege, in terms, a promise to pay, but it is sufficient to state the facts upon which the law raises an implied promise.[1] According to another line of decisions an express promise must be alleged.[2]

that it was based on the good one. Rochester *v.* Bowers, (Ind. App. 1899) 52 N. E. 814.

96. Statutory requirements.— Gould *v.* Gage, 118 Pa. St. 559, 12 Atl. 476; Rambo *v.* Nipple, 12 Pa. Co. Ct. 516; People's Mut. F. Ins. Co. *v.* Groff, 11 Pa. Co. Ct. 585, 1 Pa. Dist. 685.

Under the Pennsylvania act of May 25, 1887, section 3, providing that plaintiff's declaration in the action of assumpsit shall consist of a concise statement of plaintiff's demand, accompanied by copies of all notes, etc., a declaration may consist of a count on a note and a separate count on the original consideration for the note. Winters *v.* Mowrer, 1 Pa. Super. Ct. 47.

97. Common counts under the code.—Pleasant *v.* Samuels, 114 Cal. 34, 45 Pac. 998; Leeke *v.* Hancock, 76 Cal. 127, 17 Pac. 937; Buckingham *v.* Waters, 14 Cal. 146; De Witt *v.* Porter, 13 Cal. 171; Freeborn *v.* Glazer, 10 Cal. 337; Emslie *v.* Leavenworth, 20 Kan. 562; Clark *v.* Fensky, 3 Kan. 389; Meagher *v.* Morgan, 3 Kan. 372, 87 Am. Dec. 476; Allen *v.* Patterson, 7 N. Y. 476, Seld. Notes (N. Y.) 32, 57 Am. Dec. 542; Doherty *v.* Shields, 86 Hun (N. Y.) 303, 33 N. Y. Suppl. 497, 67 N. Y. St. 211; Cudlipp *v.* Whipple, 1 Abb. Pr. (N. Y.) 106.

98. Grover *v.* Gould, 20 Wend. (N. Y.) 227, 32 Am. Dec. 533.

Matter of which a certain court has no jurisdiction is, so far as that court is concerned, immaterial matter. If such matter is incorporated into one of the counts so that it cannot be separated from the matter of which the court has jurisdiction, it will vitiate the count; but, if it is entirely separate and distinct from the other counts, its being included in the declaration with them cannot have that effect. Lyon *v.* Alvord, 18 Conn. 66.

99. Some form of promise must be alleged. — *Alabama.*— Hill *v.* Nichols, 50 Ala. 336.

Georgia.— Dickey *v.* Leonard, 77 Ga. 151.

Illinois.— Massachusetts Mut. L. Ins. Co. *v.* Kellogg, 82 Ill. 614; Keyes *v.* Binkert, 48 Ill. App. 259.

Indiana.— Ferguson *v.* Rhoades, 7 Blackf. (Ind.) 262; Foerster *v.* Foerster, 10 Ind. App. 680, 38 N. E. 426.

Kentucky.— Lunderman *v.* Lunderman, 2 J. J. Marsh. (Ky.) 597; Bruner *v.* Stout, Hard. (Ky.) 225.

Maryland.— Swem *v.* Sharretts, 48 Md. 408.

Massachusetts.— Avery *v.* Tyringham, 3 Mass. 160, 3 Am. Dec. 105.

Michigan.— Hoard *v.* Little, 7 Mich. 468.

Missouri.— Wells *v.* Pacific R. Co., 35 Mo. 164; McNulty *v.* Collins, 7 Mo. 69; Muldrow *v.* Tappan, 6 Mo. 276.

Montana.— Conrad Nat. Bank *v.* Great Northern R. Co., 24 Mont. 178, 61 Pac. 1.

New Hampshire.— Favor *v.* Philbrick, 7 N. H. 326.

New York.— Candler *v.* Rossiter, 10 Wend. (N. Y.) 487.

South Carolina.— Wingo *v.* Brown, 12 Rich. (S. C.) 279; Brenan *v.* Shelton, 2 Bailey (S. C.) 152.

Utah.— Kilpatrick-Koch Dry-Goods Co. *v.* Box, 13 Utah 494, 45 Pac. 629.

Virginia.— Wooddy *v.* Flournoy, 6 Munf. (Va.) 506; Sexton *v.* Holmes, 3 Munf. (Va.) 566; Cooke *v.* Simms, 2 Call (Va.) 39; Winston *v.* Francisco, 2 Wash. (Va.) 187.

West Virginia.— Robinson *v.* Welty, 40 W. Va. 385, 22 S. E. 73.

United States.— Myers *v.* Davis, 6 Blatchf. (U. S.) 77, 17 Fed. Cas. No. 9,986.

England.— Lee *v.* Welch, 2 Str. 793.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 86.

As to sufficiency of promise or agreement see CONTRACTS.

1. Averment of facts raising implied promise.— *Alabama.*— Kelly *v.* Owen, Minor (Ala.) 252.

California.— Wilkins *v.* Stidger, 22 Cal. 231, 83 Am. Dec. 64.

Georgia.— Bell *v.* Hobbs, 2 Ga. Dec. 144.

Illinois.— North *v.* Kizer, 72 Ill. 172.

Indiana.— Watkins *v.* De Armond, 89 Ind. 553. *Compare* Foerster *v.* Foerster, 10 Ind. App. 680, 38 N. E. 426.

Maryland.— Swem *v.* Sharretts, 48 Md. 408.

New York.— Farron *v.* Sherwood, 17 N. Y. 227; Cropsey *v.* Sweeney, 27 Barb. (N. Y.) 310.

Tennessee.— See Woodson *v.* Moody, 4 Humphr. (Tenn.) 303.

2. Averment of express promise.—Wingo *v.* Brown, 12 Rich. (S. C.) 279; Wooddy *v.* Flournoy, 6 Munf. (Va.) 506; Sexton *v.* Holmes, 3 Munf. (Va.) 566; Morgantown Bank *v.* Foster, 35 W. Va. 357, 13 S. E. 996.

b. Special Agreement. In declaring on a special agreement, the agreement should be set out either in terms or in substance.[3] The agreement need not be repeated, however, in subsequent counts if it is sufficiently stated in the first count.[4]

c. Time of Promise. The time and place of making the promise should be alleged.[5] The precise time, however, is not material,[6] unless it constitutes a material part of the promise declared on, or where the date of a written contract is averred.[7]

4. ALLEGATION OF CONSIDERATION — a. In General. The declaration should contain a statement of facts showing a sufficient consideration to support the alleged promise.[8] In alleging the consideration for a special agreement, the whole of it

Cure of error.—A declaration omitting to aver that the promise was made to plaintiff may be good after verdict. Clark *v.* Reed, 12 Sm. & M. (Miss.) 554; McCredy *v.* James, 6 Whart. (Pa.) 547. See also Hoard *v.* Little, 7 Mich. 468; Mountford *v.* Horton, 5 B. & P. 62.

Executors and administrators.— In assumpsit by an administrator *de bonis non* the promise may be laid to have been made to the first administrator. Sullivan *v.* Holker, 15 Mass. 374. See also Vandersmith *v.* Washmein, 1 Harr. & G. (Md.) 4. A count against an executor must allege a promise by such executor. Kayser *v.* Disher, 9 Leigh (Va.) 357; Bishop *v.* Harrison, 2 Leigh (Va.) 532. See also EXECUTORS AND ADMINISTRATORS.

The word "promised" is not necessary. Any word of the same import is sufficient. Avery *v.* Tyringham, 3 Mass. 160, 3 Am. Dec. 105. See also Robinson *v.* Welty, 40 W. Va. 385, 22 S. E. 73.

3. Must be alleged in terms or in substance. — White *v.* Thomas, 39 Ill. 227; Keyes *v.* Dearborn, 12 N. H. 52; Rose *v.* Jackson, 40 Mich. 29; Allen *v.* Douglass, 2 Brev. (S. C.) 93.

See, generally, CONTRACTS.

As to correspondence of contract pleaded with contract proved see *infra*, IX, H, 2, b.

Cure of error.— Failure to set up a special contract in the declaration is cured where the contract was pleaded by defendant, and, after issue joined on the plea, a verdict was given for plaintiff. Stoll *v.* Ryan, 3 Brev. (S. C.) 238.

Matters collateral merely, or which only go to limit the future responsibility of defendants and do not enter into the consideration of the original undertaking, need not be stated. Brenan *v.* Shelton, 2 Bailey (S. C.) 152; Clarke *v.* Gray, 6 East 564, 4 Esp. 177, 2 Smith K. B. 622.

Where the contract is in the alternative and is not so set out in the declaration, the variance is material. Stone *v.* Knowlton, 3 Wend. (N. Y.) 374.

4. Repetition in subsequent counts is unnecessary. Griswold *v.* National Ins. Co., 3 Cow. (N. Y.) 96.

5. Hogan *v.* Alston, 9 Ala. 627; Atlantic Mut. F. Ins. Co. *v.* Sanders, 36 N. H. 252.

After pleading to the merits it is too late to take advantage of the omission to allege a day certain in the declaration on which the contract was made. Long *v.* Kinard, Harp. (S. C.) 47.

Mutual promises.— In assumpsit on mutual promises they must be laid in the declaration as concurrent. Bromley *v.* Goff, 75 Mich. 213, 42 N. W. 810; Livingston *v.* Rogers, 1 Cai. (N. Y.) 583; Kirby *v.* Cole, Cro. Eliz. 137.

6. Precise time immaterial.—*Alabama.*— Carlisle *v.* Davis, 9 Ala. 858; Hogan *v.* Alston, 9 Ala. 627; Lawson *v.* Townes, 2 Ala. 373.

California.—Biven *v.* Bostwick, 70 Cal. 639, 11 Pac. 790; Wetmore *v.* San Francisco, 44 Cal. 294.

Connecticut.—Sage *v.* Hawley, 16 Conn. 106, 41 Am. Dec. 128; Story *v.* Barrell, 2 Conn. 665.

Florida.— Dawkins *v.* Smithwick, 4 Fla. 158.

Illinois.— Frazer *v.* Smith, 60 Ill. 145.

Indiana.— See John *v.* Clayton, 1 Blackf. (Ind.) 54.

Massachusetts.— Perry *v.* Botsford, 5 Pick. (Mass.) 189.

New Hampshire.—Atlantic Mut. F. Ins. Co. *v.* Sanders, 36 N. H. 252.

Pennsylvania.— Stout *v.* Rassel, 2 Yeates (Pa.) 334.

England.— 1 Chitty Pl. 258; 1 Stephens N. P. 369.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 151.

Promise subsequent to writ.—A declaration alleging a promise made subsequent to the date of the writ, though bad on general demurrer (Waring *v.* Yates, 10 Johns. (N. Y.) 119; Crouse *v.* Miller, 10 Serg. & R. (Pa.) 155 [but see, *contra*, Carlisle *v.* Davis, 9 Ala. 858]), is good after verdict (Story *v.* Barrell, 2 Conn. 665; Bemis *v.* Faxon, 4 Mass. 263; Crouse *v.* Miller, 10 Serg. & R. (Pa.) 155; Sorrel *v.* Lewin, 1 Keb. 354).

7. Lawson *v.* Townes, 2 Ala. 373; Story *v.* Barrell, 2 Conn. 665; Bannister *v.* Weatherford, 7 B. Mon. (Ky.) 271; Drown *v.* Smith, 3 N. H. 299.

As to pleading special contract see *supra*, IX, A, 3, b.

8. *Alabama.*—Maury *v.* Olive, 2 Stew. (Ala.) 472.

Connecticut.— Lyon *v.* Alvord, 18 Conn. 66; Rossiter *v.* Marsh, 4 Conn. 196; Andrews *v.* Ives, 3 Conn. 368; Huntington *v.* Todd, 3 Day (Conn.) 465.

Illinois.— Connolly *v.* Cottle, 1 Ill. 364.

should be correctly and explicitly stated[9]— an allegation of consideration in addition to the true one creates a fatal variance.[10]

b. Past Consideration. In a declaration upon a promise on a consideration which is past, it is necessary to allege that the act performed or sum paid was performed or paid at the request of defendant,[11] unless where a beneficial consideration and a request are, necessarily, implied from the moral obligation under which defendant was placed.[12]

Indiana.—Johnson *v.* Clark, 5 Blackf. (Ind.) 564.

Iowa.— Decker *v.* Birhap, Morr. (Iowa) 62.

Kentucky.— Lunderman *v.* Lunderman, 2 J. J. Marsh. (Ky.) 597; Wickliffe *v.* Hill, 4 Bibb (Ky.) 269; Stephens *v.* Crostwait, 3 Bibb (Ky.) 222; Beauchamp *v.* Bosworth, 3 Bibb (Ky.) 115; Voorhies *v.* Benham, 2 Bibb (Ky.) 572; Duncan *v.* Littell, 2 Bibb (Ky.) 424; Bruner *v.* Stout, Hard. (Ky.) 225.

Maryland.— Wright *v.* Gilbert, 51 Md. 146; Chandler *v.* State, 5 Harr. & J. (Md.) 284.

Massachusetts.— Murdock *v.* Caldwell, 8 Allen (Mass.) 309; Hemmenway *v.* Hickes, 4 Pick. (Mass.) 497.

Michigan.— It is not essential that a declaration upon the common counts should set forth what the consideration consisted of, this being matter of evidence. Crane *v.* Grassman, 27 Mich. 443.

New Hampshire.— Benden *v.* Manning, 2 N. H. 289.

New York.— Wheelwright *v.* Moore, 1 Hall (N. Y.) 201; Bailey *v.* Freeman, 4 Johns. (N. Y.) 280; Lansing *v.* McKillip, 3 Cai. (N. Y.) 286.

Pennsylvania.— Whitall *v.* Morse, 5 Serg. & R. (Pa.) 358.

South Carolina.— Brenan *v.* Shelton, 2 Bailey (S. C.) 152; Douglass *v.* Davie, 2 McCord (S. C.) 218.

Tennessee.— Brown *v.* Parks, 8 Humphr. (Tenn.) 294.

Utah.— Felt *v.* Judd, 3 Utah 414, 4 Pac. 243.

Vermont.— People's Bank *v.* Adams, 43 Vt. 195; Harding *v.* Cragie, 8 Vt. 501.

Virginia.— Southern R. Co. *v.* Willcox, 98 Va. 222, 35 S. E. 355; Jackson *v.* Jackson, 10 Leigh (Va.) 467; Moseley *v.* Jones, 5 Munf. (Va.) 23; Beverley *v.* Holmes, 4 Munf. (Va.) 95; Hall *v.* Smith, 3 Munf. (Va.) 550.

West Virginia.— Morgantown Bank *v.* Foster, 35 W. Va. 357, 13 S. E. 996.

England.— Eastwood *v.* Kenyon, 11 A. & E. 438, 4 Jur. 1081, 9 L. J. Q. B. 409, 3 P. & D. 276, 39 E. C. L. 245; Clarke *v.* Gray, 6 East 564, 4 Esp. 177, 2 Smith K. B. 622.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 88.

As to correspondence of consideration alleged with consideration proved see *infra*, IX, H, 2, c.

As to sufficiency of consideration to support promise see CONTRACTS.

Aided by verdict.—A statement of a consideration in a declaration so defective as to be demurrable will, nevertheless, be held good after verdict if the consideration referred to can possibly be valid. Dickinson *v.* Dustin, 21 Mich. 561.

Reference to prior counts.— If prior counts set forth the consideration of the promise, and subsequent counts refer to them and are founded on the consideration alleged in them, they are sufficient. Dent *v.* Scott, 3 Harr. & J. (Md.) 28.

9. Allegation of consideration for special agreement.— *Connecticut.*— Hendrick *v.* Seely, 6 Conn. 176; Curley *v.* Dean, 4 Conn. 259, 10 Am. Dec. 140.

Michigan.— Bromley *v.* Goff, 75 Mich. 213, 42 N. W. 810.

New Hampshire.— Smith *v.* Webster, 48 N. H. 142; Colburn *v.* Pomeroy, 44 N. H. 19; Favor *v.* Philbrick, 7 N. H. 326.

Pennsylvania.— Cunningham *v.* Shaw, 7 Pa. St. 401.

South Carolina.— Brenan *v.* Shelton, 2 Bailey (S. C.) 152; Brooks *v.* Lowrie, 1 Nott & M. (S. C.) 342.

West Virginia.— Davisson *v.* Ford, 23 W. Va. 617.

Consideration moving from plaintiff.— The consideration of the promise to plaintiff must be alleged to have moved from him. Salmon *v.* Brown, 6 Blackf. (Ind.) 347.

Payment of part of consideration.— In declaring for the breach of a contract, it is not necessary to set forth the payment of a part of the consideration admitted by the contract to have been received. Dox *v.* Dey, 3 Wend. (N. Y.) 356.

10. Stone *v.* Knowlton, 3 Wend. (N. Y.) 374.

11. Payment or performance at request must be alleged.— *Maine.*—Jewett *v.* Somerset County, 1 Me. 125.

New Hampshire.— Johnson *v.* Greenough, 33 N. H. 396; Allen *v.* Woodward, 22 N. H. 544.

New York.— Ingraham *v.* Gilbert, 20 Barb. (N. Y.) 151; Hicks *v.* Burhans, 10 Johns. (N. Y.) 243; Comstock *v.* Smith, 7 Johns. (N. Y.) 87; Livingston *v.* Rogers, 1 Cai. (N. Y.) 583.

Pennsylvania.— Stoever *v.* Stoever, 9 Serg. & R. (Pa.) 434; Whitall *v.* Morse, 5 Serg. & R. (Pa.) 358.

England.— Hayes *v.* Warren, 2 Str. 933; Child *v.* Morley, 8 T. R. 610.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 89.

As to sufficiency of past consideration to support promise see CONTRACTS.

Aided by verdict.— Laying a consideration executed without previous request is bad on demurrer, but is cured by verdict. Stoever *v.* Stoever, 9 Serg. & R. (Pa.) 434.

12. Comstock *v.* Smith, 7 Johns. (N. Y.) 87; Livingston *v.* Rogers, 1 Cai. (N. Y.) 583.

5. Allegation of Breach. It is a further essential to a declaration that a breach of the assumpsit be assigned.[13] If one breach is well assigned but others are not, defendant may, under the plea of *non assumpsit*, object on the trial against receiving evidence or assessing damages on the defective breaches.[14]

6. Allegation of Indebtedness. A declaration on the common counts must also allege an indebtedness to plaintiff,[15] together with the facts out of which the indebtedness arises.[16] In declaring, however, on a contract which has been performed and which has resulted in a simple obligation to pay money, it is sufficient to set out the indebtedness without specially stating the contract from which it arises.[17]

7. Allegation of Performance by Plaintiff. Mutual promises, to be performed at the same time, are not mutual conditions, and the party suing need not aver performance on his part;[18] but, if the consideration of the contract is execu-

13. *Alabama.*— Hill *v.* Nichols, 50 Ala. 336; Kelly *v.* Owen, Minor (Ala.) 252.

Connecticut.— Canfield *v.* Merrick, 11 Conn. 425.

Kentucky.—Adams *v.* Chaffin, Ky. Dec. 285.

Massachusetts.— See Murdock *v.* Caldwell, 8 Allen (Mass.) 309.

New Hampshire.— Benden *v.* Manning, 2 N. H. 289.

New York.— Pettibone *v.* Stevens, 6 Hill (N. Y.) 258.

South Carolina.— Brenan *v.* Shelton, 2 Bailey (S. C.) 152.

Vermont.— Farnsworth *v.* Nason, Brayt. (Vt.) 192.

United States.— Myers *v.* Davis, 6 Blatchf. (U. S.) 77, 17 Fed. Cas. No. 9,986.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 90.

Aided by verdict.— The omission to allege specially the breach of the agreement, in a declaration in a suit on a special agreement, is cured by verdict. Weigley *v.* Weir, 7 Serg. & R. (Pa.) 309. And any defect or inaccuracy in assigning the breach is aided by verdict. Thomas *v.* Roosa, 7 Johns. (N. Y.) 461.

Collateral undertaking.—A declaration alleging a contract by defendant to become security for another is defective if it fails to allege non-payment by the principal debtor. Fay *v.* Hall, 25 Ala. 704.

Manner of alleging breach.— The allegation of the breach should be assigned in the words of the contract. Withers *v.* Knox, 4 Ala. 138. If there are several counts defendant should be charged with having failed to pay the several sums. Ellis *v.* Turner, 5 Munf. (Va.) 196. But several breaches of the same contract may be assigned in one count. Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

Sufficiency of allegation.— It is sufficient to allege that defendant "has not paid said sum," without adding that he has not paid any part of it. Judson *v.* Eslava, Minor (Ala.) 2.

14. Pettibone *v.* Stevens, 6 Hill (N. Y.) 258.

15. Brickey *v.* Irwin, 122 Ind. 51, 23 N. E. 694; Palmer *v.* Smedley, 28 Barb. (N. Y.) 468. See also Wilson *v.* Sutton, 25 Pa. Co. Ct. 29.

Sufficiency of allegation.—An averment that defendant received a large sum of money as treasurer for plaintiffs, and that, "though he has been often requested so to do, has failed and refused to account for and pay over said money" to plaintiffs, is a sufficient allegation that defendant is indebted to plaintiffs and that the debt is unpaid. Smythe *v.* Scott, 124 Ind. 183, 24 N. E. 685.

The time of the accruing of the indebtedness laid in the common counts is immaterial, provided it is of a day prior to the commencement of the suit. Wetmore *v.* San Francisco, 44 Cal. 294; Dollfus *v.* Frosch, 1 Den. (N. Y.) 367.

16. Allegation of facts.— Brooks *v.* Holland, 21 Conn. 388; Bradley *v.* Davenport, 6 Conn. 1; Brown *v.* Webber, 6 Cush. (Mass.) 560; Hibbert *v.* Courthopes, Carth. 276. See also McLeod *v.* Powe, 12 Ala. 9, holding that it is no objection to a count that it states facts from which the conclusion of indebtedness arises, instead of stating the same conclusion in a common count.

The reason for this rule is that defendant will not otherwise know for what debt plaintiff brings his action, or what defense to make; and that a recovery in such action would not otherwise be a bar to a future action for the same debt, as it would not appear to be the same unless the cause of it were stated. Brooks *v.* Holland, 21 Conn. 388.

17. Baker *v.* Corey, 19 Pick. (Mass.) 496.

18. Performance need not be alleged.— Dey *v.* Dox, 9 Wend. (N. Y.) 129, 24 Am. Dec. 137; Close *v.* Miller, 10 Johns. (N. Y.) 90; Whitall *v.* Morse, 5 Serg. & R. (Pa.) 358; Nichols *v.* Raynbred, Hob. 121; Martindale *v.* Fisher, 1 Wils. C. P. 88.

Disaffirmance of contract.—Where an action of assumpsit is in affirmance of a contract, an offer of readiness to perform is material; but, where the action is in disaffirmance thereof and to recover back the price paid, and plaintiff has complied with the contract up to the time of electing to rescind, a tender or offer of the money which would have been due on completion is not essential. Crossgrove *v.* Himmelrich, 54 Pa. St. 203.

If plaintiff's agreement to perform a subsequent act is the consideration it must be stated, although it is unnecessary to aver performance. Brenan *v.* Shelton, 2 Bailey (S. C.) 152.

Part of consideration.—Where a promise

tory or its performance depends upon some act to be done or forborne by plaintiff, or on some other event, plaintiff must aver performance or show excuse for non-performance.[19]

8. Allegation of Demand or Request. If a demand is a condition precedent to action it must be specially alleged in the declaration. In such case the general averment of "Often requested" is not enough.[20] If, however, the promise is made or the undertaking is implied in consequence of a precedent debt or duty, as in the case of the common counts, the "Often requested" in a declaration is, generally, sufficient.[21]

9. Allegation of Tort, and Waiving Thereof. A declaration in assumpsit on waiving a tort need not allege the tort or the waiving thereof.[22] It is not, however, improper to allege the facts which constitute the tort.[23]

10. Joining of Counts[24]— a. In General. At common law the rule is that a count in assumpsit cannot be joined in the same action with a count in debt[25]

goes only to part of the consideration, and a breach thereof may be paid for in damages, it is an independent promise, and an action may be maintained for the breach of it, without averring performance or readiness to perform. Stavers *v.* Curling, 3 Bing. N. Cas. 355, 2 Hodges 237, 6 L. J. C. P. 41, 3 Scott 740, 32 E. C. L. 169.

19. Performance must be alleged.— *Connecticut.*— Russell *v.* Slade, 12 Conn. 455.

Florida.— Myrick *v.* Merritt, 22 Fla. 335.

Illinois.— Henderson *v.* Wheaton, 40 Ill. App. 538; Plumb *v.* Taylor, 27 Ill. App. 238; Independent Order Mut. Aid *v.* Paine, 17 Ill. App. 572.

Indiana.— Continental L. Ins. Co. *v.* Houser, 89 Ind. 258; Justice *v.* Vermillion County, 2 Blackf. (Ind.) 149.

Massachusetts.—Palmer *v.* Sawyer, 114 Mass. 1; Newcomb *v.* Brackett, 16 Mass. 161.

Minnesota.— Becker *v.* Sweetzer, 15 Minn. 427.

Missouri.— Helm *v.* Wilson, 4 Mo. 41, 28 Am. Dec. 336.

New York.—Lester *v.* Jewett, 11 N. Y. 453; Smith *v.* Brown, 17 Barb. (N. Y.) 431; Dey *v.* Dox, 9 Wend. (N. Y.) 129, 24 Am. Dec. 137.

Ohio.— Trott *v.* Sarchett, 10 Ohio St. 241.

Pennsylvania.— Morrow *v.* Waltz, 18 Pa. St. 118.

Rhode Island.— Woonsocket Union R. Co. *v.* Taft, 8 R. I. 411.

Texas.—Shuttuck *v.* Griffin, 44 Tex. 556.

West Virginia.—Kern *v.* Zeigler, 13 W. Va. 707.

United States.— Columbia Bank *v.* Hagner, 1 Pet. (U. S.) 455, 7 L. ed. 219; Darland *v.* Greenwood, 1 McCrary (U. S.) 337, 2 Fed. 660.

England.— Stephens *v.* De Medina, 4 Q. B. 422, 3 G. & D. 110, 12 L. J. Q. B. 120, 3 R. & Can. Cas. 454, 45 E. C. L. 422; Lamphugh *v.* Brathwayt, Hob. 147; Atkinson *v.* Smith, 15 L. J. Exch. 59, 14 M. & W. 695.

See, generally, Contracts; and 5 Cent. Dig. tit. "Assumpsit, Action of," § 92.

Aided by verdict.— A declaration defective in not alleging performance or an excuse for the non-performance of the condition which is the consideration of the promise is cured by verdict. Colt *v.* Root, 17 Mass. 229; Helm *v.* Wilson, 4 Mo. 41, 28 Am. Dec. 336; Bailey *v.* Clay, 4 Rand. (Va.) 346. *Contra,* Russell *v.* Slade, 12 Conn. 455.

20. Forrest *v.* Jones, 7 Ala. 493; Byrd *v.* Cummins, 3 Ark. 592; West *v.* Murph, 3 Hill (S. C.) 284; Comyns Dig. 365.

As to necessity of demand before action see *supra,* V, B.

Aided by verdict.—Where, from the nature of the agreement sued on, a special demand is necessary, but is not alleged in the declaration, such omission will be aided by verdict. Leffingwell *v.* White, 1 Johns. Cas. (N. Y.) 99, 1 Am. Dec. 97; Rodgers *v.* Love, 2 Humphr. (Tenn.) 416. *Contra,* West *v.* Murph, 3 Hill (S. C.) 284.

One averment of a request, and a refusal to pay, is sufficient for any number of counts. Rider *v.* Robbins, 13 Mass. 284.

21. Henderson *v.* Howard, 2 Ala. 342; Dyer *v.* Rich, 1 Metc. (Mass.) 180; Lent *v.* Padelford, 10 Mass. 230, 6 Am. Dec. 119; Thomas *v.* Roosa, 7 Johns. (N. Y.) 461.

22. Nelson *v.* Kilbride, 113 Mich. 637, 71 N. W. 1089 [*distinguishing* Watson *v.* Stever, 25 Mich. 386]; Aldine Mfg. Co. *v.* Barnard, 84 Mich. 632, 48 N. W. 280; McDonald *v.* McDonald, 67 Mich. 122, 34 N. W. 276; Doherty *v.* Shields, 86 Hun (N. Y.) 303, 33 N. Y. Suppl. 497, 67 N. Y. St. 211; Harpending *v.* Shoemaker, 37 Barb. (N. Y.) 270.

As to right to waive tort and sue in assumpsit see *supra,* III, D, 3.

23. Tregent *v.* Maybee, 54 Mich. 226, 19 N. W. 962.

24. As to amendment by addition of count see *infra,* IX, A, 11.

As to election between counts see *infra,* XI, A.

25. Assumpsit and debt.— Phelps *v.* Hurd, 31 Conn. 444; McGinnity *v.* Laguerenne, 10 Ill. 101; Cruikshank *v.* Brown, 10 Ill. 75; Canton Nat. Bldg. Assoc. *v.* Weber, 34 Md. 669; Brill *v.* Neele, 3 B. & Ad. 208, 5 E. C. L. 127.

See also Joinder and Splitting of Actions.

Striking out count.—A joining of debt and assumpsit not being allowed, a party will not, in event of such joining, upon a motion in ar-

nor with a count in tort.[26] It is also improper for plaintiff to join a claim in his private right with a claim in his capacity as executor.[27] In like manner, a count against defendant as executor cannot be joined with a count against him in his individual capacity.[28]

b. Common and Special Counts. A special count in assumpsit may be joined with the common counts.[29]

c. Omnibus Count. A declaration combining in one count all the common counts is good.[30]

rest being made, be allowed to amend by striking out the count in assumpsit. Phelps *v.* Hurd, 31 Conn. 444.

26. Wickliffe *v.* Davis, 2 J. J. Marsh. (Ky.) 69; Cobb *v.* Dows, 9 Barb. (N. Y.) 230; Spencer *v.* Pilcher, 8 Leigh (Va.) 565. But see Church *v.* Mumford, 11 Johns. (N. Y.) 479, which is a declaration containing several counts, in each of which the gravamen stated is a tortious breach of defendant's duty as an attorney, as well as of the implied promise arising from an employment of him. It is held that, as each count contains allegations sufficient to support it, either in tort or assumpsit, they are not incompatible, and may be joined in the same declaration.

Case and assumpsit.— Case sounding in tort cannot be joined with counts sounding in contract. Wheeler *v.* Wilson, 57 Vt. 157; Joy *v.* Hill, 36 Vt. 333.

Aided by verdict.— Under Mich. Comp. Laws (1871), § 6051, subd. 4, providing that, after verdict, no judgment shall be stayed because of any mispleading, a misjoining of tort and assumpsit in the same count is cured by verdict. Schafer *v.* Boyce, 41 Mich. 256, 2 N. W. 1.

27. Bulkley *v.* Andrews, 39 Conn. 523.

See also EXECUTORS AND ADMINISTRATORS.

But for property of the estate, sold by him as executor, he may recover also in his own right, when joined with a claim in his private right. Haskell *v.* Bowen, 44 Vt. 579; Aiken *v.* Bridgman, 37 Vt. 249.

28. Godbold *v.* Roberts, 20 Ala. 354; Kayser *v.* Disher, 9 Leigh (Va.) 357. But see Bishop *v.* Harrison, 2 Leigh (Va.) 532, holding that, in order to save the running of the statute of limitations, counts upon promises made by an executor may be joined with counts upon promises made by the deceased debtor himself.

Deceased promisor.—In an action of assumpsit against two defendants, a count upon a promise made by the two only may be joined with counts upon promises made by the two and a third person, deceased. Wheeler *v.* Thom, 2 N. H. 397.

29. *Alabama.*—Kirkpatrick *v.* Bethany, 1 Ala. 201.

Illinois.— French *v.* Hardin County Canning Co., 67 Ill. App. 269.

Michigan.— Carland *v.* Western Union Tel. Co., 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280; Young *v.* Taylor, 36 Mich. 25.

New Jersey.— Bruen *v.* Ogden, 18 N. J. L. 124.

Virginia.— Kennaird *v.* Jones, 9 Gratt. (Va.) 183.

West Virginia.—Maloney *v.* Barr, 27 W. Va. 381.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 94.

A count on a note and a count for goods sold and delivered may be joined in the same declaration. Bogardus *v.* Trial, 2 Ill. 63. So, a cause of action on a note and a cause of action for money paid may be joined. Drake *v.* Rogers, 32 Me. 524.

30. *California.*— *Contra,* Buckingham *v.* Waters, 14 Cal. 146.

Connecticut.— Main *v.* Preston First School Dist., 18 Conn. 214.

Maine.— Griffin *v.* Murdock, 88 Me. 254, 34 Atl. 30; Cape Elizabeth *v.* Lombard, 70 Me. 396.

Massachusetts.— Whitwell *v.* Brigham, 19 Pick. (Mass.) 117.

New Jersey.— Trenton City Bridge Co. *v.* Perdicaris, 29 N. J. L. 367; Beardsley *v.* Southmayd, 14 N. J. L. 534.

New York.— Nelson *v.* Swan, 13 Johns. (N. Y.) 483; Bailey *v.* Freeman, 4 Johns. (N. Y.) 280.

Virginia.—Hoppes *v.* Straw, 10 Leigh (Va.) 361.

England.— Rock *v.* Rock, Cro. Jac. 245, Yelv. 175; Webber *v.* Tivill, 2 Saund. 121*b*.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 94.

Originally, the practice in framing declarations in assumpsit was to make each demand to which the *indebitatus* count was applicable the subject of a separate *indebitatus* count. Subsequently, the mode was adopted of combining several of such demands in one such count and treating them all as forming the consideration of a single promise, and no objection appears to have been made to this course. In Rock *v.* Rock, Cro. Jac. 245, Yelv. 175, which was decided in the reign of James I, the declaration was of this description, excepting that it stated the aggregate amounts of the debts which constituted the consideration for the promise, but not the amount of each of them in particular. The only objection taken to such declaration was that the amount of each should have been shown. This objection was overruled. In Webber *v.* Tivill, 2 Saund. 121*b*, decided in the reign of Charles II, the declaration was like that in Rock *v.* Rock, Cro. Jac. 245, Yelv. 175. In fact, no objection appears to have been made to this declaration until 1809, when, in Bailey *v.* Freeman, 4 Johns. (N. Y.) 280, the objection was made, but overruled. Under the new rules of pleading adopted by the courts in England (Regula Generalis, (Trin. T. 1 Wm. IV), 7 Bing. 774, 20 E. C. L.

11. Amendment.[31] The declaration may be amended so as to increase the amount of damages claimed,[32] or by the addition of a count,[33] provided no new cause of action is thereby introduced.[34] An amendment changing the form of the action cannot be made, however,[35] in the absence of a statute permitting it.[36]

12. Aided by Verdict. All mere technical defects in a declaration, which might have been reached by demurrer, are cured by a verdict;[37] but a declaration which does not state a cause of action is not so cured.[38]

343), this form is approved and made absolute. Main *v.* Preston First School Dist., 18 Conn. 214.

Where but one indebtedness and one promise is stated it is considered but one count. Bowman *v.* Malcolm, 12 L. J. Exch. 397, 11 M. & W. 833.

31. As to amendment as to parties see *supra*, VIII, A, 1.

32. Increasing claim for damages.— Morris *v.* Agnew, 57 Ill. App. 229; Billingsley *v.* Dean, 11 Ind. 331; Geren *v.* Wright, 8 Sm. & M. (Miss.) 360; Tassey *v.* Church, 4 Watts & S. (Pa.) 141, 39 Am. Dec. 65.

A declaration, counting upon a several promise, may be amended by counts declaring upon a joint promise, and suggesting that the other joint promisors reside out of the state. Carter *v.* Hosford, 48 Vt. 433.

Annexing bill of particulars.—A writ containing the common counts, including a count on an account annexed, but without any account annexed, may be amended at the trial by annexing thereto plaintiff's bill of particulars previously filed in the case. Tarbell *v.* Dickinson, 3 Cush. (Mass.) 345.

Time of promise.—A declaration, laying the promise to have been made after the action was commenced, may be amended after verdict by altering the day upon which the promise was laid, if it appears from the record that the cause of action arose before the commencement of the suit. Bailey *v.* Musgrave, 2 Serg. & R. (Pa.) 219.

33. Adding count.—*Alabama.*— Moore *v.* Smith, 19 Ala. 774.

California.—Cox *v.* McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164.

Connecticut.—Bulkley *v.* Andrews, 39 Conn. 523; Church *v.* Syracuse Coal, etc., Co., 32 Conn. 372.

Maine.— Holmes *v.* Robinson Mfg. Co., 60 Me. 201; Drake *v.* Rogers, 32 Me. 524; Brewer *v.* East Machias, 27 Me. 489; Penobscot Boom Corp. *v.* Baker, 16 Me. 233.

Massachusetts.— Rich *v.* Jones, 9 Cush. (Mass.) 329; Smith *v.* Palmer, 6 Cush. (Mass.) 513; Swan *v.* Nesmith, 7 Pick. (Mass.) 220, 19 Am. Dec. 282; Ball *v.* Claflin, 5 Pick. (Mass.) 303, 16 Am. Dec. 407.

New Hampshire.—Bishop *v.* Silver Lake Min. Co., 62 N. H. 455; Cocheco Aqueduct Assoc. *v.* Boston, etc., R. Co., 62 N. H. 345; Libbey *v.* Pierce, 47 N. H. 309; Stevenson *v.* Mudgett, 10 N. H. 338, 34 Am. Dec. 155.

New Jersey.— Willis *v.* Fernald, 33 N. J. L. 206; Rogers *v.* Phinney, 13 N. J. L. 1.

New York.— Chilicothe Bank *v.* Dodge, 2 How. Pr. (N. Y.) 42.

Pennsylvania.— Cavene *v.* McMichael, 8 Serg. & R. (Pa.) 441.

Vermont.—Bachop *v.* Hill, 54 Vt. 507; Austin *v.* Burlington, 34 Vt. 506.

34. Must not introduce new cause of action. — Thompson *v.* Phelan, 22 N. H. 339; French *v.* Gerrish, 22 N. H. 97; Merrill *v.* Russell, 12 N. H. 74; Butterfield *v.* Harvell, 3 N. H. 201; Brodek *v.* Hirschfield, 57 Vt. 12.

New counts are not to be regarded as for a new cause of action, when plaintiff, in all the counts, attempts to assert rights and enforce claims growing out of the same transaction, act, agreement, or contract. Smith *v.* Palmer, 6 Cush. (Mass.) 513.

35. Changing form of action.— Knight *v.* Trim, 89 Me. 469, 36 Atl. 912 (assumpsit to debt); Flanders *v.* Cobb, 88 Me. 488, 34 Atl. 277, 51 Am. St. Rep. 410 (assumpsit to tort); McKay *v.* Darling, 65 Vt. 639, 27 Atl. 324 (assumpsit to covenant).

36. Permitted by statute.—*Alabama.*— Knapp *v.* Kingsbury, 51 Ala. 563.

Connecticut.— See North *v.* Nichols, 39 Conn. 355.

Maryland.— Baltimore F. Ins. Co. *v.* McGowan, 16 Md. 47.

New Hampshire.— Stebbins *v.* Lancashire Ins. Co., 59 N. H. 143 [*overruling* Brown *v.* Leavitt, 52 N. H. 619; Little *v.* Morgan, 31 N. H. 499].

New York.— Garlock *v.* Bellinger, 2 How. Pr. (N. Y.) 43.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 123.

37. Technical defects.—*Connecticut.*—Spencer *v.* Overton, 1 Day (Conn.) 183.

Kentucky.— Drake *v.* Semonin, 82 Ky. 291.

Michigan.— Hoard *v.* Little, 7 Mich. 468.

Missouri.— Helm *v.* Wilson, 4 Mo. 41, 28 Am. Dec. 336.

New Hampshire.— Haynes *v.* Brown, 36 N. H. 545.

Pennsylvania.— East Union Tp. *v.* Comrey, 100 Pa. St. 362; Shenk *v.* Mingle, 13 Serg. & R. (Pa.) 29; Stoever *v.* Stoever, 9 Serg. & R. (Pa.) 434.

Tennessee.— Rodgers *v.* Love, 2 Humphr. (Tenn.) 417.

England.— Lamphugh *v.* Brathwayt, Hob. 147.

As to aiding of particular allegations by verdict see *supra*, notes 2, 3, 6, 8, 11, 13, 19, 20, 26.

Want of similiter.— In assumpsit, where there are four counts, to each of which defendant pleads *non assumpsit*, and plaintiff joins issue with a *similiter* on three only, the error is cured by verdict. Smith *v.* Warren, 2 How. (Miss.) 895.

38. No cause of action stated.— *Connecticut.*— Bailey *v.* Bussing, 29 Conn. 1; Lyon *v.*

B. Bill of Particulars — 1. Necessity. In a declaration containing the common counts only, plaintiff need not file a bill of particulars, unless required so to do by statute, or by rule of court.[39] Defendant, however, has the right to demand such bill in case the declaration is general.[40]

2. Requisites and Sufficiency. A bill of particulars is sufficient if it gives the desired information of the nature of plaintiff's claim with such certainty that defendant cannot be misled or deceived.[41] Matters of evidence are not required to be stated in it.[42]

3. Time of Demanding. A demand for a bill of particulars should be made before pleading to the merits.[43]

4. Effect of Filing Bill. A bill of particulars is explanatory of the declaration and an amplification of it.[44] It gives notice of the claims which plaintiff pro-

Alvord, 18 Conn. 66; Russell *v.* Slade, 12 Conn. 455.

Kentucky.— Drake *v.* Semonin, 82 Ky. 291; Bruner *v.* Stout, Hard. (Ky.) 225.

Missouri.— McNulty *v.* Collins, 7 Mo. 69; Muldrow *v.* Tappan, 6 Mo. 276.

Pennsylvania.— Dewart *v.* Masser, 40 Pa. St. 302.

Virginia.— Chichester *v.* Vass, 1 Call (Va.) 83, 1 Am. Dec. 509; Winston *v.* Francisco, 2 Wash. (Va.) 187.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 129.

39. Farwell *v.* Murray, 104 Cal. 464, 38 Pac. 199; Freeborn *v.* Glazer, 10 Cal. 337; Moses *v.* Taylor, 6 Mackey (D. C.) 255; Berringer *v.* Cobb, 58 Mich. 557, 25 N. W. 491. See also Tierney *v.* Duffy, 59 Miss. 364, holding that a declaration, for board furnished defendant and for money had and received, which accurately specifies the two items, with the charge for each, is sufficient without a bill of particulars.

As to bills of particulars, generally, see Pleading.

Amendment of declaration.— Plaintiff is not required to file a new bill of particulars for each amendment made to his declaration. Robinson *v.* Dibble, 17 Fla. 457.

40. Right to demand.— *California.*—Farwell *v.* Murray, 104 Cal. 464, 38 Pac. 199; Freeborn *v.* Glazer, 10 Cal. 337.

Connecticut.—Dean *v.* Mann, 28 Conn. 352; Sage *v.* Hawley, 16 Conn. 106, 41 Am. Dec. 128.

Delaware.— Stevens *v.* Green Hill Cemetery Co., 5 Harr. (Del.) 393.

Indiana.— Hanna *v.* Pegg, 1 Blackf. (Ind.) 181.

Maryland.— Randall *v.* Glenn, 2 Gill (Md.) 430.

Michigan.— Hall *v.* Woodin, 35 Mich. 67.

New Hampshire.—Belknap County *v.* Clark, 58 N. H. 150.

New York.— Mercer *v.* Sayre, 3 Johns. (N. Y.) 248.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 97.

41. Wright *v.* Dickinson, 67 Mich. 580, 35 N. W. 164, 11 Am. St. Rep. 602; Freehling *v.* Ketchum, 39 Mich. 299; Hess *v.* Fox, 10 Wend. (N. Y.) 436; Brown *v.* Williams, 4 Wend. (N. Y.) 360; Moore *v.* Mauro, 4 Rand. (Va.) 488.

Amendment of bill.— On objection to a bill of particulars for want of precision, the court may require it to be amended before trial. Chesapeake, etc., Canal Co. *v.* Knapp, 9 Pet. (U. S.) 541, 9 L. ed. 222. See also George Campbell Co. *v.* Angus, 91 Va. 438, 22 S. E. 167, holding that, where a sufficient bill of particulars is not filed, the proper practice is to apply to the court to require plaintiff to file an amended and sufficient account of his claim; and, if he fail to do so, to move the court to exclude evidence of any matter not described sufficiently to give defendant notice of its nature and character. And see Grether *v.* Klock, 39 Conn. 133, holding that, where the amount of damages laid in the *ad damnum* clause was sufficient to confer jurisdiction, but the bill of particulars filed showed that the balance due plaintiffs was less than the jurisdictional amount, the court may permit plaintiff to amend his bill of particulars by striking out items of credit, leaving the amount sufficient to give the court jurisdiction, when the court is satisfied that it was so drawn by inadvertence or mistake of counsel.

Defects in a bill of particulars cannot be taken advantage of on a demurrer to the declaration (George Campbell Co. *v.* Angus, 91 Va. 438, 22 S. E. 167), nor on objection urged after pleading to the merits (Southern Bldg., etc., Assoc. *v.* Price, 88 Md. 155, 41 Atl. 53, 42 L. R. A. 206).

Form of bill of particulars is set out in Bishop *v.* Perkins, 19 Conn. 300; Wright *v.* Dickinson, 67 Mich. 580, 35 N. W. 164, 11 Am. St. Rep. 602; Nugent *v.* Teachout, 67 Mich. 571, 35 N. W. 254.

42. George Campbell Co. *v.* Angus, 91 Va. 438, 22 S. E. 167.

43. Before pleading to merits.— Randall *v.* Glenn, 2 Gill (Md.) 430; Long *v.* Kinard, Harp. (S. C.) 47.

On appeal.— Unless objection is made in the trial court to the absence of a bill of particulars, the defect cannot be availed of on appeal. Tebbetts *v.* Pickering, 5 Cush. (Mass.) 83, 51 Am. Dec. 48; Tierney *v.* Duffy, 59 Miss. 364; Louisiana Bank *v.* Ballard, 7 How. (Miss.) 371.

44. Dean *v.* Mann, 28 Conn. 352; Wright *v.* Dickinson, 67 Mich. 580, 35 N. W. 164, 11 Am. St. Rep. 602; Nugent *v.* Teachout, 67 Mich. 571, 35 N. W. 254; Cicotte *v.* Wayne County, 44 Mich. 173, 6 N. W. 236; Freehling *v.* Ketchum, 39 Mich. 299; Davis *v.* Freeman,

poses to litigate, and limits him to the items of the bill, unless leave of court is obtained to add to them.[45]

C. Demurrer. To a count assigning several breaches, defendant cannot demur to one breach and plead to the others. He must plead or demur to the whole count.[46]

D. Plea or Answer — 1. In General. The plea should be an answer to all that portion of plaintiff's declaration which it assumes to answer.[47] Accordingly, a plea which professes to answer the whole declaration, but which, in fact, answers only a special count, is bad.[48]

2. The General Issue. The plea of *non assumpsit* is the general issue in assumpsit.[49] Such plea admits plaintiff's capacity to sue,[50] and that the character

10 Mich. 188; Brown *v.* Williams, 4 Wend. (N. Y.) 360. See also Jordan *v.* Keen, 54 Me. 417.

Part of pleading.—A bill of particulars is never, in strictness, a component of the pleading. Cicotte *v.* Wayne County, 59 Mich. 509, 26 N. W. 686. *Compare* Moses *v.* Taylor, 6 Mackey (D. C.) 255, holding that a bill of particulars when filed becomes a part of the declaration. See also Wright *v.* Smith, 81 Va. 777.

The pleadings are not amended by the service of a bill of particulars, nor is the issue changed by amending the bill. A plea or demurrer to a bill is not permissible. Cicotte *v.* Wayne County, 44 Mich. 173, 6 N. W. 236. See also Butler *v.* Millett, 47 Me. 492.

45. Limits recovery.— *Connecticut.*— Zacarino *v.* Pallotti, 49 Conn. 36. *Compare* Bishop *v.* Perkins, 19 Conn. 300. See also Dean *v.* Mann, 28 Conn. 352.

District of Columbia.— Moses *v.* Taylor, 6 Mackey (D. C.) 255.

Indiana.— Harding *v.* Griffin, 7 Blackf. (Ind.) 462.

Maine.— Gooding *v.* Morgan, 37 Me. 419.

Maryland.— Scott *v.* Leary, 34 Md. 389. See also De Sobry *v.* De Laistre, 2 Harr. & J. (Md.) 191, 3 Am. Dec. 555.

Michigan.— Cicotte *v.* Wayne County, 44 Mich. 173, 6 N. W. 236; Bennett *v.* Smith, 40 Mich. 211.

England.— Wade *v.* Beasley, 4 Esp. 7.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 134.

Remittitur of excess.—Where the bill of particulars filed exceeds in amount the sum claimed in the declaration, the verdict will not be set aside on that account, if plaintiff will remit the excess. Butler *v.* Millett, 47 Me. 492.

46. Pettibone *v.* Stevens, 6 Hill (N. Y.) 258.

As to judgment on demurrer without trial of issues see *infra*, XIII, C.

Admissions by demurrer.—A demurrer to special counts will not admit facts stated only in the consolidated common counts. Rose *v.* Jackson, 40 Mich. 29.

A demurrer and a plea of the general issue are inconsistent, as the first admits what the latter denies. Cicotte *v.* Wayne County, 44 Mich. 173, 6 N. W. 236.

47. Boyd *v.* Weeks, 5 Hill (N. Y.) 393; Dibble *v.* Kempshall, 2 Hill (N. Y.) 124; Britton *v.* Bishop, 11 Vt. 70.

Denial of indebtedness.—An answer to a complaint which denies the indebtedness merely, without denying the facts which show the existence of the indebtedness, is but a denial of a conclusion of law, and raises no issue. Wells *v.* McPike, 21 Cal. 215. See also Higgins *v.* Germaine, 1 Mont. 230.

Denial of promise.—After an admission of the indebtedness charged in a complaint, a denial of the alleged promise to pay is immaterial. The indebtedness being admitted, the law implies a promise to pay, and proof of an express promise is not required on the part of plaintiff. Levinson *v.* Schwartz, 22 Cal. 229.

48. Answering only special count.—Werth *v.* Montgomery Land, etc., Co., 89 Ala. 373, 7 So. 198; Gebbie *v.* Mooney, 121 Ill. 255, 12 N. E. 472; Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240; Anonymous, 19 Wend. (N. Y.) 226.

A plea in bar to the whole action, when the matter set forth bars only a part, is bad. Farquhar *v.* Collins, 3 A. K. Marsh. (Ky.) 31.

49. Non assumpsit.— State *v.* Harmon, 15 W. Va. 115.

As to matters admissible under plea see *infra*, IX, H, 1.

As to special plea amounting to general issue see *infra*, IX, D, 4, a.

Non assumpsit to the whole declaration, and a tender to part, cannot be pleaded together. Chew *v.* Close, 9 Phila. (Pa.) 211, 31 Leg. Int. (Pa.) 204.

Omission of word "undertake."—A plea of the general issue that defendant did not "promise in manner or form," omitting the words "undertake or," is good. The words "undertake" and "promise" are equivalent, and the use of either of them constitutes as effectually a traverse of the declaration as would the use of both. Eastman *v.* Anthony, 93 Ill. 590; Sbufeldt *v.* Fidelity Sav. Bank, 93 Ill. 597. See also Tomlinson *v.* Hoyt, 1 Sm. & M. (Miss.) 515, holding that it is not necessary that the plea follow the usual form. It is sufficient if the substance be there.

A plea that defendant is not indebted is not a plea of the general issue when it proceeds to set forth specially certain facts as constituting the reason why he is not indebted. Dendy *v.* Gamble, 59 Ga. 434.

50. Admits capacity to sue.— Swift River, etc., Imp. Co. *v.* Brown, 77 Me. 40; Penobscot

in which he sues is such as is set out in the declaration,[51] but denies all other facts necessary to sustain the action.[52]

3. Nil Debet, Non Est Factum, or Not Guilty. Pleas of *nil debet*,[53] *non est factum*,[54] or not guilty[55] are not appropriate in an action of assumpsit.

4. Special Pleas — a. In General. Though a special plea which amounts merely to the general issue, or which sets up matter which may be given in evidence under the general issue, is bad,[56] defendant is at liberty to plead specially any matter which admits that, in fact, a contract was made as alleged in the

R. Co. *v.* Mayo, 60 Me. 306. See also Peck *v.* Thompson, 23 Miss. 367. But see Nabors *v.* Shippey, 15 Ala. 293, holding that, where an agent declares in the common counts on a promise made to him for the benefit of his principal, the plea of *non assumpsit* puts in issue the right of the agent to maintain the action in his own name.

Implied admissions by plea.— By pleading the general issue defendant impliedly admits the legal sufficiency of the declaration and the right of plaintiff to recover upon proof of the facts therein alleged. Wrought Iron Bridge Co. *v.* Highway Com'rs, 101 Ill. 518. See also Tillman *v.* Ailles, 5 Sm. & M. (Miss.) 373, 43 Am. Dec. 520, holding that, where a party is sued in assumpsit as indorser of a note and pleads the general issue, he thereby admits the character of indorser in which he is sued.

51. Admits character in which plaintiff sues. — *Alabama.*— Strickland *v.* Burns, 14 Ala. 511.

Connecticut.— Champlin *v.* Tilley, 3 Day (Conn.) 303, 5 Fed. Cas. No. 2,586.

Maryland.— Winchester *v.* Union Bank, 2 Gill & J. (Md.) 73, 19 Am. Dec. 253.

New York.— Best *v.* Strong, 2 Wend. (N. Y.) 319, 20 Am. Dec. 607.

Ohio.— Cincinnati M. E. Church *v.* Wood, 5 Ohio 283, Wright (Ohio) 12. *Compare* Lewis *v.* Kentucky Bank, 12 Ohio 132, 40 Am. Dec. 469.

52. Swift River, etc., Imp. Co. *v.* Brown, 77 Me. 40; Carroll *v.* Corn, 1 Mo. 161.

Matters put in issue by plea.— The plea of *non assumpsit* puts in issue the consideration as well as the promise and its breach. Causey *v.* Cooper, 41 Ga. 409; Pettibone *v.* Stevens, 6 Hill (N. Y.) 258; Young *v.* Rummell, 2 Hill (N. Y.) 478, 38 Am. Dec. 594; Beech *v.* White, 12 A. & E. 668, 10 L. J. Q. B. 4, 4 P. & D. 399, 40 E. C. L. 333. In some jurisdictions, if sworn to, such plea puts in issue the execution of the writing sued on. Gray *v.* Tunstall, Hempst. (U. S.) 558, 10 Fed. Cas. No. 5,730. *Compare* Burckhart *v.* Watkins, 4 Mo. 72.

Notice of special matter.—Where matter is proper as a defense under the general issue, a notice of special matter will not restrict defendant. If he fails to sustain his notice he may still take the general ground allowed by the issue. The notice may, in such case, be totally disregarded. Smith *v.* Gregory, 8 Cow. (N. Y.) 114.

Waiving plea in abatement.— A plea of the general issue, filed at a term of the court subsequent to the return term, waives a plea in abatement filed at that term. Alliston *v.* Lindsey, 12 Sm. & M. (Miss.) 656.

53. Nil debet.— District of Columbia *v.* Washington, etc., R. Co., 1 Mackey (D. C.) 361; Koch *v.* Merk, 48 Ill. App. 26; Condict *v.* Stevens, 1 T. B. Mon. (Ky.) 73; Crane Bros. Mfg. Co. *v.* Morse, 49 Wis. 368, 5 N. W. 815.

54. Non est factum.— Heaton *v.* Myers, 4 Colo. 59; Windsor *v.* Hallett, 97 Ill. 204; Lamb *v.* Holmes, 60 Ill. 497. But see Staab *v.* Jaramillo, 3 N. M. 33, 1 Pac. 170, holding that the pleas of *non est factum* and *non assumpsit* are not repugnant.

55. Not guilty.— Cunyus *v.* Guenther, 96 Ala. 564, 11 So. 649; Carter *v.* Graves, 9 Yerg. (Tenn.) 446; Gray *v.* Kemp, 88 Va. 201, 16 S. E. 225.

Cure by verdict.— The plea of not guilty is cured by verdict. Cavene *v.* McMichael, 8 Serg. & R. (Pa.) 441. See also The Ship Milwaukie *v.* Hale, 1 Dougl. (Mich.) 306.

56. *Illinois.*— Wadhams *v.* Swan, 109 Ill. 46.

Indiana.— Jones *v.* Blane, 5 Blackf. (Ind.) 28; Scribner *v.* Bullitt, 1 Blackf. (Ind.) 112.

New Jersey.— Little *v.* Bolles, 12 N. J. L. 171.

New York.— Hughes *v.* Wheeler, 8 Cow. (N. Y.) 77.

Pennsylvania.— Birnbaum *v.* U. S. Passenger Conductors' L. Ins. Co., 15 Wkly. Notes Cas. (Pa.) 518; Stotesbury *v.* Insurance Co., 9 Phila. (Pa.) 210, 31 Leg. Int. (Pa.) 204.

Tennessee.— Sublett *v.* McLin, 10 Humphr. (Tenn.) 181.

Vermont.— State University *v.* Baxter, 42 Vt. 99.

Virginia.— George Campbell Co. *v.* Angus, 91 Va. 438, 22 S. E. 167; Philadelphia F. Assoc. *v.* Hogwood, 82 Va. 342, 4 S. E. 617; Baltimore, etc., R. Co. *v.* Polly, 14 Gratt. (Va.) 447.

West Virginia.— Bennett *v.* Perkins, 47 W. Va. 425, 35 S. E. 8; Brown *v.* Point Pleasant, 36 W. Va. 290, 15 S. E. 209; Morgantown Bank *v.* Foster, 35 W. Va. 357, 13 S. E. 996; Van Winkle *v.* Blackford, 28 W. Va. 670; Moore *v.* Wetzel County, 18 W. Va. 630; Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555; Hale *v.* West Virginia Oil, etc., Co., 11 W. Va. 229; Merchants', etc., Bank *v.* Evans, 9 W. Va. 373.

United States.— Dibble *v.* Duncan, 2 McLean (U. S.) 553, 7 Fed. Cas. No. 3,880.

England.— Hayselden *v.* Staff, 5 A. & E. 153, 31 E. C. L. 562.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 110.

declaration, but shows that it was void or voidable for any cause,[57] such as coverture,[58] duress,[59] illegality or want of consideration,[60] infancy,[61] or insanity.[62] All matters in discharge of the action may be pleaded specially, such as accord and satisfaction,[63] foreign attachment,[64] a former recovery for the same cause of action,[65] payment,[66] performance,[67] or release.[68] Matters which cannot be shown under the general issue must be specially pleaded.[69]

57. In England, by virtue of 4 Wm. IV, all matters in defense, except a denial of the promise, are required to be pleaded specially. Dibble *v.* Duncan, 2 McLean (U. S.) 553, 7 Fed. Cas. No. 3,880; Hayselden *v.* Staff, 5 A. & E. 153, 31 E. C. L. 562.

58. Coverture.— Barr *v.* Perry, 3 Gill (Md.) 313; Sublett *v.* McLin, 10 Humphr. (Tenn.) 181. See also HUSBAND AND WIFE.

As to admissibility under plea of the general issue see *infra*, IX, H, 1, a.

59. Duress.— Sublett *v.* McLin, 10 Humphr. (Tenn.) 181. See also CONTRACTS.

60. Illegality or want of consideration.— Sublett *v.* McLin, 10 Humphr. (Tenn.) 181; Dibble *v.* Duncan, 2 McLean (U. S.) 553, 7 Fed. Cas. No. 3,880. See also CONTRACTS.

As to admissibility under plea of the general issue see *infra*, IX, H, 1, a.

Under a plea of total failure of consideration defendant cannot show a partial failure. Wadhams *v.* Swan, 109 Ill. 46.

61. Infancy.— Barr *v.* Perry, 3 Gill (Md.) 313; Sublett *v.* McLin, 10 Humphr. (Tenn.) 181; Dibble *v.* Duncan, 2 McLean (U. S.) 553, 7 Fed. Cas. No. 3,880. See also INFANTS.

As to admissibility under plea of the general issue see *infra*, IX, H, 1, a.

62. Insanity.— Mitchell *v.* Kingman, 5 Pick. (Mass.) 431; Sublett *v.* McLin, 10 Humphr. (Tenn.) 181. See also INSANE PERSONS.

As to admissibility under plea of the general issue see *infra*, IX, H, 1, a.

63. Accord and satisfaction.— Sublett *v.* McLin, 10 Humphr. (Tenn.) 181; Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555; Dibble *v.* Duncan, 2 McLean (U. S.) 553, 7 Fed. Cas. No. 3,880. See also ACCORD AND SATISFACTION, VIII, C [1 Cyc. 342].

As to admissibility under plea of the general issue see *infra*, IX, H, 1, a.

64. Foreign attachment.— Dibble *v.* Duncan, 2 McLean (U. S.) 553, 7 Fed. Cas. No. 3,880. See also GARNISHMENT.

As to admissibility under plea of the general issue see *infra*, IX, H, 1, a.

65. Former recovery.— Young *v.* Rummell, 2 Hill (N. Y.) 478, 38 Am. Dec. 594; New York Mut. L. Ins. Co. *v.* Harris, 97 U. S. 331, 24 L. ed. 959. See also JUDGMENTS.

As to admissibility under plea of the general issue see *infra*, IX, H, 1, a.

A plea by two defendants, sued jointly, of a former judgment against one of them on the same promise is a good plea in bar. Ward *v.* Johnson, 13 Mass. 148.

66. Payment.— *Illinois.*— Betts *v.* Francis, 1 Ill. 105.

Indiana.— After a general denial to an action, a plea of payment introduces new matter, not provable thereunder, and is, therefore, not demurrable as included therein. Ensey *v.* Cleveland, etc., R. Co., 10 Ind. 178.

Kentucky.— Wheatly *v.* Phelps, 3 Dana (Ky.) 302.

Maryland.— Barr *v.* Perry, 3 Gill (Md.) 313.

New Hampshire.— Bowman *v.* Noyes, 12 N. H. 302.

Oregon.— See Snodgrass *v.* Andross, 19 Oreg. 236, 23 Pac. 969.

Pennsylvania.— Uhler *v.* Sanderson, 38 Pa. St. 128. See also Stillwell *v.* Rickards, 152 Pa. St. 437, 31 Wkly. Notes Cas. (Pa.) 419, 25 Atl. 831, holding that a defendant who has pleaded *non assumpsit* may, at the trial, add the plea of payment.

Tennessee.— Sublett *v.* McLin, 10 Humphr. (Tenn.) 181.

West Virginia.— Douglass *v.* Central Land Co., 12 W. Va. 502, holding that the plea should conclude to the country.

United States.— Dibble *v.* Duncan, 2 McLean (U. S.) 553, 7 Fed. Cas. No. 3,880. See also PAYMENT.

As to admissibility under plea of the general issue see *infra*, IX, H, 1, a.

Part payment may be pleaded specially. Somerville *v.* Stewart, 48 N. J. L. 116, 3 Atl. 77; Britton *v.* Bishop, 11 Vt. 70.

Admissions by plea.—Although the plea of payment admits some damages, it does not admit the whole amount laid in the declaration. Haley *v.* Caller, Minor (Ala.) 63; New-York Dry Dock Co. *v.* McIntosh, 5 Hill (N. Y.) 290.

Sufficiency of plea.— Defendant pleaded that plaintiff had agreed to accept payment in a particular currency, but failed to aver a tender of payment in such currency. It was held, on demurrer, that the plea was bad. Guion *v.* Doherty, 43 Miss. 538.

Under a plea of payment, the evidence may be of payment in other things than money. Hamilton *v.* Moore, 4 Watts & S. (Pa.) 570. But evidence of a set-off or of matter in recoupment is not admissible. Hill *v.* Austin, 19 Ark. 230.

67. Performance.— Sublett *v.* McLin, 10 Humphr. (Tenn.) 181. See also CONTRACTS.

68. Release.— Barr *v.* Perry, 3 Gill (Md.) 313; Sublett *v.* McLin, 10 Humphr. (Tenn.) 181; Dibble *v.* Duncan, 2 McLean (U. S.) 553, 7 Fed. Cas. No. 3,880. See also RELEASE.

As to admissibility under plea of the general issue see *infra*, IX, H, 1, a.

69. As to matters which cannot be shown under the general issue see *infra*, IX, H, 1.

In Mississippi, where a special plea of set-off did not exist in the action of assumpsit, defendant pleaded only such plea. Plaintiff

b. Denial of Performance of Condition Precedent. In assumpsit on a special agreement, where the right of action depends upon a condition precedent, performance of which is alleged in the declaration, defendant may, instead of pleading the general issue, deny the alleged performance of the condition.[70]

5. Severance in Plea. Defendants sued on a joint promise should not sever in their pleas,[71] unless to set up a defense which goes to the personal discharge of one of them, such as infancy, bankruptcy, *ne unques executor*, and the like.[72] And if one defendant has matter of defense personal to himself, which matter is admissible under the general issue, he may avail himself of that defense even though he has joined with the other defendants in pleading the general issue.[73]

6. Amendment. Defendant may be permitted, in the discretion of the court, to alter or change his plea.[74]

E. Affidavit of Defense. An affidavit of defense, in jurisdictions where such an affidavit is required, must be direct and certain.[75] Judgment will not be rendered for plaintiff, however, because of the insufficiency of the affidavit, if the statement of plaintiff's claim is not in the concise form required by statute.[76]

took issue upon it, and a verdict was rendered thereon and judgment given accordingly. It was held that the mispleading was cured by the verdict. Henry *v.* Hoover, 6 Sm. & M. (Miss.) 417.

70. Dewees *v.* Manhattan Ins. Co., 34 N. J. L. 244.

71. Ward *v.* Johnson, 13 Mass. 148; Meagher *v.* Bachelder, 6 Mass. 444.

As to recovery against all joint promisors see *infra*, IX, H, 2, b, (II).

Default of one defendant.— If one of two defendants suffers a default, the other may plead alone any matter that is sufficient to bar the action. Shed *v.* Pierce, 17 Mass. 623.

If two be sued on a joint promise and one alone appears, the general issue should be that he and the other defendant did not promise, etc. Butnam *v.* Abbot, 2 Me. 361; Meagher *v.* Bachelder, 6 Mass. 444; Tappan *v.* Bruen, 5 Mass. 193.

72. Moore *v.* Knowles, 65 Me. 493; Cutts *v.* Gordon, 13 Me. 474, 29 Am. Dec. 520.

Practice on sustaining personal plea.—Where an action is brought against two, one of whom pleads in abatement and the other *non assumpsit*, if the former plea be sustained the suit should be abated as to one and retained for trial as to the other. Foster *v.* Collins, 5 Sm. & M. (Miss.) 259.

73. Peebles *v.* Rand, 43 N. H. 337.

74. Hough *v.* Tracy, 1 Root (Conn.) 476; Ripley *v.* Fitch, 1 Root (Conn.) 404; Cook *v.* Haggarty, 36 Pa. St. 67.

In Georgia, the general issue being considered filed in all cases which are answered at the first term, all substantial pleas can be added thereto by amendment. National Bank *v.* Southern Porcelain Mfg. Co., 59 Ga. 157.

Amendment directed by court.— Under a statute giving the court power to amend and perfect pleas, the court may strike out defective pleas and order a plea of *non assumpsit* to be substituted. Aldridge *v.* Grider, 13 Sm. & M. (Miss.) 281.

Payment of costs.— The declaration contained a special count on a note, and the common counts. A rule of court required all pleas to be filed at the first term, and provided that all cases in which it was not done should be regarded as standing on the statutory general issue, without notice. No plea was filed at the first term. Upon the trial at a later term, the note was filed as a bill of particulars under the common counts. It was held that the filing of the note under the common counts was not such an amendment of the declaration as allowed defendant to amend the plea without cost. Monson *v.* Beecher, 45 Conn. 299.

Withdrawal of plea.— Defendant may, in the discretion of the court, withdraw his plea of the general issue and rely on his special pleas. Leonard *v.* Patton, 106 Ill. 99. See also Jackson *v.* Winchester, 2 Yeates (Pa.) 529, 4 Dall. (Pa.) 205, 1 L. ed. 802, holding that defendant shall not withdraw his plea without leave of court or consent of the adverse party where he gains any advantage thereby.

75. Sufficient affidavits are set out in Smith *v.* Elder, 167 Pa. St. 487, 31 Atl. 735; Malone *v.* Philadelphia, 132 Pa. St. 209, 19 Atl. 54; Conrad *v.* Rodgers, 3 Wkly. Notes Cas. (Pa.) 157; Bronson *v.* Shepperson, 1 Wkly. Notes Cas. (Pa.) 625; Ellison *v.* Freiling, 1 Wkly. Notes Cas. (Pa.) 109.

Insufficient affidavits are set out in Baltimore Pub. Co. *v.* Hooper, 76 Md. 115, 24 Atl. 452; Adler *v.* Crook, 68 Md. 494, 13 Atl. 153; Connolly *v.* Practical Bldg., etc., Assoc., 6 Wkly. Notes Cas. (Pa.) 176; Lippincott *v.* Milling, 5 Wkly. Notes Cas. (Pa.) 38; Rezende *v.* Berques, 3 Wkly. Notes Cas. (Pa.) 43; Geiger *v.* Hunsicker, 2 Wkly. Notes Cas. (Pa.) 80; Peiper *v.* Hershman, 1 Wkly. Notes Cas. (Pa.) 103; Smith *v.* Thorne, 9 Kulp (Pa.) 195.

76. Raworth *v.* Orr, 9 Kulp (Pa.) 293.

In Pennsylvania the actions of assumpsit for which judgment may be asked for want of an affidavit of defense are limited to such as are founded on contract alone, and do not include one in which the cause of action is *ex delicto*, or of a mixed character of contract and tort. Corry *v.* Pennsylvania R. Co., 194 Pa. St. 516, 45 Atl. 341.

Time of filing.—Where defendant is sum-

F. Replication — 1. **Necessity.** The cause should not be tried without a replication to a good special plea.[77]

2. **Requisites and Sufficiency.** The replication must answer so much of the plea as it professes to answer.[78] If a conclusion to the country is proper, it must deny in express words the allegations of the plea.[79] It is bad if it contains a departure from the declaration,[80] or is double.[81]

G. Rejoinder. A rejoinder must answer material allegations of the replication by stating material facts.[82] It must not contain a departure from the plea,[83] nor be double.[84]

H. Pleading and Proof[85] — 1. **Matters Admissible Under General Issue** —

moned in account render, and appears, but, before issue is joined, the form of the action is changed to assumpsit by amendment, a copy of which is served on defendant's counsel, plaintiff is in the same position as if a summons in assumpsit had been originally issued in the case, and affidavit of defense should be filed within fifteen days after service of plaintiff's statement. Wright *v.* Hopkins, 3 Pa. Dist. 240.

77. Miles *v.* Rose, Hempst. (U. S.) 37, 17 Fed. Cas. No. 9,544*a*.

Admissions by replication.— Traversible matter in the plea that is not traversed in the replication is admitted. Capital City Mut. F. Ins. Co. *v.* Detwiler, 23 Ill. App. 656. Where defendant pleads *non assumpsit* within three years, and plaintiff replies a new promise in writing within that time, the replication admits that the original undertaking was not within three years, and the issue is whether defendant made the new promise. Taylor *v.* Spears, 6 Ark. 381, 44 Am. Dec. 519.

Plea of set-off.— Plaintiff may meet defendant's plea of set-off by a general replication that the subject-matter of the set-off is a partnership asset between them. Bennett *v.* Pulliam, 3 Ill. App. 185.

78. Satterlee *v.* Sterling, 8 Cow. (N. Y.) 233; Bradner *v.* Demick, 20 Johns. (N. Y.) 404.

Excuse for non-performance.—Where the defense is an excuse for not performing the promise which defendant has, in fact, made, however many the parts or facts of that excuse may be, the replication may be *de injuria* — that is, that defendant of his own wrong, and without the cause by him in his plea alleged, broke his promise. Iron Clad Dryer Co. *v.* Chicago Trust, etc., Bank, 50 Ill. App. 461; Isaac *v.* Farrar, 1 M. & W. 65.

Identification of plea.— If it is plain from the nature of the pleadings which plea the replication is intended to answer, it is certain enough without expressly pointing out the plea intended by its numerical order, or in any other way. Carey *v.* Hanchet, 1 Cow. (N. Y.) 154.

Plea of payment.— In assumpsit on a promise of defendant's intestate, a replication, to a plea of payment by defendant's intestate, that defendant did not pay is bad. Barickman *v.* Kuykendall, 6 Blackf. (Ind.) 21.

Form of replication is set out in Carey *v.* Hanchet, 1 Cow. (N. Y.) 154.

79. Austin *v.* Walker, 26 N. H. 456.

In Vermont, by statute, a replication denying all the allegations of the plea in the same words in which they are pleaded is good. Austin *v.* Chittenden, 33 Vt. 553.

80. **Departure.**—Allen *v.* Mayson, 3 Brev. (S. C.) 207, holding that a reply of fraud to a plea of the statute of limitations is a departure.

New promise after discharge in insolvency. — A replication of a new promise to a plea of discharge in insolvency is not a departure. Wait *v.* Morris, 6 Wend. (N. Y.) 394; Shippey *v.* Henderson, 14 Johns. (N. Y.) 178, 7 Am. Dec. 458. If, however, the new promise is conditional it must be alleged in the replication as conditional and not as an absolute promise. Wait *v.* Morris, 6 Wend. (N. Y.) 394.

Waiving departure.— Although a replication is a departure from the complaint, yet defendant cannot avail himself of such defect on error if he did not raise the question by demurrer or by motion, but went to trial upon the issues as made up. Ankeny *v.* Clark, 148 U. S. 345, 13 S. Ct. 617, 37 L. ed. 475.

81. **Double replication.**—Wadleigh *v.* Pillsbury, 14 N. H. 373, wherein defendant pleaded in abatement the pendency of a prior action, in which he was summoned as trustee of plaintiff, who was there made defendant. Plaintiff replied that he sued out his writ on the day before the trustee process was served, and also averred that the trustee process was not pending when defendant's plea was filed, and that he was then no longer liable on the trustee process. It was held, on demurrer, that the replication was double.

After a verdict finding both true, double replications constitute no ground of error. Richmond *v.* Patterson, 3 Ohio 368.

82. Satterlee *v.* Sterling, 8 Cow. (N. Y.) 233.

Admissions by rejoinder.—A traversible allegation in a replication that is not denied in the rejoinder must be taken as true. Hinchy *v.* Foster, 3 McCord (S. C.) 428.

A rejoinder averring a suit brought in the county court, and dismissal of the same, but which fails to allege that such court had jurisdiction of the subject-matter, is obnoxious to a demurrer. Herring *v.* Poritz, 6 Ill. App. 208.

83. **Departure from plea.**— Sterns *v.* Patterson, 14 Johns. (N. Y.) 132.

84. **Double rejoinder.**— Satterlee *v.* Sterling, 8 Cow. (N. Y.) 233.

85. As to sufficiency of proof see *infra*, X.

a. In General. The plea of *non assumpsit* is broad and comprehensive in its capacity.[86] Under it defendant is entitled to show almost every defense which tends to prove that no debt was due at the time when the action was commenced, whether such defense arises from an inherent defect in the original promise, or from a subsequent extinguishment of the liability after it was incurred.[87] Applying this rule, defendant may generally give in evidence, under the plea of *non assumpsit*, accord and satisfaction,[88] coverture,[89] drunkenness,[90] foreign attachment or garnishment,[91] a former recovery for the same cause of action,[92]

86. Cook *v.* Vimont, 6 T. B. Mon. (Ky.) 284, 17 Am. Dec. 157; Fisher *v.* Ball, 93 Pa. St. 390; Gaw *v.* Wolcott, 10 Pa. St. 43.

87. Showing that no debt was due.— *Alabama.*— Robinson *v.* Windham, 9 Port. (Ala.) 397; Matthews *v.* Turner, 2 Stew. & P. (Ala.) 239.

Connecticut.— Robbins *v.* Harvey, 5 Conn. 335.

Delaware.— Cleaden *v.* Webb, 4 Houst. (Del.) 473; Phleger *v.* Ivins, 5 Harr. (Del.) 118.

Illinois.— Wilson *v.* King, 83 Ill. 232; Mines *v.* Moore, 41 Ill. 273; American Cent. Ins. Co. *v.* Birds Bldg., etc., Assoc., 81 Ill. App. 258; Iron Clad Dryer Co. *v.* Chicago Trust, etc., Bank, 50 Ill. App. 461; Huff *v.* Wolfe, 48 Ill. App. 589; Western Assur. Co. *v.* Mason, 5 Ill. App. 141.

Kentucky.— Wheatly *v.* Phelps, 3 Dana (Ky.) 302; Smart *v.* Baugh, 3 J. J. Marsh. (Ky.) 363; Cook *v.* Vimont, 6 T. B. Mon. (Ky.) 284, 17 Am. Dec. 157; Jones *v.* Pryor, 1 Bibb (Ky.) 614.

Maryland.— Dunlop *v.* Funk, 3 Harr. & M. (Md.) 318.

Massachusetts.— Baylies *v.* Fettyplace, 7 Mass. 325.

Mississippi.— Alliston *v.* Lindsey, 12 Sm. & M. (Miss.) 656.

Missouri.— Haden *v.* Herndon, 9 Mo. 864; Carroll *v.* Corn, 1 Mo. 161.

New Jersey.— Emley *v.* Perrine, 58 N. J. L. 472, 33 Atl. 951; New Jersey Patent Tanning Co. *v.* Turner, 14 N. J. Eq. 326.

New York.— Niles *v.* Totman, 3 Barb. (N. Y.) 594; Boyd *v.* Weeks, 5 Hill (N. Y.) 393; Young *v.* Rummell, 2 Hill (N. Y.) 478, 38 Am. Dec. 594; Clark *v.* Yale, 12 Wend. (N. Y.) 470; Edson *v.* Weston, 7 Cow. (N. Y.) 278; Sill *v.* Rood, 15 Johns. (N. Y.) 230; Wilt *v.* Ogden, 13 Johns. (N. Y.) 56.

Pennsylvania.— Fisher *v.* Ball, 93 Pa. St. 390; Falconer *v.* Smith, 18 Pa. St. 130, 55 Am. Dec. 611; Beals *v.* See, 10 Pa. St. 56, 49 Am. Dec. 573; Hamilton *v.* Moore, 4 Watts & S. (Pa.) 570; Kennedy *v.* Ferris, 5 Serg. & R. (Pa.) 394; Heck *v.* Shener, 4 Serg. & R. (Pa.) 249, 8 Am. Dec. 700; Dawson *v.* Tibbs, 4 Yeates (Pa.) 349.

South Carolina.— Talbert *v.* Cason, 1 Brev. (S. C.) 298.

Tennessee.— Bank of Commerce *v.* Porter, 1 Baxt. (Tenn.) 447; Sublett *v.* McLin, 10 Humphr. (Tenn.) 181.

Vermont.— Blaisdell *v.* Davis, 72 Vt. 295, 48 Atl. 14.

Virginia.— Virginia F. & M. Ins. Co. *v.* Buck, 88 Va. 517, 13 S. E. 973.

West Virginia.— Morgantown Bank *v.* Foster, 35 W. Va. 357, 13 S. E. 996.

United States.— Craig *v.* Missouri, 4 Pet. (U. S.) 410, 7 L. ed. 903; Young *v.* Black, 7 Cranch (U. S.) 565, 3 L. ed. 440; Dawes *v.* Peebles, 6 Fed. 856.

England.— 2 Tidd Pr. 647.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 139.

88. Accord and satisfaction.— *Delaware.*— Cleaden *v.* Webb, 4 Houst. (Del.) 473.

Massachusetts.— Under an answer containing a general denial and alleging payment, proof of an accord and satisfaction is not competent. Grinnell *v.* Spink, 128 Mass. 25.

New York.— Young *v.* Rummell, 2 Hill (N. Y.) 478, 38 Am. Dec. 594; Clark *v.* Yale, 12 Wend. (N. Y.) 470; Hughes *v.* Wheeler, 8 Cow. (N. Y.) 77.

Ohio.— Sapp *v.* Laughead, 6 Ohio St. 174.

Pennsylvania.— Heck *v.* Shener, 4 Serg. & R. (Pa.) 249, 8 Am. Dec. 700.

Rhode Island.— Covell *v.* Carpenter, (R. I. 1902) 51 Atl. 425 [*citing* 1 Cyc. 340].

Tennessee.— Sublett *v.* McLin, 10 Humphr. (Tenn.) 181.

West Virginia.—Wellsburg First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

See also ACCORD AND SATISFACTION, VIII, B, 1 [1 Cyc. 341].

As to pleading accord and satisfaction specially see *supra*, IX, D, 4, a.

89. Coverture.— *Connecticut.*— *Compare* Monson *v.* Beecher, 45 Conn. 299.

Illinois.— Streeter *v.* Streeter, 43 Ill. 155.

Maine.— Fuller *v.* Bartlett, 41 Me. 241.

New Hampshire.—Peebles *v.* Rand, 43 N. H. 337.

New York.—Clark *v.* Yale, 12 Wend. (N. Y.) 470.

Pennsylvania.— Heck *v.* Shener, 4 Serg. & R. (Pa.) 249, 8 Am. Dec. 700.

Tennessee.— Sublett *v.* McLin, 10 Humphr. (Tenn.) 181.

See also HUSBAND AND WIFE.

As to pleading coverture specially see *supra*, IX, D, 4, a.

90. Drunkenness.— Peebles *v.* Rand, 43 N. H. 337. See also DRUNKARDS.

91. Foreign attachment.— Young *v.* Rummell, 2 Hill (N. Y.) 478, 38 Am. Dec. 594; Clark *v.* Yale, 12 Wend. (N. Y.) 470; Turbill's Case, 1 Saund. 67. See also GARNISHMENT.

As to pleading foreign attachment specially see *supra*, IX, D, 4, a.

92. Former recovery.—*Alabama.*— Gunn *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484.

Kentucky.— Arnold *v.* Paxton, 6 J. J.

fraud,[93] infancy,[94] insanity,[95] payment of the obligation sued on either in full or in part,[96] performance of the promise,[97] release,[98] usury in the contract,[99]

Marsh. (Ky.) 503; Cook *v.* Vimont, 6 T. B. Mon. (Ky.) 284, 17 Am. Dec. 157.

New York.— Niles *v.* Totman, 3 Barb. (N. Y.) 594; Young *v.* Rummell, 2 Hill (N. Y.) 478, 38 Am. Dec. 594.

Pennsylvania.— Carvill *v.* Garrigues, 5 Pa. St. 152.

United States.— New York Mut. L. Ins. Co. *v.* Harris, 97 U. S. 331, 24 L. ed. 959; Bartels *v.* Schell, 16 Fed. 341.

England.— Stafford *v.* Clark, 2 Bing. 377, 9 E. C. L. 623, 1 C. & P. 24, 403, 12 E. C. L. 27, 238, 3 L. J. C. P. O. S. 48, 9 Moore C. P. 724; Turbill's Case, 1 Saund. 67; Burrows *v.* Jemino, 2 Str. 733.

See also JUDGMENTS.

As to pleading former recovery specially see *supra*, IX, D, 4, a.

As to recovery pending suit see *infra*, IX, H, 1, b.

93. Fraud.— Thomas *v.* Grise, 1 Pennew. (Del.) 381, 41 Atl. 883; Strong *v.* Linington, 8 Ill. App. 436; Block *v.* Elliott, 1 Mo. 275; Talbert *v.* Cason, 1 Brev. (S. C.) 298. But see McCabe *v.* Caner, 68 Mich. 182, 35 N. W. 901, holding that, in assumpsit on notes, where defendant pleads the general issue, with notice that the notes were without consideration and made under a contract against public policy, he cannot introduce evidence of fraud in procuring the contract.

See also FRAUD.

94. Infancy.— *Kentucky.*— Brown *v.* Warner, 2 J. J. Marsh. (Ky.) 37; Cook *v.* Vimont, 6 T. B. Mon. (Ky.) 284, 17 Am. Dec. 157.

New Hampshire.—Peebles *v.* Rand, 43 N. H. 337.

New York.— Wailing *v.* Toll, 9 Johns. (N. Y.) 141; Hartness *v.* Thompson, 5 Johns. (N. Y.) 160.

Pennsylvania.— Heck *v.* Shener, 4 Serg. & R. (Pa.) 249, 8 Am. Dec. 700.

South Carolina.— Talbert *v.* Cason, 1 Brev. (S. C.) 298; Evans *v.* Terry, 1 Brev. (S. C.) 80.

Tennessee.— Sublett *v.* McLin, 10 Humphr. (Tenn.) 181.

United States.—Stansbury *v.* Marks, 4 Dall. (U. S.) 130, 1 L. ed. 771.

See also INFANTS.

As to pleading infancy specially see *supra*, IX, D, 4, a.

95. Insanity.— Mitchell *v.* Kingman, 5 Pick. (Mass.) 431; Peebles *v.* Rand, 43 N. H. 337; Sublett *v.* McLin, 10 Humphr. (Tenn.) 181. See also INSANE PERSONS.

As to pleading insanity specially see *supra*, IX, D, 4, a.

96. Payment.— *Alabama.*— McMillian *v.* Wallace, 3 Stew. (Ala.) 185.

California.—Mickle *v.* Heinlen, 92 Cal. 596, 28 Pac. 784; Wetmore *v.* San Francisco, 44 Cal. 294.

Connecticut.— See Ripley *v.* Fitch, 1 Root (Conn.) 404.

Delaware.— Cleaden *v.* Webb, 4 Houst. (Del.) 473.

Illinois.— Kennard *v.* Secor, 57 Ill. App. 415.

Indiana.— Mahon *v.* Gardner, 6 Blackf. (Ind.) 319.

Kentucky.— Wheatly *v.* Phelps, 3 Dana (Ky.) 302; Craig *v.* Whips, 1 Dana (Ky.) 375.

Michigan.— Brennan *v.* Tietsort, 49 Mich. 397, 13 N. W. 790.

Mississippi.— Alliston *v.* Lindsey, 12 Sm. & M. (Miss.) 656.

New Hampshire.— Bowman *v.* Noyes, 12 N. H. 302.

New Jersey.— Somerville *v.* Stewart, 48 N. J. L. 116, 3 Atl. 77; Dingee *v.* Letson, 15 N. J. L. 259.

New York.— Boyd *v.* Weeks, 2 Den. (N. Y.) 321, 43 Am. Dec. 749; Young *v.* Rummell, 2 Hill (N. Y.) 478, 38 Am. Dec. 594; Clark *v.* Yale, 12 Wend. (N. Y.) 470; Hughes *v.* Wheeler, 8 Cow. (N. Y.) 77; Edson *v.* Weston, 7 Cow. (N. Y.) 278; Drake *v.* Drake, 11 Johns. (N. Y.) 531.

Tennessee.— Sublett *v.* McLin, 10 Humphr. (Tenn.) 181.

Vermont.— Worthen *v.* Dickey, 54 Vt. 277; Shaw *v.* Moon, 49 Vt. 68; Britton *v.* Bishop, 11 Vt. 70.

United States.— Jeffrey *v.* Schlasinger, Hempst. (U. S.) 12, 13 Fed. Cas. No. 7,253*a*.

See also PAYMENT.

As to payment pending suit see *infra*, IX, H, 1, b.

As to pleading payment specially see *supra*, IX, D, 4, a.

97. Performance.— *Colorado.*— Heaton *v.* Myers, 4 Colo. 59.

Mississippi.— Alliston *v.* Lindsey, 12 Sm. & M. (Miss.) 656.

New Hampshire.— Robinson *v.* Batchelder, 4 N. H. 40.

Tennessee.— Sublett *v.* McLin, 10 Humphr. (Tenn.) 181.

England.— 2 Tidd Pr. 647.

See also CONTRACTS.

As to pleading performance specially see *supra*, IX, D, 4, a.

98. Release.— *Kentucky.*— Cook *v.* Vimont, 6 T. B. Mon. (Ky.) 284, 17 Am. Dec. 157.

New York.— Young *v.* Rummell, 2 Hill (N. Y.) 478, 38 Am. Dec. 594; Clark *v.* Yale, 12 Wend. (N. Y.) 470; Edson *v.* Weston, 7 Cow. (N. Y.) 278.

Pennsylvania.— Dawson *v.* Tibbs, 4 Yeates (Pa.) 349.

Tennessee.— Sublett *v.* McLin, 10 Humphr. (Tenn.) 181.

United States.— Bartleman *v.* Douglass, 1 Cranch C. C. (U. S.) 450, 2 Fed. Cas. No. 1,073.

See also RELEASE.

As to pleading release specially see *supra*, IX, D, 4, a.

99. Usury.— Cleaden *v.* Webb, 4 Houst. (Del.) 473; New Jersey Patent Tanning Co. *v.* Turner, 14 N. J. Eq. 326; Talbert *v.* Cason, 1 Brev. (S. C.) 298.

See also USURY.

want, illegality, or failure of consideration,[1] or that the action was prematurely brought.[2] But bankruptcy,[3] a set-off,[4] the statute of limitations,[5] or a tender[6] cannot be shown under the general issue. Such matters, to be available, must be pleaded specially.

b. Matters Arising Subsequent to Suit. Matters of defense which have arisen since suit brought cannot be given in evidence under the general issue, but must be specially pleaded.[7]

1. Want or illegality of consideration.— *Georgia.*— *Compare* Johnson *v.* Ballingall, 1 Ga. 68.

Missouri.— Block *v.* Elliott, 1 Mo. 275.

Pennsylvania.— Blessing *v.* Miller, 102 Pa. St. 45; Keen *v.* Ranck, 14 Phila. (Pa.) 168, 37 Leg. Int. (Pa.) 14.

South Carolina.— Farrow *v.* Mays, 1 Nott & M. (S. C.) 312; Talbert *v.* Cason, 1 Brev. (S. C.) 298.

Tennessee.— Sublett *v.* McLin, 10 Humphr. (Tenn.) 181.

United States.— Craig *v.* Missouri, 4 Pet. (U. S.) 410, 7 L. ed. 903; Dawes *v.* Peebles, 6 Fed. 856.

See also CONTRACTS.

As to pleading illegality or want of consideration specially see *supra*, IX, D, 4, a.

2. Premature suit.— Rainey *v.* Long, 9 Ala. 754; Kahn *v.* Cook, 22 Ill. App. 559; Collins *v.* Montemy, 3 Ill. App. 182.

3. Bankruptcy.— Young *v.* Rummell, 2 Hill (N. Y.) 478, 38 Am. Dec. 594; Virginia F. & M. Ins. Co. *v.* Buck, 88 Va. 517, 13 S. E. 973; Morgantown Bank *v.* Foster, 35 W. Va. 357, 13 S. E. 996. *Contra*, Lefler *v.* Hunt, 8 Blackf. (Ind.) 195. See also Kennedy *v.* Ferris, 5 Serg. & R. (Pa.) 394, holding that the fact that defendant is an insolvent debtor, and that his property has been assigned to trustees for the use of his creditors, may be proved under the general issue.

New promise.—Where plaintiff brings assumpsit upon a judgment, and defendant pleads in defense a discharge in bankruptcy, it is competent for plaintiff to introduce evidence of a new promise subsequent to the discharge, even though such new promise has not been counted upon in the declaration. Craig *v.* Seitz, 63 Mich. 727, 30 N. W. 347.

4. Set-off.—*Alabama.*—Wadsworth *v.* Montgomery First Nat. Bank, 124 Ala. 441, 27 So. 460; Judson *v.* Eslava, Minor (Ala.) 2.

Illinois.— Kennard *v.* Secor, 57 Ill. App. 415; Koch *v.* Merk, 48 Ill. App. 26.

Maryland.— Sangston *v.* Maitland, 11 Gill & J. (Md.) 286.

Mississippi.— A set-off may be given in evidence, under the plea of *non assumpsit*, if the account in set-off be filed with the plea. Alliston *v.* Lindsey, 12 Sm. & M. (Miss.) 656.

New Jersey.— Dingee *v.* Letson, 15 N. J. L. 259.

New York.— Young *v.* Rummell, 2 Hill (N. Y.) 478, 38 Am. Dec. 594.

Tennessee.— Sublett *v.* McLin, 10 Humphr. (Tenn.) 181.

Virginia.— *Compare* Bell *v.* Crawford, 8 Gratt. (Va.) 110.

See also RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

Under a plea of set-off, evidence is admissible to show that, since suit was brought, plaintiff acknowledged that a settlement had taken place, and that he thereby became indebted to defendant, and gave defendant a note for the debt. Marshall *v.* Sheridan, 10 Serg. & R. (Pa.) 268. But, under the general issue, with notice of a specific claim of set-off, defendant cannot set up an additional claim. Cleveland *v.* Miller, 94 Mich. 97, 53 N. W. 961.

5. Statute of limitations.— *Connecticut.*— Robbins *v.* Harvey, 5 Conn. 335.

Illinois.— Wilson *v.* King, 83 Ill. 232.

Kentucky.— Smart *v.* Baugh, 3 J. J. Marsh. (Ky.) 363; Cook *v.* Vimont, 6 T. B. Mon. (Ky.) 284, 17 Am. Dec. 157.

New York.— Young *v.* Rummell, 2 Hill (N. Y.) 478, 38 Am. Dec. 594.

Tennessee.— Sublett *v.* McLin, 10 Humphr. (Tenn.) 181.

Virginia.— Virginia F. & M. Ins. Co. *v.* Buck, 88 Va. 517, 13 S. E. 973.

West Virginia.— Morgantown Bank *v.* Foster, 35 W. Va. 357, 13 S. E. 996.

England.— Lee *v.* Rogers, 1 Lev. 110; Duppa *v.* Mayo, 1 Saund. 282.

See also LIMITATIONS OF ACTIONS.

6. Tender.— *Illinois.*—Wilson *v.* King, 83 Ill. 232.

Maryland.— *Compare* Dunlop *v.* Funk, 3 Harr. & M. (Md.) 318.

New York.— Young *v.* Rummell, 2 Hill (N. Y.) 478, 38 Am. Dec. 594.

Tennessee.— Sublett *v.* McLin, 10 Humphr. (Tenn.) 181.

Virginia.— Virginia F. & M. Ins. Co. *v.* Buck, 88 Va. 517, 13 S. E. 973.

West Virginia.— Morgantown Bank *v.* Foster, 35 W. Va. 357, 13 S. E. 996.

See also TENDER.

7. Robbins *v.* Harvey, 5 Conn. 335; Phleger *v.* Ivins, 5 Harr. (Del.) 118; Hutchinson *v.* Hendrickson, 29 N. J. L. 180; Boyd *v.* Weeks, 2 Den. (N. Y.) 321, 43 Am. Dec. 749.

Mich. Comp. Laws (1871), § 5792, abolishing special pleas, was not designed to deprive defendant of the right of making a special defense of matters arising subsequent to the filing of his plea of the general issue. Johnson *v.* Kibbee, 36 Mich. 269.

An award made pendente lite cannot be given in evidence under the plea of *non assumpsit*. Harrison *v.* Brock, 1 Munf. (Va.) 22.

Payment made after commencement of the suit cannot be given in evidence under the general issue as an answer to the action.

2. VARIANCE — a. In General. The pleading and the proof must correspond.[8] Plaintiff, however, is not bound to prove all the causes of action set out in the common counts,[9] nor the precise sum claimed thereby.[10]

b. In Promise or Agreement — (i) *IN GENERAL.* If the declaration be upon a special contract, the contract offered in evidence must correspond in substance and in terms with the one laid in the declaration. Variance in this respect is fatal, if insisted on.[11] So, a party who bases his right of recovery solely upon the breach of a special contract cannot recover upon proof of the breach of an implied one.[12] It has been held, however, that, if plaintiff declares on a special contract and fails in his right to recover on it, he may recover on a general count, if the

Pemigewasset Bank *v.* Brackett, 4 N. H. 557; Boyd *v.* Weeks, 2 Den. (N. Y.) 321, 43 Am. Dec. 749. *Contra*, McMillian *v.* Wallace, 3 Stew. (Ala.) 185; Moore *v.* McNairy, 12 N. C. 319. If given at all its function will be to reduce damages. Pemigewasset Bank *v.* Brackett, 4 N. H. 557; Hutchinson *v.* Hendrickson, 29 N. J. L. 180. See also Costar *v.* Davies, 8 Ark. 213, 46 Am. Dec. 311.

Recovery of judgment.— Under the general issue, defendant cannot show a judgment recovered since the commencement of the suit upon the same cause of action in another state. Child *v.* Eureka Powder Works, 44 N. H. 354.

8. *Alabama.*— Wilkinson *v.* Moseley, 18 Ala. 288.

Illinois.— Menifee *v.* Higgins, 57 Ill. 50.

Indiana.—Foerster *v.* Foerster, 10 Ind. App. 680, 38 N. E. 426.

Kentucky.— Taylor *v.* Hickman, Litt. Sel. Cas. (Ky.) 434.

New Hampshire.— Colburn *v.* Pomeroy, 44 N. H. 19.

Oregon.— Little Klamath Water Ditch Co. *v.* Ream, 27 Oreg. 129, 39 Pac. 998.

West Virginia.— Davisson *v.* Ford, 23 W. Va. 617.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 148.

9. Bailey *v.* Freeman, 4 Johns. (N. Y.) 280. See also Matthieu *v.* Nixon, 1 McCord (S. C.) 571, holding that, on a declaration containing three counts, plaintiff may give evidence to either one.

10. Lafferty *v.* Day, 7 Ark. 258.

As to limitation of recovery to amount of damages laid in the declaration see *infra*, XIV, C.

11. *Alabama.*— Hopper *v.* Eiland, 21 Ala. 714.

Connecticut.— Russell *v.* South Britain Soc., 9 Conn. 508; Shepard *v.* Palmer, 6 Conn. 95; Bunnel *v.* Taintor, 5 Conn. 273; Curley *v.* Dean, 4 Conn. 259, 10 Am. Dec. 140; Rossiter *v.* Marsh, 4 Conn. 196.

Delaware.— Simpson *v.* Warren, 5 Harr. (Del.) 371.

Illinois.— Keiser *v.* Topping, 72 Ill. 226; Wheeler *v.* Reed, 36 Ill. 81; Mastin *v.* Toncray, 3 Ill. 216; Reading *v.* Linington, 12 Ill. App. 491.

Kentucky.— Brown *v.* Warner, 2 J. J. Marsh. (Ky.) 37; Pringle *v.* Samuel, 1 Bibb (Ky.) 172.

Maine.— Kidder *v.* Flagg, 28 Me. 477.

Maryland.— Bull *v.* Schuberth, 2 Md. 38; Speake *v.* Sheppard, 6 Harr. & J. (Md.) 81; Walsh *v.* Gilmor, 3 Harr. & J. (Md.) 383, 6 Am. Dec. 502.

Michigan.— Rose *v.* Jackson, 40 Mich. 29.

Mississippi.— Fowler *v.* Austin, 1 How. (Miss.) 156, 26 Am. Dec. 701.

New Hampshire.— Keyes *v.* Dearborn, 12 N. H. 52; Drown *v.* Smith, 3 N. H. 299.

New York.— Norris *v.* Durham, 9 Cow. (N. Y.) 151; Hatch *v.* Adams, 8 Cow. (N. Y.) 35; Crawford *v.* Morrell, 8 Johns. (N. Y.) 253.

North Carolina.— Starnes *v.* Erwin, 32 N. C. 226.

Pennsylvania.— Anderson *v.* Hayes, 2 Yeates (Pa.) 95.

Tennessee.— Vance *v.* Jones, Peck (Tenn.) 329.

Texas.— Gammage *v.* Alexander, 14 Tex. 414.

Virginia.— Harris *v.* Harris, 2 Rand. (Va.) 431.

West Virginia.— Baltimore, etc., R. Co. *v.* Rathbone, 1 W. Va. 87, 88 Am. Dec. 664.

England.— Drewry *v.* Twiss, 4 T. R. 558.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 149.

As to setting out contract in declaration see *supra*, IX, A, 3.

Mistake in date.—When a plaintiff declares on a written instrument as bearing a particular date, a mistake in the date is a fatal variance. Lawson *v.* Townes, 2 Ala. 373; Drown *v.* Smith, 3 N. H. 299.

Smaller damages.— It is not a ground of nonsuit that the evidence proves a smaller sum to have been agreed upon between the parties than is stated in the declaration. Covington *v.* Lide, 1 Bay (S. C.) 158.

12. Alleging breach of special, and proving breach of implied, contract.— *Indiana.*—Armacost *v.* Lindley, 116 Ind. 295, 19 N. E. 138; Bartlett *v.* Pittsburgh, etc., R. Co., 94 Ind. 281; Jeffersonville, etc., R. Co. *v.* Worland, 50 Ind. 339; Sanders *v.* Hartge, 17 Ind. App. 243, 46 N. E. 604; Foerster *v.* Foerster, 10 Ind. App. 680, 38 N. E. 426; Schaffner *v.* Kober, 2 Ind. App. 409, 28 N. E. 871.

Iowa.— Eyser *v.* Weissgerber, 2 Iowa 463.

Kentucky.— Price *v.* Price, 101 Ky. 28, 19 Ky. L. Rep. 211, 39 S. W. 429.

Nebraska.— Mayer *v.* Ver Bryck, 46 Nebr. 221, 64 N. W. 691; Powder River Live Stock Co. *v.* Lamb, 38 Nebr. 339, 56 N. W. 1019.

case be such that, supposing there had been no special contract, he might have recovered on a general count.[13]

(n) *Joint Promise.* In a declaration against joint promisors, plaintiff must recover against all who are served or none, unless one sets up a defense which goes to his personal discharge.[14] So, where plaintiffs sue jointly, proof of a liability from defendant to one plaintiff, alone, will be rejected, as it does not support the cause of action disclosed in the declaration.[15]

c. **In Consideration.** The consideration of the promise must be proved as laid in the declaration;[16] and, if plaintiff declares on two considerations, he must

Texas.— Orynski *v.* Menger, 15 Tex. Civ. App. 448, 39 S. W. 388.

As to recovery on common counts in case of express contract see *supra*, III, C, 2.

Presumption on appeal.— No assumpsit can be presumed to have been proved on the trial but that which is alleged in the declaration. Stimpson *v.* Gilchrist, 1 Me. 202.

13. Declaring on special contract, and recovering on general count.—*Alabama.*—Darden *v.* James, 48 Ala. 33; Snedicor *v.* Leachman, 10 Ala. 330.

Delaware.— Shea *v.* Kerr, 1 Pennew. (Del.) 530, 43 Atl. 843; Morris *v.* Burton, 4 Harr. (Del.) 53; Porter *v.* Beltzhoover, 2 Harr. (Del.) 484.

Iowa.— Lorton *v.* Agnew, Morr. (Iowa) 64.

Maryland.— Speake *v.* Sheppard, 6 Harr. & J. (Md.) 81. See also Carter *v.* Tuck, 3 Gill (Md.) 248.

Michigan.— See Wyman *v.* Crowley, 33 Mich. 84. *Compare* Berringer *v.* Cobb, 58 Mich. 557, 25 N. W. 491; Wetmore *v.* McDougall, 32 Mich. 276, holding that if one has given evidence on a special count, and proceeded all through the trial until the case goes to the jury, he cannot, at the last moment, abandon it and recover under the common counts.

Mississippi.— Morrison *v.* Ives, 4 Sm. & M. (Miss.) 652.

New Jersey.— Perrine *v.* Hankinson, 11 N. J. L. 181.

New York.— Robertson *v.* Lynch, 18 Johns. (N. Y.) 451; Linningdale *v.* Livingston, 10 Johns. (N. Y.) 36; Richardson *v.* Smith, 8 Johns. (N. Y.) 439; Tuttle *v.* Mayo, 7 Johns. (N. Y.) 132.

South Carolina.— Barnes *v.* Gorman, 9 Rich. (S. C.) 297; Sinclair *v.* State Bank, 2 Strobh. (S. C.) 344.

Tennessee.— Irwin *v.* Bell, 1 Overt. (Tenn.) 485.

England.— Cooke *v.* Munstone, 4 B. & P. N. R. 351.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 152.

14. *Illinois.*— Flake *v.* Carson, 33 Ill. 518; Gribbin *v.* Thompson, 28 Ill. 61; Fuller *v.* Robb, 26 Ill. 246.

Kentucky.— Brown *v.* Warner, 2 J. J. Marsh. (Ky.) 37; Erwin *v.* Devine, 2 T. B. Mon. (Ky.) 124.

Maine.— Moore *v.* Knowles, 65 Me. 493; Cutts *v.* Gordon, 13 Me. 474, 29 Am. Dec. 520; Redington *v.* Farrar, 5 Me. 379.

Massachusetts.— Columbian Mfg. Co. *v.* Dutch, 13 Pick. (Mass.) 125; Tuttle *v.* Cooper, 10 Pick. (Mass.) 281; Woodward *v.* Newhall, 1 Pick. (Mass.) 500; Ward *v.* Johnson, 13 Mass. 148.

New Hampshire.— Griffin *v.* Simpson, 45 N. H. 18; Peebles *v.* Rand, 43 N. H. 337; Bowman *v.* Noyes, 12 N. H. 302; Pillsbury *v.* Cammett, 2 N. H. 283.

New Jersey.— Dacosta *v.* Davis, 24 N. J. L. 319.

New York.— Robertson *v.* Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227; Hartness *v.* Thompson, 5 Johns. (N. Y.) 160; Tom *v.* Goodrich, 2 Johns. (N. Y.) 213.

Pennsylvania.—Williams *v.* McFall, 2 Serg. & R. (Pa.) 280.

Vermont.— Metropolitan Washing Mach. Co. *v.* Morris, 39 Vt. 393.

England.— 1 Chitty Pl. 32; Salmon *v.* Smith, 1 Saund. 206; Noke *v.* Ingham, 1 Wils. C. P. 83.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 169.

Absent promisors.—Where it appears that one of several joint defendants resides without the state, so that no service can be had upon him, plaintiff may discontinue as to him and have judgment against such, alone, as are within the jurisdiction. Rand *v.* Nutter, 56 Me. 339; Tappan *v.* Bruen, 5 Mass. 193.

Individual liability.—A declaration containing the common counts was filed against two defendants jointly, and a bill of particulars was filed purporting to be an account against both defendants jointly. On the trial on the plea of *non assumpsit* it was proved that only a part of the items were charges against the two defendants jointly, and that the other items were charges against one defendant individually. It was held that the judgment must be against defendants on the joint items, but without judgment against the one defendant for the individual items. Enos *v.* Stansbury, 18 W. Va. 477.

15. Strickland *v.* Burns, 14 Ala. 511.

16. *Alabama.*— Jordan *v.* Roney, 23 Ala. 758.

Connecticut.— Chittenden *v.* Stevenson, 26 Conn. 442; Hendrick *v.* Seely, 6 Conn. 176; Curley *v.* Dean, 4 Conn. 259, 10 Am. Dec. 140; Bulkley *v.* Landon, 2 Conn. 404; Smith *v.* Barker, 3 Day (Conn.) 312, 22 Fed. Cas. No. 13,013.

Illinois.— Indianapolis, etc., R. Co. *v.* Rhodes, 76 Ill. 285.

Kentucky.— Carrell *v.* Collins, 2 Bibb (Ky.) 429.

Michigan.— Bromley *v.* Goff, 75 Mich. 213, 42 N. W. 810.

New Hampshire.— Colburn *v.* Pomeroy, 44

aver and prove performance of both, for the assumpsit on the part of defendant is presumed to be founded on both, taken together.[17]

X. EVIDENCE.

Plaintiff must prove defendant's promise as charged in the declaration by direct proof, or show by the evidence a state of facts from which the law will imply such promise.[18]

XI. TRIAL.

A. Election Between Counts. Plaintiff who has declared upon the common counts and also upon special counts cannot be compelled, on the trial, to elect upon which count he will proceed.[19]

B. Questions For Jury. The question whether there is a contract, express or implied, between the parties is one for the jury.[20]

C. Trial by Jury. Defendant in an action of assumpsit is entitled to a trial by jury, unless a jury is waived in the manner provided by statute.[21]

XII. VERDICT.

A verdict for plaintiff should assess the amount of damages to which he is entitled. A mere finding for him is not a sufficient foundation for a judgment.[22]

N. H. 19; Smith *v.* Wheeler, 29 N. H. 334; Knox *v.* Martin, 8 N. H. 154; Benden *v.* Manning, 2 N. H. 289.

New York.— Stone *v.* Knowlton, 3 Wend. (N. Y.) 374; Lansing *v.* McKillip, 3 Cai. (N. Y.) 286.

South Carolina.— Brooks *v.* Lowrie, 1 Nott & M. (S. C.) 342.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 150.

As to necessity of alleging consideration see *supra*, IX, A, 4.

Sufficiency of proof.—Where a promise to pay money is averred in the declaration to have been made for value received, it will be sufficient proof of a consideration to show a written promise to pay for value received. Meyers *v.* Phillips, 72 Ill. 460.

17. Carrell *v.* Collins, 2 Bibb (Ky.) 429; Lansing *v.* McKillip, 3 Cai. (N. Y.) 286.

18. Wrought Iron Bridge Co. *v.* Highway Com'rs, 101 Ill. 518.

As to necessity of contract, express or implied, see *supra*, II, B, 1.

A request may be proved by circumstantial evidence. Hill *v.* Packard, 69 Me. 158.

Whatever is necessary to be alleged in a special count must be proved to support a common count for the same cause of action. Landrum *v.* Brookshire, 1 Stew. (Ala.) 252.

19. Consolidation Coal Co. *v.* Shannon, 34 Md. 144; Norris *v.* Durham, 9 Cow. (N. Y.) 151. See also Meserve *v.* Norris, 3 Cush. (Mass.) 403, holding that, on the trial of an action of assumpsit containing the usual money counts, a count upon an account annexed, and a special count upon a contract, defendant, after the testimony is closed and his counsel is arguing, cannot require plaintiff to elect a single count upon which to rest his case. And see Carland *v.* Western Union Tel. Co., 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280, holding that, where the common counts are not supported by any evidence and the special count is the only one relied on, it is unnecessary to compel the election of counts.

Waiving tort.— Election between counts need not be required where, in assumpsit for money obtained by defendant through fraud, the common counts are joined to a special count waiving the tort. Tregent *v.* Maybee, 54 Mich. 226, 19 N. W. 962.

Where there are different counts and evidence applicable to each, it is not a ground for granting a new trial that the court refused to require the jury to declare on what count or counts they found their verdict. Bulkley *v.* Andrews, 39 Conn. 523.

20. Hill *v.* Hill, 121 Ind. 255, 23 N. E. 87; Smith *v.* Denman, 48 Ind. 65; Neale *v.* Engle, (Pa. 1886) 7 Atl. 60. See also Feiertag *v.* Feiertag, 80 Mich. 489, 45 N. W. 188.

Amount of compensation.— In an action for the board of defendant's employees, when there was no agreement how long plaintiff was to furnish board, and extra services were rendered to them, the amount of compensation is for the jury. Clowe *v.* Imperial Pine Product Co., 114 N. C. 304, 19 S. E. 153.

Performance of special contract.— The question whether plaintiff has fully performed his part so as to enable him to sue on the common counts is one of fact for the jury. Shepard *v.* Mills, 173 Ill. 223, 50 N. E. 709.

Presumption as to submission.—Where there are several pleas, and the entry of judgment speaks of the "issue joined," the appellate court will presume that all the issues were submitted to the jury. Jennings *v.* Cummings, 9 Port. (Ala.) 309.

21. Farwell *v.* Murray, 104 Cal. 464, 38 Pac. 199.

See, generally, JURIES.

22. Knickerbocker, etc., Silver Min. Co. *v.* Hall, 3 Nev. 194; Ames *v.* Sloat, Wright

A general verdict will be upheld where there are several counts, if any one of the counts is good.[23]

XIII. JUDGMENT.

A. Form and Requisites. Judgment should be for the sum due as damages, and not for the debt and damages.[24]

B. By Default. In the absence of special regulation by statute or of established practice of court, a jury should be called to assess damages on default on a declaration containing the common counts.[25] Upon the assessment of damages, a defense which goes to the right of recovery cannot be made.[26]

(Ohio) 577. But see Frye *v.* Hinkley, 18 Me. 320, wherein it is held that the fact that the jury failed to assess damages on the trial of an issue on a plea of misnomer is not ground for setting aside the verdict, as the damages may be assessed by the court as in case of a default.

As to aiding declaration by verdict see *supra*, IX, A, 12.

Alternative counts.— In assumpsit under the code, if plaintiff declares in the common counts for money paid out and expended, with a prayer indicating that they are in the alternative, a finding for plaintiff on the first count is a finding against him on the others. Leeke *v.* Hancock, 76 Cal. 127, 17 Pac. 937.

Findings by court.— A formal finding is not necessary where the whole matter is submitted by the parties to the court. Smith *v.* Smith, Morr. (Iowa) 300.

Sufficiency of verdict.—A verdict "that the jurors find for plaintiff and fix the judgment at five hundred dollars in his favor" is sufficient in substance. Hartford F. Ins. Co. *v.* Vanduzor, 49 Ill. 489.

Verdict for defendant—Where defendant in assumpsit pleaded the general issue, so much of a verdict for defendant as awards him damages must be rejected as surplusage. Neely *v.* Sensenig, 150 Pa. St. 520, 24 Atl. 748.

23. Bulkley *v.* Andrews, 39 Conn. 523. See also Jones *v.* Cooke, 14 N. C. 104, holding that where a plaintiff declares in two counts, and the attention of the jury is directed by the court to one of them only, a general verdict found by them is presumed to be on that count.

Responsiveness to issues.— Under the pleas of *non assumpsit*, accord and satisfaction, and payment, a verdict that defendant did undertake and promise, as alleged in the declaration, and assessing plaintiff's damages, covers all the issues. Martin *v.* Williams, 7 Humphr. (Tenn.) 220. See also Sapp *v.* Laughead, 6 Ohio St. 174; Carter *v.* Graves, 9 Yerg. (Tenn.) 446.

24. Jones *v.* Robinson, 8 Ark. 484; Lyon *v.* Barney, 2 Ill. 387.

As the code has abolished the common-law distinction between the actions of debt and assumpsit, the same form of judgment may be rendered in either action. Knapp *v.* Kingsbury, 51 Ala. 563.

Sufficiency of judgment.—A judgment that "the said plaintiff, have and recover of the said defendant herein, the sum of one hundred and eight dollars and fifty cents debt, together with his costs" (Foster *v.* Jared, 12 Ill. 451, 456), or that "the plaintiffs, have and recover from the said defendants, the sum of three hundred and forty-two dollars and eighty-seven cents, as aforesaid, likewise their costs and charges by them in this behalf expended" (Henrichsen *v.* Mudd, 33 Ill. 476), is good.

25. Porter *v.* Burleson, 38 Ala. 343; Beville *v.* Reese, 25 Ala. 451; Langdon *v.* Williams, 22 Ala. 681; Phillips *v.* Malone, Minor (Ala.) 110; Moreland *v.* Ruffin, Minor (Ala.) 18; Starbuck *v.* Lazenby, 7 Blackf. (Ind.) 268.

As to judgments by default, generally, see JUDGMENTS.

In Virginia it is necessary, in order to warrant a judgment by default without a writ of inquiry upon the common counts, under Va. Code (1873), c. 167, § 44, that defendant should be served with a copy of the account, stating the items of the plaintiff's claim in said counts. Burwell *v.* Burgess, 32 Gratt. (Va.) 472.

Default of one defendant.—Where the action is against several and one of them pleads, and the default of the others is entered, it is error to take final judgment against them until the issue as to the defendant who pleads is disposed of. Russell *v.* Hogan, 2 Ill. 552. See also Ridgely *v.* Dobson, 3 Watts & S. (Pa.) 118.

Entry of default.— It is error to impanel a jury and assess damages without default first taken and entered. Lehr *v.* Vandeveer, 48 Ill. App. 511; Strong *v.* Catlin, 3 Pinn. (Wis.) 121, 3 Chandl. (Wis.) 130.

26. New York City Third Nat. Bank *v.* Dorset Marble Co., 58 Vt. 70, 3 Atl. 329. See also Sweet *v.* McDaniels, 39 Vt. 272, holding that where plaintiff files a specification describing certain promissory notes, and defendant, without filing any plea, has submitted to judgment, he cannot, upon the assessment of damages, be allowed to show that the consideration of the notes was money won from him at cards.

No evidence has been held to be necessary, upon the assessment of damages on default, if the suit is upon an instrument for a definite sum of money. Massachusetts Mut. L. Ins. Co. *v.* Kellogg, 82 Ill. 614. See also Harris *v.* Ray, 15 B. Mon. (Ky.) 628, holding that, where an account is exhibited and the amount claimed is specifically alleged as due, no proof is necessary to enable the court to

C. On Demurrer. In like manner, it has been held that, on the overruling of a demurrer to a declaration containing the common counts, final judgment cannot be rendered without a writ of inquiry to ascertain the damages.[27] It has also been held that final judgment cannot be taken, on the overruling of a demurrer to a count of the declaration, if defendant has interposed a plea to another count, and the issue raised by such plea has not been disposed of.[28]

XIV. AMOUNT OF RECOVERY.

A. In General. Where the nature of the contract or agreement sued on furnishes the standard of assessment of damages, the jury cannot allow arbitrary damages.[29]

B. Allowance of Interest. It has been held that interest is due after a default to pay upon demand made, or, if no demand is made, from the commencement of the suit.[30]

C. Limitation by Amount Laid in Declaration. Plaintiff may recover less,[31] but not more,[32] damages than are laid in the declaration.

ASSUMPTION. The agreement of the transferee of property to pay obligations of the transferrer which are chargeable on it.[1] (Assumption: Of Debts —

render judgment for the amount claimed upon failure to answer. *Compare* Webb *v.* Coonce, 11 Mo. 9.

27. Stanton *v.* Henderson, 1 Ind. 69; Fleming *v.* Langton, 1 Str. 532; Duperoy *v.* Johnson, 7 T. R. 473.

In Michigan, on overruling a demurrer to a declaration upon promissory notes, it is not regular to give final judgment at once for a given sum in damages, but, if the case be not a proper one for pleading over, the correct practice is to award judgment interlocutory, with a reference to the clerk to assess, upon notice, the damages under the statute. Mason *v.* Reynolds, 33 Mich. 60.

28. Ewing *v.* Codding, 5 Blackf. (Ind.) 433.

Demurrer to plea.—Where defendant pleads both *non assumpsit* and a special plea in bar, and plaintiff demurs to the special plea, final judgment should not be entered on overruling the demurrer to the special plea without a trial of the issue raised by the plea of *non assumpsit*. Armstrong *v.* Webster, 30 Ill. 333; Rodgers *v.* Hunter, 8 Sm. & M. (Miss.) 640; Morgantown Bank *v.* Foster, 35 W. Va. 357, 13 S. E. 996. See also Heyfron *v.* Mississippi Union Bank, 7 Sm. & M. (Miss.) 434.

29. Farrand *v.* Bouchell, Harp. (S. C.) 83. See also Hanna *v.* Pegg, 1 Blackf. (Ind.) 181, holding that the only special damages recoverable on a count for money paid out, if any are recoverable at all, is interest.

As to damages for breach of contract, generally, see DAMAGES.

Nominal damages.— If issue is joined on a plea of payment, and no evidence is given at the trial by either party, plaintiff is entitled to nominal damages. New-York Dry Dock Co. *v.* McIntosh, 5 Hill (N. Y.) 290. So, where the declaration contains general counts for work done and a special count on an alleged contract by defendant to pay plaintiff a stated sum for his services, if plaintiff proves services rendered, but fails to prove their value, and fails to recover on his special count, he is entitled to nominal damages. Wyatt *v.* Herring, 90 Mich. 581, 51 N. W. 684.

30. Barnard *v.* Bartholomew, 22 Pick. (Mass.) 291; McIlvaine *v.* Wilkins, 12 N. H. 474; Mahurin *v.* Bickford, 6 N. H. 567; Anonymous, 1 Johns. (N. Y.) 315; Gammell *v.* Skinner, 2 Gall. (U. S.) 45, 9 Fed. Cas. No. 5,210.

As to allowance of interest, generally, see INTEREST.

A special assumpsit for damages on a warranty of soundness is subject to the rule governing actions sounding in damages, that interest is not recoverable, *eo nomine*. Ancrum *v.* Sloane, 2 Speers (S. C.) 594.

31. Lafferty *v.* Day, 7 Ark. 258; Sawyer *v.* Daniels, 48 Ill. 269; Pynchon *v.* Brewster, Quincy (Mass.) 224; Covington *v.* Lide, 1 Bay (S. C.) 158.

32. *Illinois.*— Kelley *v.* Chicago Third Nat. Bank, 64 Ill. 541.

Kentucky.— Baltzell *v.* Hickman, 4 Litt. (Ky.) 265.

Mississippi.— Geren *v.* Wright, 8 Sm. & M. (Miss.) 360; Potter *v.* Prescott, 2 How. (Miss.) 686.

Missouri.— Maupin *v.* Triplett, 5 Mo. 422.

Pennsylvania.—Siltzell *v.* Michael, 3 Watts & S. (Pa.) 329.

Tennessee.— Crabb *v.* Nashville Bank, 6 Yerg. (Tenn.) 332.

See 5 Cent. Dig. tit. "Assumpsit, Action of," § 160.

Remittitur of excess.— If the jury find for plaintiff a larger sum than the amount of damages laid in the declaration, plaintiff may remit the surplus beyond such amount and take judgment for the balance. Cahill *v.* Pintony, 4 Munf. (Va.) 371.

1. Springer *v.* De Wolf, 93 Ill. App. 260, 263 [*quoting* Century Dict.].

Generally, see FRAUDS, STATUTE OF; GUARANTY; NOVATION; By Purchaser of Land, see VENDOR AND PURCHASER; Of Creditor to Third Person, see ACCORD AND SATISFACTION. Of Facts in Instructions, see CRIMINAL LAW; TRIAL. Of Mortgage or Mortgage Debt, see MORTGAGES. Of Partnership Liabilities by New Firm, see PARTNERSHIP. Of Risk of Injury — Generally, see NEGLIGENCE; By Employee, see MASTER AND SERVANT.)

ASSURANCE. The legal evidence of the transfer of property;[2] insurance,[3] particularly life insurance.[4] (See, generally, CHATTEL MORTGAGES; COVENANTS; DEEDS; INSURANCE; MORTGAGES; SALES.)

ASSYTHMENT. In Scotch law, indemnification for killing, maiming, or laming a person.[5]

A SUMMO REMEDIO AD INFERIOREM ACTIONEM NON HABETUR REGRESSUS, NEQUE AUXILIUM. A maxim meaning "After using the highest remedy there can be no recourse to an inferior action nor assistance."[6]

2. State *v.* Farrand, 8 N. J. L. 333, 335 [*citing* 2 Bl. Comm. 294].
"The terms 'conveyance' and 'assurance' are used as convertible or synonymous by the soundest and most accurate writers and judges." State *v.* Farrand, 8 N. J. L. 333, 335.
3. Bouvier L. Dict.
4. Burrill L. Dict.
5. Burrill L. Dict. [*citing* Bell Dict.; Erskine Inst. bk. IV, tit. 4, § 105; 1 Forbes Inst. bk. III, pt. II, c. 1, tit. 10].
6. Adams Gloss.

ASYLUMS

By Edward M. Winston

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- Municipal Liability For Maintenance Insane, see Municipal Corporations.
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I. DEFINITION.

"Asylum" is defined as "a sanctuary or place of refuge and protection where criminals and debtors found shelter, and from which they could not be taken without sacrilege;[1] an institution for the protection and relief of unfortunates."[2]

1. State *v.* Bacon, 6 Nebr. 286, 291. See also *In re* Stupp, 11 Blatchf. (U. S.) 124, 155, 23 Fed. Cas. No. 13,562, holding that, in extradition treaties, "'Asylum' means a place where the matter may not be tried."

History of asylums.—"Under the Mosaic Dispensation cities of refuge were set apart to which the slayer might flee so that innocent blood should not be shed, in case the person was not worthy of death — that is, in case the act was accidental and not malicious. But among the ancients, outside of the Jews, it seems that temples, statues to the gods, and altars particularly consecrated for such purposes, constituted such places of refuge for persons generally, and it was deemed an act of impiety to remove forcibly one who had fled to such an asylum for protection. However, Tiberius abolished all asylums except the temples of Juno and Æsculapius. These asylums finally passed over to the Christian world, and under Constantine the Great, all Christian Churches were made asylums for all those who were pursued by officers of justice or the violence of their enemies, and the younger Theodosius, in the year 431, extended these privileges to all courts, gardens, walks, and houses belonging to the church. In the year 631 the Synod of Toledo extended the limits of asylums thirty paces from every church, and this privilege afterward prevailed in Catholic countries: and it is said to have been a strong armor of defense against the wild spirit of the middle ages, and not without good consequences at the time when force often prevailed against justice. But in later periods of time as other and better systems of procedure in the administration of justice became adopted, asylums were abolished in most countries." Gantt, J., in State *v.* Bacon, 6 Nebr. 286, 290 [*citing* 1 Encyc. Americana, 439].

2. Wolcott *v.* Holcomb, 97 Mich. 361, 364, 56 N. W. 837, 23 L. R. A. 215 [*quoting* Webster Dict.]; State *v.* Bacon, 6 Nebr. 286, 291.

Other definitions are: "Place of retreat or

II. ESTABLISHMENT AND MAINTENANCE.

A. In General. Where a commission is appointed by a legislature to locate an asylum, they should fix the site[3] and condemn land, but cannot, in the absence of statutory authority,[4] purchase at private sale.[5] If an act for the purchase of real estate and erection of an asylum provides for control by a private corporation, such corporation has a mere license, revocable by the state.[6]

B. Regulations. The legislative authority may make regulations for the construction and maintenance of asylums, public or private, but these are binding only so far as they are reasonable,[7] and institutions established by the United States are not subject to control of the state governments as to internal regulations.[8] The trustees of an asylum may also make reasonable rules to govern the inmates thereof, provided such rules are not inconsistent with the constitution and laws of the United States and of the state where located.[9]

C. Officers — 1. APPOINTMENT AND REMOVAL. In case of appointment for a fixed term and until a successor is qualified, the rule applicable to other officials applies to those of an asylum,[10] but, where the statute provides for appointment by a given authority and is silent as to removal, the power of removal is incident to the power of appointment, and the appointing authority may remove at will.[11] Where an officer is removable by trustees only for stated causes, the responsibility rests with them, and the courts cannot set aside a judgment which appears to be within the causes for removal established by statute.[12]

2. POWERS. Officers may disburse moneys appropriated for the improvement of the grounds or buildings of an asylum, and may exercise their discretion as to

shelter." Lawrence *v.* Leidigh, 58 Kan. 594, 598, 50 Pac. 600, 62 Am. St. Rep. 631.

"A refuge; sanctuary; a charitable institution." Cromie *v.* Louisville Orphans' Home Soc., 3 Bush (Ky.) 365, 391.

Asylums may be either public or private, but mere incidental profit, from an asylum founded, under a statute, by certain parishes, arising from the board of outsiders or from the labor of inmates and employees, does not make the institution any less a public asylum. Reg. *v.* Fulbourn, 6 B. & S. 451, 11 Jur. N. S. 620, 34 L. J. M. C. 106, 12 L. T. Rep. N. S. 344, 13 Wkly. Rep. 713, 118 E. C. L. 451. An asylum established under state authority by a county, though a public institution, is not a state institution within the meaning of the Ohio constitution. Chalfant *v.* State, 37 Ohio St. 60.

Denomination as "asylum" not essential. — That is to be classified as an asylum which is so used, even though not so denominated. Reg. *v.* Bishop, 5 Q. B. D. 259, 14 Cox C. C. 404, 44 J. P. 330, 49 L. J. M. C. 45, 42 L. T. Rep. N. S. 240, 28 Wkly. Rep. 475 (so holding where a private person took insane persons into her house, not believing them to be such); Reg. *v.* Shaw, 11 Cox C. C. 109, 37 L. J. M. C. 112, 18 L. T. Rep. N. S. 583, 16 Wkly. Rep. 913 (so holding where a person actually insane was delivered to a physician as an invalid and not as insane, and the physician was held liable for keeping an unlicensed asylum).

3. Until the precise tract or parcel of ground is selected upon which the asylum should be located, the location is incomplete and the commission has power to reconsider any partial or tentative action which it has taken upon the subject. State *v.* Bondy, 66 Minn. 240, 68 N. W. 1075.

4. Power to reject bids. — The commissioners to erect an asylum, authorized to adopt and reject bids which are not reasonable and satisfactory, but directed to take the lowest responsible bid, may be compelled to act by mandamus; but, in determining what is the lowest responsible bid, they act judicially and, therefore, their decision cannot be controlled by mandamus. Hoole *v.* Kinkead, 16 Nev. 217.

5. Hornaday *v.* State, 62 Kan. 822, 62 Pac. 329.

6. Home For Friendless Soc. *v.* State, 58 Nebr. 447, 78 N. W. 726.

7. *Ex p.* Whitwell, 98 Cal. 73, 32 Pac. 870, 35 Am. St. Rep. 152, 19 L. R. A. 727, holding that it is unreasonable to require that the grounds should be surrounded by high and thick walls, that the building should be fireproof, and that each class of patients should have separate buildings.

8. So of the state law forbidding the use of oleomargarin. Ohio *v.* Thomas, 173 U. S. 276, 19 S. Ct. 453, 43 L. ed. 699.

9. People *v.* Sailors' Snug Harbor, 54 Barb. (N. Y.) 532, 5 Abb. Pr. N. S. (N. Y.) 119.

10. People *v.* Langdon, 8 Cal. 1; People *v.* Reid, 6 Cal. 288.

11. Littleton *v.* Board Infirmary Directors, 18 Ohio Cir. Ct. 891 (so holding of a board of directors); Keenan *v.* Perry, 24 Tex. 253 (so holding of the governor).

12. People *v.* Higgins, 15 Ill. 110.

the nature and character of such improvements,[13] and may secure expert assistants.[14] They may also be given the right *prima facie* to determine to what county an insane person shall be charged.[15] They have no authority, however, to borrow money without express sanction, and will be personally liable for money received by them and used otherwise than in regular ways.[16] Nor does power given to a committee of visitation to examine witnesses under oath carry the power to commit for contempt.[17] The regular authorities will be presumed to retain their power except in so far as those powers are expressly withdrawn.[18]

D. Maintenance — 1. Right to Government Aid. It has been held that a corporation organized to maintain a charitable asylum, over which the state has no control, cannot receive moneys from the state or any municipal corporation for the care of inebriates who might otherwise be sent to the bridewell, where the constitution forbids donations by municipal corporations to private corporations;[19] and that a constitutional provision forbidding the payment of money to any institution controlled by sectarian authority was violated by an act providing for the commitment of dependent girls to a corporation, and the payment of their tuition bills by the county, where such corporation was actually a school controlled by a certain church.[20] So, the state constitution, providing for distribution of certain moneys belonging to the school fund among the common schools, forbade any payments therefrom to any private asylums; but funds raised by taxation for school purposes might be so distributed,[21] provided the asylum had complied with the regulations relating to public schools.[22] On the other hand, it has been held by numerous authorities that constitutional provisions forbidding the payment of money to private corporations of sectarian character are not violated by payments on account of children committed to individual schools, or for patients sent to private hospitals, or the like, since such payments are to be considered simply as payments for services rendered.[23]

2. Warrants — How Drawn. Where the statute allows the auditor of state to issue warrants for only the amount of debts and liabilities existing, a warrant can legally be issued only after the expense or liability is actually incurred;[24] but, in case of some special provision, the auditor should draw his warrant for the whole appropriation, and need not take any responsibility as to payments.[25] If the appropriation is to be diminished by an unexpended balance, the auditor may determine by any means, either by reports of officers or otherwise, what the balance is.[26]

13. Milwaukee County *v.* Paul, 59 Wis. 341, 18 N. W. 321.

14. Shipman *v.* State, 43 Wis. 377.

15. State *v.* Dodge County, 56 Wis. 79, 13 N. W. 680, though it seems doubtful whether it would be constitutional to refuse an ultimate appeal to the courts.

16. State *v.* Mills, 55 Wis. 229, 12 N. W. 359.

17. Brown *v.* Davidson, 59 Iowa 461, 13 N. W. 442.

18. So, where a statute provided that the state board of commissioners should have charge of the expenditure for an additional building on the ground of the existing asylum, it was held that the regular board retained power to determine the location of such building. Long *v.* Central Kentucky Lunatic Asylum, 9 Ky. L. Rep. 699, 6 S. W. 335.

19. Chicago Washingtonian Home *v.* Chicago, 157 Ill. 414, 41 N. E. 893, 29 L. R. A. 798.

20. Cook County *v.* Chicago Industrial School, 125 Ill. 540, 18 N. E. 183, 8 Am. St. Rep. 386, 1 L. R. A. 437.

21. St. Patrick's Orphan Asylum *v.* Board of Education, 34 How. Pr. (N. Y.) 227.

22. People *v.* Glowacki, 2 Thomps. & C. (N. Y.) 436.

23. *Delaware.*—State *v.* New Castle County Levy Ct., 1 Pennew. (Del.) 597, 43 Atl. 522.

District of Columbia.—Roberts *v.* Bradfield, 12 App. Cas. (D. C.) 453.

Illinois.— Millard *v.* Board of Education, 121 Ill. 297, 10 N. E. 669.

Nevada.— State *v.* Hallock, 16 Nev. 373.

South Dakota.— Dakota Synod *v.* State, 2 S. D. 366, 50 N. W. 632, 14 L. R. A. 418.

24. Tandy *v.* Norman, 16 Ky. L. Rep. 290, 27 S. W. 861.

25. State *v.* State Auditor, 46 Mo. 326.

26. Norman *v.* Central Kentucky Lunatic Asylum, 92 Ky. 10, 13 Ky. L. Rep. 310, 17 S. W. 150.

III. STATUS OF INMATES.[27]

A. In General. It has been held that admission to an asylum does not create any valuable vested right, and that a person so admitted may be expelled on the ground of insubordination without notice or hearing,[28] but, where the right of entry is made dependent upon residence, it depends upon residence at the time of commitment, and a child duly committed cannot be discharged merely because his parents remove from the state.[29]

B. When Voluntarily Entered. In case of a voluntary entry to an asylum, on a written agreement to remain for a year, it has been held that no man could, by agreement, lose his liberty, and that the managers of an asylum could not compel compliance with the agreement.[30]

IV. LIABILITIES.

An asylum is an agency of the state, and may be sued with the consent of the legislature, express or implied.[31] It is liable for agreements of officers strictly within the authority given, and for work actually done under contract, but not otherwise,[32] and for trespasses on property.[33] It is not liable for personal injuries inflicted through the misconduct of an employee.[34]

AT. A word of somewhat indefinite meaning,[1] whose significance is generally controlled by the context and attending circumstances denoting the precise sense in which it is used.[2] Used in reference to place it often means "in"[3]

27. **Right of inmates to vote,** see ELECTIONS.

28. Tuck *v.* Board Directors Industrial Home, 106 Cal. 216, 39 Pac. 607. But see People *v.* Sailors' Snug Harbor, 54 Barb. (N. Y.) 532, 5 Abb. Pr. N. S. (N. Y.) 119, holding that accused should have notice and an opportunity to be heard, and that the courts may review the finding.

29. Opinion of Judges, 4 R. I. 587.

30. Matter of Baker, 29 How. Pr. (N. Y.) 485.

31. St. Paul, etc., R. Co. *v.* Brown, 24 Minn. 517; Maia *v.* Eastern State Hospital, 97 Va. 507, 34 S. E. 617, 47 L. R. A. 577.

32. Shipman *v.* State, 42 Wis. 377.

33. Hauns *v.* Central Kentucky Lunatic Asylum, 103 Ky. 562, 20 Ky. L. Rep. 246, 45 S. W. 890, but, though its property may be sold on execution, it is doubtful whether the sale would be good as to articles essential to the operation of the asylum and the comfort of the inmates thereof.

34. Maia *v.* Eastern State Hospital, 97 Va. 507, 34 S. E. 617, 47 L. R. A. 577.

1. People *v.* Blanding, 63 Cal. 333, 339; Minter *v.* State, 104 Ga. 743, 753, 30 S. E. 989.

2. Williams *v.* Ft. Worth, etc., R. Co., 82 Tex. 553, 559, 18 S. W. 206.

3. *Arkansas.*— Graham *v.* State, 1 Ark. 171, 181.

California.— People *v.* Blanding, 63 Cal. 333, 339 [*quoting* Webster Dict.].

Georgia.— Minter *v.* State, 104 Ga. 743, 753, 30 S. E. 989.

Illinois.— Hurley *v.* Marsh, 2 Ill. 329, 330.

Louisiana.— State *v.* Nolan, 8 Rob. (La.) 513, 517.

Maine.— Kaler *v.* Tufts, 81 Me. 63, 65, 16 Atl. 336.

Mississippi.— Harris *v.* State, 72 Miss. 960, 18 So. 387, 33 L. R. A. 85.

New York.— Mohawk Bridge Co. *v.* Utica, etc., R. Co., 6 Paige (N. Y.) 554, 562.

Texas.— Williams *v.* Ft. Worth, etc., R. Co., 82 Tex. 553, 559, 18 S. W. 206; Augustine *v.* State, 20 Tex. 450; Blackwell *v.* State, 30 Tex. App. 416, 418, 17 S. W. 1061.

Canada.— Holmes *v.* Goderich, 36 Can. L. J. 422, 423.

Compare Hilgers *v.* Quinney, 51 Wis. 62, 8 N. W. 17, holding that an affidavit of posting notices "at" certain public places did not show a sufficient posting "in" such places.

"With the names of cities and towns the use of 'at' or 'in' depends not chiefly upon the size of the place, but upon the point of view; when we think merely of the local or geographical point, we use 'at'; when we think of inclusive space, we employ 'in'; as, we arrived 'at' Liverpool; there are a few rich men 'in' this village." Standard Dict. [*quoted* in Rogers *v.* Galloway Female College, 64 Ark. 627, 632, 44 S. W. 454, 39 L. R. A. 636]. *Compare* Century Dict. [*quoted* in Rogers *v.* Galloway Female College, 64 Ark. 627, 632, 44 S. W. 454, 39 L. R. A. 636], where it is said that the preposition "at" denotes "usually a place conceived of as a mere point: . . . so, with names of towns, as, 'at' Stratford, 'at' Lexington; . . . but if the city is of great size, 'in' is commonly used, as 'in' London; . . . unless, again, the city is conceived of as a mere geographical point, as, our financial interests center 'at' New York."

or "within;"[4] but its primary idea is "nearness"[5] or "proximity,"[6] and it is commonly used as the equivalent of "near"[7] or "about."[8] With reference to time it denotes "simultaneousness" as distinguished from "subsequence" or "priority."[9]

AT AND FROM. See MARINE INSURANCE.

ATHEIST. One who disbelieves in the existence of a God Who is the rewarder of truth, and the avenger of falsehood;[10] one who owns no religion.[11] (Atheist: Competency as — Juror, see JURIES; Public Officer, see OFFICERS; Witness,[12] see WITNESSES. Oath of, see OATHS AND AFFIRMATIONS.)

ATLANTIC OCEAN. That branch of the general ocean which separates the continents of Europe and Africa from America.[13]

AT LARGE. Not limited to any particular matter, point, or question; not under physical restraint.[14] (See, generally, ANIMALS.)

AT LAW. According to law; by, for, or in law.[15]

AT LEAST. In the smallest or lowest degree; at the lowest estimate, or at the smallest concession or claim; at the smallest number.[16]

4. Minter *v.* State, 104 Ga. 743, 753, 30 S. E. 989; Mohawk Bridge Co. *v.* Utica, etc., R. Co., 6 Paige (N. Y.) 554, 562; Williams *v.* Ft. Worth, etc., R. Co., 82 Tex. 553, 559, 18 S. W. 206; Homer *v.* Homer, 8 Ch. D. 758, 764, 47 L. J. Ch. 635, 39 L. T. Rep. N. S. 3, 27 Wkly. Rep. 101.

It more generally means "within" than "without," in consequence of its idea of nearness, although it is sometimes used to denote exclusion rather than inclusion. Knoxville, etc., R. Co. *v.* Beeler, 90 Tenn. 548, 553, 18 S. W. 391; Chesapeake, etc., Canal Co. *v.* Key, 3 Cranch C. C. (U. S.) 599, 606, 5 Fed. Cas. No. 2,649.

5. Webster Dict. [*quoted* in O'Conner *v.* Nadel, 117 Ala. 595, 598, 23 So. 532; Ray *v.* State, 50 Ala. 172, 173; Rogers *v.* Galloway Female College, 64 Ark. 627, 632, 44 S. W. 454, 39 L. R. A. 636; Minter *v.* State, 104 Ga. 743, 753, 30 S. E. 989; West Chicago St. R. Co. *v.* Manning, 70 Ill. App. 239, 242; Bartlett *v.* Jenkins, 22 N. H. 53, 63; Williams *v.* Ft. Worth, etc., R. Co., 82 Tex. 553, 559, 18 S. W. 206]; State *v.* Camden, 38 N. J. L. 299, 302; Knoxville, etc., R. Co. *v.* Beeler, 90 Tenn. 548, 553, 18 S. W. 391; Kibbe *v.* Benson, 17 Wall. (U. S.) 624, 21 L. ed. 741. See also Richardson Eng. Dict. [*quoted* in Minter *v.* State, 104 Ga. 743, 753, 30 S. E. 989; Bartlett *v.* Jenkins, 22 N. H. 53, 63].

6. *Georgia.*— Minter *v.* State, 104 Ga. 743, 753, 30 S. E. 989 [*quoting* Richardson Eng. Dict.].

Illinois.— West Chicago St. R. Co. *v.* Manning, 70 Ill. App. 239, 242.

New Hampshire.— Bartlett *v.* Jenkins, 22 N. H. 53, 63 [*quoting* Richardson Eng. Dict.].

Texas.— Williams *v.* Ft. Worth, etc., R. Co., 82 Tex. 553, 559, 18 S. W. 206.

Canada.—Holmes *v.* Goderich, 36 Can. L. J. 422, 423.

7. *California.*— People *v.* Blanding, 63 Cal. 333, 339 [*quoting* Webster Dict.].

Georgia.— Minter *v.* State, 104 Ga. 743, 753, 30 S. E. 989 [*citing* Webster Dict.].

Illinois.— Hurley *v.* Marsh, 2 Ill. 329, 330; West Chicago St. R. Co. *v.* Manning, 70 Ill. App. 239, 242 [*citing* Century Dict.; Webster Dict.].

Maine.— State *v.* Old Town Bridge Corp., 85 Me. 17, 28, 26 Atl. 947.

New Hampshire.— Bartlett *v.* Jenkins, 22 N. H. 53, 63.

New Jersey.— State *v.* Camden, 38 N. J. L. 299, 302.

England.— See Price *v.* Bala, etc., R. Co., 50 L. T. Rep. N. S. 787.

8. West Chicago St. R. Co. *v.* Manning, 70 Ill. App. 239, 242 [*citing* Century Dict.; Webster Dict.].

9. People *v.* Blanding, 63 Cal. 333, 339; Farwell *v.* Rogers, 4 Cush. (Mass.) 460, 463. But see Annan *v.* Baker, 49 N. H. 161, 171, holding that "'At' the end of the year, means 'after' the expiration of the year, and not at any hour, minute, or instant before the end of the year." To same effect see Rogers *v.* Burr, 97 Ga. 10, 25 S. E. 339; *In re* Railway Sleepers Supply Co., 29 Ch. D. 204, 206, 54 L. J. Ch. 720, 52 L. T. Rep. N. S. 731, 33 Wkly. Rep. 595.

10. Com. *v.* Hills, 10 Cush. (Mass.) 530, 532; Gibson *v.* American Mut. L. Ins. Co., 37 N. Y. 580, 584, 5 Transcr. App. (N. Y.) 261.

11. Hale *v.* Everett, 53 N. H. 9, 54, 16 Am. Rep. 82 [*citing* Robbins Religions of All Nations, p. 6].

12. Collateral attack of atheist's affidavit see AFFIDAVITS, 2 Cyc. 5, note 7.

13. The Orient, 4 Woods (U. S.) 255, 16 Fed. 916, 920 [*citing* American Encyc.; Chambers Encyc.].

14. Burrill L. Dict.

15. Burrill L. Dict.

The words signify not "merely a legal tribunal, as distinguished from an equitable jurisdiction, but generally, our system of jurisprudence, whether legal or equitable." Fleming *v.* Burgin, 37 N. C. 584, 590.

16. Hoffman *v.* Clark County, 61 Wis. 5, 7, 20 N. W. 376 [*quoting* Imp. Dict.; Webster Dict.; Worcester Dict.].

Imply that quantity may be more.— While the use of the words "at least" expresses the idea that the quantity shall not be less

AT ONCE. At one and the same time;[17] promptly; forthwith;[18] within a reasonable time.[19]

ATS. See Ad Sectam.

AT SEA. See Marine Insurance.

ATTACH. To take or apprehend by commandment of a writ or precept commonly called an attachment;[20] to take or touch;[21] to tie or fasten; to bind;[22] to connect with.[23]

ATTACHÉ. A person attached to a foreign legation.[24] (See, generally, Ambassadors and Consuls.)

than a given measure in any event, it distinctly implies that it may be more. Roberts *v.* Wilcock, 8 Watts & S. (Pa.) 464, 470. But see Warren Mfg. Co. *v.* Hoffman, 62 Md. 165, 170, wherein it was held clear that the words were used as equivalent to "at most" or "not to exceed."

17. Platter *v.* Green, 26 Kan. 252, 268.

18. Lewis *v.* Hojer, 16 N. Y. Suppl. 534, 536, 41 N. Y. St. 617.

19. Reg. *v.* Rogers, 3 Q. B. D. 28, 33.

20. Burrill L. Dict. See, generally, Attachment.

21. Hollister *v.* Goodale, 8 Conn. 332, 334, 21 Am. Dec. 674 [*quoted* in Buckeye Pipe Line Co. *v.* Fee, 62 Ohio St. 543, 557, 57 N. E. 446, 78 Am. St. Rep. 743; Pennsylvania R. Co. *v.* Pennock, 51 Pa. St. 244, 253], wherein the word is said to be "derived remotely from the Latin term *attingo*, and more immediately from the French *attachér*."

22. Com. *v.* Dumbauld, 97 Pa. St. 293, 303 [*quoting* Webster Dict.].

23. Albin *v.* West Branch, 58 Iowa 77, 80, 12 N. W. 134.

24. Burrill L. Dict.

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Arrest in Civil Actions, see ARREST.
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For Matters Relating to — (*continued*)
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Sequestration, see SEQUESTRATION.
Trustee Process, see GARNISHMENT.
Review of Attachment Proceedings, Generally, see APPEAL AND ERROR.

I. DEFINITION.

The word "attachment" has been defined as "taking into the custody of the law the person or property of one already before the court, or of one whom it is sought to bring before it; a writ issued at the institution or during the progress of an action, commanding the sheriff or other proper officer to attach the property, rights, credits, or effects of the defendant to satisfy the demands of the plaintiff."[1]

II. NATURE AND PURPOSE OF REMEDY.

A. Nature — 1. IN GENERAL. Attachments may be used for two purposes:

1. Bouvier L. Dict. [*quoted* in Beardsley *v.* Beecher, 47 Conn. 408, 414]. See also Lowry *v.* Cady, 4 Vt. 504, 24 Am. Dec. 628; ATTACH.

Attachment of the person is not included within the scope of this article. As to that see CONTEMPT; WITNESSES.

Distinguished from execution.— An attachment has but few of the attributes of an execution, execution being a judicial process for obtaining debt or damages recovered by judgment, and final in its character, while the attachment is but mesne process, liable at any time to be dissolved and the judgment upon which may or may not affect the property seized. Thomson *v.* Baltimore, etc., Steam Co., 33 Md. 312. See also Johnson *v.* Foran, 58 Md. 148.

Judicial attachment defined.— "Judicial," as distinguished from other attachments in Texas, includes those cases where, after an unsuccessful attempt to obtain personal service upon defendant, an attachment is sued out to take the place of personal service. Briggs *v.* Smith, 13 Tex. 269. See *infra*, V, P.

(1) To compel the appearance of a defendant; (2) to seize and hold his property for the payment of the debt to collect which suit is brought. For the first purpose, it was a common-law writ called attachment or pone from its language, "*pone per vadium et salvos plegios*,"—put by gage and safe pledges A. B. the defendant, etc. This was a writ, not issuing out of chancery, but out of the court of common pleas, being grounded on the non-appearance of defendant at the return of the original writ; and thereby the sheriff was commanded to attach him, by taking gage, that is, certain of his goods, which he was to forfeit if he did not appear; or by making him find safe pledges or sureties, who were to be amerced in case of his non-appearance. This was the second process in an ordinary suit, then following the summons, and the first process in actions of trespass *vi et armis* or for other trespasses against the peace such as deceit or conspiracy where the violence of the wrong required a more speedy remedy. The second kind of attachment is a proceeding unknown to the common law. It had its origin in the civil law, and first arose in England in the form of a local custom of London merchants, out of which, as modified and extended by statute, has grown the modern law of attachment.[2] The proceeding as it exists in the United States to-day is deemed to be a summary and extraordinary remedy in derogation of the common law and has been said to owe its existence entirely to statutory enactment.[3]

2. Common-law attachment or pone.— 3 Bl. Comm. 280.

Modern attachment.— Hannibal, etc., R. Co. *v.* Crane, 102 Ill. 249, 40 Am. Rep. 581; Turner *v.* Lytle, 59 Md. 199; Goldmark *v.* Magnolia Metal Co., 65 N. J. L. 341, 47 Atl. 720; Schenck *v.* Griffin, 38 N. J. L. 462; Tolman *v.* Thompson, 2 McCord (S. C.) 43. See also Haber *v.* Nassitts, 12 Fla. 589, 608 (where the court said: "No such process was known at common law, and the proceeding is traced to a custom of London whereby 'if a plaint was affirmed and returned *nihil*,' the plaintiff had a garnishment against debtors of the defendant, and after certain proceedings was entitled to judgment. Under these proceedings, without personal service upon the defendant, debts due the defendant, which were not subjects that could be reached by a fi. fa. at law, were subjected to his claim"); Woolsey Attachm. 23, 24 (where it is said: "The process of attachment seems therefore, in its origin, to have been originally intended merely to compel the appearance of the defendant by sufficient sureties to answer the plaintiff's demand upon him. It was justly considered that the merchants of a great mercantile city would have debtors resident in foreign countries, with no means (unless by their property here) of rendering them amenable to our courts of justice. The process of attachment was therefore probably devised; and hence, in our common law books, it is styled Foreign Attachment. But it may be remarked, that, in the language of the city courts, all non-freemen are styled foreigners"); 1 Rolle Abr. tit. Customs of London, K, 13; Locke Foreign Attachm. 1; and *infra*, II, B.

Georgia — Statutes construed according to custom of London.— In Mills *v.* Findlay, 14 Ga. 230, it was held that the Georgia attachment laws were founded upon the custom of London, and, where they did not contain contrary provisions, were to be construed according to the practice and decisions under that custom.

3. *Alabama.*— Pullman Palace Car Co. *v.* Harrison, 122 Ala. 149, 25 So. 697, 82 Am. St. Rep. 68; Vann *v.* Adams, 71 Ala. 475.

Arizona.— Ordenstein *v.* Bones, (Ariz. 1887) 12 Pac. 614.

Arkansas.— Bush *v.* Visant, 40 Ark. 124; Smith *v.* Block, 7 Ark. 358; Hynson *v.* Taylor, 3 Ark. 552.

California.— Rudolph *v.* Saunders, 111 Cal. 233, 43 Pac. 619; Roberts *v.* Landecker, 9 Cal. 262.

Colorado.— Collins *v.* Burns, 16 Colo. 7, 26 Pac. 145.

Connecticut.—Hubbell *v.* Kingman, 52 Conn. 17; Sanford *v.* Pond, 37 Conn. 588.

Delaware.— Smith *v.* Armour, 1 Pennew. (Del.) 361, 40 Atl. 720; Pennsylvania Steel Co. *v.* New Jersey Southern R. Co., 4 Houst. (Del.) 572.

Florida.— McGehee *v.* Wilkins, 31 Fla. 83, 12 So. 228; West *v.* Woolfolk, 21 Fla. 189.

Georgia.— Clark *v.* Tuggle, 18 Ga. 604; Mills *v.* Findlay, 14 Ga. 230; Levy *v.* Millman, 7 Ga. 167.

Idaho.— Vollmer *v.* Spencer, (Ida. 1897) 51 Pac. 609; Murphy *v.* Montandon, 2 Ida. 1048, 29 Pac. 851, 35 Am. St. Rep. 279.

Illinois.— Haywood *v.* Collins, 60 Ill. 328; May *v.* Baker, 15 Ill. 89; Moore *v.* Hamilton, 7 Ill. 429.

Indiana.— Hoffman *v.* Henderson, 145 Ind. 613, 44 N. E. 629; Cunningham *v.* Jacobs, 120 Ind. 306, 22 N. E. 335; Risher *v.* Gilpin, 29 Ind. 53; Rodde *v.* Hollweg, 19 Ind. App. 222, 49 N. E. 282.

Iowa.— Eads *v.* Pitkin, 3 Greene (Iowa) 77.

Kansas.— Manley *v.* Headley, 10 Kan. 88.

Maryland.— Gunby *v.* Porter, 80 Md. 402, 31 Atl. 324; Thomas *v.* Brown, 67 Md. 512,

2. In Rem or In Personam. Attachment is sometimes spoken of as a proceeding *in rem*,[4] but strictly speaking this is incorrect, as a proceeding *in rem* is taken irrespective of parties and is binding on the whole world, while the attachment affects the particular debtor only and is binding on him alone.[5] When no

10 Atl. 713; Randle *v.* Mellen, 67 Md. 181, 8 Atl. 573; Evesson *v.* Selby, 32 Md. 340; McPherson *v.* Snowden, 19 Md. 197. But *compare* Barney *v.* Patterson, 6 Harr. & J. (Md.) 182.

Michigan.— Jaffray *v.* Jennings, 101 Mich. 515, 60 N. W. 52, 25 L. R. A. 645; Estlow *v.* Hanna, 75 Mich. 219, 42 N. W. 812; Drake *v.* Lake Shore, etc., R. Co., 69 Mich. 168, 37 N. W. 70, 13 Am. St. Rep. 382; Langtry *v.* Wayne Cir. Judges, 68 Mich. 451, 36 N. W. 211, 13 Am. St. Rep. 352.

Mississippi.— Rankin *v.* Dulaney, 43 Miss. 197.

Missouri.— Beach *v.* Baldwin, 14 Mo. 597; Wyeth Hardware, etc., Co. *v.* Lang, 54 Mo. App. 147.

Nebraska.— Hoagland *v.* Wilcox, 42 Nebr. 138, 60 N. W. 376; John V. Farwell Co. *v.* Wright, 38 Nebr. 445, 56 N. W. 984; Handy *v.* Brong, 4 Nebr. 60.

New Hampshire.— Kittredge *v.* Bellows, 7 N. H. 399.

New Jersey.— Baldwin *v.* Flagg, 43 N. J. L. 495; Leonard *v.* Stout, 36 N. J. L. 370; Curtis *v.* Steever, 36 N. J. L. 304; Pullinger *v.* Van Emburgh, 16 N. J. L. 457.

New York.— Penoyar *v.* Kelsey, 150 N. Y. 77, 79, 44 N. E. 788, 34 L. R. A. 248, where the court said: "It exists, as a provisional remedy, only when authorized by statute, and, as such, is comparatively recent in its origin. While attachments were permitted in Justices' Courts by the Revised Statutes and were extended somewhat by the Non-imprisonment Act, they were proceedings in the nature of original process, by which the action was commenced. (2 R. S. 274; L. 1831, ch. 200; Bradner on Attachment, 2. See, also, 1 Webster & Skinner, 236, 2 R. L. 1813, p. 157.) Attachment as a provisional remedy, with the object of securing a debt by preliminary levy upon property to conserve it for eventual execution, was created by the Code of Procedure, and has been continued and extended by the Code of Civil Procedure. (Code Proc. § 227; Co. Civ. Proc. § 635);" Murphy *v.* Jack, 76 Hun (N. Y.) 356, 27 N. Y. Suppl. 802, 58 N. Y. St. 481; Rowles *v.* Hoare, 61 Barb. (N. Y.) 266.

North Dakota.— Birchall *v.* Griggs, 4 N. D. 305, 60 N. W. 842, 50 Am. St. Rep. 654.

Ohio.— Humphrey *v.* Wood, Wright (Ohio) 566.

Oregon.— Case *v.* Noyes, 16 Oreg. 329, 19 Pac. 104; Schneider *v.* Sears, 13 Oreg. 69, 8 Pac. 841.

South Carolina.—Addison *v.* Sujette, (S. C. 1897) 27 S. E. 631; Stanley *v.* Stanley, 35 S. C. 94, 14 S. E. 675; Sargeant *v.* Helmbold, Harp. (S. C.) 219.

South Dakota.— Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

Tennessee.— Jackson *v.* Burke, 4 Heisk. (Tenn.) 610; Conrad *v.* McGee, 9 Yerg. (Tenn.) 428; Terril *v.* Rogers, 3 Hayw. (Tenn.) 203.

Texas.— Wooster *v.* McGee, 1 Tex. 17.

Utah.— Bowers *v.* London Bank of Utah, 3 Utah 417, 4 Pac. 225.

Vermont.— Brigham *v.* Avery, 48 Vt. 602; Walker *v.* Wilmarth, 37 Vt. 289; Leavitt *v.* Holbrook, 5 Vt. 405.

Virginia.— McAllister *v.* Guggenheimer, 91 Va. 317, 21 S. E. 475; Barksdale *v.* Hendree, 2 Patt. & H. (Va.) 43.

West Virginia.— U. S. Baking Co. *v.* Bachman, 38 W. Va. 84, 18 S. E. 382; Altmeyer *v.* Caulfield, 37 W. Va. 847, 17 S. E. 409; Cosner *v.* Smith, 36 W. Va. 788, 15 S. E. 977.

Wisconsin.— Barth *v.* Graf, 101 Wis. 27, 76 N. W. 1100.

United States.— Ritchie *v.* Sayers, 100 Fed. 520.

But *compare* Mack *v.* Parks, 8 Gray (Mass.) 517, 69 Am. Dec. 267.

See 5 Cent. Dig. tit. "Attachment," § 5.

As compared with imprisonment for debt attachment is not deemed to be in derogation of the common law, but rather in mitigation of its severity. Barney *v.* Patterson, 6 Harr. & J. (Md.) 182.

Constitutionality of statute.— In White *v.* Thielens, 106 Pa. St. 173, 175, it was held that the Pennsylvania act of March 17, 1869, relating to the commencement of actions by attachment against fraudulent debtors, was constitutional. The court said: "It works no denial of a trial by jury for the ascertainment of the alleged indebtedness. If the alleged fraud is not sustained the attachment may be dissolved. Yet if there has been a service on the defendant the suit goes on. . . . If just cause existed for the attachment of the property it is because it would be liable to execution after the judgment is obtained. The debtor gets all the benefit of a trial by jury in determining the question of his indebtedness, and is not therefore deprived of the benefit of the laws exempting property from execution issued on the judgment."

4. *Indiana.*—Johnston *v.* Field, 62 Ind. 377.

Maine.— Eastman *v.* Wadleigh, 65 Me. 251, 20 Am. Rep. 695.

Maryland.— Johnson *v.* Stockham, 89 Md. 368, 43 Atl. 943; Coward *v.* Dillinger, 56 Md. 59; Lewis *v.* Higgins, 52 Md. 614; Brent *v.* Taylor, 6 Md. 58.

Mississippi.— Sale *v.* French, 61 Miss. 170; Myers *v.* Farrell, 47 Miss. 281.

New Jersey.— Connelly *v.* Lerche, 56 N. J. L. 95, 28 Atl. 430; Schenck *v.* Griffin, 38 N. J. L. 462; Thompson *v.* Eastburn, 16 N. J. L. 100; Haight *v.* Bergh, 15 N. J. L. 183.

South Carolina.— Stanley *v.* Stanley, 35 S. C. 94, 14 S. E. 675.

5. Rhode Island Hospital Trust Co. *v.* Keeney, 1 N. D. 411, 48 N. W. 341; Woodruff

jurisdiction is obtained over the debtor's person the remedy partakes of the nature of a proceeding *in rem*, in that it proceeds against the property in the custody of the court and the judgment binds such property only;[6] but where jurisdiction of the debtor's person is obtained, either by personal service or appearance, the proceeding is ordinarily *in personam* and a personal judgment is rendered.[7]

3. Original or Auxiliary Process. Under the statutes of some states an attachment is an original process for the commencement of a suit,[8] but now, under the statutes of most states, it is not a writ or process by which an action is commenced, but a mere provisional remedy, ancillary to an action commenced at or before the time when the attachment is sued out.[9] Where it is thus ancillary to a

v. Taylor, 20 Vt. 65; Houston *v.* McCluney, 8 W. Va. 135; Madison First Nat. Bank *v.* Greenwood, 79 Wis. 269, 45 N. W. 810, 48 N. W. 421. See also Sale *v.* French, 61 Miss. 170, 174, where the court said: "As to the property seized, these proceedings have frequently been styled proceedings *in rem*, and it is not altogether incorrect so to designate them, since the property is *in custodia legis*, and is specifically subjected to the satisfaction of the plaintiff's demand; but such suits are also proceedings *in personam*, since it is the personal obligation of the defendant owner which is the foundation of the suit, and it is not necessary that the property seized should have had any sort of connection with the contract sued on. The property seized is not the debtor to the plaintiff, but stands in the suit in which it is attached as the representative of its owner, the defendant. The right to attach is simply the right to seize the property of the debtor and to deal with it as his representative. By the seizure of the thing the right becomes initiate and is consummated by the recovery of the judgment against the owner. If the defendant is served with process or appears and defends, a general judgment may be rendered against him, upon which a general execution may issue. If the court fails to obtain jurisdiction of the person of the defendant, a general judgment is rendered, but its execution is restricted to the property seized."

6. *Arkansas.*— Richmond *v.* Duncan, 4 Ark. 197.

Colorado.— Crisman *v.* Dorsey, 12 Colo. 567, 21 Pac. 920, 14 L. R. A. 664; Emery *v.* Yount, 7 Colo. 107, 1 Pac. 686.

Connecticut.— Waterman *v.* A. & W. Sprague Mfg. Co., 55 Conn. 554, 12 Atl. 240.

Florida.— Haber *v.* Nassitts, 12 Fla. 589.

Georgia.— Kolb *v.* Cheney, 63 Ga. 688.

Illinois.— Tennent-Strihbling Shoe Co. *v.* Hargardine-McKittrick Dry Goods Co., 58 Ill. App. 368.

Indiana.— Johnston *v.* Field, 62 Ind. 377.

Kansas.— National Bank *v.* Peters, 51 Kan. 62, 32 Pac. 637.

Maryland.— Johnson *v.* Stockham, 89 Md. 368, 43 Atl. 943; Coward *v.* Dillinger, 56 Md. 59.

Mississippi.— Erwin *v.* Heath, 50 Miss. 795.

Missouri.— McCord, etc., Mercantile Co. *v.* Bettles, 58 Mo. App. 384.

Nebraska.— Darnell *v.* Mack, 46 Nebr. 740, 65 N. W. 805.

New Jersey.— Schenck *v.* Griffin, 38 N. J. L. 462; Thompson *v.* Easthurn, 16 N. J. L. 100.

New York.— Fitzsimmons *v.* Marks, 66 Barb. (N. Y.) 333.

Ohio.— Oil Well Supply Co. *v.* Koen, 64 Ohio St. 422, 60 N. E. 603; Buckeye Pipe Line Co. *v.* Fee, 62 Ohio St. 543, 57 N. E. 446, 78 Am. St. Rep. 743.

South Carolina.— Stanley *v.* Stanley, 35 S. C. 94, 14 S. E. 675.

Tennessee.— Brown *v.* Brown, 2 Sneed (Tenn.) 431.

Vermont.— Woodruff *v.* Taylor, 20 Vt. 65.

Wisconsin.— Madison First Nat. Bank *v.* Greenwood, 79 Wis. 269, 45 N. W. 810, 48 N. W. 421; Bell *v.* Olmsted, 18 Wis. 69; Jones *v.* Spencer, 15 Wis. 583.

United States.— Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931.

As to what judgment can be rendered where no jurisdiction of debtor's person obtained see *infra*, XVI, D, 1.

7. *Alabama.*— Betancourt *v.* Eberlin, 71 Ala. 461.

Mississippi.— Holman *v.* Fisher, 49 Miss. 472; Erwin *v.* Heath, 50 Miss. 795.

Missouri.— Bachman *v.* Lewis, 27 Mo. App. 81.

New Jersey.— Thompson *v.* Easthurn, 16 N. J. L. 100.

South Carolina.— Shooter *v.* McDuffie, 5 Rich. (S. C.) 61; Robinson *v.* Crowder, 1 Bailey (S. C.) 185.

Tennessee.— Boggess *v.* Gamble, 3 Coldw. (Tenn.) 148; Snell *v.* Allen, 1 Swan (Tenn.) 207; Perkins *v.* Norvell, 6 Humphr. (Tenn.) 151; Green *v.* Shaver, 3 Humphr. (Tenn.) 138; Seawell *v.* Williams, 2 Overt. (Tenn.) 272.

Texas.— Wilson *v.* Zeigler, 44 Tex. 657; Chevallier *v.* Williams, 2 Tex. 239.

Wisconsin.— Madison First Nat. Bank *v.* Greenwood, 79 Wis. 269, 45 N. W. 810, 48 N. W. 421; Whitney *v.* Brunette, 15 Wis. 61.

United States.— Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931.

As to judgment in the proceedings see *infra*, XVI, D.

8. Bradley *v.* State Bank, 20 Ind. 528; Southern California Fruit Exch. *v.* Stamm, 9 N. M. 361, 54 Pac. 345; Furman *v.* Walter, 13 How. Pr. (N. Y.) 348; Albany City Ins. Co. *v.* Whitney, 70 Pa. St. 248.

Attachment as original process to commence an action see Process.

9. *Arkansas.*— Ferguson *v.* Glidewell, 48 Ark. 195, 2 S. W. 711; Atkins *v.* Swope, 38 Ark. 528.

suit already commenced it does not affect the decision of the case upon the merits[10]

California.— Low *v.* Adams, 6 Cal. 277.
Illinois.— Moore *v.* Hamilton, 7 Ill. 429.
Indiana.— Hoffman *v.* Henderson, 145 Ind. 613, 44 N. E. 629; Cunningham *v.* Jacobs, 120 Ind. 306, 22 N. E. 335; Martin *v.* Holland, 87 Ind. 105; Lowry *v.* McGee, 75 Ind. 508; State *v.* Miller, 63 Ind. 475; Robbins *v.* Alley, 38 Ind. 553; Excelsior Fork Co. *v.* Lukens, 38 Ind. 438; Risher *v.* Gilpin, 29 Ind. 53; Fechheimer *v.* Hays, 11 Ind. 478; U. S. Capsule Co. *v.* Isaacs, 23 Ind. App. 533, 55 N. E. 832; Rodde *v.* Hollweg, 19 Ind. App. 222, 49 N. E. 282; Fargo *v.* Cutshaw, 12 Ind. App. 392, 39 N. E. 532.
Indian Territory.— McFadden *v.* Blocker, 2 Indian Terr. 260, 48 S. W. 1043.
Iowa.— Danforth *v.* Rupert, 11 Iowa 547; Veiths *v.* Hagge, 8 Iowa 163; Elliott *v.* Mitchell, 3 Greene (Iowa) 237; Carothers *v.* Click, Morr. (Iowa) 54.
Kansas.— Bundrem *v.* Denn, 25 Kan. 430; Boston *v.* Wright, 3 Kan. 227; Miller *v.* Dixon, 2 Kan. App. 445, 42 Pac. 1014.
Kentucky.— Duncan *v.* Wickliffe, 4 Metc. (Ky.) 118; Steinharter *v.* Wolfstein, 13 Ky. L. Rep. 871.
Louisiana.— U. S. *v.* Murdock, 18 La. Ann. 305, 89 Am. Dec. 651.
Nebraska.— Darnell *v.* Mack, 46 Nebr. 740, 65 N. W. 805; Stutzner *v.* Printz, 43 Nebr. 306, 61 N. W. 620; Reed *v.* Maben, 21 Nebr. 696, 33 N. W. 252; Tessier *v.* Crowley, 16 Nebr. 369, 20 N. W. 264. *Compare* Jordan *v.* Dewey, 40 Nebr. 639, 59 N. W. 88, where an analogy is drawn between an attachment and an action.
New Mexico.— Staab *v.* Hersch, 3 N. M. 153, 3 Pac. 248. And see Southern California Fruit Exch. *v.* Stamm, 9 N. M. 361, 54 Pac. 345.
New York.— Stone *v.* Pratt, 90 Hun (N. Y.) 39, 35 N. Y. Suppl. 519, 70 N. Y. St. 131; Lamkin *v.* Douglass, 27 Hun (N. Y.) 517; Finn *v.* Mehrbach, 65 N. Y. Suppl. 250; Herzberg *v.* Boiesen, 53 N. Y. Suppl. 256; Houghton *v.* Ault, 8 Abb. Pr. (N. Y.) 89 note, 16 How. Pr. (N. Y.) 77; Furman *v.* Walter, 13 How. Pr. (N. Y.) 348; Fraser *v.* Greenhill, 3 Code Rep. (N. Y.) 172, 2 Edm. Sel. Cas. (N. Y.) 356.
North Carolina.—Grambling *v.* Dickey, 118 N. C. 986, 24 S. E. 671.
North Dakota.— Fox *v.* Mackenzie, 1 N. D. 298, 47 N. W. 386; Jordan *v.* Frank, 1 N. D. 206, 46 N. W. 171.
Ohio.— Carty *v.* Fenstemaker, 14 Ohio St. 457.
South Carolina.— Stevenson *v.* Dunlap, 33 S. C. 350, 11 S. E. 1017.
South Dakota.—Western Twine Co. *v.* Scott, 11 S. D. 27, 75 N. W. 273.
Tennessee.— Walker *v.* Cottrell, 6 Baxt. (Tenn.) 257; Lewis *v.* Woodfolk, 2 Baxt. (Tenn.) 25.
Washington.— Windt *v.* Banniza, 2 Wash. 147, 26 Pac. 189; Nesqually Mill Co. *v.* Taylor, 1 Wash. Terr. 1.
West Virginia.—Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.
Wisconsin.— Maguire *v.* Bolen, 94 Wis. 48, 68 N. W. 408; Madison First Nat. Bank *v.* Greenwood, 79 Wis. 269, 45 N. W. 810, 48 N. W. 421; Bell *v.* Olmsted, 18 Wis. 69; Jarvis *v.* Barrett, 14 Wis. 591; Chase *v.* Hill, 13 Wis. 222.
See 5 Cent. Dig. tit. "Attachment," § 1.

Where process is served upon defendant the attachment is auxiliary process. Williams *v.* Kimball, 8 Mart. N. S. (La.) 351; Hillman *v.* Anthony, 4 Baxt. (Tenn.) 444.

Part of record.— An attachment, though an ancillary proceeding, is a part of the record. Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

Is an "action" so far as relates to justice's fees.— An attachment, while it is not an independent action, and while it is auxiliary and ancillary to the main action in which it may be obtained, is, nevertheless, an "action" or "cause" within the meaning of such words as used in a statute allowing a justice to charge fees upon the trial of a cause. Gibson *v.* Sidney, 50 Nebr. 12, 69 N. W. 314.

10. Atkins *v.* Swope, 38 Ark. 528; Stutzner *v.* Printz, 43 Nebr. 306, 61 N. W. 620; Jordan *v.* Frank, 1 N. D. 206, 46 N. W. 171; Windt *v.* Banniza, 2 Wash. 147, 26 Pac. 189. See also Elliott *v.* Mitchell, 3 Greene (Iowa) 237, 239, where the court said: "The attachment and the suit are distinct matters, and any error or irregularity in the former cannot affect the latter. The suit should be tried and determined upon its own merits, without any regard to the attachment."

Affidavit not a pleading in action.— Neither the affidavit for an attachment nor the order of attachment is any part of the pleadings in the action. Bundrem *v.* Denn, 25 Kan. 430.

Orders in proceeding do not affect the merits.— The attachment proceeding being ancillary to the main action, any order made with reference to the attached property does not affect the progress of the case upon the merits. Miller *v.* Dixon, 2 Kan. App. 445, 42 Pac. 1014.

Appeal from order in attachment proceedings.— The attachment is so far independent of the principal action that an order in the attachment proceedings may, when final, be, in some states, the subject of a petition in error, during the pendency of the action. Boston *v.* Wright, 3 Kan. 227; Shakman *v.* Koch, 93 Wis. 595, 67 N. W. 925.

Appeals from orders dissolving or refusing to dissolve an attachment see *infra*, XV, G.

Failure to serve process in main action.— Jurisdiction properly acquired over property by attachment is not lost by failure to serve process in the main action so long as the action remains pending and has not been dismissed. Rachman *v.* Clapp, 50 Nebr. 648, 70 N. W. 259 [*following* Darnell *v.* Mack, 46 Nebr. 740, 65 N. W. 805].

and, if the attachment be dissolved, this alone will not necessarily defeat the action.[11]

4. Construction of Statutes — a. In General. Attachment being an extraordinary and summary remedy in derogation of the common law,[12] the courts will usually, in the absence of any statutory provision to the contrary,[13] construe the statutes strictly in favor of those against whom the proceeding is employed, both as to the subject-matter of the attachment and the method of enforcing the remedy, and will exact of plaintiff a strict compliance with all the statutory requirements.[14] The remedy must be closely confined within the limits assigned

11. Boston *v.* Wright, 3 Kan. 227; Holman *v.* Fisher, 49 Miss. 472; Reed *v.* Maben, 21 Nebr. 696, 33 N. W. 252.

Effect on the principal action of dissolution of attachment see *infra*, XV, E, 2.

12. Attachment in derogation of common law see *supra*, II, A, 1.

13. Liberal construction provided by statute see *infra*, II, A, 4, b

14. *Arizona.*— Ordenstein *v.* Bones, (Ariz. 1887) 12 Pac. 614.

Arkansas.— Bush *v.* Visant, 40 Ark. 124; Hynson *v.* Taylor, 3 Ark. 552; Desha *v.* Baker, 3 Ark. 509; Jones *v.* Buzzard, 2 Ark. 415.

California.— Rudolph *v.* Saunders, 111 Cal. 233, 43 Pac. 619; Roberts *v.* Landecker, 9 Cal. 262.

Connecticut.—Hubbell *v.* Kingman, 52 Conn. 17; Sanford *v.* Pond, 37 Conn. 588.

Delaware.— Smith *v.* Armour, 1 Pennew. (Del.) 361, 40 Atl. 720.

Florida.— Chattanooga First Nat. Bank *v.* Willingham, 36 Fla. 32, 18 So. 58; McGehee *v.* Wilkins, 31 Fla. 83, 12 So. 228.

Idaho.— Vollmer *v.* Spencer, (Ida. 1897) 51 Pac. 609; Murphy *v.* Montandon, 2 Ida. 1048, 29 Pac. 851, 35 Am. St. Rep. 279.

Indiana.— Lowry *v.* McGee, 75 Ind. 508; Marnine *v.* Murphy, 8 Ind. 272; Tyner *v.* Gapin, 3 Blackf. (Ind.) 370; Powers *v.* Hurst, 3 Blackf. (Ind.) 229; O'Brien *v.* Daniel, 2 Blackf. (Ind.) 290; U. S. Capsule Co. *v.* Isaacs, 23 Ind. App. 533, 55 N. E. 832; Rodde *v.* Hollweg, 19 Ind. App. 222, 49 N. E. 282; Fargo *v.* Cutshaw, 12 Ind. App. 392, 39 N. E. 532.

Kansas.— Manley *v.* Headley, 10 Kan. 88; Campbell *v.* Hall, 1 Kan. 488; Harding *v.* Guaranty L. & T. Co., 3 Kan. App. 519, 43 Pac. 835.

Kentucky.— Moses *v.* Rountree, 11 Ky. L. Rep. 438.

Louisiana.— Natchez First Nat. Bank *v.* Moss, 41 La. Ann. 227, 6 So. 25; Bussey *v.* Rothschilds, 26 La. Ann. 258; Price *v.* Merritt, 13 La. Ann. 526; Denegre *v.* Milne, 10 La. Ann. 324; Graham *v.* Burckhalter, 2 La. Ann. 415; Offutt *v.* Edwards, 9 Rob. (La.) 90; Putnam *v.* Grand Gulf R., etc., Co., 3 Rob. (La.) 232; Lacy *v.* Kenley, 3 La. 16.

Michigan.— Faul *v.* Beucus, 124 Mich. 25, 82 N. W. 659; Jaffray *v.* Jennings, 101 Mich. 515, 60 N. W. 52, 25 L. R. A. 645; McCrea *v.* Russell, 100 Mich. 375, 58 N. W. 1118; Drake *v.* Lake Shore, etc., R. Co., 69 Mich. 168, 37 N. W. 70, 13 Am. St. Rep. 382; Borland *v.* Kingsbury, 65 Mich. 59, 31 N. W. 620; Fairbanks *v.* Bennett, 52 Mich. 61, 17 N. W. 696; Van Norman *v.* Jackson County Cir. Judge, 45 Mich. 204, 7 N. W. 796; Mathews *v.* Densmore, 43 Mich. 461, 5 N. W. 669.

Nebraska.— John V. Farwell Co. *v.* Wright, 38 Nebr. 445, 56 N. W. 984; Handy *v.* Brong, 4 Nebr. 60.

New York.— Penoyar *v.* Kelsey, 150 N. Y. 77, 44 N. E. 788, 34 L. R. A. 248; Solinger *v.* Patrick, 7 Daly (N. Y.) 408.

Ohio.— Taylor *v.* McDonald, 4 Ohio 149; Humphrey *v.* Wood, Wright (Ohio) 566; Hoyman *v.* Beverstock, 8 Ohio Cir. Ct. 473.

Oregon.— Case *v.* Noyes, 16 Oreg. 329, 19 Pac. 104; Schneider *v.* Sears, 13 Oreg. 69, 8 Pac. 841.

South Carolina.— Munroe *v.* Williams, 37 S. C. 81, 16 S. E. 533, 19 L. R. A. 665; Ketchin *v.* Landnecker, 32 S. C. 155, 10 S. E. 936; National Exch. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028; Wando Phosphate Co. *v.* Rosenberg, 31 S. C. 301, 9 S. E. 969; Kerchner *v.* McCormac, 25 S. C. 461; Myers *v.* Lewis, 1 McMull. (S. C.) 54.

South Dakota.—Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

Utah.— Bowers *v.* London Bank of Utah, 3 Utah 417, 4 Pac. 225.

Vermont.— Brigham *v.* Avery, 48 Vt. 602; Walker *v.* Wilmarth, 37 Vt. 289.

Virginia.— McAllister *v.* Guggenheimer, 91 Va. 317, 21 S. E. 475.

West Virginia.— Ballard *v.* Great Western Min., etc., Co., 39 W. Va. 394, 19 S. E. 510; Reed *v.* McCloud, 38 W. Va. 701, 18 S. E. 924; U. S. Baking Co. *v.* Bachman, 38 W. Va. 84, 18 S. E. 382; Altmeyer *v.* Caulfield, 37 W. Va. 847, 17 S. E. 409; Cosner *v.* Smith, 36 W. Va. 788, 15 S. E. 977; Hudkins *v.* Haskins, 22 W. Va. 645; Delaplain *v.* Armstrong, 21 W. Va. 211.

Wisconsin.— Oconto Co. *v.* Esson, (Wis. 1901) 87 N. W. 855; Barth *v.* Graf, 101 Wis. 27, 76 N. W. 1100; Lederer *v.* Rosenthal, 99 Wis. 235, 74 N. W. 971; Maguire *v.* Bolen, 94 Wis. 48, 68 N. W. 408; Whitney *v.* Brunette, 15 Wis. 61; Elliott *v.* Jackson, 3 Wis. 649; Pratt *v.* Pratt, 2 Pinn. (Wis.) 395.

United States.— Ritchie *v.* Sayers, 100 Fed. 520.

See 5 Cent. Dig. tit. "Attachment," § 5.

Failure to comply with a merely directory provision will not vitiate an attachment. Morrel *v.* Buckley, 20 N. J. L. 667; Wood *v.* Chapin, 13 N. Y. 509, 67 Am. Dec. 62.

No presumptions will supply the defect where the statute is departed from. Smith

by the legislature and cannot be extended by implication beyond the terms of the statute creating it;[15] but the court will not push the strict construction so far as to nullify the beneficial intent of the statute and leave the creditor remediless.[16] The rule requiring strict construction does not extend to a statute providing means for resisting the attachment.[17]

b. Liberal Construction Provided by Statute. The proceeding by attachment is a favorite of the legislatures and in a number of jurisdictions it is now expressly provided that the statutes shall not be strictly construed,[18] and in other states the courts, having regard to the intention of the legislatures, have adopted a more liberal construction independently of express statutory provisions.[19] In any

v. Union Milk Co., 70 Hun (N. Y.) 348, 24 N. Y. Suppl. 79, 53 N. Y. St. 891; Lederer *v.* Rosenthal, 99 Wis. 235, 74 N. W. 971.

15. *Arkansas.*— Smith *v.* Block, 7 Ark. 358; Hynson *v.* Taylor, 3 Ark. 552.

Florida.— Haber *v.* Nassitts, 12 Fla. 589.

Louisiana.— Smith *v.* Smith, 2 La. Ann. 447.

Michigan.— Jaffray *v.* Jennings, 101 Mich. 515, 60 N. W. 52, 25 L. R. A. 645; Van Norman *v.* Jackson County Cir. Judge, 45 Mich. 204, 7 N. W. 796.

Mississippi.— Roach *v.* Brannon, 57 Miss. 490; Cantrell *v.* Letwinger, 44 Miss. 437; Hosey *v.* Ferriere, 1 Sm. & M. (Miss.) 663.

Nebraska.— Rouss *v.* Wright, 14 Nebr. 457, 16 N. W. 765; Handy *v.* Brong, 4 Nebr. 60.

New Jersey.— Pullinger *v.* Van Emburgh, 16 N. J. L. 457.

New York.— Solinger *v.* Patrick, 7 Daly (N. Y.) 408.

Oregon.— Case *v.* Noyes, 16 Oreg. 329, 19 Pac. 104.

South Carolina.—Addison *v.* Sujette, (S. C. 1897) 27 S. E. 631; Ivy *v.* Caston, 21 S. C. 583; Robinson *v.* Crowder, 1 Bailey (S. C.) 185; Sargeant *v.* Helmbold, Harp. (S. C.) 219.

Tennessee.— Jackson *v.* Burke, 4 Heisk. (Tenn.) 610.

Texas.— Givens *v.* Taylor, 6 Tex. 315; Sloo *v.* Powell, Dall. (Tex.) 467.

Virginia.— Barksdale *v.* Hendree, 2 Patt. & H. (Va.) 43.

West Virginia.— Cosner *v.* Smith, 36 W. Va. 788, 15 S. E. 977.

Wisconsin.— Davidson *v.* Hackett, 49 Wis. 186, 5 N. W. 459.

Compliance must appear on face of proceedings.—The attachment proceedings must upon their face show affirmatively that the requirements of the statute have been complied with. Coward *v.* Dillinger, 56 Md. 59.

16. Taylor *v.* Ricards, 9 Ark. 378, 384 (where Walker, J., said: "It is true that this is a statutory proceeding, in derogation of the common law, and should receive a strict construction; yet there is a common sense view of this and all other acts, whether in derogation of the common law remedies or not, that should not be lost sight of, for it is not unfrequently the case that courts, by adopting this familiar and well recognized rule, feel that their sphere of action is so circumscribed as to force them into refined and unmeaning technicalities, such as defeat every valuable purpose of our most important and useful statutes"); Hardee *v.* Langford, 6 Fla. 13; Bretney *v.* Jones, 1 Greene (Iowa) 366. And see Rowles *v.* Hoare, 61 Barb. (N. Y.) 266.

17. Mitchell *v.* Woods, 11 Ark. 180 (where it was held that a statute allowing a third person to interplead in attachment would not be strictly construed. The same reasons that require a strict construction of the statute providing for the attachment proceedings forbid a strict construction of a statute providing means for resisting such proceedings); Sydnor *v.* Chambers, Dall. (Tex.) 601.

18. *Alabama.*— Flake *v.* Day, 22 Ala. 132; Pearsoll *v.* Middlebrook, 2 Stew. & P. (Ala.) 406.

Georgia.— Kennon *v.* Evans, 36 Ga. 89; Force *v.* Hubbard, 26 Ga. 289. Formerly the attachment laws were strictly construed. Clark *v.* Tuggle, 18 Ga. 604; Mills *v.* Findlay, 14 Ga. 230; Levy *v.* Millman, 7 Ga. 167.

Iowa.— Magoon *v.* Gillett, 54 Iowa 54, 6 N. W. 131. Under the earlier statutes a strict construction was required. Musgrave *v.* Brady, Morr. (Iowa) 456; Wilkie *v.* Jones, Morr. (Iowa) 97.

Mississippi.—Saunders *v.* Columbus L., etc., Ins. Co., 43 Miss. 583; Green *v.* Anderson, 39 Miss. 359; Augusta Bank *v.* Conrey, 28 Miss. 667; Dandridge *v.* Stevens, 12 Sm. & M. (Miss.) 723; Lee *v.* Peters, 1 Sm. & M. (Miss.) 503. But see Rankin *v.* Dulaney, 43 Miss. 197; Hopkins *v.* Grissom, 26 Miss. 143.

New Jersey.— Devlan *v.* Wells, 65 N. J. L. 213, 47 Atl. 467; Jersey City *v.* Horton, 38 N. J. L. 88; Thompson *v.* Eastburn, 16 N. J. L. 100.

Tennessee.— Dougherty *v.* Kellum, 3 Lea (Tenn.) 643; Lewis *v.* Woodfolk, 2 Baxt. (Tenn.) 25; Jackson *v.* Burke, 4 Heisk. (Tenn.) 610; Lyons *v.* Mason, 4 Coldw. (Tenn.) 525; Vance *v.* Cooper, 2 Coldw. (Tenn.) 497; Maples *v.* Tunis, 11 Humphr. (Tenn.) 108, 53 Am. Dec. 779; Runyan *v.* Morgan, 7 Humphr. (Tenn.) 210. Under the earlier statutes a strict construction was deemed necessary. Conrad *v.* McGee, 9 Yerg. (Tenn.) 428.

Texas.— Cahn *v.* Bonnett, 62 Tex. 674; Lewis *v.* Stewart, 62 Tex. 352. But see Burch *v.* Watts, 37 Tex. 135; Wooster *v.* McGee, 1 Tex. 17; Whitley *v.* Jackson, 1 Tex. App. Civ. Cas. § 574; Raquet *v.* Nixon, Dall. (Tex.) 386.

See 5 Cent. Dig. tit. "Attachment," § 5.

19. *Illinois.*— It is held that in view of the liberal nature of the attachment laws, the

case, however, a person seeking the benefit of this summary remedy must bring himself clearly within the material provisions of the statute.[20]

c. Conflict of Laws. Remedies are governed exclusively by the laws of the place where they are prosecuted; and therefore the validity and effect of attachment proceedings must be determined by the laws of the state in which they are brought, provided that the property attached is within the jurisdiction of such state.[21]

d. Retrospective Operation of Statutes. It has been held in some cases that a statute giving the remedy by attachment in cases where it had not previously existed may operate retrospectively so as to embrace acts committed before its passage;[22] but when the statute is not intended to be retroactive it will have no effect upon proceedings commenced previous to its going into operation.[23]

e. Effect of Repeal on Pending Proceedings. It has been held that the repeal of an act authorizing attachment, pending proceedings thereunder but before the attachment lien has been perfected by judgment, will operate to divest the lien in the absence of any saving clause excepting pending attachments;[24] but where the lien of the attachment has been perfected by judgment it becomes a vested right which cannot be taken away by subsequent legislation.[25]

f. Construction of State Statutes by Federal Courts. In the circuit and district courts of the United States, after jurisdiction has been obtained of the person of defendant,[26] plaintiff is entitled to an attachment in the cases pro-

evident intention of the legislature would be defeated by adopting a strict construction. Hannibal, etc., R. Co. *v.* Crane, 102 Ill. 249, 40 Am. Rep. 581. In the earlier cases a strict construction was considered necessary. May *v.* Baker, 15 Ill. 89; Moore *v.* Hamilton, 7 Ill. 429.

Maryland.—A substantial compliance with the statute is deemed sufficient. Gunby *v.* Porter, 80 Md. 402, 31 Atl. 324; Hoffman *v.* Reed, 57 Md. 370; Coward *v.* Dillinger, 56 Md. 59; Evesson *v.* Selby, 32 Md. 340; Mears *v.* Adreon, 31 Md. 229; White *v.* Solomonsky, 30 Md. 585; Shivers *v.* Wilson, 5 Harr. & J. (Md.) 130, 9 Am. Dec. 497. *Compare* Randle *v.* Mellen, 67 Md. 181, 8 Atl. 573; Turner *v.* Lytle, 59 Md. 199; Brown *v.* Somerville, 8 Md. 444.

Montana.— Cope *v.* Upper Missouri Min., etc., Co., 1 Mont. 55.

North Carolina.— It is held that when it appears from the whole record that the statute has been substantially complied with the attachment will not be dissolved. Best *v.* British, etc., Co., 128 N. C. 351, 38 S. E. 923; Grant *v.* Burgwyn, 79 N. C. 513.

Pennsylvania.— It has been held that the statutes providing for attachments are remedial and should be liberally construed. Strock *v.* Little, 45 Pa. St. 416; Swartz *v.* Lawrence, 12 Phila. (Pa.) 181, 34 Leg. Int. (Pa.) 114. But see Elliott *v.* Plukart, 6 Pa. Co. Ct. 151.

20. Craigmiles *v.* Hays, 7 Lea (Tenn.) 720; Lewis *v.* Woodfolk, 2 Baxt. (Tenn.) 25; Lewis *v.* Stewart, 62 Tex. 352.

21. *Michigan.*— Corbett *v.* Littlefield, 84 Mich. 30, 47 N. W. 581, 22 Am. St. Rep. 681, 11 L. R. A. 95.

Missouri.— Ruhe *v.* Buck, 124 Mo. 178, 27 S. W. 412, 46 Am. St. Rep. 439, 25 L. R. A. 178.

New Hampshire.— Ferguson *v.* Clifford, 37 N. H. 86; French *v.* Hall, 9 N. H. 137, 32 Am. Dec. 341.

New Jersey.— Cronan *v.* Fox, 50 N. J. L. 417, 14 Atl. 119.

South Carolina.— Pegram *v.* Williams, 4 Rich. (S. C.) 219.

United States.— Green *v.* Van Buskirk, 5 Wall. (U. S.) 307, 18 L. ed. 599.

See also Minor Conflict of Laws, §§ 126, 180; GARNISHMENT.

22. Green *v.* Anderson, 39 Miss. 359; Swartz *v.* Lawrence, 12 Phila. (Pa.) 181, 34 Leg. Int. (Pa.) 114.

Retrospective operation of statutes in general see STATUTES.

A statute permitting an amended or substituted affidavit in an attachment was applied to actions pending when it was enacted, inasmuch as it related only to the remedy, and prescribed and regulated a mere matter of procedure; and in such matter a party has no vested right. Rosenthal *v.* Wehe, 58 Wis. 621, 17 N. W. 318.

23. Frankenheimer *v.* Slocum, 24 Ala. 373; Risewick *v.* Davis, 19 Md. 82; Parkinson *v.* Brandenburg, 35 Minn. 294, 28 N. W. 919, 59 Am. Rep. 326; Greenleaf *v.* Edes, 2 Minn. 264. See, generally, CONSTITUTIONAL LAW.

24. Stephenson *v.* Doe, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489; Evans-Snider-Buel Co. *v.* McFadden, 105 Fed. 293.

Repeal of ground for attachment.— The Colorado act of 1895, repealing one of the grounds on which an attachment might issue, did not affect proceedings pending when it became a law. Mulnix *v.* Spratlin, 10 Colo. App. 390, 50 Pac. 1078; Day *v.* Madden, 9 Colo. App. 464, 48 Pac. 1053; National Bank of Commerce *v.* Riethmann, 79 Fed. 582, 49 U. S. App. 144, 25 C. C. A. 101.

25. McFadden *v.* Blocker, 2 Indian Terr. 260, 48 S. W. 1043. See, generally, CONSTITUTIONAL LAW.

Lien of an attachment see *infra*, XII.

26. Jurisdiction of federal courts to issue see *infra*, VII, B, 9.

vided by the statutes in force on June 1, 1872, in the state where such federal court is held and by such subsequent statutes of that state as have been adopted by the general rule of the federal court.[27] The federal courts follow the decisions of the supreme court of the state upon the construction of the state attachment law,[28] and they follow the state practice "as near as may be." [29]

B. Purpose. Originally the purpose of the attachment laws seems to have been simply to compel the appearance of a debtor over whose person jurisdiction could not be obtained by ordinary process,[30] but at an early date the remedy was generally extended by statute so as to serve the double purpose of compelling defendant's appearance and securing to plaintiff the benefit of such judgment as he might recover;[31] and under the present statutes in most jurisdictions the chief purpose served by the remedy is to secure a contingent lien on defendant's

27. Logan *v.* Goodwin, 104 Fed. 490, 43 C. C. A. 658; Binns *v.* Williams, 4 McLean (U. S.) 580, 3 Fed. Cas. No. 1,423; U. S. Rev. Stat. (1872), § 915; 17 U. S. Stat. at L. p. 197, c. 255.

28. Price *v.* Adler-Goldman Commission Co., 71 Fed. 151, 36 U. S. App. 266, 18 C. C. A. 15; Wolf *v.* Cook, 40 Fed. 432.

Conflict between state and federal decisions.— An attachment issued by the federal court in a cause to which plaintiffs were not parties was levied upon property on which plaintiffs held a mortgage, valid under the decisions of the state court, but invalid under a decision of the federal court from which the writ issued. It was held that, in an action in a state court by the mortgagee against the attachment plaintiff to recover the amount of his interest in the property seized and sold, the decisions of the state courts as to the validity of such a mortgage should prevail and not the decision of the federal court whence the attachment issued. Meyer *v.* Gage, 65 Iowa 606, 22 N. W. 892.

29. Rice *v.* Adler-Goldman Commission Co., 71 Fed. 151, 36 U. S. App. 266, 18 C. C. A. 15; Baltimore Third Nat. Bank *v.* Teal, 4 Hughes (U. S.) 572, 5 Fed. 503; Wolf *v.* Cook, 40 Fed. 432; U. S. Rev. Stat. (1872), § 914. But a federal court may allow an amendment in a case where the state practice does not permit such relief. Booth *v.* Denike, 65 Fed. 43; Bowden *v.* Burnham, 59 Fed. 752, 19 U. S. App. 448, 8 C. C. A. 248; Erstein *v.* Rothschild, 22 Fed. 61.

30. *District of Columbia.*— Robinson *v.* Morrison, 2 App. Cas. (D. C.) 105.

Maryland.— Risewick *v.* Davis, 19 Md. 82; Barr *v.* Perry, 3 Gill (Md.) 313; Barney *v.* Patterson, 6 Harr. & J. (Md.) 182; Campbell *v.* Morris, 3 Harr. & M. (Md.) 535.

Massachusetts.— Mack *v.* Parks, 8 Gray (Mass.) 517, 69 Am. Dec. 267; Hubbard *v.* Hamilton Bank, 7 Metc. (Mass.) 340; Watson *v.* Todd, 5 Mass. 271.

Mississippi.— Myers *v.* Farrell, 47 Miss. 281; Page *v.* Ford, 2 Sm. & M. (Miss.) 266.

New Jersey.— State *v.* Mills, 57 N. J. L. 574, 32 Atl. 7; Phœnix Iron Co. *v.* New York Wrought Iron R. Chair Co., 27 N. J. L. 484.

New York.— Penoyar *v.* Kelsey, 150 N. Y. 77, 79, 44 N. E. 788, 34 L. R. A. 248, where the court said: "The process of attachment, as it existed under the common law, differed in its nature and object from the provisional remedy now known by that name. Its original purpose was to acquire jurisdiction of the defendant by compelling him to appear in court through the seizure of his property, which he forfeited if he did not appear, or furnish sureties for his appearance. (3 Bl. Comm. 280; 1 Rolle Abr. tit. Customs of London K, 13; Kneeland Attach. 6; Drake Attach. § 5; Ashley Attach. 11; Locke Foreign Attach. 12.) It was part of the service of process in a civil action through a species of distress, in which the goods attached were the ancient *vadii* or pledges."

South Carolina.— Munroe *v.* Williams, 37 S. C. 81, 16 S. E. 533, 19 L. R. A. 665; Callender *v.* Duncan, 2 Bailey (S. C.) 454; Robinson *v.* Crowder, 1 Bailey (S. C.) 185; Young *v.* Gray, Harp. (S. C.) 38; Foster *v.* Jones, 1 McCord (S. C.) 116.

Tennessee.—Welch *v.* Robinson, 10 Humphr. (Tenn.) 263.

31. Johnson *v.* Stockham, 89 Md. 368, 43 Atl. 943; Cruett *v.* Jenkins, 53 Md. 217; Risewick *v.* Davis, 19 Md. 82. And see Hepburn's Case, 3 Bland Ch. (Md.) 95; Mack *v.* Parks, 8 Gray (Mass.) 517, 69 Am. Dec. 267; Hubbard *v.* Hamilton Bank, 7 Metc. (Mass.) 340; Sewall *v.* Mattoon, 9 Mass. 535; Watson *v.* Todd, 5 Mass. 271; Bowman *v.* Barnard, 24 Vt. 355.

New Hampshire — Attachment of land.— In New Hampshire an attachment of land is a species of lien created by statute, by which the land is held to respond to the debt or damage and cost which a plaintiff may recover in the suit. Kittredge *v.* Bellows, 7 N. H. 399.

New Jersey — To bind property for benefit of all creditors.— The intent of the statute allowing attachment against an absent or absconding debtor is to bind by summary proceeding *in rem* the debtor's estate for the equal benefit of all his creditors. Cummins *v.* Blair, 18 N. J. L. 151.

Pennsylvania — Foreign attachment.— The purpose of the Pennsylvania statutes providing for foreign attachments is twofold: to compel the appearance of the debtor, and to render his effects within the state subject to the demands of creditors. Albany City Ins. Co. *v.* Whitney, 70 Pa. St. 248; Jackson's Appeal, 2 Grant (Pa.) 407; Darrach *v.* Wilson, 2 Miles (Pa.) 116; H. B. Claflin Co. *v.* Weiss, 16 Pa. Co. Ct. 247.

property until plaintiff can, by appropriate proceedings, obtain a judgment and have such property applied to its satisfaction.[32]

C. Attachment and Arrest as Concurrent Remedies. Attachment lies against defendant's property although he has been previously arrested on process issued in the same cause;[33] but defendant's property cannot be attached and his body taken on the same writ.[34]

Tennessee — Distinction between original and ancillary attachment.— In Tennessee where an attachment is issued as original process it serves the double purpose of compelling the appearance and answer of defendant and of subjecting his property to the satisfaction of the expected recovery. Chattanooga Third Nat. Bank *v.* Foster, 90 Tenn. 735, 18 S. W. 267; Walker *v.* Cottrell, 6 Baxt. (Tenn.) 257; Harris *v.* Taylor, 3 Sneed (Tenn.) 536, 67 Am. Dec. 576; Boyd *v.* Buckingham, 10 Humphr. (Tenn.) 433. Where, however, the attachment is merely ancillary to an action, its only office is to hold the attached property for the satisfaction of the judgment in the principal action, and does not bring the party into court. Walker *v.* Cottrell, 6 Baxt. (Tenn.) 257; Lewis *v.* Woodfolk, 2 Baxt. (Tenn.) 25.

32. *Arkansas.*— Ferguson *v.* Glidewell, 48 Ark. 195, 2 S. W. 711; Atkins *v.* Swope, 38 Ark. 528.

California.— Low *v.* Adams, 6 Cal. 277.

Colorado.— Crisman *v.* Dorsey, 12 Colo. 567, 21 Pac. 920, 4 L. R. A. 664; Raynolds *v.* Ray, 12 Colo. 108, 20 Pac. 4.

Connecticut.— Hollister *v.* Goodale, 8 Conn. 332, 21 Am. Dec. 674.

District of Columbia.— Robinson *v.* Morrison, 2 App. Cas. (D. C.) 105.

Indiana.— Cunningham *v.* Jacobs, 120 Ind. 306, 22 N. E. 335; Excelsior Fork Co. *v.* Lukens, 38 Ind. 438; Risher *v.* Gilpin, 29 Ind. 53.

Indian Territory.— McFadden *v.* Blocker, 2 Indian Terr. 260, 48 S. W. 1043.

Kansas.— Quinlan *v.* Danford, 28 Kan. 507; Bundrem *v.* Denn, 25 Kan. 430; Larimer *v.* Kelley, 10 Kan. 298; Boston *v.* Wright, 3 Kan. 227.

Kentucky.— Steinharter *v.* Wolfstein, 13 Ky. L. Rep. 871.

Louisiana.— Adams *v.* Day, 14 La. 503; Harvey *v.* Grymes, 8 Mart. (La.) 395.

Maine.— Nichols *v.* Valentine, 36 Me. 322; Crocker *v.* Pierce, 31 Me. 177.

Massachusetts.— Gay *v.* Raymond, 140 Mass. 69, 2 N. E. 782.

Maryland.— Brent *v.* Taylor, 6 Md. 58.

Michigan.— Trowbridge *v.* Bullard, 81 Mich. 451, 45 N. W. 1012.

Mississippi.— Montague *v.* Gaddis, 37 Miss. 453; Woolfolk *v.* Cage, Walk. (Miss.) 300.

Nebraska.— Turpin *v.* Coates, 12 Nebr. 321, 11 N. W. 300.

New York.— Penoyar *v.* Kelsey, 150 N. Y. 77, 44 N. E. 788, 34 L. R. A. 248; Webb *v.* Bailey, 54 N. Y. 164; Lynch *v.* Crary, 52 N. Y. 181; Stone *v.* Pratt, 90 Hun (N. Y.) 39, 35 N. Y. Suppl. 519, 70 N. Y. St. 131; Finn *v.* Mehrbach, 65 N. Y. Suppl. 250; Herzberg *v.* Boiesen, 53 N. Y. Suppl. 256; Schieb *v.* Baldwin, 22 How. Pr. (N. Y.) 278.

North Dakota.— Fox *v.* Mackenzie, 1 N. D. 298, 47 N. W. 386.

Ohio.— Buckeye Pipe Line Co. *v.* Fee, 62 Ohio St. 543, 57 N. E. 446, 78 Am. St. Rep. 743; Liebman *v.* Ashbacker, 36 Ohio St. 94; Carty *v.* Fenstemaker, 14 Ohio St. 457.

South Carolina.— Swann *v.* Lee, 15 Rich. (S. C.) 164.

South Dakota.— Finch *v.* Armstrong, 9 S. D. 255, 68 N. W. 740.

Wisconsin.— Zechman *v.* Haak, 85 Wis. 656, 56 N. W. 158; Cox *v.* North Wisconsin Lumber Co., 82 Wis. 141, 51 N. W. 1130.

Lien of the attachment see *infra*, XII.

Attachment is a sort of sequestration of property, for the eventual security of the attaching creditor. The property thus taken is to remain in the custody of the law, to await the determination of the suit in which it is attached. Wallace *v.* Barker, 8 Vt. 440.

Mississippi — To give lien on debtor's real estate.— The process of attachment is a branch of that system which charges the real estate of the debtor with the payment of his debts, and its object is to give to the creditor, upon the institution of a suit, a lien on the real estate of his debtor. Saunders *v.* Columbus L., etc., Ins. Co., 43 Miss. 583.

New Hampshire — To caution the public and the debtor.— The object of an attachment is not, as in the case of extents, to pass the title, but is merely to caution the public and the debtor that the land attached is intended to be considered by the creditor as eventual security for his debt. Howard *v.* Daniels, 2 N. H. 137.

Pennsylvania — Domestic attachment.—The Pennsylvania statutes providing for domestic attachments — as distinguished from those authorizing foreign attachments which are designed to compel the appearance of defendant — are intended to give plaintiff a lien upon the property attached to satisfy any judgment which may be recovered. Lieberman *v.* Hoffman, 2 Pennyp. (Pa.) 211; Slingluff *v.* Sisler, 23 Pa. Co. Ct. 540.

Not proper remedy to recover specific property.— Gates *v.* Bennett, 33 Ark. 475; Hanna *v.* Loring, 11 Mart. (La.) 276; Mendelsohn *v.* Smith, 27 Mich. 2.

33. Massey *v.* Walker, 8 Ala. 167; Wood *v.* Carter, 29 Ga. 580.

As to effect of previous attachment as preventing arrest of defendant's person see ARREST, 3 Cyc. 916.

34. Daniels *v.* Wilcox, 2 Root (Conn.) 346; Trafton *v.* Gardiner, 39 Me. 501; Almy *v.* Wolcott, 13 Mass. 73; Brinley *v.* Allen, 3 Mass. 561; Cleft *v.* Hosford, 12 Vt. 296. But see Langdon *v.* Dyer, 13 Vt. 273.

III. IN WHOSE FAVOR AVAILABLE.

A. In General. The right to process of attachment is ordinarily given to creditors alone.[35] As a rule, however, when proper statutory grounds for the issue of an attachment exist[36] any creditor[37] is held to be entitled to the remedy.[38]

Release of body before attachment of property.— Where a writ of attachment was served by arresting the debtor's body but before return was made, the creditor, on discovering goods belonging to the debtor, released the latter's body and caused the goods to be attached by the same writ, it was held that the attachment was legal. Scott *v.* Crane, 1 Conn. 255.

Where a writ is against two defendants one of them may be arrested and the property of the other attached. Connor *v.* Madden, 57 Me. 410.

35. Todd *v.* Shouse, 14 La. Ann. 426; Price *v.* Merritt, 13 La. Ann. 526; Henderson *v.* Thornton, 37 Miss. 448, 75 Am. Dec. 70; Herbert *v.* Herbert, 49 N. J. Eq. 70, 22 Atl. 789; Cocks *v.* Varney, 45 N. J. Eq. 72, 17 Atl. 108.

"Creditor or other person entitled to sue." — Under the Tennessee act of 1843, c. 29, § 1, the attachment may issue in favor of "any creditor, or other person entitled to sue." Runyan *v.* Morgan, 7 Humphr. (Tenn.) 210.

A party without right to prosecute the action cannot maintain an attachment (Cocks *v.* Varney, 45 N. J. Eq. 72, 17 Atl. 108; Landauer *v.* Espenhain, 95 Wis. 169, 70 N. W. 287), the remedy being merely ancillary to the action (see *supra*, II, A, 3), and the right cannot be invoked by a creditor whose debtor offers to pay all that he owes (Feld *v.* Portwood, (Miss. 1890) 7 So. 492).

36. Grounds for attachment see *infra*, V.

37. A depositary sued for a deposit by the owner cannot plead as off set or counter-claim a debt due him from such owner and cannot accomplish the same object in a different way by suing for his debt immediately after paying a judgment against him for the deposit, and then issuing an attachment on the money so paid while still in the hands of the sheriff under execution. Purvis *v.* Breed, 7 La. Ann. 636.

A judgment creditor has no right to proceed against the property of a debtor by process of attachment; his remedy is by writ of fieri facias for the collection of his judgment. Frellson *v.* Stewart, 14 La. Ann. 832.

38. Gould *v.* Statesboro Bank, 105 Ga. 373, 31 S. E. 548.

A board of county supervisors can give bond and maintain an attachment in behalf of the county. State *v.* Fortinberry, 54 Miss. 316.

A clerk and master in chancery, who, as such, holds notes executed for the benefit of creditors on which suits have been instituted in the circuit court, may file his bill in the court in which such notes were taken for the purpose of attaching the property of the debtors who are about to remove such property. Rutland *v.* Cummings, 7 Humphr. (Tenn.) 279.

A corporation that is a creditor is a person within the meaning of the attachment laws, and as such is entitled to this remedy (Planters', etc., Bank *v.* Andrews, 8 Port. (Ala.) 404; Kentucky Jeans Clothing Co. *v.* Bohn, 104 Ky. 387, 20 Ky. L. Rep. 612, 47 S. W. 250; Union Bank *v.* U. S. Bank, 4 Humphr. (Tenn.) 369; State *v.* Nashville University, 4 Humphr. (Tenn.) 156, 166 [*citing* Alabama Bank *v.* Berry, 2 Humphr. (Tenn.) 442, where this was assumed]) and a foreign corporation, which brings an action by attachment, without having complied with the domestic statutes, but which complies before the return-day of the process, can maintain the action (Carson-Rand Co. *v.* Stern, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420). See, generally, CORPORATIONS.

A married woman may have an attachment against the property of her husband, where, by force of statute, marriage does not extinguish existing debts. Keyser *v.* Keyser, 1 N. Y. City Ct. 405.

An administrator (McCoy *v.* Swan, 2 Harr. & J. (Md.) 344), or administrator with the will annexed (Dunlap *v.* McFarland, 25 Kan. 488 [foreign administrator]; Van Camp *v.* Searle, 79 Hun (N. Y.) 134, 29 N. Y. Suppl. 757, 61 N. Y. St. 349, 24 N. Y. Civ. Proc. 16 [*affirmed* in 147 N. Y. 150, 41 N. E. 427, 70 N. Y. St. 878]) may sue out an order of attachment.

A stockholder, who is also a creditor of a corporation, may sue out an attachment against the property of the corporation (Pioneer Sav., etc., Co. *v.* Peck, 20 Tex. Civ. App. 111, 49 S. W. 160) even though, by virtue of statute, he may be personally liable to satisfy other judgments against the corporation (Peirce *v.* Partridge, 3 Metc. (Mass.) 44).

A partner having elected, under the wrongful acts of his copartner, to dissolve the partnership, has a right as a creditor to collect a debt against the latter in California. Strong *v.* Stapp, 74 Cal. 280, 15 Pac. 835.

Holders of certificates in a beneficial society become, upon the maturity thereof, such creditors that they may maintain an attachment against the funds of the order if it becomes insolvent. Failey *v.* Fee, 83 Md. 83, 34 Atl. 839, 55 Am. St. Rep. 326, 32 L. R. A. 311.

Separate members of a mercantile firm are each of them creditors upon a debt due to the copartnership. Renard *v.* Hargous, 13 N. Y. 259.

The attorney-general for the state is, in Alabama, authorized by statute to sue out an attachment at the direction of the governor. Wolffe *v.* State, 79 Ala. 201, 58 Am. Rep. 590, holding that an objection that such direction was not given should be taken by motion to dissolve the attachment before joining issue.

Where proper grounds exist and any creditor is entitled to the remedy it is immaterial whether he be the original creditor or not.[39]

B. Foreigners and Non-Residents. The right to proceed by process of attachment has been limited by the statutes of some of the states to a citizen of the state or to a citizen of some other of the United States.[40] As a rule, however, at the present time this right is not ordinarily affected by the question of citizenship,[41] and it is generally immaterial that the attaching creditor is a non-resident.[42]

The Crown may have an attachment against the property of an absconding debtor. Reg. *v.* Stewart, 8 Ont. Pr. 297.

The United States, when plaintiff in a civil action, is entitled to the writ of attachment in the District of Columbia. U. S. *v.* Ottman, 3 MacArthur (D. C.) 73. See also U. S. *v.* Murdock, 18 La. Ann. 305, 89 Am. Dec. 651.

39. Gould *v.* Statesboro Bank, 105 Ga. 373, 31 S. E. 548; Besley *v.* Palmer, 1 Hill (N. Y.) 482. See also Davis *v.* Wyer, 1 Cranch C. C. (U. S.) 527, 7 Fed. Cas. No. 3,660.

But the assignee of a debt fraudulently contracted is not entitled to an attachment against the debtor under Minn. Laws (1867), c. 66, § 1, as fraud in the inception of a debt is personal to the contracting parties, and does not follow the assignment. Cheshire Provident Inst. *v.* Johnston, 5 Fed. Cas. No. 2,659.

Any equitable owner of a chose in action is as much entitled to a writ of attachment as he who combines both interests, but in declaring upon the cause of action in Mississippi he must put upon the record the party in whom is the legal title. Tully *v.* Herrin, 44 Miss. 626.

Presumption as to bona fides of transfer. — Where a resident of another state indorses a note to a citizen, the law will presume, in the absence of proof to the contrary, that the indorsee is the equitable as well as the legal owner thereof; and he will therefore be entitled to sue thereon by attachment, under the statute extending that right to residents only. Fuller *v.* Smith, 58 N. C. 192.

40. This was true in **Maryland** under the act of 1795, c. 56 (Stockbridge *v.* Fahnestock, 87 Md. 127, 39 Atl. 95; Risewick *v.* Davis, 19 Md. 82; Hepburn's Case, 3 Bland Ch. (Md.) 95; Yerby *v.* Lackland, 6 Harr. & J. (Md.) 446; Shivers *v.* Wilson, 5 Harr. & J. (Md.) 130, 9 Am. Dec. 497; Burk *v.* McClain, 1 Harr. & M. (Md.) 236); but this restriction was abolished by the act of 1854, c. 153 (Stockbridge *v.* Fahnestock, 87 Md. 127, 39 Atl. 95).

41. Barnett *v.* Kinney, 2 Ida. 706, 23 Pac. 922, 24 Pac. 624 [*following* Green *v.* Van Buskirk, 7 Wall. (U. S.) 139, 19 L. ed. 109].

42. *Alabama.*— Kirkman *v.* Vanlier, 7 Ala. 217; Pearsoll *v.* Middlebrook, 2 Stew. & P. (Ala.) 406; Woodley *v.* Shirley, Minor (Ala.) 14. But process of attachment by one non-resident against another will lie only for causes of action on which debt or *indebitatus assumpsit* could be brought (Hazard *v.* Jordan, 12 Ala. 180), and a non-resident cannot sue out an attachment against the property of a deceased non-resident debtor (Hemingway *v.* Moore, 11 Ala. 645).

Idaho.— Barnett *v.* Kinney, 2 Ida. 706, 23 Pac. 922, 24 Pac. 624.

Illinois.— Givens *v.* St. Louis Merchants' Nat. Bank, 85 Ill. 442; Mitchell *v.* Shook, 72 Ill. 492.

Indiana.— McClerkin *v.* Sutton, 29 Ind. 407.

Kansas.— Payne *v.* Kansas City First Nat. Bank, 16 Kan. 147.

Kentucky.— Gray *v.* Briscoe, 6 Bush (Ky.) 687.

Louisiana.— Russell *v.* Wilson, 18 La. 367; Tyson *v.* Lansing, 10 La. 444.

Maryland.— Stockbridge *v.* Fahnestock, 87 Md. 127, 39 Atl. 95.

Michigan.— State Bank *v.* Maxson, 123 Mich. 250, 82 N. W. 31, 81 Am. St. Rep. 196.

Mississippi.— Bower *v.* Henshaw, 56 Miss. 619; Barrow *v.* Burbridge, 41 Miss. 622. *Contra,* under earlier statutes (Peters *v.* Finney, 12 Sm. & M. (Miss.) 449; Hosey *v.* Ferriere, 1 Sm. & M. (Miss.) 663), though objection was waived by pleading to the attachment (Peters *v.* Finney, 12 Sm. & M. (Miss.) 449).

Missouri.—Graham *v.* Bradbury, 7 Mo. 281; Posey *v.* Buckner, 3 Mo. 604.

New York.— Cooke *v.* Appleton, 51 N. Y. Super. Ct. 529; Ready *v.* Stewart, Code Rep. N. S. (N. Y.) 297; *Ex p.* Caldwell, 5 Cow. (N. Y.) 293 [*overruling* Matter of Fitzgerald, 2 Cai. (N. Y.) 318]; Robbins *v.* Cooper, 6 Johns. Ch. (N. Y.) 186. Under an earlier statute a non-resident creditor was entitled to the writ only when defendant was indebted on a contract made within the state (Matter of Marty, 3 Barb. (N. Y.) 229 [*affirming* 2 Barb. (N. Y.) 436, 3 How. Pr. (N. Y.) 208, 2 Edm. Sel. Cas. (N. Y.) 454]; People *v.* Griffith, Lalor (N. Y.) 447; Matter of Brown, 21 Wend. (N. Y.) 316; Matter of Fitch, 2 Wend. (N. Y.) 298; *Ex p.* Schroeder, 6 Cow. (N. Y.) 603), and this is still true in case of a foreign corporation (Oliver *v.* Walter Heywood Chair Mfg. Co., 10 N. Y. Suppl. 771, 32 N. Y. St. 542). 2 N. Y. Rev. Stat. pt. 1, c. 5, tit. 1, relating to attachments against absconding, concealed, or non-resident debtors, did not allow non-residents to initiate the proceedings, though it allowed them to share in the distribution (Matter of Coates, 3 Abb. Dec. (N. Y.) 231, 12 How. Pr. (N. Y.) 344), and though one temporarily resident might avail himself of the remedy (Matter of Marty, 2 Barb. (N. Y.) 436, 3 How. Pr. (N. Y.) 208, 2 Edm. Sel. Cas. (N. Y.) 454 [*affirmed* in 3 Barb. (N. Y.) 229]).

Pennsylvania.—Mulliken *v.* Aughinbaugh, 1 Penr. & W. (Pa.) 117; H. B. Claflin Co. *v.*

The general rule as to the immateriality of citizenship is, however, subject to exceptions in some states.[43]

C. Debtor Against Himself. In some states, in the absence of fraud, a debtor may attach his own property for the benefit of a creditor, where authority has been given him so to do, or where there has been a subsequent ratification of his act by the creditor,[44] and such attachment is binding on subsequently attaching creditors.[45]

IV. AGAINST WHOM AVAILABLE.

A. In General. The remedy can only be enforced against the property of persons natural or artificial,[46] and, as a general rule, the party against whom an attachment is available must stand in the relation of debtor to the plaintiff in the action.[47] If a statute authorizing attachment limits the remedy to cases where

Weiss, 16 Pa. Co. Ct. 247; John Ray Clark Co. *v.* Toby Valley Supply Co., 14 Pa. Co. Ct. 344. *Compare* Long *v.* Girdwood, 28 Wkly. Notes Cas. (Pa.) 299.

South Carolina.— Gibson *v.* Everett, 41 S. C. 22, 19 S. E. 286; *Ex p.* Dickinson, 29 S. C. 453, 7 S. E. 593, 13 Am. St. Rep. 749, 1 L. R. A. 685.

Texas.— Ward *v.* McKenzie, 33 Tex. 297, 7 Am. Rep. 261.

See 5 Cent. Dig. tit. "Attachment," § 44.

43. **In North Carolina** a non-resident creditor cannot attach the property of his debtor in the state, when the latter has not absconded or removed to avoid the ordinary process of law. McCready *v.* Kline, 28 N. C. 245; Taylor *v.* Buckley, 27 N. C. 384; Broghill *v.* Wellborn, 15 N. C. 511.

In Tennessee it was formerly necessary that one of the parties should be a resident of the state (Decatur Bank *v.* Berry, 3 Humphr. (Tenn.) 590; Webb *v.* Lee, 6 Yerg. (Tenn.) 472; Shugart *v.* Orr, 5 Yerg. (Tenn.) 191; Kincaid *v.* Francis, Cooke (Tenn.) 49), but under the act of 1852, c. 177, § 2, attachments would lie both at law and in equity though both parties were non-residents (Hills *v.* Lazelle, 5 Sneed (Tenn.) 363). By the act of 1871, c. 122, § 1, however, where a debtor and creditor are both non-residents of Tennessee, and residents of the same state, a creditor shall not have attachment against the property of his debtor unless he swears that the property of the debtor has been fraudulently removed to Tennessee to evade the process of law in the state of their domicile or residence. Taylor *v.* Badoux, 92 Tenn. 249, 21 S. W. 522; Merchant *v.* Preston, 1 Lea (Tenn.) 280; Beasley *v.* Parker, 3 Tenn. Ch. 47. This section has no application to the remedy given by Tenn. Code, § 4289, providing a mere process in the ordinary course of the chancery court to impound and preserve property sought to be reached. Douglas *v.* Bank of Commerce, 97 Tenn. 133, 36 S. W. 874; Commercial Nat. Bank *v.* Motherwell Iron, etc., Co., 95 Tenn. 172, 31 S. W. 1003, 29 L. R. A. 164; Taylor *v.* Badoux, 92 Tenn. 249, 21 S. W. 522; Beasley *v.* Parker, 3 Tenn. Ch. 47.

44. Bayley *v.* Bryant, 24 Pick. (Mass.) 198; Baird *v.* Williams, 19 Pick. (Mass.) 381; Madison First Nat. Bank *v.* Greenwood, 79 Wis. 269, 45 N. W. 810, 48 N. W. 421 [*citing* Landauer *v.* Vietor, 69 Wis. 434, 34 N. W. 229].

Sufficient evidence of ratification.— Where a debtor, having agreed that in case of difficulty he would secure his creditor, attaches his own property for benefit of such creditor to secure him, on hearing which the latter said that if the debtor did not secure him he was a rascal, evidence of this was held to be sufficient to show a ratification and to make the attachment binding upon subsequently attaching creditors. Bayley *v.* Bryant, 24 Pick. (Mass.) 198.

45. Bayley *v.* Bryant, 24 Pick. (Mass.) 198.

46. Hence an affidavit that the "estate" of A is a non-resident of the state will not authorize the issue of the writ. Muller *v.* Leeds, 52 N. J. L. 366, 19 Atl. 261.

Attachment against corporations see CORPORATIONS.

Attachment against national banks see BANKS AND BANKING.

47. Wiley *v.* Sledge, 8 Ga. 532; Gaughan *v.* Squares, 8 Ohio Dec. (Reprint) 142, 1 Cinc. L. Bul. 164; Kildare Lumber Co. *v.* Atlanta Bank, 91 Tex. 95, 41 S. W. 64. See also Mertz *v.* Fenouillet, 13 N. Y. App. Div. 222, 43 N. Y. Suppl. 217, holding that an attachment cannot issue in an action against an unincorporated association in the name of its president, because the president, as such, has no property, the title to the property of the association not being vested in him, and the law nowhere providing for an attachment against such an association. But *compare* Runyan *v.* Morgan, 7 Humphr. (Tenn.) 210, in which the only requirement of the statute is that the party be a defendant.

Liability to give bail a test.— Under statutes allowing certain persons, either on account of sex or previous services rendered, the right to claim an exemption from the liability to give bail, it is held that, as against them, an attachment will not lie. Walker *v.* Anderson, 18 N. J. L. 217 [*criticizing* the doctrine, but acquiescing to the principle as laid down in Pullinger *v.* Van Emburgh, 16 N. J. L. 457]. Upon this principle it is said that an attachment will not lie against the heir of a deceased debtor. Peacock *v.* Wildes, 8 N. J. L. 179.

defendant is beyond the reach of ordinary process it will not lie against a debtor who can be personally served;[48] but the fact that it becomes practicable after issue and service of the writ to give personal notice to defendant will not deprive plaintiff of his remedy by attachment.[49]

B. Women.[50] In the absence of an express provision making the attachment law applicable to women it has been held that they are exempt from its operation in a jurisdiction in which they cannot be held to bail and where a defendant in attachment cannot defend without putting in special bail.[51]

C. Joint Debtors or Co-Defendants[52] — **1. In General.** While the statutes regulating attachments against joint obligors are not uniform, it is usually permissible to pursue the remedy against a part, without including all,[53] where the ground for attachment exists as to some, but not as to others,[54] or where it is to the creditor's interest to proceed against one or a part of the debtors only.[55]

2. Effect of Solvency of Co-Debtor. The mere fact that defendant's coöbligors are solvent does not affect plaintiff's right to proceed against the former by attachment.[56]

D. Persons Under Disability[57] — **1. Infants.** In the absence of a provi-

48. Funk *v.* McCullough, 24 Miss. 481; Weldon *v.* Wood, 9 R. I. 241; Nason *v.* Esten, 2 R. I. 337; Boyd *v.* Buckingham, 10 Humphr. (Tenn.) 433; Terril *v.* Rogers, 3 Hayw. (Tenn.) 203; Rice *v.* Powell, Dall. (Tex.) 413. But where, as is usually the case, the attachment is merely an ancillary remedy and its object is to obtain security for such judgment as may be rendered, it may properly issue, although personal service is also had on defendant. Boyd *v.* Buckingham, 10 Humphr. (Tenn.) 433.

As to the purpose of remedy see *supra*, II, B.

49. Field *v.* Shoop, 6 Ill. App. 445; Grubbs *v.* Colter, 7 Baxt. (Tenn.) 432.

50. Attachment of married woman see Husband and Wife.

51. Pullinger *v.* Van Emburgh, 16 N. J. L. 457.

Rule changed by statute.— Soon after this decision, however, a supplement to the attachment act was passed, providing that the writ might issue against any absconding or absent female, changing the condition of the bond into the due and safe return of the goods, etc., and leaving out the surrender of defendant to the constable. Davis *v.* Mahany, 38 N. J. L. 104; Hackettstown Bank *v.* Mitchell, 28 N. J. L. 516.

52. Attachment against partners see Partnership.

53. A writ against all is proper where, in an action against several persons for tort, the affidavit discloses a ground of attachment as to all of them. Hadley *v.* Bryars, 58 Ala. 139.

Attachment against joint debtor on ground of non-residence see *infra*, V, L, 1, b.

54. *Indiana.*— Higgins *v.* Pence, 2 Ind. 566.

Iowa.— Austin *v.* Burgett, 10 Iowa 302; Chittenden *v.* Hobbs, 9 Iowa 417 [*overruling* Ogilvie *v.* Washburn, 4 Greene (Iowa) 548; Courrier *v.* Cleghorn, 3 Greene (Iowa) 523].

Kansas.—Jefferson County *v.* Swain, 5 Kan. 376.

Kentucky.— Duncan *v.* Headley, 4 Bush (Ky.) 45 [*following* Mills *v.* Brown, 2 Metc. (Ky.) 404], save in case of non-residency.

Contra, Kouns *v.* Brown, 2 T. B. Mon. (Ky.) 146.

Missouri.— Searcy *v.* Platte County, 10 Mo. 269.

New York.— Brewster *v.* Honigsburger, 2 Code Rep. (N. Y.) 50; Robbins *v.* Cooper, 6 Johns. Ch. (N. Y.) 186.

Pennsylvania.— Fretz *v.* Johnson, 15 Wkly. Notes Cas. (Pa.) 208. *Contra*, Lawrence *v.* Steadman, 49 Ill. 270; Harriman *v.* Bryan First Baptist Church, 63 Ga. 186, 36 Am. Rep. 117; Cottrell *v.* Hatheway, 108 Mich. 619, 66 N. W. 596; Edwards *v.* Hughes, 20 Mich. 289; Taylor *v.* McDonald, 4 Ohio 149; Cowdin *v.* Hurford, 4 Ohio 132. But *compare* Jones *v.* Lunceford, 95 Ill. App. 210.

See 5 Cent. Dig. tit. "Attachment," § 51.

55. *Indiana.*— Leach *v.* Swann, 8 Blackf. (Ind.) 68.

Iowa.— See Patterson *v.* Stiles, 6 Iowa 54.

Maine.— Fuller *v.* Loring, 42 Me. 481.

Mississippi.— Timberlake *v.* Thayer, (Miss. 1895) 16 So. 878; Crump *v.* Wooten, 41 Miss. 611.

New York.— Buckingham *v.* Swezey, 25 Hun (N. Y.) 84.

See 5 Cent. Dig. tit. "Attachment," § 51.

56. Richardson *v.* Probst, 103 Iowa 241, 72 N. W. 521; Chittenden *v.* Hobbs, 9 Iowa 417; Maxwell *v.* Gunn, 2 Mart. N. S. (La.) 140. See also Smith *v.* Coopers, 9 Iowa 376, where the point was undecided, though it was held that where the co-debtors were insolvent the writ would issue.

In Kentucky, where the ground for attachment is that the debtor has made, or is about to make, a fraudulent disposition of his property, the attachment will lie, regardless of the solvency of coöbligors (Perkins *v.* Scott, 7 Ky. L. Rep. 589); but where the ground is that defendant has not property sufficient to pay his debts, it must be shown that the other obligors are unable to pay the demand, and that plaintiff's claim would be endangered by delay (Dunn *v.* McAlpin, 90 Ky. 78, 11 Ky. L. Rep. 884, 13 S. W. 363).

57. Attachment of married woman see Husband and Wife.

sion to the contrary an attachment may be had against the property of an infant.[58]

2. Lunatics. Inasmuch as a personal suit at law can be maintained against a lunatic, there is no reason why an attachment may not, in a proper case, be issued against him;[59] but when the ground for the attachment necessitates a certain mental attitude it is a defense to show that defendant was insane, and therefore incapable of such attitude.[60]

E. Persons in Fiduciary Capacity — 1. Executors and Administrators. The remedy of a creditor by attachment being obviously inconsistent with the usual administration of the assets of an estate, it is not, in the absence of express[61] statutory authorization,[62] available against an executor or administrator as such.[63]

2. Guardians. As a guardian holds the property of his ward in a representative capacity, he is not, as a general rule, liable to be proceeded against as such by attachment.[64]

58. Dillon *v.* Burnham, 43 Kan. 77, 22 Pac. 1016.

59. Weber *v.* Weitling, 18 N. J. Eq. 441, the ground being defendant's non-residence.

60. Chambers, etc., Glass Co. *v.* Roberts, 4 N. Y. App. Div. 20, 38 N. Y. Suppl. 301, 73 N. Y. St. 668, where an attachment on the ground that defendant had left the state with intent to defraud his creditors was vacated upon proof that, at the time of his departure, he was in a condition of insanity almost amounting to mania. See also Ross *v.* Edwards, 52 Ga. 24.

61. They must be specifically designated by the statute to render them liable to an attachment, and a statute providing for attachments against absent or absconding debtors does not warrant an attachment against them in their representative capacity, although they are non-residents. Hemingway *v.* Moore, 11 Ala. 645; Matter of Hurd, 9 Wend. (N. Y.) 465; Jackson *v.* Walsworth, 1 Johns. Cas. (N. Y.) 372.

62. In Alabama, by virtue of Clay's Dig. p. 58, § 14, an attachment lies against an executor or administrator only where the debtor was living out of the limits of the state and had property within the state at the time of his decease; and then the attachment must be levied before such property had been reduced to the possession of the foreign executor and became assets in his hands. Loomis *v.* Allen, 7 Ala. 706. It would not lie against a domestic executor or administrator. Taliaferro *v.* Lane, 23 Ala. 369. Neither could it be revived by scire facias against a foreign executor or administrator where it had been sued out against the non-resident debtor himself while living, unless it appeared that he was a non-resident at the time of his death. Mobile Branch Bank *v.* McDonald, 22 Ala. 474.

In Georgia the code provides that the attachment may issue against an executor or administrator when he shall be actually removing or about to remove the property of his deceased testator or intestate without the limits of any county of the state. Holloway *v.* Chiles, 40 Ga. 346; Cox *v.* Felder, 36 Ga. 597. By a later provision of the code, the final judgment shall not be entered up against him until after the expiration of two years from the granting of the letters of administration or letters testamentary as the case may be. Ross *v.* Edwards, 52 Ga. 24.

In New Jersey an attachment may be had only against an executor or administrator in the case of joint debtors. Muller *v.* Leeds, 52 N. J. L. 366, 19 Atl. 261.

In Ohio, under the attachment law of 1805, a foreign attachment could be brought against the administrator of a deceased debtor in those cases in which he would have been a proper party to be sued, could process have been served upon him personally. Mitchell *v.* Eyster, 7 Ohio, pt. I, 257.

63. *Louisiana.*— Cheatham *v.* Carrington, 14 La. Ann. 696; Debuys *v.* Yerby, 1 Mart. N. S. (La.) 380.

New Jersey.—Connelly *v.* Lerche, 56 N. J. L. 95, 28 Atl. 430; Pullinger *v.* Van Emburgh, 16 N. J. L. 457; Haight *v.* Bergh, 15 N. J. L. 183; Haight *v.* Bergh, 3 N. J. Eq. 386.

New York.— Matter of Hurd, 9 Wend. (N. Y.) 465. At least, without charging the executors with some breach of duty other than a neglect to pay the debt. Metcalf *v.* Clark, 41 Barb. (N. Y.) 45. See also Wickham *v.* Stern, 9 N. Y. Suppl. 803, 28 N. Y. St. 154, 18 N. Y. Civ. Proc. 63, holding that it may issue against "A & B, executors," for a debt contracted by them while trading under that name.

Pennsylvania.— Pringle *v.* Black, 2 Dall. (Pa.) 97, 1 L. ed. 305; McCoombe *v.* Dunch, 2 Dall. (Pa.) 73, 1 L. ed. 294; Kane *v.* Coyle, 20 Wkly. Notes Cas. (Pa.) 317; Williamson *v.* Beck, 8 Phila. (Pa.) 269. It has been held, however, that the attachment, if allowable in a foreign country against a decedent's estate, will be upheld in Pennsylvania. Bank of North America *v.* McCall, 4 Binn. (Pa.) 371.

United States.—Henderson *v.* Henderson, 5 Cranch C. C. (U. S.) 469, 11 Fed. Cas. No. 6,353; Patterson *v.* McLaughlin, 1 Cranch C. C. (U. S.) 352, 18 Fed. Cas. No. 10,828. And see Redfern *v.* Rumney, 1 Cranch C. C. (U. S.) 300, 20 Fed. Cas. No. 11,627.

See 5 Cent. Dig. tit. "Attachment," § 50.

If the executor or administrator be personally liable, he may of course be proceeded against by attachment. Matter of Galloway, 21 Wend. (N. Y.) 32, 34 Am. Dec. 209.

64. Stevenson *v.* Dunlap, 33 S. C. 350, 11 S. E. 1017.

3. Trustees. An attachment ordinarily will not issue against a trustee in his representative capacity.[65]

V. Grounds of Attachment.

A. In General. Attachment, being a purely statutory remedy, is available only where one or more of the grounds enumerated in the statute exist[66] at the time the writ is sued out,[67] and if issued without statutory authority no valid lien is created, even though the proceedings be sufficient in form and substance and properly levied.[68] Thus the mere fact that a debtor is insolvent will not justify a resort to the proceeding where insolvency is not one of the specified grounds.[69]

65. Cox *v.* Henry, 113 Ga. 259, 38 S. E. 856; Burns *v.* Lewis, 86 Ga. 591, 13 S. E. 123; Smith *v.* Riley, 32 Ga. 356. See also Ward *v.* Waterman, 85 Cal. 488, 24 Pac. 930, holding that the only remedy any beneficiary under the trust had was to proceed to enforce the execution of it.

66. *Alabama.*— City Nat. Bank *v.* Jeffries, 73 Ala. 183; Tucker *v.* Adams, 52 Ala. 254; Jones *v.* Lawrence, 36 Ala. 618.

Iowa.— Ogilvie *v.* Washburn, 4 Greene (Iowa) 548.

Kansas.—Santa Fé Bank *v.* Haskell County Bank, 54 Kan. 375, 38 Pac. 485.

Kentucky.— Patterson *v.* Caldwell, 1 Metc. (Ky.) 489, holding that under Ky. Civ. Code it is not a ground for attachment that plaintiff is a surety for defendant without indemnity, the statute (Ky. Rev. Stat. c. 97, § 4) which formerly authorized attachment on this ground being repealed.

Maryland.— Thomas *v.* Brown, 67 Md. 512, 10 Atl. 713; Randle *v.* Mellen, 67 Md. 181, 8 Atl. 573; Risewick *v.* Davis, 19 Md. 82.

Mississippi.— Weissinger *v.* Studebaker, 73 Miss. 480, 18 So. 915; Roach *v.* Brannon, 57 Miss. 490 (to the effect that no clause in the Mississippi statute (Code (1871), § 1420) which specifies the grounds for attachment makes an undervaluation of his property by a debtor who is seeking a compromise with his creditors a cause for the issue of the writ).

Missouri.— Hawlow *v.* Sass, 38 Mo. 34.

New Jersey.— Kennedy *v.* Chumar, 26 N. J. L. 305.

New York.— Strauss *v.* Seamon, 13 N. Y. St. 740; Goldschmidt *v.* Herschorn, 13 N. Y. St. 560, 28 N. Y. Wkly. Dig. 160; Mershon *v.* Leonard Scott Pub. Co., 4 N. Y. Civ. Proc. 319.

North Carolina.—Howland *v.* Marshall, 127 N. C. 427, 37 S. E. 462.

North Dakota.— Severn *v.* Giese, 6 N. D. 523, 72 N. W. 922.

Pennsylvania.—Robinson *v.* Atkins, 2 Wkly. Notes Cas. (Pa.) 111, to the effect that the fact that defendant has made a fraudulent contract since his liability to plaintiff was incurred is not a statutory ground for attachment.

South Carolina.— Goss *v.* Gowing, 5 Rich. (S. C.) 477.

Tennessee.— Jackson *v.* Burke, 4 Heisk. (Tenn.) 610.

And see cases cited *supra*, II, A, 4, a.

Grounds available where debt not due see *infra*, VI, D.

Arkansas — Grounds cumulative.—Ark. Dig. p. 172, § 1, authorizes an attachment in all cases against absent and absconding debtors having property in the state; and section 3 provides that the attaching creditor shall file an affidavit stating the amount of his debt, and also that defendant is a non-resident of the state, or that he is about to remove out of the state, or that he is about to remove his goods and effects out of this state, or that he so secretes himself that ordinary process of law cannot be served on him. It has been held that the grounds specified in section 3 were cumulative of, and not limited by, those of section 1, and that it was not necessary for a defendant subject to attachment under section 3 to be also "absent" and "absconding," as provided by section 1. Mandel *v.* Peet, 18 Ark. 236.

Mississippi — Selling or giving away liquor. — Miss. Code, § 1590, in providing that a civil suit may be commenced by attachment without bond to recover the penalty therein provided for the "selling or giving away by any person at his place of business, unlawfully, of liquors," or the "allowing" the same to be done, creates a new ground of attachment for the particular purpose of the section, distinct from those provided in Miss. Code, c. 9, providing for attachments against debtors. Adams *v.* Johnson, 72 Miss. 896, 17 So. 682. See also Adams *v.* Evans, (Miss. 1896) 19 So. 834.

Under a statute allowing attachment against one who deals in cotton futures, the writ will be issued against an agent who dealt in such futures for an undisclosed principal, where it appears that the agent risked his own money in part. Dillard *v.* Brenner, 73 Miss. 130, 18 So. 933.

67. Must exist at date of issue.— An attachment must stand or fall according to the state of facts existing at the date of its issue and cannot be cured by a subsequent event. H. B. Claflin Co. *v.* Feibelman, 44 La. Ann. 518, 10 So. 862; Todd *v.* Shouse, 14 La. Ann. 426; Denegre *v.* Milne, 10 La. Ann. 324; Read *v.* Ware, 2 La. Ann. 498; Scudder *v.* Payton, 65 Mo. App. 314; Barth *v.* Graf, 101 Wis. 27, 76 N. W. 1100.

68. Sims *v.* Charleston Bank, 3 W. Va. 415.

Right to remedy not given by consent of parties.— The parties cannot by contract give the right to resort to the remedy of attachment in a case not within the statute. Dogan *v.* Cole, 63 Miss. 153.

69. *Alabama.*— Durr *v.* Jackson, 59 Ala. 203.

B. Absconding, Absence, and Concealment — 1. In General. Attachment is usually allowed by statute against the property of actual[70] absconders,[71] or those intending to abscond.[72]

2. What Constitutes. With reference to what constitutes absconding it is held that a party absconds in a legal sense when he hides, conceals,[73] or absents

Kentucky.— Clarke *v.* Seaton, 18 B. Mon. (Ky.) 226; Rhodes *v.* Cobb, 4 Dana (Ky.) 23; Wooley *v.* Stone, 7 J. J. Marsh. (Ky.) 302; Rich *v.* Catterson, 2 J. J. Marsh. (Ky.) 135; McFerran *v.* Jones, 2 Litt. (Ky.) 219; Hickman *v.* Reed, 11 Ky. L. Rep. 406.

Mississippi.— Weissinger *v.* Studebaker, 73 Miss. 480, 18 So. 915.

Nebraska.— Sorenson *v.* Benedict, 24 Nebr. 347, 38 N. W. 827; Simmons Hardware Co. *v.* Benedict, 24 Nebr. 346, 38 N. W. 827; Bliss *v.* Benedict, 24 Nebr. 346, 38 N. W. 827; Peru Plow, etc., Co. *v.* Benedict, 24 Nebr. 340, 38 N. W. 824; Walker *v.* Hagerty, 20 Nebr. 482, 30 N. W. 556; Parmer *v.* Keith, 16 Nebr. 91, 20 N. W. 103.

Texas.— Kaufman *v.* Armstrong, 74 Tex. 65, 11 S. W. 1048.

See 5 Cent. Dig. tit. "Attachment," § 55.

70. Millaudon *v.* Foucher, 8 La. 588; Stewart *v.* Lyman, 62 N. Y. App. Div. 182, 70 N. Y. Suppl. 936; Wilson *v.* Beadle, 2 Head (Tenn.) 510. See also Allen *v.* Greenwood, 1 Cranch C. C. (U. S.) 60, 1 Fed. Cas. No. 222.

If the fugitive debtor was carrying off property such absconding furnished a distinct ground for attachment under the Kentucky act of 1838. Nutter *v.* Connet, 3 B. Mon. (Ky.) 199.

Danger of losing claim need not be shown where departure of defendant from the state is relied on as a ground for attachment. Wright *v.* Smith, 19 Tex. 297; Messner *v.* Hutchins, 17 Tex. 597.

71. A foreigner residing and conducting business within the state may become an absconder (Field *v.* Adreon, 7 Md. 209); and absconders were held to be sufficiently resident within the state in McCaulley *v.* Shute, 5 Harr. (Del.) 26.

A non-resident of a state may be an absconder from the state (Middlebrook *v.* Ames, 5 Stew. & P. (Ala.) 158; Johnson *v.* Lowry, 47 Ga. 560, 15 Am. Rep. 655. *Contra,* Matter of Fitzgerald, 2 Cai. (N. Y.) 318; Thurneyssen *v.* Vouthier, 1 Miles (Pa.) 422); though he need not have acquired a domicile (Kennedy *v.* Baillie, 3 Yeates (Pa.) 55; Barnet's Case, 1 Dall. (Pa.) 152, 1 L. ed. 77). See also *Ex p.* Schroeder, 6 Cow. (N. Y.) 603, where the court held that a non-resident could not be attached as an absconding debtor when the debt was due a foreign creditor and was not contracted within the state.

A non-resident of the county is not liable to attachment on the ground that he is "actually removing out of the limits of the county." Thompson *v.* Wright, 22 Ga. 607.

A repeated visitor carrying on business within the province could be an absconder. Ford *v.* Lusher, 3 U. C. Q. B. O. S. 428.

72. *Georgia.*— Perryman *v.* Pope, 102 Ga. 502, 31 S. E. 37; Irvin *v.* Howard, 37 Ga. 18; Selleck *v.* Twesdall, Dudley (Ga.) 196.

Maryland.— Stouffer *v.* Niple, 40 Md. 477.

Michigan.— Stock *v.* Reynolds, 121 Mich. 356, 80 N. W. 289.

Mississippi.— Thomason *v.* Wadlington, 53 Miss. 560.

Missouri.— Elliott *v.* Keith, 32 Mo. App. 579. But see Temple *v.* Cochran, 13 Mo. 116, where it was held under an earlier statute that the absconding must have actually taken place.

Tennessee.— Lyons *v.* Mason, 4 Coldw. (Tenn.) 525; Isaacks *v.* Edwards, 7 Humphr. (Tenn.) 464, 46 Am. Dec. 86; Fisher *v.* Cummings, 7 Humphr. (Tenn.) 231; Runyan *v.* Morgan, 7 Humphr. (Tenn.) 210.

Virginia.— Mantz *v.* Hendley, 2 Hen. & M. (Va.) 308, holding that prior to the Virginia act of Jan. 25, 1806, an original attachment would issue only against one actually removing.

Contra, Lewis *v.* Butler, Ky. Dec. 246; Hale *v.* Richardson, 89 N. C. 62.

The intention of absconding must be made out or no ground exists (Hanson *v.* Tompkins, 2 Wash. 508, 27 Pac. 73. See Pierse *v.* Smith, 1 Minn. 82, where evidence was held insufficient to show an intention to abscond), and abandoning the intention before any start is made prevents attachment (Reddy *v.* Bego, 33 Miss. 529).

73. Concealment is but a phase of absconding. State *v.* Mills, 57 N. J. L. 574, 32 Atl. 7.

Requesting false information to be given of one's movements after departure constitutes a concealment. North *v.* McDonald, 1 Biss. (U. S.) 57, 18 Fed. Cas. No. 10,318.

Shutting one's self up is concealment (Ives *v.* Curtiss, 2 Root (Conn.) 133; State *v.* Mills, 57 N. J. L. 574, 32 Atl. 7; Gilbert *v.* Tompkins, Code Rep. N. S. (N. Y.) 16; Cammann *v.* Tompkins, Code Rep. N. S. (N. Y.) 12, 2 Edm. Sel. Cas. (N. Y.) 227), whether at place of abode or elsewhere (Lewis *v.* Wright, 3 Bush (Ky.) 311), and no matter how short a time it continues (Young *v.* Nelson, 25 Ill. 565); but mere refusal to see callers will not have a like effect (Wallach *v.* Sippilli, 65 How. Pr. (N. Y.) 501).

Permanent residence out of the county is not concealment. Boggs *v.* Bindskoff, 23 Ill. 66.

Proof of concealment.— Positive proof is not necessary to make out a concealment (Brewer *v.* Mock, 14 Colo. App. 454, 60 Pac. 578), but failure of creditor to find debtor does not show concealment (Reynolds *v.* Horton, 67 Hun (N. Y.) 122, 22 N. Y. Suppl. 18, 51 N. Y. St. 545 [*affirmed* in 141 N. Y. 585, 36 N. E. 739, 58 N. Y. St. 865]; Head *v.*

himself clandestinely[74] with intent to avoid the service of legal process.[75] It is

Wollner, 53 Hun (N. Y.) 615, 6 N. Y. Suppl. 916, 25 N. Y. St. 645; Thomas *v.* Dickerson, 11 N. Y. Suppl. 436, 33 N. Y. St. 786); unless, perhaps, when the search has been diligent (Hall *v.* Anderson, 17 Misc. (N. Y.) 270, 40 N. Y. Suppl. 354; Finn *v.* Mehrbach, 65 N. Y. Suppl. 250). Evidence of the debtor's previous arrangements to leave the state on a trip, the purposes of the journey, and what was done on the same are part of the *res gestæ*, and competent to show what his intentions were in going away. Mahner *v.* Linck, 70 Mo. App. 380.

74. **Mere absence from the state** does not amount to absconding (Mandel *v.* Peet, 18 Ark. 236; State *v.* Morris, 50 Iowa 203; McMorran *v.* Moore, 113 Mich. 101, 71 N. W. 505; Branson *v.* Shinn, 13 N. J. L. 250; New York City Bank *v.* Merrit, 13 N. J. L. 131. See also Kingsland *v.* Worsham, 15 Mo. 657 [*followed* in Ellington *v.* Moore, 17 Mo. 424], where the court said that mere casual and temporary absence of a debtor from his usual place of abode was not a legal ground for issuing an attachment against his property; but that the absence must be such as to prevent service of ordinary process upon him); but under some statutes it has been made a distinct ground for attachment where the absence from the state has lasted for a certain time (Spalding *v.* Simms, 4 Metc. (Ky.) 285, holding that under the statute allowing attachment where defendant has been absent from the state for four months, such time begins to run when the debtor leaves home for another state, although an unlooked-for delay prevents his actual passing beyond the state line until some days later. See also Dudley *v.* Donaldson, 2 B. Mon. (Ky.) 151; Dudley *v.* Porter, 1 B. Mon. (Ky.) 403).

Leaving the state for business purposes alone is not sufficient to constitute absconding. Pitts *v.* Burroughs, 6 Ala. 733; Fitch *v.* Waite, 5 Conn. 117; Rust *v.* Stuart, 2 N. Y. City Ct. 295; Coulon *v.* De Lisle, 1 Browne (Pa.) 256; Loesh *v.* Rivers, 5 Phila. (Pa.) 83, 19 Leg. Int. (Pa.) 141. See also Schorten *v.* Davis, 21 La. Ann. 173, where it was held that the absconder must intend to leave the state permanently.

Open and notorious departure usually negatives the intention necessary to make the absentee an absconder. Castellanos *v.* Jones, 5 N. Y. 164; Swezey *v.* Bartlett, 3 Abb. Pr. N. S. (N. Y.) 444; Dunn *v.* Myres, 3 Yerg. (Tenn.) 413. See also F. A. Ringler Co. *v.* Newman, 33 Misc. (N. Y.) 653, 68 N. Y. Suppl. 871 (where the court said of a departure considered by itself that neither by fact nor inference was this ground of attachment disclosed); Robinson *v.* Crowder, 1 Bailey (S. C.) 185 (holding, under a statute providing that a debtor about to depart from the state may, by giving notice of his intended departure and offering to answer any suit brought against him, prevent an attachment, that an announcement by the resident member of a firm will prevent an attachment against the partnership property). *Compare* Morgan *v.* Avery, 7 Barb. (N. Y.) 656, 2 Code Rep. (N. Y.) 91 [*affirmed* in 2 Code Rep. (N. Y.) 121], holding that departure need not be secret.

Remarks of an alleged absconding debtor at the time and place of departure are admissible on an issue of his intent as part of the *res gestæ*. Oliver *v.* Wilson, 29 Ga. 642.

75. Smith *v.* Johnson, 43 Nebr. 754, 62 N. W. 217; Gandy *v.* Jolly, 34 Nebr. 536, 52 N. W. 376. But see Tiller *v.* Abernathy, 37 Mo. 196, to the effect that in Missouri both the debtor and his family must be absent from their usual place of abode in order that attachment will lie against him as an absconder; for as long as the family remain the process against the debtor may be delivered to a member of his family.

An intention to avoid service of process is ordinarily essential (Winkler *v.* Barthel, 6 Ill. App. 111; Crayne *v.* Wells, 2 Ill. App. 574; Johnson *v.* Kaufman, 104 Ky. 494, 20 Ky. L. Rep. 684, 47 S. W. 324; Dunn *v.* Salter, 1 Duv. (Ky.) 342; Barnard *v.* Sebre, 2 A. K. Marsh. (Ky.) 151; Morgan *v.* Avery, 7 Barb. (N. Y.) 656, 2 Code Rep. (N. Y.) 91; Smith *v.* Fogarty, 6 N. Y. Civ. Proc. 360; Farmers', etc., Bank *v.* Evans, 95 Tenn. 702, 34 S. W. 2); but an intention to avoid inquiry by creditors has been held sufficient (Bank of Commerce *v.* Payne, 86 Ky. 446, 10 Ky. L. Rep. 43, 8 S. W. 856), and avoiding process sued out by one creditor gives a second creditor ground for attachment (Sherrill *v.* Bench, 37 Ark. 560).

An intention to avoid criminal process is, in some jurisdictions, equally effective in making the absentee an absconder. Malone *v.* Handley, 81 Ala. 117, 8 So. 189; Bank of Commerce *v.* Payne, 86 Ky. 446, 10 Ky. L. Rep. 43, 8 S. W. 856; Starke *v.* Scott, 78 Va. 180; Reg. *v.* Stewart, 8 Ont. Pr. 297. *Contra*, Evans *v.* Saul, 8 Mart. N. S. (La.) 247; Thames, etc., Mar. Ins. Co. *v.* Dimick, 22 N. Y. Suppl. 1096, 51 N. Y. St. 41.

An intent to injure his creditors is not essential where the debtor has absconded. Hawes *v.* Clement, 64 Wis. 152, 25 N. W. 21. *Compare* Scott *v.* Mitchell, 8 Ont. Pr. 518, holding that where the debtor departs with an intention to defraud his creditors he will be deemed an absconding debtor.

Departure under suspicious circumstances will often justify an inference that debtor is absconding. Wilkins *v.* Hillman, 8 App. Cas. (D. C.) 469; McCollem *v.* White, 23 Ind. 43; Buell *v.* Van Camp, 3 Silv. Supreme (N. Y.) 598, 8 N. Y. Suppl. 207, 28 N. Y. St. 907; Gibson *v.* McLaughlin, 1 Browne (Pa.) 292; Gillingham *v.* Kiehl, 1 Wkly. Notes Cas. (Pa.) 146. A gratuitous conveyance of property shortly before departure is such suspicious circumstance. Lacker *v.* Dreher, 38 N. Y. App. Div. 75, 55 N. Y. Suppl. 979. But see Tuller *v.* Howard, 17 Misc. (N. Y.) 105, 40 N. Y. Suppl. 739, where the court held the evidence insufficient to show an absconding.

not necessary that he leave the limits of the state,[76] or where the statute makes removal out of the state ground for attachment that he has determined upon a new residence or home elsewhere.[77]

C. Death of Non-Resident Debtor Leaving Property in State. An attachment is sometimes authorized where any person liable for any debt or demand, residing out of the state, dies, leaving property in the state.[78]

D. Demand Not Otherwise Secured. In some states it is a ground of attachment that plaintiff's claim is not otherwise secured, or that the security given by defendant has, without plaintiff's fault, become valueless.[79] Under such a provision it is held that a surrender by the creditor of the security given for the debt entitles him to sue out an attachment.[80]

E. Failure to Pay For Labor on Performance. Where it is made a ground for attachment that the debt was for work and labor performed, which the debtor should have paid at the time of the performance,[81] an attachment cannot be maintained when the whole transaction shows a mutual account, consisting of debits and credits.[82] The burden is upon attachment plaintiff to show, as against defendant's traverse, the terms of the contract and the time when the services were to be paid for.[83]

F. Failure to Pay on Delivery. Under a statute making it ground for attachment " that the defendant has failed or refused to pay the price or value of any article or thing delivered to him, which he should have paid for on the

Where the conduct of a debtor induces the belief that he is absconding, the attachment on this ground may be sustained. Lesage *v.* Schmitt, 10 N. J. L. J. 10.

Where the intended removal was conditional and the condition upon which it was to take place had not occurred, the ground for attachment was not made out. Bamberger *v.* Merchants' Bank, 73 Miss. 572, 19 So. 296.

Continuance of absconding.— It was held error to charge that if a debtor is once shown to be absconding he continues so until his creditors get notice of his new residence. Oliver *v.* Wilson, 29 Ga. 642.

Lack of fraudulent intention necessary to make a departing person an absconder was shown by the circumstance that he was merely traveling through the country (Dudley *v.* Staples, 15 Johns. (N. Y.) 196); that he was absent as a soldier at the seat of war (Haynes *v.* Powell, 1 Lea (Tenn.) 347); that he was absent for the purpose of visiting (Walcott *v.* Hendrick, 6 Tex. 406); or that he was returning to the country of his home (Taylor *v.* Nicholl, 1 U. C. Q. B. 416).

The return of debtor after six days' absence rebutted any inference that he left with intent to defraud his creditors. Island Coal Co. *v.* Rehling, 22 Ind. App. 305, 53 N. E. 777.

76. Field *v.* Adreon, 7 Md. 209; Smith *v.* Johnson, 43 Nebr. 754, 62 N. E. 217.

77. Troy *v.* Rogers, 113 Ala. 131, 20 So. 999.

78. Bacchus *v.* Peters, 85 Tenn. 678, 4 S. W. 833; Merchant *v.* Preston, 1 Lea (Tenn.) 280; Boyd *v.* Martin, 9 Heisk. (Tenn.) 382; Sharp *v.* Hunter, 7 Coldw. (Tenn.) 389.

79. Right to attachment in action on demand otherwise secured see *infra*, VI, F.

The reservation of title to real estate in the vendor was held to create such a lien in his favor as to debar him from invoking the remedy by attachment under such statute. Willman *v.* Freidman, (Ida. 1893) 35 Pac. 37.

Waiver of right.— Where a statute provides, among other things, that an attachment may issue, if the party applying for the same is not secured by mortgage, lien, or pledge upon real or personal property, a creditor of an insolvent, after consenting to an assignment by him of all his property for the benefit of creditors under which he is certain to receive his proportion of property assigned, cannot, without attacking the assignment for fraud or otherwise, procure an attachment against the insolvent's property. Elling *v.* Kirkpatrick, 6 Mont. 119, 9 Pac. 900.

80. Wooddy *v.* Jamieson, (Ida. 1895) 40 Pac. 61; Parberry *v.* Woodson Sheep Co., 18 Mont. 317, 45 Pac. 278.

81. Mills' Anno. Stat. Colo. § 2700, subs. 8.

Action for wages by day laborer.— In an action for wages, in which an attachment was issued against the property of defendant on this ground, the proofs showed that plaintiff was working for defendant by the day; that there was no stipulated time for payment of his wages, which were paid from time to time, on his demand; that either party might terminate the contract, as defendant did, at any time; and that when so discharged plaintiff demanded the wages then due and unpaid. It was held that such services entitled plaintiff, after demand of the amount due, to maintain such attachment. De Lappe *v.* Sullivan, 7 Colo. 182, 2 Pac. 926.

82. Morris *v.* Everly, 19 Colo. 529, 36 Pac. 150, where it was said that, if the payment depended upon any condition, the contract did not come within the operation of the statute.

83. Drake *v.* Avanzini, 20 Colo. 104, 36 Pac. 846.

delivery thereof," to justify an attachment plaintiff must show an unconditional contract to pay on delivery,[84] and a demand for such payment.[85] If credit is given, or intended to be given, no attachment can be sustained on this ground.[86]

G. Fraud in Incurring Liability — 1. In General. Fraud on the part of the debtor in contracting a debt[87] is generally made by statute[88] a ground for attachment in an action on the obligation thus fraudulently created.[89]

2. What Constitutes Fraud — a. In General. A preconceived purpose not to pay for goods furnished on credit[90] or not to keep a collateral agreement regard-

84. Miller *v.* Godfrey, 1 Colo. App. 177, 27 Pac. 1016; Harlow *v.* Sass, 38 Mo. 34.

A contract to pay upon delivery, if demanded, is not a contract to pay upon delivery within the meaning of the statute. St. Louis Type Foundry *v.* Union Printing, etc., Co., 3 Mo. App. 142.

Waiver of right.— Kan. Civ. Code, § 190, subs. 11, authorizing an attachment "when the debtor has failed to pay the price or value of any article or thing delivered, which by contract he was bound to pay upon delivery," does not apply if the contract to pay upon delivery has been modified by the vendor, or if, by subsequent dealings with defendant, he has waived the right to demand payment upon delivery. Young *v.* Lynch, 30 Kan. 205, 1 Pac. 503.

Right belongs to seller alone.— The right to an attachment on this ground belongs to the seller alone; and an express company, which has rendered itself liable to a seller by delivering goods to the purchaser without requiring payment, cannot sue out an attachment in an action against such purchaser. Richardson's Missouri Express Co. *v.* Cunningham, 25 Mo. 396.

85. Miller *v.* Godfrey, 1 Colo. App. 177, 27 Pac. 1016.

86. Harlow *v.* Sass, 38 Mo. 34, where a promise to give a note payable at a future date was held not to be a stipulation to pay on delivery. But see Aultman *v.* Daggs, 50 Mo. App. 280, where it was held that a stipulation by a purchaser to execute his note, secured by mortgage, on receipt of the goods, amounted to a promise to pay on delivery, where such note was intended as payment.

87. The obligation must arise from contract.— Merchants' Bank *v.* Ohio L. Ins., etc., Co., 1 Disn. (Ohio) 469, 12 Ohio Dec. (Reprint) 738. See also Baxter *v.* Nash, 70 Minn. 20, 72 N. W. 799.

Plaintiff may affirm the contract by suing upon it and yet rely on the fraud as a ground for attachment. Kansas City Stained Glass Works, etc., Co. *v.* Robertson, 73 Mo. App. 154; Blackinton *v.* Rumpf, 12 Wash. 279, 40 Pac. 1063. But see Batroff *v.* Pioneer Tobacco Co., 17 Wkly. Notes Cas. (Pa.) 255 (where the court held that persons who were induced by fraudulent representations to sell their stock in trade to a corporation could not sue in an action of debt to collect payment and issue an attachment. If they desired to take advantage of the fraud the action should have been for damages and for rescission of the contract); Walker *v.* Collins, 50 Fed. 737, 4 U. S. App. 406, 1 C. C. A. 642.

88. Up to 1888 in New York fraud in contracting the obligation was not a ground for attachment. Greef *v.* Sickle, 15 N. Y. St. 248; Goldschmidt *v.* Herschorn, 13 N. Y. St. 560, 28 N. Y. Wkly. Dig. 160; Stamp *v.* Herpich, 8 N. Y. St. 446. See, however, N. Y. Code Civ. Proc. § 636, as amended N. Y. Laws (1894), c. 736, N. Y. Laws (1895), c. 578, N. Y. Laws (1899), c. 598.

After a revision of the laws of South Dakota in 1895, it was held that fraud in contracting an obligation still remained as a ground for attachment in actions on either matured or immatured debts. Finch *v.* Armstrong, 9 S. D. 255, 68 N. W. 740, Hanley, J., dissenting as to matured debts.

89. Only fraudulently incurred liability can be included in the attachment suit.

Michigan.— Estlow *v.* Hanna, 75 Mich. 219, 42 N. W. 812.

Nebraska.— Dolan *v.* Armstrong, 35 Nebr. 339, 53 N. W. 132; Meyer *v.* Evans, 27 Nebr. 367, 43 N. W. 109; Mayer *v.* Zingre, 18 Nebr. 458, 25 N. W. 727.

Pennsylvania.— National Brewing Co. *v.* Bomgardner, 5 Pa. Dist. 365; Wilson *v.* Greenwood, 8 Kulp (Pa.) 210; Ross *v.* Behringer, 21 Pa. Co. Ct. 260; Wright *v.* Ewen, 24 Wkly. Notes Cas. (Pa.) 111, 19 Phila. (Pa.) 312, 46 Leg. Int. (Pa.) 179.

Texas.— Stiff *v.* Fisher, 85 Tex. 556, 22 S. W. 577.

Wyoming.— A. D. Smith Drug Co. *v.* Casper Drug Co., 5 Wyo. 510, 40 Pac. 979, 42 Pac. 213.

Compare Teweles *v.* Lins, 98 Wis. 453, 74 N. W. 122, holding that where the evidence in the trial of a traverse of the affidavit for attachment shows that only a part of the debt was fraudulently contracted, an order sustaining the attachment as to that part, and dismissing it as to the other part, is proper.

See 5 Cent. Dig. tit. "Attachment," § 87.

Giving renewal notes for the whole amount would not change this rule regarding the amount for which the attachment may issue. Sedalia Third Nat. Bank *v.* Cramer, 78 Mo. App. 476. *Contra*, Mackey *v.* Hyatt, 42 Mo. App. 443, where the court held that in an action on an open account attachment would issue for the balance due, although some but not all of the items were fraudulently contracted.

90. Kelsey *v.* Harrison, 29 Kan. 143; Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791; Strauss *v.* Abrahams, 32 Fed. 310. See also Reynolds *v.* Horton, 67 Hun (N. Y.) 122, 22 N. Y. Suppl. 18, 51 N. Y. St. 545 [*affirmed* in 141 N. Y. 585, 36 N. E.

ing the disposition of the property[91] makes the debt one which is fraudulently contracted;[92] but such fraud is not shown by mere failure to pay at maturity.[93] The kind of fraud[94] which gives a ground for attachment is not present in an action for malicious prosecution,[95] in an action against a professional man for negligence in the performance of his duties,[96] or in one for the conversion of property.[97]

b. False Representations — (i) *In General.* Securing property[98] or credit[99] by false representations regarding existing ascertainable facts[1] constitutes fraud.

739, 58 N. Y. St. 865], where the court held that the evidence did not show a design not to pay for the goods at the time credit was obtained.

91. Weiller *v.* Schreiber, 63 How. Pr. (N. Y.) 491; Campbell *v.* Walls, 17 Wkly. Notes Cas. (Pa.) 524.

92. Defendant's state of mind at time contract is made is the test. The debt is not one which has been fraudulently contracted by reason of the breach of a *bona fide* promise to give security (Johnson *v.* Stockham, 89 Md. 358, 43 Atl. 920. *Contra*, McGuire *v.* Louis Snider Paper Co., 6 Ohio S. & C. Pl. Dec. 392, 4 Ohio N. P. 262, where there was a false statement as to the purpose for which the money was to be used, and doubt as to the *bona fides* of the promise); by reason of a breach of an agreement to turn over money received from retailing goods (Rohan Bros. Boiler Mfg. Co. *v.* Latimore, 18 Mo. App. 16); or by reason of failure to keep a promise to apply money to the satisfaction of a certain debt (Geneva Nat. Bank *v.* Bailor, 48 Nebr. 866, 67 N. W. 865).

93. Staed *v.* Mahon, 70 Mo. App. 400; Seymour Mfg. Co. *v.* Sheahan, 13 Mo. App. 577; St. Louis Type Foundry *v.* Union Printing, etc., Co., 13 Mo. App. 142.

Giving a bad check in payment at or before delivery of the purchased goods is such a fraud as will justify attachment (Easton Nat. Bank *v.* Wilson, 12 Wkly. Notes Cas. (Pa.) 336. But see Burke *v.* Halloway, 18 Phila. (Pa.) 271, 43 Leg. Int. (Pa.) 280); but neglect to provide for a post-dated check is not (Cluff *v.* Gunnis, 16 Wkly. Notes Cas. (Pa.) 65).

94. To constitute fraud within the meaning of the attachment acts, it must be shown that the debtor had the purpose to deceive and defraud the creditor. Hughes *v.* Lake, 63 Miss. 552; Marqueze *v.* Sontheimer, 59 Miss. 430; Belmont *v.* Lane, 22 How. Pr. (N. Y.) 365; Devinney *v.* Smith, 5 Ohio Dec. (Reprint) 353, 5 Am. L. Rec. 6 [*affirming* 7 Ohio Dec. (Reprint) 31, 1 Cinc. L. Bul. 43]; Finch *v.* Armstrong, 9 S. D. 255, 68 N. W. 740.

Embezzlement.— In an action to recover money embezzled by defendant, an attachment may be had on the ground that the debt is fraudulently contracted. Cole *v.* Aune, 40 Minn. 80, 41 N. W. 934. But embezzlement by principal does not make his liability to repay a surety on his bond the amount embezzled a debt which was fraudulently contracted. New York American Surety Co. *v.* Haynes, 91 Fed. 90.

95. Glidden, etc., Varnish Co. *v.* Joy, 8 Ohio Cir. Ct. 157.

96. Rawlings *v.* Powers, 25 Nebr. 681, 41 N. W. 651. See also Warren *v.* Barsby, 24 Nebr. 811, 40 N. W. 314, where the court held that the refusal of a lawyer to pay over money belonging to a firm on a claim that he had a right to hold because an individual partner had agreed to pay his fee did not constitute a fraud which would justify attachment.

97. Goss *v.* Boulder County, 4 Colo. 468; Finlay *v.* Bryson, 84 Mo. 664; Sunday Mirror Co. *v.* Galvin, 55 Mo. App. 412; Devinney *v.* Smith, 5 Ohio Dec. (Reprint) 353, 5 Am. L. Rec. 6 [*affirming* 7 Ohio Dec. (Reprint) 31, 1 Cinc. L. Bul. 43].

The conversion of negotiable paper sent for collection does not create an obligation fraudulently incurred. Merchants' Bank *v.* Ohio L. Ins., etc., Co., 1 Disn. (Ohio) 469, 12 Ohio Dec. (Reprint) 738. *Contra*, Mechanics' Nat. Bank *v.* Miners' Bank, 13 Wkly. Notes Cas. (Pa.) 236. See also Troup *v.* Appleman, 52 Md. 456, where the court expressly refused to decide whether the conversion of bonds deposited for safe-keeping furnished a ground for attachment, but did decide that if a valid ground was furnished it was waived by accepting the note of the tort-feasor for the amount of the value of the bonds.

98. Yates *v.* Dodge, 123 Ill. 50, 13 N. E. 847 [*affirming* 21 Ill. App. 547, 23 Ill. App. 338].

Damages resulting from false representations, whereby one is induced to purchase land and pay therefor more than its true value, constitute a debt for property obtained under false pretenses, within Iowa Code (1873), § 2951, prescribing such a debt as a cause for attachment. Stanhope *v.* Swafford, 77 Iowa 594, 42 N. W. 450.

99. Schwartz *v.* Lawrence, 1 Wkly. Notes Cas. (Pa.) 131.

Securing an accommodation indorsement by falsely representing the amount of notes to be much less than it is in fact constitutes the securing of credit by fraud. May *v.* Newman, 95 Mich. 501, 55 N. W. 364.

1. Belmont Min. Co. *v.* Rogers, 10 Ohio Cir. Ct. 305.

Mere expressions of opinion are not sufficient (Norfolk, etc., Hosiery Co. *v.* Arnold, 18 N. Y. Suppl. 910, 46 N. Y. St. 491; Rice *v.* Warren, 3 Del. Co. (Pa.) 283; Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743); but a false statement as to the purpose for which borrowed money is to be used is a false representation authorizing attach-

The false representations[2] must be made to plaintiff[3] by defendant[4] with an intention to deceive,[5] and they must be relied on by plaintiff in giving credit.[6]

(II) *As to Financial Condition.* Failure to disclose insolvency, which is not hopelessly irremediable,[7] at the time the debt was created does not of itself[8] constitute fraud; but a false allegation of solvency[9] or a false statement regarding the ownership[10] or value[11] of property generally warrants an attachment.

H. Fraudulent Transfer and Disposition of Property — 1. In General.

ment (McGuire *v.* Louis Snider Paper Co., 6 Ohio S. & C. Pl. Dec. 392, 4 Ohio N. P. 262).

2. In Illinois the fraudulent statement must be reduced to writing and signed. Fisher *v.* Secrist, 48 Fed. 264.

3. Representations to a third person are not sufficient (Long *v.* West, 31 Kan. 298, 1 Pac. 545; Winter *v.* Davis, 48 La. Ann. 260, 19 So. 263); but false statements to a commercial agency for the express purpose of securing credit stand on a different basis (Emerson *v.* Detroit Steel, etc., Co., 100 Mich. 127, 58 N. W. 659). See also Kilpatrick-Koch Dry Goods Co. *v.* McPheely, 37 Nebr. 800, 56 N. W. 389, where the court held that a false report of financial condition made to a banker, who merely communicated his conclusion based thereon to plaintiff, did not constitute fraud justifying an attachment.

4. Hooven Mercantile Co. *v.* Backley, 7 Kulp (Pa.) 552; Lodge *v.* Rose Valley Mills, 1 Pa. Dist. 811, 11 Pa. Co. Ct. 667.

5. Tootle *v.* Lysaght, 65 Mo. App. 139; Liveright *v.* Greenhouse, 61 N. J. L. 156, 38 Atl. 697.

Honest belief in the truth of false representations prevents an attachment. Wright *v.* Ewen, 24 Wkly. Notes Cas. (Pa.) 111, 19 Phila. (Pa.) 312, 46 Leg. Int. (Pa.) 179. But see Cox *v.* Buckly, 19 Wkly. Notes Cas. (Pa.) 291, where the court held that one making false representations without reasonable and probable ground for believing them true acted at his peril.

6. Penoyar *v.* Kelsey, 150 N. Y. 77, 44 N. E. 788, 34 L. R. A. 248; Gray *v.* Steedman, 63 Tex. 95; Curtis *v.* Hoxie, 88 Wis. 41, 59 N. W. 581; Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743.

So a ground for attachment is not made out when the false representations were made after the credit was given (Marqueze *v.* Sontheimer, 59 Miss. 430; Mayer *v.* Zingre, 18 Nebr. 458, 25 N. W. 727); or when the false representations were made long before (Meyers *v.* Rauch, 4 Pa. Dist. 333. But see Lewis *v.* Pratt, 11 Minn. 57, holding representations made five months previously were still effective in inducing plaintiff to give credit).

Procuring renewal notes by fraudulent representations furnishes a ground for attachment, although the original indebtedness which was renewed by the notes was contracted without fraud (Stevens Point First Nat. Bank *v.* Rosenfeld, 66 Wis. 292, 28 N. W. 370; Wachter *v.* Famachon, 62 Wis. 117, 22 N. W. 160); but inducing the creditor to accept a note for the debt by false representations has been held not to have a like effect (Mayer *v.* Zingre, 18 Nebr. 458, 25 N. W. 727).

Negligence on the part of plaintiff in failing to discover the truth will not prevent an attachment. Richards *v.* Harrison, 71 Mo. App. 224.

The burden is on plaintiff to show that the goods were obtained upon the faith of the false statements. Vietor *v.* Henlein, 67 How. Pr. (N. Y.) 486.

7. Kelsey *v.* Harrison, 29 Kan. 143; Dunlap *v.* Fox, (Miss. 1887) 2 So. 169; Hughes *v.* Lake, 63 Miss. 552; Nichols *v.* Pinner, 18 N. Y. 295; Ellison *v.* Bernstein, 60 How. Pr. (N. Y.) 145; Freeman *v.* Campbell, 1 N. Y. St. 728; Miller *v.* Shapiro, 2 Pa. Dist. 356, 12 Pa. Co. Ct. 526. See also Landauer *v.* Espenhain, 95 Wis. 169, 70 N. W. 287, where the court held that absconding was not conclusive proof of insolvency two months previously. But see Anonymous, 67 N. Y. 598; Wright *v.* Brown, 67 N. Y. 1.

8. Immediate delivery of goods to a third party to whom they have been sold is not a sufficient additional circumstance to show fraud (McGlensey *v.* Landis, 3 Wkly. Notes Cas. (Pa.) 240); but selling the goods at auction, below cost, immediately after receiving them is (Claflin *v.* Einstein, 6 Wkly. Notes Cas. (Pa.) 398).

9. Ring *v.* Chas. Vogel Paint, etc., Co., 44 Mo. App. 111; Warner *v.* Kade, 15 Mo. App. 600; Molony *v.* Atkinson, 2 Pa. Co. Ct. 441.

Statements regarding financial condition need only be approximately true to rebut an inference of fraud (Mack *v.* Jones, 31 Fed. 189); and too much weight should not be given to discrepancies between a report made to a financial agency and the actual condition of a defendant's affairs (Dieckerhoff *v.* Brown, (Md. 1886) 2 Atl. 723). But see Rosenthal *v.* Wehe, 58 Wis. 621, 17 N. W. 318, where the court held a statement that indebtedness was far less than it really was constituted fraud.

The statement must be untrue in some material matter to make the debt one which is fraudulently contracted. Sedalia Third Nat. Bank *v.* Cramer, 78 Mo. App. 476, 2 Mo. App. Rep. 287.

10. Askwith *v.* Allen, 33 Nebr. 418, 50 N. W. 267; Young *v.* Cooper, 12 Nebr. 610, 12 N. W. 91; Cohen *v.* Grimes, 18 Tex. Civ. App. 327, 45 S. W. 210.

Failure to disclose that defendant is doing business on borrowed capital does not constitute fraud. Dieckerhoff *v.* Brown, (Md. 1886) 2 Atl. 723; Boyd *v.* Bright, 4 Pa. Co. Ct. 518.

11. Littlejohn *v.* Jacobs, 66 Wis. 600, 29 N. W. 545; Kahn *v.* Angus, 61 Wis. 264, 21 N. W. 81. But see Kipling *v.* Corbin, 66 How. Pr. (N. Y.) 12, where it was held that

The fraudulent transfer[12] or disposition[13] of property[14] is usually made by statute[15] a ground for attachment against the debtor making[16] the transfer.[17]

2. **What Constitutes Transfer.** To constitute a transfer[18] within the meaning of attachment acts there must be a voluntary[19] alienation of title[20] by defend-

a failure to state that a stock of goods was not readily salable, did not constitute fraud.

12. **Distinguished from other grounds.**— Fraudulently transferring property is a ground distinct from secreting property (Culbertson *v.* Cabeen, 29 Tex. 247; Garner *v.* Burleson, 26 Tex. 348; Hopkins *v.* Nichols, 22 Tex. 206), or from an intention to fraudulently transfer it (Dunnenbaum *v.* Schram, 59 Tex. 281), but the first and last are not inconsistent (Kendall *v.* Kennedy, 8 Ky. L. Rep. 532).

13. **The word "disposition" has a broad signification** and includes all fraudulent transfers of property (Howard *v.* Caperon, 3 Tex. App. Civ. Cas. § 313); though in Missouri the word "disposed" is used to cover only alienations of property which may be effected by mere delivery without a written instrument (Bullene *v.* Smith, 73 Mo. 151).

Duty of trial court to define term.— It has been held error for a trial judge to refuse to define the meaning of the phrase "to fraudulently dispose of property." Matthews *v.* Boydstun, (Tex. Civ. App. 1895) 31 S. W. 814.

14. **A chose in action** (Bibb *v.* Smith, 1 Dana (Ky.) 580; Wilson *v.* Beadle, 2 Head (Tenn.) 510) or a judgment (Gribble *v.* Ford, (Tenn. Ch. 1898) 52 S. W. 1007) may be fraudulently transferred.

Property without the state may be fraudulently transferred so as to afford a ground for attachment. Kibbe *v.* Wetmore, 31 Hun (N. Y.) 424.

Fraudulent transfer of land is not a ground for attachment in Pennsylvania. Continental Nat. Bank *v.* Draper, 89 Pa. St. 446; Kline *v.* O'Donnell, 1 Pa. Dist. 741, 11 Pa. Co. Ct. 38.

15. Cooley *v.* Abbey, 111 Ga. 439, 36 S. E. 786; Hobbs *v.* Greenfield, 103 Ga. 1, 30 S. E. 257; Dewey *v.* Eckert, 62 Ill. 218; Archer *v.* Strachan, (Mich. 1901) 88 N. W. 465.

The purpose of the legislature in making fraudulent transfer of property a ground for attachment was to afford creditors a remedy effectual against debtors who may be disposed to be dishonest without requiring such creditors to swear to a fixed state of facts. Dawley *v.* Sherwin, 5 S. D. 594, 59 N. W. 1027.

16. **The fraudulent receipt of property** is not a ground for attachment. Bangs Milling Co. *v.* Burns, 152 Mo. 350, 53 S. W. 923; Howland *v.* Marshall, 127 N. C. 427, 37 S. E. 462.

17. **Injury to the particular attaching creditor** by reason of the transfer must be shown (Zeigler *v.* Cox, 63 Ill. 48; Sheffield *v.* Gay, 32 Tex. 225); but the debtor need not be insolvent (Hoffman *v.* Henderson, 145 Ind. 613, 44 N. E. 629; Flannagan *v.* Donaldson, 85 Ind. 517; Rock Island Nat. Bank *v.* Powers, 134 Mo. 432, 34 S. W. 869, 35 S. W. 1132; Elkhart Bank *v.* Western Lumber Co., 59 Mo. App. 317), in which case, however, a material portion of the debtor's property must be shown to have passed (Parrott *v.* Mayer, 31 Misc. (N. Y.) 50, 64 N. Y. Suppl. 649). See also Keith *v.* McDonald, 31 Ill. App. 17, where the court held that besides actual fraudulent intention the effect of the transfer must be to hinder and delay creditors.

18. **Necessity of transfer.**— The hindering and delaying of the creditor in the collection of his debt must, to authorize or uphold an attachment, be in some manner connected with the disposition or transfer of the debtor's property (Hosea *v.* McClure, 42 Kan. 403, 22 Pac. 317; Brown *v.* Morris, 10 S. C. 467); and it is not sufficient that the conveyance would be voidable in equity, but it must be utterly void as to creditors so as to create a resulting trust in their favor, and to constitute the grantee in the deed a trustee for their benefit (Forster *v.* Mullanphy Planing Mill Co., 16 Mo. App. 150).

19. McMorran *v.* Moore, 113 Mich. 101, 71 N. W. 505.

Confession of judgment by a debtor is usually regarded as a voluntary transfer. Field *v.* Liverman, 17 Mo. 218; Rubinsky *v.* Ullman, 4 Pa. Dist. 126; Simon *v.* Johnson, 7 Kulp (Pa.) 166; Terry *v.* Knoll, 3 Kulp (Pa.) 272; Ditchburn *v.* Jermyn, etc., Co-operative Assoc., 13 Pa. Co. Ct. 1; Johnson *v.* Heidenheimer, 65 Tex. 263.

Giving a judgment note has been held to be a conveyance of property. Ross *v.* Roth, 13 Pa. Co. Ct. 14. But see Lennig *v.* Senior, 21 Wkly. Notes Cas. (Pa.) 379, where the court said that technically it was not defendant who was disposing of his property by confessing a judgment, but it was the law which was disposing of it for him.

20. **Division of firm property** by partners among themselves is a sufficient conveyance to justify attachment if done with a fraudulent intent (Cox *v.* Peoria Mfg. Co., 42 Nebr. 660, 60 N. W. 933); and the withdrawal of partnership property for his own use by the manager of the partnership has been held a fraudulent disposition of it (Winner *v.* Kuehn, 97 Wis. 394, 72 N. W. 227).

Hazarding money or credit in speculation is not a sufficient conveyance of property to justify an attachment. Chicago Union Nat. Bank *v.* Mead Mercantile Co., 151 Mo. 149, 52 S. W. 196.

Mere deposit of property by the debtor for safe-keeping is not sufficient transfer. Couldren *v.* Caughey, 29 Wis. 317.

Securing goods on credit for one firm and selling by another.— Where a purchaser secured goods on credit, by representing that he was "behind" certain firms, and the goods when shipped were received and placed on sale by other firms, this was held to be a

ant[21] of a material portion[22] of his own property[23] either under an apparently absolute conveyance or by way of mortgage.[24] The conveyance must be made after plaintiff's claim was in existence,[25] but how shortly before the beginning of the attachment suit is not definitely settled.[26]

3. Intent, Motive, or Purpose — a. Generally. As a general rule fraud in law

transfer of the goods justifying an attachment by the creditor. Kirkendall *v.* Shorey, 28 Nebr. 631, 44 N. W. 992.

21. Transfer by one partner is not sufficient where the alleged ground is a transfer by the firm. Albuquerque First Nat. Bank *v.* Lesser, 9 N. M. 604, 58 Pac. 345.

22. A transfer of all the debtor's property need not be shown. Johnson *v.* Laughlin, 7 Kan. 359; Dixon Nat. Bank *v.* Western Lumber Co., 68 Mo. App. 81; Wildman *v.* Van Gelder, 60 Hun (N. Y.) 443, 14 N. Y. Suppl. 914, 39 N. Y. St. 162, 21 N. Y. Civ. Proc. 143; Weiller *v.* Schreiber, 63 How. Pr. (N. Y.) 491.

23. Title in the debtor of the property transferred is essential. Empire Warehouse Co. *v.* Mallett, 84 Hun (N. Y.) 561, 32 N. Y. Suppl. 861, 66 N. Y. St. 313; Troy Cent. Nat. Bank *v.* Ft. Ann Woolen Co., 24 N. Y. Suppl. 640; Allen *v.* Herschorn, 9 Abb. Pr. N. S. (N. Y.) 80; German Bank *v.* Dash, 60 How. Pr. (N. Y.) 124.

Pledged property.— In German Bank *v.* Meyer, 55 Hun (N. Y.) 86, 8 N. Y. Suppl. 205, 30 N. Y. St. 278, defendant transferred property which he had pledged to another by depositing warehouse receipts, and the court held that he had sufficient title to make a transfer of the property as his own. To same effect see Bank of Commerce *v.* Payne, 86 Ky. 446, 10 Ky. L. Rep. 43, 8 S. W. 856.

An executor who has left the state may be sued and his property attached on the ground that he has wrongfully and unlawfully disposed of and converted the property of the estate. Van Camp *v.* Searle, 147 N. Y. 150, 41 N. E. 427, 70 N. Y. St. 878 [*affirming* 79 Hun (N. Y.) 134, 29 N. Y. Suppl. 757, 61 N. Y. St. 349, 24 N. Y. Civ. Proc. 16].

24. An assignment for the benefit of creditors is a sufficient conveyance (Louisville Banking Co. *v.* Etheridge Mfg. Co., 19 Ky. L. Rep. 908, 43 S. W. 169; Dawson *v.* Coffey, 12 Oreg. 513, 8 Pac. 838); but an assignment inoperative for want of authority in the person executing it is not a transfer justifying an attachment (Bull *v.* Harris, 18 B. Mon. (Ky.) 195).

A mortgage by a debtor on his stock of goods which, after condition broken, divests him of the title and vests it in the mortgagees is such a transfer of his property as authorizes attachment. Tabb, etc., Hardware Co. *v.* Gelzer, 43 S. C. 342, 21 S. E. 261. The mortgage alleged to be the transfer must have taken effect (McCrosky *v.* Leach, 63 Ill. 61; Farmers' Nat. Bank *v.* Eason, 13 Ky. L. Rep. 496; Pierce *v.* White, 10 Ohio Dec. (Reprint) 552, 22 Cinc. L. Bul. 98); but it need not be a valid instrument (Kingman First Nat. Bank *v.* Gerson, 50 Kan. 589, 32 Pac. 908; Leser *v.* Glaser, 32 Kan. 546, 4 Pac. 1026). See also Joseph Bowling Co. *v.* Colvin, 49 La. Ann. 1340, 22 So. 374, where the court held that the confession of judgments by an insolvent debtor in favor of some creditors, which were docketed and created a lien on his property, and the refusing of the same to others, constituted a conveyance by way of mortgage and justified an attachment.

25. Hobbs *v.* Greenfield, 103 Ga. 1, 30 S. E. 257; Prunk *v.* Williams, 28 Ind. 523; Bauer Grocery Co. *v.* Smith, 74 Mo. App. 419; Trebilcock *v.* Big Missouri Min. Co., 9 S. D. 206, 68 N. W. 330. But an admittedly fraudulent transfer need not be shown by plaintiff to have been made prior to suing out the attachment; that will be presumed in his favor. Nebraska Moline Plow Co. *v.* Fuehring, 52 Nebr. 541, 72 N. W. 1003.

Acceptance of new notes in settlement of an open account is a creation of a new debt, and a fraudulent transfer made prior thereto affords no ground for attachment. Hershfield *v.* Lowenthal, 35 Kan. 407, 11 Pac. 173.

A previous transfer would only be sufficient where the debtor intended at the time thereof to contract the particular debt and defraud the creditor (Bergson *v.* Dunham, (Tex. Civ. App. 1897) 40 S. W. 17); and so in a case where a mortgage was put on record a year before the debt was contracted and there was no concealment or misrepresentation no ground for attachment existed (Allen *v.* Fuget, 42 Kan. 672, 22 Pac. 725). A previous transfer that was concealed might be a ground for attachment upon the ground of fraud in incurring the liability. See *supra*, V, G.

26. Two years is the period fixed in Illinois by statute during which an attachment may be brought for the fraudulent transfer. Nelson *v.* Leiter, 190 Ill. 44, 60 N. E. 851, 83 Am. St. Rep. 142 [*affirming* 93 Ill. App. 176]; Hanford *v.* Richart, 66 Ill. App. 443; Strauss Bros. Co. *v.* White, 61 Ill. App. 171. In Allen *v.* Herschorn, 9 Abb. Pr. N. S. (N. Y.) 80, an attachment on the ground of a fraudulent conveyance made nearly four years previously was not allowed because the creditor did not show a satisfactory reason for his delay; and in Loveland *v.* Kearney, 14 Colo. App. 463, 60 Pac. 584, a delay of eight years in making the attachment suit was held to bar the ground for attachment.

Continuing fraud.— A conveyance to trustees on a secret trust is a continuing fraud and will afford a ground for attachment in an action based on debts contracted subsequent to the transfer. Bostwick *v.* Blake, 145 Ill. 85, 34 N. E. 38.

Rescinding a fraudulent sale has been held not to defeat a creditor's right to attach. Smith-McCord Dry-Goods Co. *v.* Perry, (Indian Terr. 1900) 54 S. W. 812.

or constructive fraud in making the conveyance is not sufficient to constitute the same a fraudulent transfer and the debtor must be actuated by actual fraudulent purpose or intent,[27] but the motive or ulterior purpose of the debtor is immaterial;[28] and the rule can be invoked that a person is presumed to intend the necessary and natural consequences of his voluntary acts.[29]

27. *Alabama.*— Schloss *v.* Rovelsky, 107 Ala. 596, 18 So. 71.

Illinois.— Nelson *v.* Leiter, 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142 [*affirming* 93 Ill. App. 176]; Weare Commission Co. *v.* Druley, 156 Ill. 25, 41 N. E. 48, 30 L. R. A. 465 [*affirming* 54 Ill. App. 391]; Hargadine-McKittrick Dry Goods Co. *v.* Belt, 74 Ill. App. 581; Hanford *v.* Richart, 66 Ill. App. 443; Singer *v.* Lidwinosky, 36 Ill. App. 343; Dempsey *v.* Bowen, 25 Ill. App. 192; Princeton First Nat. Bank *v.* Kurtz, 22 Ill. App. 213; Shove *v.* Farwell, 9 Ill. App. 256.

Kentucky.—Warner *v.* Everett, 7 B. Mon. (Ky.) 262; Bridgeford *v.* Kentucky Glass Works Co., 14 Ky. L. Rep. 144. But see Locke *v.* Boles, 14 Ky. L. Rep. 573, where it was held that, in an attachment to enforce a specific lien, actual fraudulent intent need not be proved.

Louisiana.— Ferguson *v.* Chastant, 35 La. Ann. 339; Lefevre *v.* Landry, 24 La. Ann. 82.

Michigan.— McMorran *v.* Moore, 113 Mich. 101, 71 N. W. 505; Ionia First Nat. Bank *v.* Steele, 81 Mich. 93, 45 N. W. 579.

Nebraska.— Steele *v.* Dodd, 14 Nebr. 496, 16 N. W. 909.

New Jersey.— Kipp *v.* Salyer, 64 N. J. L. 160, 44 Atl. 843.

New York.—Wildman *v.* Van Gelder, 60 Hun (N. Y.) 443, 14 N. Y. Suppl. 914, 39 N. Y. St. 162, 21 N. Y. Civ. Proc. 143; Andrews *v.* Schwartz, 55 How. Pr. (N. Y.) 190. See also Harding *v.* Elliott, 12 Misc. (N. Y.) 521, 67 N. Y. St. 798, 33 N. Y. Suppl. 1095, where the court held that a transfer by the debtor for the purpose of compelling his creditor, who was a non-resident of New York, to enforce his claim in the state of the debtor's domicile did not furnish a ground for attachment.

Ohio.— Heidenheimer *v.* Ogborn, 1 Disn. (Ohio) 351, 12 Ohio Dec. (Reprint) 665; Hoyman *v.* Beverstock, 8 Ohio Cir. Ct. 473; Union Rolling Mill Co. *v.* Packard, 1 Ohio Cir. Ct. 76, 1 Ohio Cir. Dec. 46; McFarlan *v.* Mills, 7 Ohio Dec. (Reprint) 706, 4 Cinc. L. Bul. 1064; Jefferson Nat. Bank *v.* Purcell, 6 Ohio Dec. (Reprint) 936, 8 Am. L. Rec. 744; Chamberlain *v.* Strong, 3 Ohio Dec. (Reprint) 118, 3 Wkly. L. Gaz. 281; Market Nat. Bank *v.* Bethel, 1 Ohio S. & C. Pl. Dec. 233, 32 Cinc. L. Bul. 135.

Pennsylvania.— Dienelt *v.* Aronia Fabric Co., 2 Pa. Co. Ct. 206.

South Carolina.— Bray Clothing Co. *v.* Shealy, 53 S. C. 12, 30 S. E. 620.

South Dakota.— German Bank *v.* Folds, 9 S. D. 295, 68 N. W. 747; Park *v.* Armstrong, 9 S. D. 269, 68 N. W. 739; Sturgis First Nat. Bank *v.* McMillan, 9 S. D. 227, 68 N. W. 537.

Texas.— Needham Piano, etc., Co. *v.* Hollingsworth, (Tex. Civ. App. 1897) 40 S. W. 750.

Washington.— Holbrook *v.* Peters, etc., Co., 8 Wash. 344, 36 Pac. 256.

United States.— Strauss *v.* Abrahams, 32 Fed. 310 (construing Missouri statute); Hills *v.* Stockwell, etc., Furniture Co., 23 Fed. 432 (construing Michigan statute); La Belle Iron Works *v.* Hill, 22 Fed. 195 (construing Missouri statute).

Contra, Joseph *v.* Levi, 58 Miss. 843; Potter *v.* McDowell, 31 Mo. 62; Reed *v.* Pelletier, 28 Mo. 173; Dunham-Buckley *v.* Halberg, 69 Mo. App. 509; Glacier *v.* Walker, 69 Mo. App. 288; Gens *v.* Hargadine, 56 Mo. App. 245; Farmers, etc., Bank *v.* Price, 41 Mo. App. 291; Douglass *v.* Cissna, 17 Mo. App. 44. But see Spencer *v.* Deagle, 34 Mo. 455; Barry County Bank *v.* Russey, 74 Mo. App. 651.

There is sufficient fraudulent intent where the debtor intends to delay his creditors (Sherrill *v.* Bench, 37 Ark. 560; Curran *v.* Rothschild, 14 Colo. App. 497, 60 Pac. 1111; Gray *v.* Neill, 86 Ga. 188, 12 S. E. 362; Kellog *v.* Richardson, 19 Fed. 70), to place his property so that one creditor cannot attach and get all (McBryan *v.* Trowbridge, 125 Mich. 542, 84 N. W. 1084; Kingman *v.* Weiser, 48 Nebr. 834, 67 N. W. 941), or to force a compromise by creditors by means of the conveyance (Collier *v.* Hanna, 71 Md. 253, 17 Atl. 1017).

28. Farmers, etc., Bank *v.* Price, 41 Mo. App. 291; Cooper *v.* Standley, 40 Mo. App. 138; Douglass *v.* Cissna, 17 Mo. App. 44; Vietor *v.* Henlein, 34 Hun (N. Y.) 562, 67 How. Pr. (N. Y.) 486. See also McBryan *v.* Trowbridge, 125 Mich. 542, 84 N. W. 1084 (where an intention to pay the claims of creditors with prospective profits did not prevent an attachment); Seckendorf *v.* Ketcham, 67 How. Pr. (N. Y.) 526 (where the court held that a party might have an innocent purpose in so far as the moral aspect of the case was concerned and yet in law have an actual fraudulent intent, and that facts leading to the inevitable conclusion that defendant intended to place property out of the reach of his creditors were sufficient to justify an attachment).

Previous consent by the creditor to a specific sale will not prevent him from relying on such sale as a ground for attachment if it is made with a fraudulent intent to place property beyond the reach of creditors. Dingley *v.* Robinson, 5 Me. 127.

29. Winter *v.* Kirby, 68 Ark. 471, 60 S. W. 34; Curran *v.* Rothschild, 14 Colo. App. 497, 60 Pac. 1111; Cook *v.* Burnham, 3 Kan. App. 27, 44 Pac. 447; Potter *v.* McDowell, 31 Mo. 62; Gens *v.* Hargadine, 56 Mo. App. 245. See also Conyne *v.* Jones, 51 Ill. App. 17, where it was held that a transfer by an insolvent furnished a ground for attachment, although he

On the other hand the intention of the transferee who receives the property is of course immaterial.[30]

b. Proof of Intent — (1) *In General.* To prove fraudulent intent[31] the acts and declarations of the alleged fraudulent transferrer[32] and the circumstances attendant upon the transfer[33] may be shown.

had a mistaken belief that the property transferred was not liable for his debts.

30. Spear *v.* Joyce, 27 Ill. App. 456; Pettingill *v.* Drake, 14 Ill. App. 424; Barry County Bank *v.* Russey, 74 Mo. App. 651; Miller *v.* McNair, 65 Wis. 452, 27 N. W. 333.

31. The burden of proving fraud is on the person who asserts it (Hasie *v.* Connor, 53 Kan. 713, 37 Pac. 128; Roach *v.* Brannon, 57 Miss. 490; Noyes *v.* Cunningham, 51 Mo. App. 194; Strauss *v.* Abrahams, 32 Fed. 310); but conclusive proof of intention is not required (White *v.* Leszynsky, 14 Cal. 165).

The question is one of fact and its decision should be left to the jury. Hargadine-McKittrick Dry Goods Co. *v.* Belt, 74 Ill. App. 581; Roach *v.* Brannon, 57 Miss. 490. But see Swofford Bros. Dry-Goods Co. *v.* Zeigler, 2 Kan. App. 296, 42 Pac. 592 (where it was held that defendant's intent in making the transfer was a mixed question of law and fact to be decided by the trial judge); McQuade *v.* Williams, 101 Tenn. 334, 47 S. W. 427 (where the court held that a finding of a court below that the transfer of stock was fraudulent was a finding of fact and conclusive).

32. Roddey *v.* Erwin, 31 S. C. 36, 46, 9 S. E. 729, where the court said: "Fraudulent intent is not a physical entity which can be seen and felt, but a condition of the mind beyond the reach of the senses — usually kept secret — not very likely to be confessed, and therefore can only be proved by unguarded expressions, conduct, and circumstances generally."

Acts and declarations before or at the time of an alleged fraudulent sale are admissible. Buckingham *v.* Tyler, 74 Mich. 101, 41 N. W. 868; Angell *v.* Pickard, 61 Mich. 561, 28 N. W. 680; Cooney *v.* Whitfield, 41 How. Pr. (N. Y.) 6.

Acts and declarations subsequent to the fraudulent disposition are also admissible (McMorran *v.* Moore, 113 Mich. 101, 71 N. W. 505; Minck *v.* Levey, 17 Misc. (N. Y.) 315, 40 N. Y. Suppl. 348; Wilson *v.* Eifler, 7 Coldw. (Tenn.) 31. *Contra*, Bumberger *v.* Gerson, 24 Fed. 257. See also Lewis *v.* Rice, 61 Mich. 97, 27 N. W. 867, where the court held that in the collateral proceeding the declarations of an alleged fraudulent vendor were not admissible in derogation of the rights of the vendee), and may be sufficient to show fraudulent intent (Blake *v.* Sherman, 12 Minn. 420). But declarations by a mortgagee, to whom an alleged fraudulent mortgage had been made, to the effect that the mortgage was fraudulent are not sufficient to prove an intent to defraud on the debtor's part (Salzberg *v.* Mandelbaum, 89 Hun (N. Y.) 497, 35 N. Y. Suppl. 1014, 70 N. Y. St. 763).

Account-books of defendant cannot be used to prove intent on the trial of an issue of fraudulent conveyance (Wolfstein *v.* Steinharter, 10 Ky. L. Rep. 635), but are competent to show the amount of indebtedness (Meridian Fertilizer Factory *v.* Bush, 77 Miss. 697, 27 So. 645); and a failure to keep systematic books of account tends to show fraud (Senour Mfg. Co. *v.* Clarke, 96 Wis. 469, 71 N. W. 883).

An assignment previously made is admissible as bearing on the question of intent. German Bank *v.* Folds, 9 S. D. 447, 69 N. W. 823.

Failure to disclose the whereabouts of part of his property does not show fraudulent intention in defendant when the property was held for an honest purpose. Iosco County Sav. Bank *v.* Barnes, 100 Mich. 1, 58 N. W. 606.

False or contradictory statements tend to show fraudulent intent when made by the debtor (Hardie *v.* Colvin, 43 La. Ann. 851, 9 So. 745; Boyd *v.* Miller, 34 N. Y. Suppl. 1026, 69 N. Y. St. 2; Johnston *v.* Ferris, 14 Daly (N. Y.) 302, 12 N. Y. St. 666; Lewis *v.* Bragg, 47 W. Va. 707, 35 S. E. 943) or by his transferee (Wessinger *v.* Mausur, etc., Implement Co., 75 Miss. 64, 21 So. 757); but where it is charged that defendant's money was used in making a purchase, the failure of the purchaser to explain how he obtained the purchase-money does not show a fraudulent transfer, in the absence of all evidence to connect the debtor with the transaction (Howard *v.* Carpenter, 13 Ky. L. Rep. 735).

Withholding of a mortgage from record is also competent evidence. Rabb *v.* White, (Tex. Civ. App. 1898) 45 S. W. 850.

It is competent to ask defendant at the trial whether she intended by a conveyance to put her property beyond the reach of her creditors (Pierce *v.* White, 10 Ohio Dec. (Reprint) 552, 22 Cinc. L. Bul. 98), and to question a third person as to the purpose for which he looked over defendant's property when the alleged purpose was to receive it by way of fraudulent conveyance (Parker *v.* Luce, 14 Mich. 9); but a question asked defendant's salesman as to his instructions regarding his duties was held irrelevant and immaterial (John V. Farwell Co. *v.* McGraw, 13 Colo. App. 467, 59 Pac. 231).

33. McNeil, etc., Co. *v.* Plows, 83 Ill. App. 186; Seckendorf *v.* Ketcham, 67 How. Pr. (N. Y.) 526.

Financial condition of debtor. — The insolvency of a debtor is a material circumstance tending to prove fraudulent intent (Adams *v.* Kellogg, 63 Mich. 105, 29 N. W. 679; Parmer *v.* Keith, 16 Nebr. 91, 20 N. W. 103); but defendant's rating or want of rating with

(II) *As Affected by Mode of Transfer* — (A) *Assignment.* A general assignment by a debtor for the benefit of creditors, even though void,[34] does not of itself[35] justify an attachment on the ground of fraudulent conveyance.[36] The

certain commercial agencies is properly excluded (Lowenstein *v.* Aaron, 69 Miss. 341, 12 So. 269).

Mere decrease in the debtor's assets will not of itself justify the conclusion that he has made a fraudulent conveyance (Thompson *v.* Dater, 57 Hun (N. Y.) 316, 10 N. Y. Suppl. 613, 32 N. Y. St. 361; Stamp *v.* Herpich, 8 N. Y. St. 446) unless the decrease is sudden and to a very considerable amount (Tannenbaum *v.* Gottlieb, 14 N. Y. App. Div. 105, 43 N. Y. Suppl. 469; Strauss *v.* Vogt, 4 Misc. (N. Y.) 612, 25 N. Y. Suppl. 801, 54 N. Y. St. 142; Talcott *v.* Rosenberg, 8 Abb. Pr. N. S. (N. Y.) 287).

A fraudulent intent is not shown by defendant's previous bad record (Hegwer *v.* Kiff, 31 Kan. 440, 2 Pac. 553); by a mere breach of contract (Powers *v.* O'Brien, 44 Mich. 317, 6 N. W. 679); by the fact that one partner made an application for a receiver for the firm at an unusual hour (Wadsworth *v.* Laurie, 164 Ill. 42, 45 N. E. 435 [*affirming* 61 Ill. App. 156]), that the debtor purchased worthless mining stock (Thurber *v.* Sexauer, 15 Nebr. 541, 19 N. W. 493), that he included debts in an assignment which he had not disclosed to plaintiff (Freeman *v.* Campbell, 1 N. Y. St. 728), that he made a conveyance within sixty days prior to assignment (Wachter *v.* Famachon, 62 Wis. 117, 22 N. W. 160), or that he sold a few articles cheaply in a new store to attract customers (Mack *v.* Jones, 31 Fed. 189. *Compare* Wando Phosphate Co. *v.* Rosenberg, 31 S. C. 301, 9 S. E. 969); by the mere transfer of property by debtor (Winter *v.* Davis, 48 La. Ann. 260, 19 So. 263; Troy Cent. Nat. Bank *v.* Ft. Ann. Woolen Co., 27 N. Y. Suppl. 1114, 57 N. Y. St. 316 [*affirming* 24 N. Y. Suppl. 640]; Union Rolling Mill Co. *v.* Packard, 1 Ohio Cir. Ct. 76, 1 Ohio Cir. Dec. 46; Beitman *v.* MacKenzie, 9 Ohio Dec. (Reprint) 241, 11 Cinc. L. Bul. 272), particularly where the debt sued for is very ancient (Kipp *v.* Salyer, 64 N. J. L. 160, 44 Atl. 843); by depositing money as security with the obligor on a bail-bond (Howland *v.* Marshall, 127 N. C. 427, 37 S. E. 462); or by the facts in Alexander *v.* Dulaney, (Miss. 1894) 16 So. 203; Reed *v.* Bagley, 24 Nebr. 332, 38 N. W. 827; Walters *v.* Brown, (Tenn. Ch. 1898) 46 S. W. 777; Hunt *v.* Kellum, 59 Tex. 535.

There was sufficient evidence of fraud in the following cases:

Arkansas.— Shibley, etc., Grocery Co. *v.* Ferguson, 60 Ark. 160, 29 S. W. 275.

Nebraska.— Morse *v.* Steinrod, 29 Nebr. 108, 46 N. W. 922.

New York.— Wildman *v.* Van Gelder, 60 Hun (N. Y.) 443, 14 N. Y. Suppl. 914, 39 N. Y. St. 162, 21 N. Y. Civ. Proc. 143; Levy *v.* Goldstein, 18 Misc. (N. Y.) 639, 43 N. Y. Suppl. 774; Jaeger *v.* Arnstein, 1 N. Y. St. 621; Weiller *v.* Schreiber, 63 How. Pr. (N. Y.) 491.

Pennsylvania.— Fisher *v.* Fisher, 2 Woodw. (Pa.) 321.

United States.— Senter *v.* Mitchell, 5 McCrary (U. S.) 147, 16 Fed. 206.

34. Harris *v.* Capell, 28 Kan. 117; Milliken *v.* Dart, 26 Hun (N. Y.) 24; Friend *v.* Michaelis, 15 Abb. N. Cas. (N. Y.) 354; Conlee Lumber Co. *v.* Ripon Lumber, etc., Co., 66 Wis. 481, 28 N. W. 285.

The validity of an assignment for the benefit of creditors is immaterial in determining whether it affords a ground for attachment as a fraudulent conveyance (McPike *v.* Atwell, 34 Kan. 142, 8 Pac. 118; German Bank *v.* Folds, 9 S. D. 295, 68 N. W. 747), and an assignment may furnish a ground for attachment, even though valid on its face (Skinner *v.* Oettinger, 14 Abb. Pr. (N. Y.) 109) or though it passes a valid title to the trustee in favor of some of the creditors secured (Enders *v.* Richards, 33 Mo. 598; Stewart *v.* Cabanne, 16 Mo. App. 517; Wilson *v.* Eifler, 7 Coldw. (Tenn.) 31).

35. It is not rendered fraudulent by the additional circumstance that it was attempted therein to create an invalid preference (Cooper *v.* Clark, 44 Kan. 358, 24 Pac. 422; McPike *v.* Atwell, 34 Kan. 142, 8 Pac. 118; Rose *v.* Renton, 13 N. Y. Suppl. 592, 37 N. Y. St. 683); that a valid preference in favor of a *bona fide* creditor is made (Achelis *v.* Kalman, 60 How. Pr. (N. Y.) 491); that the assignee is authorized to sell on credit (C. J. L. Meyer, etc., Co. *v.* Black, 4 N. M. 190, 16 Pac. 620); or by reason of an omission to annex a schedule of liabilities (Cooper *v.* Clark, 44 Kan. 358, 24 Pac. 422. *Contra*, Powers *v.* Goins, (Tenn. Ch. 1895) 35 S. W. 902).

A delay of trustees to procure bonds for two weeks after a deed of trust was filed does not show that the assignor had a fraudulent intent. Palmer *v.* Hughes, 84 Md. 652, 36 Atl. 431.

36. *Alabama.*— Thorington *v.* Gould, 59 Ala. 461.

Colorado.— Hunter *v.* Ferguson, 3 Colo. App. 287, 33 Pac. 82.

Dakota.— Straw *v.* Jenks, 6 Dak. 414, 43 N. W. 941.

Maryland.— Pitts Agricultural Works *v.* Smelser, 87 Md. 493, 40 Atl. 56.

Missouri.— Douglass *v.* Cissna, 17 Mo. App. 44.

New York.— Vietor *v.* Kayton, 48 Hun (N. Y.) 620, 2 N. Y. Suppl. 42, 16 N. Y. St. 1000; Grosvenor *v.* Sickle, 2 N. Y. Suppl. 40; Fleitmann *v.* Sickle, 13 N. Y. St. 399; Wilmerding *v.* Cunningham, 65 How. Pr. (N. Y.) 344; Miller *r.* Brinkerhoff, 4 Den. (N. Y.) 118, 47 Am. Dec. 242. *Contra*, under a statute prohibiting such assignments. Bicknell

assignment is fraudulent, however, if it reserves benefits to the assignor,[37] includes fictitious claims,[38] or allows the assignor to retain possession of the assigned property,[39] but a creditor accepting benefits under the assignment cannot avail himself of it as a ground for attachment.[40]

(B) *Mortgage.* Although the execution of a mortgage is not in itself[41] sufficient to satisfy the statute as a ground for attachment,[42] one very much in excess of the amount secured[43] is usually fraudulent,[44] and to permit a mortgagor to retain possession of the mortgaged property and sell it tends to show such bad faith and fraud as will sustain an attachment.[45]

v. Speir, 18 N. Y. Suppl. 590, 45 N. Y. St. 651.

Pennsylvania.— McCallum *v.* Hadder, 2 Wkly. Notes Cas. (Pa.) 185.

Wyoming.—Wearne *v.* France, 3 Wyo. 273, 21 Pac. 703.

United States.— La Belle Iron Works *v.* Hill, 22 Fed. 195, construing Missouri statute.

See 5 Cent. Dig. tit. "Attachment," § 109.

A fortiori an assignment to a receiver appointed by a court is not a fraudulent conveyance. Wells *v.* Sandford, 85 Ill. 100.

A threat by a debtor to assign for the benefit of creditors has been held not to be a fraudulent disposition of property, although it was followed by an assignment. Dickinson *v.* Benham, 12 Abb. Pr. (N. Y.) 158, 20 How. Pr. (N. Y.) 343.

37. Whedbee *v.* Stewart, 40 Md. 414.

A partnership assignment which reserves benefits to individual partners furnishes a ground for attachment (Ryhiner *v.* Ruegger, 19 Ill. App. 156); but failure to specify the order of priorities in an assignment by a firm does not have a like effect because it is obligatory on the assignee to make a proper and legal distribution of the assets (Friend *v.* Michaelis, 15 Abb. N. Cas. (N. Y.) 354).

38. Bickham *v.* Lake, 51 Fed. 892.

An honest mistake which caused an accommodation note to be included among the indebtedness did not justify an attachment. Chicago Union Nat. Bank *v.* Mead Mercantile Co., 151 Mo. 149, 52 S. W. 196.

Agreements contrary to public policy, sound morals, or statute, if contained in an assignment, may make it a ground for attachment. Leitensdorfer *v.* Webb, 1 N. M. 34.

39. Robinson *v.* Worley, 19 Ky. L. Rep. 791, 42 S. W. 95; Roy *v.* Union Mercantile Co., 3 Wyo. 417, 26 Pac. 996.

40. Richards *v.* White, 7 Minn. 345.

Waiver.— A creditor by accepting a position as assignee jointly with others, and by consenting to the elimination of the fraudulent part of an assignment, thereby waives a ground for attachment which the assignment would otherwise have afforded him. Ryhiner *v.* Ruegger, 19 Ill. App. 156. But no waiver is established by showing that the creditor sold goods to his debtor subsequent to the fraudulent transfer (Ryan Drug Co. *v.* Hvambsahl, 89 Wis. 61, 61 N. W. 299), or by the creditor's acceptance of unsecured notes which were given under false representations (Johnston *v.* Ferris, 14 Daly (N. Y.) 302, 12 N. Y. St. 666).

41. A mortgage is not fraudulent by reason of the fact that the mortgage note bears usurious interest (Adler, etc., Clothing Co. *v.* Corl, 155 Mo. 149, 55 S. W. 1017), or because the mortgage secures an accommodation indorser (Godbe-Pitts Drug Co. *v.* Allen, 8 Utah 117, 29 Pac. 881), or is made void by statute as to plaintiff's claim (Lord *v.* Wirt, 96 Mich. 415, 56 N. W. 7).

A conveyance absolute on its face, but really given as security, is not fraudulent because it fails to show that it is a mortgage. Rigney *v.* Tallmadge, 17 How. Pr. (N. Y.) 556.

42. Ivy *v.* Caston, 21 S. C. 583.

43. Disproportion between value of security and amount secured does not have the same effect. Dayton Spice-Mills Co. *v.* Sloan, 49 Nebr. 622, 68 N. W. 1040; Smith *v.* Boyer, 35 Nebr. 46, 52 N. W. 581 [*reversing* on rehearing 29 Nebr. 76, 45 N. W. 265, 26 Am. St. Rep. 373]; Grimes *v.* Farrington, 19 Nebr. 44, 26 N. W. 618.

44. Marbourg *v.* Lewis Cook Mfg. Co., 32 Kan. 629, 5 Pac. 181; Taylor *v.* Kuhuke, 26 Kan. 132; King *v.* Hubbell, 42 Mich. 597, 4 N. W. 440; Tabb, etc., Hardware Co. *v.* Gelzer, 43 S. C. 342, 21 S. E. 261; Rice *v.* Morner, 64 Wis. 599, 25 N. W. 668. See also Iosco County Sav. Bank *v.* Barnes, 100 Mich. 1, 58 N. W. 606, where it was held that the failure of the mortgagee to advance the whole amount of the mortgage bond did not make the mortgage fraudulent when it was intended that he should do so ultimately.

45. *Florida.*— Eckman *v.* Munnerlyn, 32 Fla. 367, 13 So. 922, 37 Am. St. Rep. 109.

Kansas.— Leser *v.* Glaser, 32 Kan. 546, 4 Pac. 1026.

Missouri.— Sauer *v.* Behr, 49 Mo. App. 86.

Oklahoma.— Ranney-Alton Mercantile Co. *v.* Watson, 10 Okla. 675, 65 Pac. 98.

Texas.— Gallagher *v.* Goldfrank, 75 Tex. 562, 12 S. W. 964.

Wisconsin.— Anderson *v.* Patterson, 64 Wis. 557, 25 N. W. 541.

United States.— Crooks *v.* Stuart, 2 McCrary (U. S.) 13, 7 Fed. 800.

Contra, Cox *v.* Birmingham Dry Goods Co., 125 Ala. 320, 28 So. 456, 82 Am. St. Rep. 238; Rhode *v.* Matthai, 35 Ill. App. 147; Meyer *v.* Gage, 65 Iowa 606, 22 N. W. 892.

See 5 Cent. Dig. tit. "Attachment," § 107.

A fortiori a secret agreement allowing the mortgagor to sell the property would constitute the mortgage a fraudulent conveyance. Cole Mfg. Co. *v.* Jenkins, 47 Mo. App. 664. *Compare* Leser *v.* Glaser, 32 Kan. 546, 4 Pac.

(c) *Sale.* Sales of goods by a debtor in the ordinary course of trade are usually not fraudulent,[46] and the application of the proceeds to pay debts rebuts any inference of fraud.[47] A fraudulent disposition of the proceeds, however, has the opposite effect,[48] as does a marked inadequacy of consideration;[49] but the convey-

1026, where it was suggested that the mortgagor might be authorized to sell the mortgaged property as agent or trustee of the mortgagee.

Filing such a mortgage for record might have the effect of disproving fraud (Lukens Iron, etc., Co. *v.* Payne, 13 N. Y. App. Div. 11, 43 N. Y. Suppl. 376; Ryan Drug Co. *v.* Hvambsahl, 89 Wis. 61, 61 N. W. 299); but failure to record a mortgage would not justify an inference against defendant when it was not withheld at his request (Burruss *v.* Trant, 88 Va. 980, 14 S. E. 845).

Mere delay in taking possession by mortgagee is not of itself a badge of fraud. Ripon Knitting Works *v.* Johnson, 93 Mich. 129, 53 N. W. 17; Pierce *v.* Johnson, 93 Mich. 125, 53 N. W. 16, 18 L. R. A. 486.

Monthly accounting by the mortgagor according to provisions in the mortgage would not prevent the inference of fraud. Joseph *v.* Levi, 58 Miss. 843.

Mere inferences as to debtor's insolvency drawn mainly from the fact that his stock of goods is reduced are insufficient to prove that a mortgage made by him was fraudulent. Bray Clothing Co. *v.* Shealy, 53 S. C. 12, 30 S. E. 620.

Release of a fraudulent mortgage will not prevent an attachment where the mortgaged property is immediately remortgaged to other parties. Buford, etc., Implement Co. *v.* McWhorter, 41 Kan. 262, 21 Pac. 86.

Effect of fraud subsequent to making mortgage.— Fraudulent collusion between a mortgagor and mortgagee to sell mortgaged property and prevent any surplus proceedings from arising constitutes a fraudulent conveyance authorizing attachment (Laflin *v.* Central Pub. House, 52 Ill. 432); and misappropriation of the proceeds of mortgaged chattels by the mortgagor has the same effect (Semmes *v.* Underwood, 64 Ark. 415, 42 S. W. 1069); but the contrary is true of a sale of mortgaged property by a mortgagor without the mortgagee's knowledge or consent (Hopkins *v.* Hastings, 21 Mo. App. 263).

46. *Louisiana.*— New Iberia State Bank *v.* Martin, 52 La. Ann. 1628, 28 So. 130; Hernsheim *v.* Levy, 32 La. Ann. 340.

Maryland.— Smith *v.* Easton, 54 Md. 138, 39 Am. Rep. 355.

New York.—Freeman *v.* Campbell, 1 N. Y. St. 728.

Ohio.— Mulligan *v.* Ruggles, 3 Ohio Dec. (Reprint) 311, L. & Bank. Bul. 311.

Texas.— Willis *v.* Lowry, 66 Tex. 540, 2 S. W. 449.

See 5 Cent. Dig. tit. "Attachment," § 98.

Sale by an insolvent in violation of the United States bankrupt law is not fraudulent. Stanley *v.* Sutherland, 54 Ind. 339.

Sale of mortgaged property.—The fact that the mortgagor is selling the mortgaged stock of goods as contemplated, but not applying the proceeds to the debt, does not authorize a specific attachment. Schnabel *v.* Jacobs, 20 Ky. L. Rep. 1596, 49 S. W. 774; Locke *v.* Boles, 14 Ky. L. Rep. 573.

Secret sales will usually justify an inference of fraud. Harbour-Pitt Shoe Co. *v.* Dixon, 22 Ky. L. Rep. 1169, 60 S. W. 186.

Selling goods cheaply in the regular course of trade does not afford a ground for attachment (Wando Phosphate Co. *v.* Rosenberg, 31 S. C. 301, 9 S. E. 969. *Compare* Mack *v.* Jones, 31 Fed. 189), even though the sale is accompanied by declarations of defendant that he is going to beat plaintiff if he can (Thames *v.* Sharbrough, (Miss. 1900) 27 So. 834), and particularly when the sales were made by an agent without the principal's authority (Myers *v.* Whiteheart, 24 S. C. 196). See also Todd *v.* Kratz, 13 Montg. Co. Rep. (Pa.) 209, where the court held that a sale of property was not fraudulent, although made after a conditional offer to apply the property in settlement of a debt for a larger amount than that realized from the sale.

Shipment in unusual quantities does not alter the rule (Shuler *v.* Birdsall, etc., Mfg. Co., 17 N. Y. App. Div. 228, 45 N. Y. Suppl. 725), but rapid sales of stock without a satisfactory account of the proceeds will justify the conclusion of fraud (Reed Bros. Co. *v.* Weeping Water First Nat. Bank, 46 Nebr. 168, 64 N. W. 701).

47. *Kentucky.*— Peak *v.* Weller, 10 Ky. L. Rep. 153.

Louisiana.— Poitevent, etc., Lumber Co. *v.* Standard Planing Mills, etc., Co., 49 La. Ann. 72, 21 So. 194.

Michigan.— Iosco County Sav. Bank *v.* Barnes, 100 Mich. 1, 58 N. W. 606.

Missouri.— Estes *v.* Fry, 22 Mo. App. 80; Knapp *v.* Joy, 9 Mo. App. 47.

Nebraska.— Tenney *v.* Diss, 32 Nebr. 61, 48 N. W. 877.

Pennsylvania.— Wightman *v.* Henry, 1 Wkly. Notes Cas. (Pa.) 74.

48. Jordan *v.* White, 38 Mich. 253; Whildin *v.* Smith, 4 Wkly. Notes Cas. (Pa.) 88; Blum *v.* Davis, 56 Tex. 423.

Refusal to apply proceeds to satisfy plaintiff's claim, accompanied by removal of defendant from the state, justified attachment on the ground that he had fraudulently transferred property. Goodwell *v.* Minchew, 26 La. Ann. 621.

49. *Illinois.*—Conyne *v.* Jones, 51 Ill. App. 17.

Kansas.— Curtis *v.* Hoadley, 29 Kan. 566.

Missouri.— Nelson Distilling Co. *v.* Vossmeyer, 25 Mo. App. 578.

ance is not fraudulent by reason of a failure to make delivery sufficient to pass title to the purchaser as against the creditor of the seller.[50]

(III) *As Affected by Person of Transferee*—(A) *Creditor.* It is not a fraudulent transfer justifying attachment for a debtor to prefer[51] a creditor, whether this is done by way of absolute conveyance of property in liquidation of the debt,[52] by confessing a judgment in the creditor's favor,[53] or by way of mort-

Nebraska.—Robinson Notion Co. *v.* Ormsby, 33 Nebr. 665, 50 N. W. 952.

Wisconsin.—Flanders *v.* McDonald, 39 Wis. 288.

Wyoming.— Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743.

Compare Seckendorf *v.* Ketcham, 67 How. Pr. (N. Y.) 526 (where the court said that a sale without valid consideration might be *bona fide* so that an attachment issued thereon would be vacated); Capehart *v.* Dowery, 10 W. Va. 130 (holding that a sale of a steamboat at a large discount followed by the removal of the proceeds outside the state did not give a ground for attachment as being a fraudulent conveyance); Miami Powder Co. *v.* Hotchkiss, 29 Fed. 767 (holding that promissory notes, given by a purchaser of doubtful solvency, were a sufficient consideration to rebut the inference that a sale was fraudulent).

Conveyance in consideration of services to be rendered in the future may be fraudulent for want of valuable consideration. Shellabarger *v.* Mottin, 47 Kan. 451, 28 Pac. 199, 27 Am. St. Rep. 306; Winfield Nat. Bank *v.* Croco, 46 Kan. 629, 26 Pac. 942.

Adequacy of consideration, on the other hand, will not always prevent a sale from being fraudulent. McDonald *v.* Hoover, 142 Mo. 484, 44 S. W. 334; Seckendorf *v.* Ketcham, 67 How. Pr. (N. Y.) 526. But see Heidenheimer *v.* Ogborn, 1 Disn. (Ohio) 351, 12 Ohio Dec. (Reprint) 665.

50. Schwabacker *v.* Rush, 81 Ill. 310; Taylor *v.* Smith, 17 B. Mon. (Ky.) 536; Simmons Hardware Co. *v.* Pfeil, 35 Mo. App. 256. But see Reed *v.* Pelletier, 28 Mo. 173 (holding that an agreement that the seller should remain in possession and continue to sell in the ordinary course of business constituted the transfer fraudulent and afforded a valid ground for attachment); Schumann *v.* Davis, 14 N. Y. Suppl. 284, 38 N. Y. St. 191 (reaching the same conclusion on similar facts where, however, the parties to the sale were husband and wife).

51. **"Unfair" preferences.**— In construing a statute which made an "unfair" preference to creditors a ground for attachment, it was held that the word "unfair" was surplusage because no preference can be unfair which is legal, and to be illegal it must be fraudulent. Fitzpatrick *v.* Flannagan, 106 U. S. 648, 1 S. Ct. 369, 27 L. ed. 211. In Louisiana a similar statute has been held not to make all preferences a ground for attachment. Seeligson *v.* Rigmaiden, 37 La. Ann. 722; Lehman *v.* McFarland, 35 La. Ann. 624. See also Stevens *v.* Helpman, 29 La. Ann. 635, holding that a preference by a debtor, whose conduct showed that he had been deceiving creditors and attempting to evade the payment of his debts, was unfair and justified an attachment.

An agreement to prefer a creditor by a purchaser of goods on credit is not fraudulent so as to afford a ground for attachment (New York Nat. Park Bank *v.* Whitmore, 104 N. Y. 297, 10 N. E. 524); but a debtor cannot delegate authority to another to make a preference in his behalf (Hargadine-McKittrick Dry Goods Co. *v.* Carnahan, 79 Mo. App. 219).

52. *Colorado.*—Hunter *v.* Ferguson, 3 Colo. App. 287, 33 Pac. 82.

Illinois.— Standard Oil Co. *v.* Morrison, etc., Co., 54 Ill. App. 531.

Indiana.— Island Coal Co. *v.* Rehling, 22 Ind. App. 305, 53 N. E. 777.

Kansas.— Douglas County Nat. Bank *v.* Sands, 47 Kan. 596, 28 Pac. 620; Watkins Nat. Bank *v.* Sands, 47 Kan. 591, 28 Pac. 618; Winfield Nat. Bank *v.* Croco, 46 Kan. 629, 26 Pac. 942.

Kentucky.— Fogarty *v.* Estes, 7 Ky. L. Rep. 286.

Michigan.—Ionia First Nat. Bank *v.* Steele, 81 Mich. 93, 45 N. W. 579; Gore *v.* Ray, 73 Mich. 385, 41 N. W. 329.

Missouri.— Heideman-Benoist Saddlery Co. *v.* Urner, 24 Mo. App. 534.

New York.—Knorr *v.* New York State Mut. Ben. Assoc., 79 Hun (N. Y.) 83, 29 N. Y. Suppl. 508, 61 N. Y. St. 365; Dintruff *v.* Tuthill, 62 Hun (N. Y.) 591, 17 N. Y. Suppl. 556, 43 N. Y. St. 704; Ellison *v.* Bernstein, 60 How. Pr. (N. Y.) 145.

Ohio.— Stone *v.* Bank, 8 Ohio Cir. Ct. 636, 1 Ohio Dec. 369, 4 Ohio Cir. Dec. 354.

Pennsylvania.—Loucheim *v.* Marks, 2 Pearson (Pa.) 268.

Washington.—Holbrook *v.* Peters, etc., Co., 8 Wash. 344, 36 Pac. 256.

Wyoming.— Wearne *v.* France, 3 Wyo. 273, 21 Pac. 703.

United States.— Strauss *v.* Abrahams, 32 Fed. 310 (construing Missouri statute); Farwell *v.* Brown, 1 Fed. 128 (construing Wisconsin statute).

See 5 Cent. Dig. tit. "Attachment," § 110.

Suspicious conduct by the debtor at the time of making preference might show it was fraudulent. Sellew *v.* Chrisfield, 1 Handy (Ohio) 86, 12 Ohio Dec. (Reprint) 41.

53. Wilson *v.* Chalaron, 26 La. Ann. 641; Estes *v.* Fry, 22 Mo. App. 80; Wilson *v.* Greenwood, 8 Kulp (Pa.) 210; Wright *v.* Ewen, 24 Wkly. Notes Cas. (Pa.) 111, 19 Phila. (Pa.) 312, 46 Leg. Int. (Pa.) 179; Wyman *v.* Wilmarth, 1 S. D. 172, 46 N. W. 190.

An inference of fraud would be justified from the fact that the judgment allowed to be confessed was based on accommodation notes (Marietta First Nat. Bank *v.* Bruns-

gage to secure payment;[54] but the transfer will be fraudulent if the debtor intends to secure benefits to himself thereby.[55]

wick Chemical Works, 3 Silv. Supreme (N. Y.) 61, 6 N. Y. Suppl. 318, 25 N. Y. St. 830, 17 N. Y. Civ. Proc. 229 [*affirmed* in 119 N. Y. 645, 23 N. E. 1149, 29 N. Y. St. 993]); that defendant had greatly increased his stock of goods just before it was sold to satisfy the confessed judgment (Rubinsky *v.* Walenk, 4 Pa. Dist. 611, 16 Pa. Co. Ct. 401); from an entire lack of consideration (Meyers *v.* Rauch, 4 Pa. Dist. 333); or from the existence of suspicious circumstances attending the confession of judgment (Rand *v.* Getchell, 24 Minn. 319; Jaffrey *v.* Nast, 10 N. Y. Suppl. 280, 32 N. Y. St. 250).

No inference of fraud is justified from the fact taken by itself that a debtor confesses judgment (Nelson Distilling Co. *v.* Lock, 59 Mo. App. 637; Thomas *v.* Dickerson, 11 N. Y. Suppl. 436, 33 N. Y. St. 786; Kline *v.* O'Donnell, 11 Pa. Co. Ct. 38), although his act is accompanied by inaccurate statements regarding his liabilities, when such inaccuracies were satisfactorily explained (Strasburger *v.* Bachrach, 59 Hun (N. Y.) 624, 13 N. Y. Suppl. 538, 36 N. Y. St. 1006); from an informality in the confession of judgment making the judgment invalid (Rainwater *v.* Faconesowich, 29 Mo. App. 26); or from mere neglect to defend an action brought against a debtor (Rigney *v.* Tallmadge, 17 How. Pr. (N. Y.) 556).

54. *Kansas.*—Gregory Grocer Co. *v.* Young, 53 Kan. 339, 36 Pac. 713; Miller *v.* Wichita Overall, etc., Mfg. Co., 53 Kan. 75, 35 Pac. 799; Burnham *v.* Patmor, 3 Kan. App. 257, 45 Pac. 115.

Louisiana.— Merchants, etc., Bank *v.* McKellar, 44 La. Ann. 940, 11 So. 592; Seeligson *v.* Rigmaiden, 37 La. Ann. 722; Abney *v.* Whitted, 28 La. Ann. 818.

Maryland.— Johnson *v.* Stockham, 89 Md. 358, 43 Atl. 920.

Nebraska.—Britton *v.* Boyer, 27 Nebr. 522, 43 N. W. 356.

New York.— Merriam *v.* Wood, etc., Lithographing Co., 19 N. Y. App. Div. 329, 46 N. Y. Suppl. 484; Andrews *v.* Schwartz, 55 How. Pr. (N. Y.) 190.

Tennessee.— Wyler *v.* McGrew, (Tenn. Ch. 1895) 35 S. W. 754.

Texas.— Williams *v.* Kane, (Tex. Civ. App. 1900) 55 S. W. 974.

Wisconsin.— Campbell *v.* Jackson, 80 Wis. 48, 49 N. W. 121.

United States.— Hills *v.* Stockwell, etc., Furniture Co., 23 Fed. 432, construing Michigan statute.

Attendant circumstances not making preference fraudulent.— A preference will not be fraudulent from the circumstance that all the debtor's property was included in it (Abernathy Furniture Co. *v.* Armstrong, 46 Kan. 270, 26 Pac. 693); by reason of false representations made at the time of the transfer as to the debtor's condition and intentions (Chouteau *v.* Sherman, 11 Mo. 385); by reason of the fact that the preferred person is the debtor's wife and the debt could not be enforced at law in the state where they resided (Loveland *v.* Kearney, 14 Colo. App. 463, 60 Pac. 584); or by reason of the fact that the preference is made to the officers of the corporation making the transfer (Lexow *v.* St. Lawrence Marble Co., 16 Misc. (N. Y.) 133, 38 N. Y. Suppl. 831.

Inconsistent allegations of fraud.— Where, in an action on a note not due, plaintiff, to justify the bringing of the action, alleged that defendant made false representations regarding his indebtedness, and, to support the attachment, also alleged a fraudulent disposal of his property by mortgage to secure fictitious debts, it was held that the attachment could not be sustained as the debts secured were not fictitious if the representations of plaintiff regarding his indebtedness were fraudulent. Johnson *v.* Buckel, 65 Hun (N. Y.) 601, 20 N. Y. Suppl. 566, 48 N. Y. St. 924.

55. Hobbs *v.* Greenfield, 103 Ga. 1, 30 S. E. 257; Nichthauser *v.* Lehman, 17 Misc. (N. Y.) 336, 39 N. Y. Suppl. 1091.

Composition agreements.— Where creditors of a debtor have entered into a composition agreement extending the time of payment for their claims there is an implied stipulation of good faith on the debtor's part, and if he fraudulently transfers property the agreement is at an end and the creditors would be allowed to attach. Hill *v.* Wertheimer-Swarts Shoe Co., 150 Mo. 483, 51 S. W. 702. Where a debtor, by paying two unsecured creditors in full, obtained money for a composition, the creditors accepting his offer, with knowledge of the source from which the money came, cannot later object that they have been defrauded. City Nat. Bank *v.* Jeffries, 73 Ala. 183. See also Galle *v.* Tode, 60 Hun (N. Y.) 132, 14 N. Y. Suppl. 531, 38 N. Y. St. 862, 863, 21 N. Y. Civ. Proc. 147, 152, where it was held that as defendants had lulled their creditors into security by promising a settlement without preferences, their subsequent confession of judgment in favor of preferred creditors, though made upon *bona fide* claims, was void and afforded grounds for attachment.

Preferring creditors with partnership property.—The appropriation of partnership property to pay individual debts of the partner is *prima facie* fraudulent and, unless the fraud is rebutted, furnishes good ground for attachment. Keith *v.* Fink, 47 Ill. 272; Keith *v.* Armstrong, 65 Wis. 225, 26 N. W. 445. But see Vahlberg *v.* Birnbaum, 64 Ark. 207, 41 S. W. 581 (where it was held that a preference in the partnership assignment to a creditor secured by mortgage of an individual partner's property was not fraudulent and did not justify an attachment); Casola *v.* Vanquez, 147 N. Y. 258, 41 N. E. 517, 69 N. Y. St. 540 [*reversing* 85 Hun (N. Y.) 314, 32 N. Y. Suppl. 1140, 65 N. Y. St. 870] (where *bona fide* preferences by the partner-

(B) *Relative.* The circumstance that relationship exists between the parties to an alleged fraudulent conveyance does not of itself show fraud,[56] but where the good faith of a transfer is in question the relationship of the parties is a fact for the consideration of the jury.[57]

(IV) *As Affected by Property Transferred.* As exempt property is beyond the reach of creditors, no disposition of it which the debtor chooses to make will be fraudulent.[58]

I. Insufficient Property in State to Satisfy Demand. In Kentucky an attachment is authorized in an action for the recovery of money due upon a contract, judgment, or award,[59] if defendant have no property in the state subject to execution or not enough thereof to satisfy plaintiff's demand, and the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found.[60] Under this statute it is not alone sufficient to

ship were held not to afford a ground for attachment, although such preferences were forbidden by a statute of the state where the transfer was made).

Under-valuation of the property transferred by way of preference tends to show such an intention on the debtor's part. Dyer *v.* Rosenthal, 45 Mich. 588, 8 N. W. 560; Potter *v.* McDowell, 31 Mo. 62.

56. *Alabama.*— Marx *v.* Leinkauff, 93 Ala. 453, 9 So. 818.

Illinois.— Field *v.* Stout, 68 Ill. App. 360.

Louisiana.— Winter *v.* Davis, 48 La. Ann. 260, 19 So. 263; Wilson *v.* Chalaron, 26 La. Ann. 641.

Michigan.— Iosco County Sav. Bank *v.* Barnes, 100 Mich. 1, 58 N. W. 606.

Nebraska.— Carson *v.* Solomon, 33 Nebr. 652, 50 N. W. 1054.

New York.—Taylor *v.* Hull, 56 Hun (N. Y.) 90, 9 N. Y. Suppl. 140, 29 N. Y. St. 635.

Pennsylvania.— Rice *v.* Warren, 3 Del. Co. (Pa.) 283.

See 5 Cent. Dig. tit. "Attachment," § 97.

Allowing wife to retain separate earnings. — Where a husband does not exercise his right to obtain possession of his wife's earnings, but allows her to retain them, this is not a fraudulent conveyance of property justifying attachment. Beach *v.* Baldwin, 14 Mo. 597.

Building a house on wife's land is not necessarily a fraudulent conveyance by the debtor (Grauman *v.* Davis, 13 Ky. L. Rep. 590); and a reconveyance by the husband to his wife of land purchased with the wife's money furnishes no ground for attachment (Cooper *v.* Standley, 40 Mo. App. 138).

Presumption of fraud is raised by secret sales to relatives (Lustig *v.* McCullouch, 10 Colo. App. 41, 50 Pac. 48); by a voluntary conveyance by an insolvent debtor to his wife (Islin *v.* Goldberg, 6 Misc. (N. Y.) 603, 26 N. Y. Suppl. 79, 56 N. Y. St. 622; Vietor *v.* Goldberg, 6 Misc. (N. Y.) 46, 25 N. Y. Suppl. 1005, 56 N. Y. St. 620; Gribble *v.* Ford, (Tenn. Ch. 1898) 52 S. W. 1007); by a conveyance to defendant's mother to pay a debt which did not appear on his account-books (Lowenstein *v.* Powell, 68 Miss. 73, 8 So. 269); or by general evidence of defendant's financial worthlessness at the time he made the conveyance (Keigher *v.* McCormick, 11 Minn. 545). But see Tennis *v.* Barnes, 11 Colo. App. 196, 52 Pac. 1038, where a husband, under power of attorney from his wife, conveyed real property to himself and subsequently conveyed to his wife's creditor in payment of a *bona fide* debt, and the court held that an allegation of fraud in the conveyance to himself raised an immaterial issue, owing to the subsequent deed.

57. Hough *v.* Dickinson, 58 Mich. 89, 24 N. W. 809.

58. Davis *v.* Land, 88 Mo. 436; Novelty Mfg. Co. *v.* Pratt, 21 Mo. App. 171; Clark *v.* Ingraham, 15 Phila. (Pa.) 646, 38 Leg. Int. (Pa.) 393; Wyman *v.* Wilmarth, 1 S. D. 172, 46 N. W. 190.

Acquiring exempt property.— It is not a fraudulent transfer of property for an insolvent debtor to use money to pay off a mortgage on his homestead (Palmer *v.* Hawes, 80 Wis. 474, 50 N. W. 341) or to exchange for stock which will be exempt (Long *v.* Hopper, 54 Kan. 572, 38 Pac. 809). See also Vahlberg *v.* Birnbaum, 64 Ark. 207, 41 S. W. 581, where it was held not to be a fraudulent transfer for partners to divide firm property and take a wagon and horses as individual property which were then claimed to be exempt.

59. Not applicable to demand sounding in tort.— No attachment can be granted on this ground in an action for the recovery of money obtained by fraud, though in form *ex contractu* for money had and received. U. S. *v.* Lilly, 6 Ky. L. Rep. 582.

Right to attachment in actions sounding in tort see *infra*, VI, C.

60. Ky. Civ. Code, § 194, subs. 11.

Does not lie for immatured demands.— Wolfstein *v.* Steinharter, 10 Ky. L. Rep. 635; McChord *v.* Barker, 8 Ky. L. Rep. 790; Simpson *v.* Starnes, 8 Ky. L. Rep. 357; Cowherd *v.* Harding, 7 Ky. L. Rep. 217.

Right to attach before maturity of demand see *infra*, VI, D.

Creditors cannot combine claims.— Several creditors cannot assign the naked legal right to their claims to one of their number, still remaining the equitable owners thereof, and thus create in the assignee a demand large enough to entitle him to sue out an attachment on the ground that defendant has not enough property subject to execution to sat-

authorize an attachment that the debtor is insolvent,[61] or has not enough property in the state to satisfy the demand.[62] Plaintiff must show that the collection of his demand will be endangered unless the attachment issues,[63] but no intent on the

isfy plaintiff's demand. Warren *v.* Richardson, 11 Ky. L. Rep. 629.

Separate claim of plaintiff's wife included. — An attachment granted on the ground that defendant had not enough property to satisfy plaintiff's demand cannot be sustained as to the whole demand, where it appears that this includes money loaned to defendant by plaintiff's wife, and that the money was her separate estate. Reisert *v.* Vancleve, 9 Ky. L. Rep. 401.

Enough property to satisfy any one debt. — Attachments were issued against two defendants jointly on debts contracted by them. One of the grounds of each attachment was that defendants did not have property enough subject to execution to satisfy the debts. The defendants together owned enough property to satisfy any one of the debts. It was held that on this ground the attachments could not be sustained against either defendant. Peak *v.* Weller, 10 Ky. L. Rep. 153.

Estimating value of property.— The basis of valuation of defendant's property is what it would sell for at the place where it was when the attachment issued (Gray *v.* Robinson, 9 Ky. L. Rep. 765; Haynes *v.* Viley, 8 Ky. L. Rep. 606, 2 S. W. 681; Ackerman *v.* Bohm, 4 Ky. L. Rep. 893), deducting valid prior liens (Stucky *v.* Brown, 11 Ky. L. Rep. 404; Ackerman *v.* Bohm, 4 Ky. L. Rep. 893) and statutory exemptions (Gray *v.* Robinson, 9 Ky. L. Rep. 765). Debts due to plaintiff or others which cannot be enforced by attachment are not to be considered. Wolfstein *v.* Steinharter, 10 Ky. L. Rep. 635. Evidence of what defendant's property sold for at public sale is competent, as tending to show its value at the time the attachment was sued out, but it is not conclusive. Johnson *v.* Myers, 13 Ky. L. Rep. 969; Grant *v.* Grant, 15 Ky. L. Rep. 813.

61. Burdett *v.* Phillips, 78 Ky. 246; Grauman *v.* Davis, 13 Ky. L. Rep. 590; Farmers' Nat. Bank *v.* Eason, 13 Ky. L. Rep. 496; Hickman *v.* Reed, 11 Ky. L. Rep. 406; Hobson *v.* Hall, 10 Ky. L. Rep. 635; Simpson *v.* Starnes, 8 Ky. L. Rep. 357; Russell *v.* Robinson, 7 Ky. L. Rep. 361.

Insolvency as evidence of danger of delay. — An undenied allegation that the debtor is insolvent furnishes *prima facie* evidence of the danger of delay. Steitler *v.* Helenbush, (Ky. 1901) 61 S. W. 701; Owensboro Deposit Bank *v.* Smith, 22 Ky. L. Rep. 808, 58 S. W. 792; Johnson *v.* Louisville City Nat. Bank, 22 Ky. L. Rep. 118, 56 S. W. 710.

62. Dunn *v.* McAlpin, 90 Ky. 78, 11 Ky. L. Rep. 884, 13 S. W. 363; McCulloch *v.* Cook, 15 Ky. L. Rep. 207. But see Powell *v.* Cummins, 7 Ky. L. Rep. 361.

63. Downs *v.* Ringgold, 101 Ky. 392, 19 Ky. L. Rep. 639, 41 S. W. 317; Covington First Nat. Bank *v.* D. Kiefer Milling Co., 95 Ky. 97, 15 Ky. L. Rep. 457, 23 S. W. 675; Dunn *v.* McAlpin, 90 Ky. 78, 11 Ky. L. Rep. 884, 13 S. W. 363; McCulloch *v.* Cook, 15 Ky. L. Rep. 207. And see Helmers *v.* Klehammer, 19 Ky. L. Rep. 1005, 42 S. W. 1107.

Burden of proof on plaintiff.—Where an attachment is issued on the ground that the debtor has not enough property in the state to satisfy plaintiff's demand, plaintiff has the burden of proof. McFarland *v.* McNutt, 4 Ky. L. Rep. 903. But see Draddy *v.* Heile, 17 Ky. L. Rep. 1182, 33 S. W. 1107, where it was said that, while the debtor was not required to prove he had sufficient property to satisfy the claim, yet, if he elected to go on the stand as a witness, he must show this to defeat the attachment.

Nothing presumed in favor of creditor.— Ackerman *v.* Bohm, 4 Ky. L. Rep. 893.

Sufficient showing to sustain attachment.— An attachment of mortgaged realty, before judgment and return of "No property found," on the ground that the debt will be lost by delay, will be sustained, where the personal property seized is insufficient to satisfy the debt, the evidence is conflicting as to whether the value of the land is sufficient to pay the mortgage and plaintiff's debt, after an allotment of homestead, and there is evidence that defendant drinks to excess and gambles. Smith *v.* Kennedy, 18 Ky. L. Rep. 272, 36 S. W. 18.

Insufficient showing.— Though a merchant whose stock of goods has just been destroyed by fire have not property subject to execution sufficient to satisfy the demand sued on, yet the fact that the insurance and other debts due him greatly exceed his indebtedness, and that he is a man of established business integrity, is sufficient to rebut the presumption that the collection of plaintiff's demand will be endangered by delay, and an attachment on that ground cannot be sustained. Downs *v.* Ringgold, 101 Ky. 392, 19 Ky. L. Rep. 639, 41 S. W. 317. A few days before the attachment was issued, defendant's storehouse and stock of goods were burned, he at the time carrying twelve hundred dollars insurance thereon. He also owned in cash and accounts one thousand dollars, and always had good credit, being a man of established integrity. Plaintiff alleged as ground for attachment that defendant had not enough property subject to execution to satisfy his demand of two hundred and twenty-eight dollars, and that its collection would be endangered by delay. It was held that the attachment could not be sustained. Robinson *v.* McInteer, 15 Ky. L. Rep. 128.

Where other persons jointly liable.— If plaintiff could recover his demand by suing persons jointly liable with defendant, the danger contemplated by the statute does not exist and no attachment will be allowed. Francis *v.* Burnett, 84 Ky. 23, 7 Ky. L. Rep. 715; Dunn *v.* McAlpin, 10 Ky. L. Rep. 874.

[V, I]

part of the debtor to defraud his creditors is necessary when an attachment is sought on this ground.[64]

J. Intent to Dispose of Property Fraudulently — 1. In General. For a debtor to be about to dispose of his property for the purpose of defrauding his creditors is generally made by statute[65] a ground for an attachment to issue against his property.[66]

2. What Constitutes Being "About" to Dispose of Property. A debtor who has formed a design to dispose[67] of his property and is soon to carry it out is "about" to dispose of his property,[68] and an actual transfer is not necessary.[69]

3. Fraudulent Intent — a. Generally. To furnish a ground for attachment the fraudulent intent of a debtor contemplating a disposal of his property must be in all respects similar to the intent which actuates a debtor making an actual fraudulent transfer of his property.[70]

b. Proof of Intent — (1) *In General.* Although the fraudulent intent of a debtor may be inferred from his acts and conduct,[71] the events relied on must not

64. Burdett *v.* Phillips, 78 Ky. 246.

65. Abrams *v.* Teague, 24 La. Ann. 567; Brown *v.* Morris, 10 S. C. 467; Johnson *v.* Rankin, (Tenn. Ch. 1900) 59 S. W. 638. *Contra*, in Alabama in 1848. Reynolds *v.* Culbreath, 14 Ala. 581.

Residence of the debtor within the state is not required. Bray Clothing Co. *v.* Shealy, 53 S. C. 12, 30 S. E. 620.

66. **Intention to fraudulently transfer property and actual transfer are distinct grounds** for attachment (Dunnenbaum *v.* Schram, 59 Tex. 281), and an attachment on the ground that a debtor is about to dispose of his property fraudulently cannot be supported by proof of an actual disposition (Yarborough *v.* Hudson, 19 Ala. 653).

Efficiency of this ground.— An attachment on the ground that defendant is about to dispose of his property is as valid and effective as an attachment issued on any other ground and will prevail over a subsequent attachment by another creditor on the ground that the debtor has left the state. Boyd *v.* Labranche, 35 La. Ann. 285.

67. **The mode of disposition** contemplated is immaterial. Parsons *v.* Stockbridge, 42 Ind. 121.

68. Dueber Watch Case Mfg. Co. *v.* Young, 155 Ill. 226, 40 N. E. 582 [*affirming* 54 Ill. App. 383].

Proof of contemplated disposition.— While it has been held that an overt act on the part of the debtor is not necessary (Hardee *v.* Langford, 6 Fla. 13), yet mere fragmentary declarations of the debtor are insufficient to show a design to dispose of the property (Brown *v.* Carpenter, 5 Ky. L. Rep. 120), and the mere opinion of plaintiff that defendant contemplates a fraudulent act is not enough (Brown *v.* Crenshaw, 5 Baxt. (Tenn.) 584). The facts must be sufficient to justify a reasonable conviction on the part of the creditor (Lewis *v.* Kennedy, 3 Greene (Iowa) 57; Hurd *v.* Jarvis, 1 Pinn. (Wis.) 475), although in trying the issue of reasonable belief the evidence is not restricted to the knowledge which plaintiff had at the time of suing out the attachment (Zinn *v.* Dzialynski, 13 Fla. 597). See also Chaffe *v.* Mackenzie, 43 La. Ann. 1062, 10 So. 369; Haulenbeck *v.* Coenen, 12 N. Y. Suppl. 1, 34 N. Y. St. 689, 20 N. Y. Civ. Proc. 6 (where it was held not a sufficient intent to transfer that defendants "thought" they might have to turn over their business).

The debtor must contemplate a transfer at the time the attachment issues in order to justify it. Scudder *v.* Payton, 65 Mo. App. 314; Bickham *v.* Lake, 51 Fed. 892.

69. Ditchburn *v.* Jermyn, etc., Co-operative Assoc., 13 Pa. Co. Ct. 1; Waples-Platter Co. *v.* Low, 54 Fed. 93, 10 U. S. App. 704, 4 C. C. A. 205.

Intention to dispose of concealed property. — The grounds for attachment that defendant is concealing property and is about to dispose of property are not inconsistent where it appears that he had temporarily concealed the real title in preparation for making a fraudulent transfer of it. Jurgens *v.* Tum Suden, 32 N. Y. App. Div. 1, 52 N. Y. Suppl. 662.

70. **Reason for requiring actual fraudulent intent.**— The intent must actually exist and cannot be merely inferred from the consequence of the act because the effect, if that were done, would prevent any sale by a debtor, however advantageous it might be to himself and to his creditors. Seidentopf *v.* Annabil, 6 Nebr. 524.

Fraudulent intent against plaintiff alone is sufficient and it will not prevent an attachment that the debtor entertained an honest purpose toward the rest of his creditors. Correy *v.* Lake, Deady (U. S.) 469, 6 Fed. Cas. No. 3,253.

71. Meinhard *v.* Lilienthal, 17 Fla. 501; Scott *v.* Simmons, 34 How. Pr. (N. Y.) 66.

Consideration for intended transfer.— No inference of fraudulent intent is justified when the contemplated transfer is to be made for an adequate consideration (Eaton *v.* Wells, 18 Minn. 410; Pierce *v.* White, 10 Ohio Dec. (Reprint) 552, 22 Cinc. L. Bul. 98); but the contrary is true where the transfer is to be gratuitous (Clark *v.* Smith, 7 B. Mon. (Ky.) 273; Askwith *v.* Allen, 33 Nebr. 418, 50 N. W. 267; Johnson *v.* Rankin, (Tenn. Ch. 1900) 59 S. W. 638) or for an in-

have transpired at so remote a period as to prevent their becoming a part of the *res gestæ*,[72] and the burden is on plaintiff to show that such an intent existed.[73]

(11) *Threatened Assignment.* Fraudulent intent is not necessarily shown from the fact that a debtor threatens to make an assignment,[74] even though preferences are contemplated therein,[75] for an intention to prefer is legiti-

significant price (Boyd *v.* Labranche, 35 La. Ann. 285); and an actual gratuitous conveyance is proof of a prior fraudulent purpose (Washburn *v.* McGuire, 19 Nebr. 98, 26 N. W. 709), although such proof is not always conclusive (Blass *v.* Lee, 55 Ark. 329, 18 S. W. 186). See also Marietta First Nat. Bank *v.* Brunswick Chemical Works, 3 Silv. Supreme (N. Y.) 61, 6 N. Y. Suppl. 318, 25 N. Y. St. 830, 17 N. Y. Civ. Proc. 229 [*affirming* 5 N. Y. Suppl. 824, and *affirmed* in 119 N. Y. 645, 23 N. E. 1149, 29 N. Y. St. 993], where it was held that for defendant to allow judgment to be recovered against him on accommodation notes by the person for whose accommodation the notes had been given proved a fraudulent intent and a contemplated disposal of property.

Threats not to pay.— Fraudulent intent on the debtor's part may be established by his threats not to pay if sued (Hanks *v.* Andrews, 53 Ark. 327, 13 S. E. 1102; Newman *v.* Kraim, 34 La. Ann. 910; Livermore *v.* Rhodes, 3 Rob. (N. Y.) 626); but not if the threat is accompanied by a promise to pay if no suit is brought (Kerchner *v.* McCormac, 25 S. C. 461) or if made under excitement (Walker *v.* Hagerty, 20 Nebr. 482, 30 N. W. 556; Quay *v.* Robbins, 1 Wkly. Notes Cas. (Pa.) 154).

Fraudulent intent is not shown by evidence that the debtor attempted to borrow money with which to speculate (Galligan *v.* Groten, 18 Misc. (N. Y.) 428, 42 N. Y. Suppl. 22, 26 N. Y. Civ. Proc. 78); that he refused to carry out a previous promise to give security (Parsons *v.* Stockbridge, 42 Ind. 121); that he has not paid an admitted debt frequently demanded and has offered to sell part of his personal property for cash (Meyers *v.* Boyd, 37 Mo. App. 532); by his making a promise to pay which he has no reasonable expectation of being able to keep (Parsons *v.* Stockbridge, 42 Ind. 121); by an offer on his part to secure a *bona fide* creditor by mortgage (C. D. Smith Drug Co. *v.* Casper Drug Co., 5 Wyo. 510, 40 Pac. 979, 42 Pac. 213); by a refusal to secure a creditor (Ellison *v.* Bernstein, 60 How. Pr. (N. Y.) 145); or by his statement that the holder of a judgment against him will not issue execution except to protect him from his other creditors (Liveright *v.* Greenhouse, 61 N. J. L. 156, 38 Atl. 697). See also Armstrong *v.* Cook, 95 Mich. 257, 54 N. W. 873.

72. Hardee *v.* Langford, 6 Fla. 13.

Admissibility of evidence.— In determining the question of defendant's fraudulent intent, it is competent for him to show that plaintiff was secured by collaterals (Brown *v.* Blanchard, 39 Mich. 790), and to show his own lack of knowledge regarding his indebtedness (Hyde *v.* Nelson, 11 Mich. 353), or that his purpose to dispose was generally known in the neighborhood (Lister *v.* Campbell, (Tex. Civ. App. 1898) 46 S. W. 876); but proof of subsequent payment of debts should not be allowed (Lister *v.* Campbell, (Tex. Civ. App. 1898) 46 S. W. 876). See also Lewis *v.* Kennedy, 3 Greene (Iowa) 57, where it was held that evidence that debtor was financially embarrassed ten years previously and had then transferred property in fraud of his creditors was not competent to show that he was about to dispose of his property with intent to defraud creditors.

The facts were held sufficient to justify an attachment on the ground that defendant contemplated a fraudulent transfer of his property in the following cases:

Kentucky.— Rice *v.* Tolbert, 20 Ky. L. Rep. 674, 47 S. W. 323.

Louisiana.— Standard Cotton Seed Oil Co. *v.* Matheson, 48 La. Ann. 1321, 20 So. 713.

Nebraska.—Symns Grocery Co. *v.* Snow, 58 Nebr. 516, 78 N. W. 1066.

New York.— Boyd *v.* Miller, 34 N. Y. Suppl. 1026, 69 N. Y. St. 2.

Texas.— Orr, etc., Shoe Co. *v.* Harris, 82 Tex. 273, 18 S. W. 308.

73. McAllister *v.* Davey, 5 Ohio N. P. 274, 7 Ohio S. & C. Pl. Dec. 354. See also Hoy *v.* Weiss, 24 La. Ann. 269.

Where the circumstances stated by plaintiff are positively denied by defendant the attachment should not be allowed to stand (Morton *v.* Sterrett, 3 Ohio Dec. (Reprint) 173, 4 Wkly. L. Gaz. 132), unless plaintiff's statements were corroborated in other ways (Chaffee *v.* Runkel, 11 S. D. 333, 77 N. W. 583).

74. Torlina *v.* Trorlicht, 6 N. M. 54, 27 Pac. 794 [*affirming* 5 N. M. 148, 21 Pac. 68]; Kemper, etc., Dry Goods Co. *v.* Fischel, 4 Okla. 250, 44 Pac. 205; Wingo *v.* Purdy, 87 Va. 472, 12 S. E. 970; Stevens Point First Nat. Bank *v.* Rosenfeld, 66 Wis. 292, 28 N. W. 370. *A fortiori* a contemplated assignment would not furnish a ground for attachment when the debtor abandoned his purpose before the writ was sued out. Dogan *v.* Cole, 63 Miss. 153.

An application for a receiver by an insolvent corporation does not justify an inference of an intended fraudulent transfer. Shuler *v.* Birdsall, etc., Mfg. Co., 17 N. Y. App. Div. 228, 45 N. Y. Suppl. 725.

75. Atlas Furniture Co. *v.* Freeman, 70 Hun (N. Y.) 13, 23 N. Y. Suppl. 1131, 53 N. Y. St. 284; Evans *v.* Warner, 21 Hun (N. Y.) 574; Wilson *v.* Britton, 26 Barb. (N. Y.) 562, 6 Abb. Pr. (N. Y.) 97 [*reversing* 6 Abb. Pr. (N. Y.) 331]; Harroway *v.* Flint, 19 Misc. (N. Y.) 411, 44 N. Y. Suppl.

mate;[76] but the circumstances under which the threat is made may justify an inference of fraud.[77]

K. Liability Criminally Incurred. Under statutes making it a ground of attachment that the liability was criminally incurred,[78] an attachment has been allowed in an action by the surety in a fidelity bond against the principal to recover the amount paid by the former on account of an embezzlement by the latter;[79] and such a provision has reference to injuries to property as well as to the person.[80]

L. Non-Residence — 1. When Ground For Attachment — a. In General. Non-residence of the debtor within the state[81] where the action is instituted is a usual statutory ground for attachment.[82] Aside from the fact that the debt is

335; Newwitter *v.* Mansell, 14 N. Y. Suppl. 506, 38 N. Y. St. 595; Dickinson *v.* Benham, 10 Abb. Pr. (N. Y.) 390, 19 How. Pr. (N. Y.) 410; Farwell *v.* Furniss, 67 How. Pr. (N. Y.) 188; Kipling *v.* Corbin, 66 How. Pr. (N. Y.) 12. See also Thompson *v.* Dater, 57 Hun (N. Y.) 316, 10 N. Y. Suppl. 613, 32 N. Y. St. 361, where it was held that a refusal to make a *pro rata* general assignment was no evidence of an intent to fraudulently dispose of property.

76. McLoughlin *v.* Utica Consumers' Brewing Co., 20 Misc. (N. Y.) 144, 45 N. Y. Suppl. 716; Easterline *v.* Jones, 2 Kulp (Pa.) 121.

77. New York Nat. Park Bank *v.* Whitmore, 104 N. Y. 297, 10 N. E. 524; Anthony *v.* Stype, 19 Hun (N. Y.) 265.

A fraudulent purpose is shown by ability to pay in connection with a threat to assign (White *v.* Leszynsky, 14 Cal. 165); and a reservation of benefits to the debtor in the assignment has the same effect (Campbell *v.* Hopkins, 87 Ala. 179, 6 So. 76).

Intent directed against a particular creditor and a desire to prevent him from securing his claim would cause a contemplated assignment made for such purpose to furnish a valid ground for attachment. U. S. Net, etc., Co. *v.* Alexander, 18 N. Y. Suppl. 147, 42 N. Y. St. 668; Gasherie *v.* Apple, 14 Abb. Pr. (N. Y.) 64.

78. Right to attachment in actions sounding in tort see *infra*, VI, C.

79. New York American Surety Co. *v.* Haynes, 91 Fed. 90 [*disapproving* Deering *v.* Collins, 38 Mo. App. 73], construing the Missouri statute, where it was held that to justify attachment for this cause it was not necessary that the action be technically grounded on the wrong.

80. Brandenstein *v.* Way, 17 Wash. 293, 49 Pac. 511.

81. Non-residence in a county does not warrant an attachment. Dickenson *v.* Cowley, 15 Kan. 269. *Compare* Fielding *v.* Lucas, 87 N. Y. 197, to the effect that, prior to N. Y. Code Civ. Proc. § 3169, the marine court of New York city could issue an attachment for a debt, not exceeding two thousand dollars, against a non-resident of New York county, although he had a place of business in the city where he regularly transacted business in person and was a resident of the state.

If the parties be in fact residents the remedy is not available. Barr *v.* Perry, 3 Gill (Md.) 313; Lincoln German Nat. Bank *v.* Kautler, 55 Nebr. 103, 75 N. W. 566, 70 Am. St. Rep. 371; Matter of Dillon, 2 Pearson (Pa.) 182; Keegan *v.* Sutton, 12 Wkly. Notes Cas. (Pa.) 292; Patterson *v.* McLaughlin, 1 Cranch C. C. (U. S.) 352, 18 Fed. Cas. No. 10,828.

Action by United States where property is located.— An attachment may be brought by the United States in a state court against a debtor residing in another state, and the objection is not tenable that attachments are designed to aid creditors whose debtors are absent and cannot be cited, and that therefore the United States cannot resort to the proceeding because the debtor is a citizen of the United States and subject to citation in the state where he resides. U. S. *v.* Murdock, 18 La. Ann. 305, 89 Am. Dec. 651.

Former residence immaterial.—Under these statutes it is immaterial whether or not the non-resident has ever been within the state. **Toby *v.* Brown, 3 Ark. 352; Barney *v.* Patterson, 6 Harr. & J. (Md.) 182; Redwood *v.* Consequa, 2 Browne (Pa.) 62.** See also **Jones *v.* Buzzard, 2 Ark. 415.**

That the non-resident was an alien enemy is immaterial. Hepburn's Case, 3 Bland Ch. (Md.) 95. See, generally, Aliens, 2 Cyc. 105, note 70.

82. The theory of foreign attachment is that the court cannot obtain jurisdiction over the person of defendant, and his creditors would be without remedy unless jurisdiction could be acquired over his property. The attachment is to compel defendant to come forward and allow his indebtedness to be litigated. Blair *v.* Winston, 84 Md. 356, 35 Atl. 1101; Herbert *v.* Herbert, 49 N. J. Eq. 70, 22 Atl. 789; Munroe *v.* Williams, 37 S. C. 81, 16 S. E. 533, 19 L. R. A. 665.

Although omitted as a distinct ground on a revision of the Ohio statute (Ohio Rev. Stat. (1900), §§ 5521–5523, 5048, subs. 3) the court has held that by implication the legislature intended to continue non-residence as a ground for attachment. Gorham *v.* Steinau, 10 Ohio S. & C. Pl. Dec. 131 [*approving* Auerbach *v.* Swadner, 10 Ohio Cir. Ct. 435]. See also Moore *v.* Williams, 44 Miss. 61, 63, where it was held that, under the Mississippi act of 1852, attachments

due[83] the sole[84] fact to be established is actual non-residence[85] at the time when the writ of attachment is issued.[86]

b. In Case of Joint Debtors.[87] An attachment on the ground of non-residence will not issue against the joint property[88] of co-debtors where only one of them resides without the state.[89]

against non-residents shall be "subject to the same rules, regulations, and restrictions" that apply to attachments against absconding debtors.

In Tennessee the act of 1794, c. 1, § 23, applied only to non-residents who were the owners of property within the state. James *v.* Hall, 1 Swan (Tenn.) 297.

In West Virginia, under W. Va. Code (1860), c. 51, § 11, it was held that, unless plaintiff's claim was an equitable one, non-residence was the sole ground for attachment in equity (Sims *v.* Charleston Bank, 3 W. Va. 415), but this rule has been altered by statute.

An attachment on this ground will not lie against a trustee in Georgia (Cox *v.* Henry, 113 Ga. 259, 38 S. E. 856; Smith *v.* Riley, 32 Ga. 356), or against an alleged homestead as such (Burns *v.* Lewis, 86 Ga. 591, 13 S. E. 123).

Provision for attachment against non-resident debtor constitutional.—The law of Georgia providing for the issue of an attachment against a non-resident debtor has been held to be not in conflict with section 2, article 4, of the Constitution of the United States, which declares that citizens of each state shall be entitled to all privileges and immunities of citizens of the several states nor with the fourteenth amendment of that constitution. Pyrolusite Manganese *v.* Ward, 73 Ga. 491.

83. Douglas *v.* Bank of Commerce, 97 Tenn. 133, 36 S. W. 874; Lederer *v.* Rosenthal, 99 Wis. 235, 74 N. W. 971.

Contingent liability.— Mere non-residence is not a ground for attachment in an action on a contingent liability. Brannin *v.* Smith, 2 Disn. (Ohio) 436.

84. An intent to defraud on the debtor's part need not be shown. Mitchell *v.* Shook, 72 Ill. 492.

Impossibility of serving process on defendant in the state of his residence need not be shown. Hickson *v.* Brown, 92 Ga. 225, 17 S. E. 1035; De Poret *v.* Gusman, 30 La. Ann. 930.

Plaintiff's danger of losing his debt need not be established. Messner *v.* Hutchins, 17 Tex. 597; Sydnor *v.* Chambers, Dall. (Tex.) 601; Goldsoll *v.* Votaw, 1 Tex. Unrep. Cas. 90.

85. Blair *v.* Winston, 84 Md. 356, 35 Atl. 1101 [*citing* Barr *v.* Perry, 3 Gill (Md.) 313]; State *v.* Mills, 57 N. J. L. 570, 31 Atl. 1023.

If non-residence is disputed the question is one of fact, to be determined by the circumstances of the particular case (Krone *v.* Cooper, 43 Ark. 547; Ritter *v.* Phœnix Mut. L. Ins. Co., 32 Kan. 504, 4 Pac. 1032; Stratton *v.* Brigham, 2 Sneed (Tenn.) 420), and where the question is doubtful the decision should be rendered to best secure the rights of all parties involved (Keith *v.* Stetter, 25 Kan. 100; Hatch *v.* Smith, 6 Kan. App. 645, 49 Pac. 698).

Prima facie evidence of non-residence.—The return of the writ of capias or summons without service is *prima facie* evidence of non-residence as is an affidavit of non-residence by plaintiff or some credible person. Smith *v.* Armour, 1 Pennew. (Del.) 361, 40 Atl. 720.

86. Witbeck *v.* Marshall-Wells Hardware Co., 188 Ill. 154, 58 N. E. 929 [*affirming* 88 Ill. App. 101]; State *v.* Mills, 57 N. J. L. 570, 31 Atl. 1023. But see Pullian *v.* Nelson, 28 Ill. 112, where it was held that an affidavit alleging non-residence at the time the affidavit was made stated a sufficient ground for attachment, because the issue of the affidavit was practically the commencement of the suit.

Proof of previous residence in the state some time before the writ issued does not prevent an attachment. Barth *v.* Burnham, 105 Wis. 548, 81 N. W. 809.

87. Attachment against joint debtors see *supra*, IV, C.

88. One joint debtor residing without the state is subject to attachment, though his co-debtor is a resident (Searcy *v.* Platte County, 10 Mo. 269; Baird *v.* Walker, 12 Barb. (N. Y.) 298, Code Rep. N. S. (N. Y.) 329, 2 Edm. Sel. Cas. (N. Y.) 268. *Contra*, Corbit *v.* Corbit, 50 N. J. L. 363, 13 Atl. 178; Thayer *v.* Treat, 39 N. J. L. 150; Barber *v.* Robeson, 15 N. J. L. 17; Curtis *v.* Hollingshead, 14 N. J. L. 402); and the interest of one member in a partnership may be attached for a firm debt because of his non-residence merely (McHaney *v.* Cawthorn, 4 Heisk. (Tenn.) 508).

89. McHaney *v.* Cawthorn, 4 Heisk. (Tenn.) 508; Wallace *v.* Galloway, 5 Coldw. (Tenn.) 510; Goodman *v.* Henry, 42 W. Va. 526, 26 S. E. 528, 35 L. R. A. 847. *Contra*, Mills *v.* Brown, 2 Metc. (Ky.) 404, where, however, the court refused to allow attachment against the separate property of co-defendants residing within the state. See also McKinlay *v.* Fowler, 67 How. Pr. (N. Y.) 388, where attachment was allowed against a firm doing business in a foreign state, although one member had a domicile within the state from which he was absent a part of each year.

Under the early attachment law of Ohio an attachment could be issued against individuals who were non-residents, but could not be had against firms which were non-residents. Dobell *v.* Loker, 1 Handy (Ohio) 574, 12 Ohio Dec. (Reprint) 297.

The casual presence of one joint debtor who is served with process in the state will

2. WHAT CONSTITUTES — a. In General — (I) "*RESIDENCE*" *DEFINED.* Residence is a place of abode,[90] a dwelling, a habitation, the act of abiding or dwelling in a place for some continuance of time; to have a permanent abode for the time being as contra-distinguished from a mere temporary locality of existence.[91]

(II) "*RESIDENCE*" *AND* "*DOMICILE*" *DISTINGUISHED.* "Domicile" is sometimes used as synonymous with "non-residence," [92] but to constitute domicile, two things must concur — the fact of residence and an intention to remain.[93] Attachment statutes contemplate actual residence without regard to domicile,[94] and a person may have his domicile in one state and his residence in another.[95]

(III) "*PLACE OF BUSINESS*" *AND* "*ACTUAL RESIDENCE*" *DISTINGUISHED.* A person may be a non-resident within the attachment laws, although he has a regular place of business within the state;[96] and a debtor is not liable to attach-

not prevent an attachment against the joint property. Jackson *v.* Perry, 13 B. Mon. (Ky.) 231.

Transferring to a resident an undivided interest in property will not deprive the creditor of his right to attachment against the interest of a non-resident. Stevenson *v.* Prather, 23 La. Ann. 434.

90. Fixed place of abode is an important if not conclusive consideration in determining the question of residence.

Arkansas.- Krone *v.* Cooper, 43 Ark. 547.

District of Columbia.— Robinson *v.* Morrison, 2 App. Cas. (D. C.) 105.

Illinois.—Witbeck *v.* Marshall-Wells Hardware Co., 188 Ill. 154, 58 N. E. 929 [*affirming* 88 Ill. App. 101]; Barron *v.* Burke, 82 Ill. App. 116.

New Jersey.—Baldwin *v.* Flagg, 43 N. J. L. 495.

New York.— Wood *v.* Hamilton, 14 Daly (N. Y.) 41, 1 N. Y. St. 779.

Wisconsin.— Barth *v.* Burnham, 105 Wis. 548, 81 N. W. 809.

Want of place of abode at which summons could be served makes a person a non-resident. Baldwin *v.* Flagg, 43 N. J. L. 495.

Actual absence of the non-resident from the state at the time process is sued out is not necessary (Burcalow *v.* Trump, 1 Houst. (Del.) 363; Bryans *v.* Dunseth, 1 Mart. N. S. (La.) 412; Blair *v.* Winston, 84 Md. 356, 35 Atl. 1101); but actual absence from the county has been held essential (Bainbridge *v.* Alderson, 2 Browne (Pa.) 51; Maule *v.* Cooper, 1 Wkly. Notes Cas. (Pa.) 109; Lummis *v.* Cozier, 12 Phila. (Pa.) 320, 35 Leg. Int. (Pa.) 262); and this has been qualified by requiring defendant to show he was in the county at the precise time the writ issued (King *v.* Cooper, 2 Miles (Pa.) 176).

91. Long *v.* Ryan, 30 Gratt. (Va.) 718, 720.

The term "non-residence" in an attachment statute means the same as when used in a statute exempting personal property. State *v.* Allen, 48 W. Va. 154, 35 S. E. 990, 50 L. R. A. 284.

The term "not resident in this state" in the first section of the New Jersey attachment act means that the debtor is not actually present in person within the state; while the same term in the twenty-sixth section of the act means that the debtor has not only a legal residence or domicile abroad but that the ordinary process of the courts cannot be served upon him. Brundred *v.* Del Hoyo, 20 N. J. L. 328.

92. Stratton *v.* Brigham, 2 Sneed (Tenn.) 420.

93. Long *v.* Ryan, 30 Gratt. (Va.) 718; Andrews *v.* Mundy, 36 W. Va. 22, 14 S. E. 414.

94. Egener *v.* Juch, 101 Cal. 105, 35 Pac. 432, 873; Hanson *v.* Graham, 82 Cal. 631, 23 Pac. 56, 7 L. R. A. 127; Lawson *v.* Adlard, 46 Minn. 243, 48 N. W. 1019 [*distinguishing* Keller *v.* Carr, 40 Minn. 428, 42 N. W. 292]; Haggart *v.* Morgan, 5 N. Y. 422, 55 Am. Dec. 350; Matter of Thompson, 1 Wend. (N. Y.) 43.

95. Levy *v.* Rubarts, 17 Ky. L. Rep. 1370, 34 S. W. 1078; Brown *v.* Crane, 69 Miss. 678, 13 So. 855; Hackettstown Bank *v.* Mitchell, 28 N. J. L. 516; Cain *v.* Jennings, 3 Tenn. Ch. 131. *Contra*, Johnson *v.* May, 49 Nebr. 601, 68 N. W. 1032, where the court said that it was a solecism to allow a debtor to have a residence in one state and at the same time a domicile in another.

Actual resident with foreign domicile is not subject to attachment as a non-resident. Krone *v.* Cooper, 43 Ark. 547; Rosenzweig *v.* Wood, 30 Misc. (N. Y.) 297, 63 N. Y. Suppl. 447; Lyle *v.* Foreman, 1 Dall. (Pa.) 480, 1 L. ed. 232.

Citizen residing abroad is subject to attachment as a non-resident. Dorsey *v.* Kyle, 30 Md. 512, 96 Am. Dec. 617; Hanover Nat. Bank *v.* Stebbins, 69 Hun (N. Y.) 308, 23 N. Y. Suppl. 529, 53 N. Y. St. 350; Union Square Bank *v.* Reichmann, 23 N. Y. Suppl. 531, 53 N. Y. St. 352; Matter of Thompson, 1 Wend. (N. Y.) 43.

96. *District of Columbia.*— Robinson *v.* Morrison, 2 App. Cas. (D. C.) 105 [*affirmed* on rehearing, 2 App. Cas. (D. C.) 129].

Louisiana.— Rayne *v.* Taylor, 10 La. Ann. 726.

New Jersey.—Perrine *v.* Evans, 35 N. J. L. 221.

New York.— Wallace *v.* Castle, 68 N. Y. 370; Coffin *v.* Stitt, 5 N. Y. Civ. Proc. 261; Murphy *v.* Baldwin, 11 Abb. Pr. N. S. (N. Y.) 407, 41 How. Pr. (N. Y.) 270; Greaton *v.* Morgan, 8 Abb. Pr. (N. Y.) 64; Barry *v.* Bockover, 6 Abb. Pr. (N. Y.) 374; Bache

ment in the state of his residence because he has a regular place of business in another state.[97]

b. Effect of Absence on Question of Residence — (I) *PROLONGED.* An absence from the state prolonged for an indefinite period [1] with no place of abode within the state [2] makes the absentee a non-resident, although he may have a general intention to return at some future time.[3]

(II) *WHEN TEMPORARY.* Mere casual or temporary [4] absence from the state will not make the absentee a non-resident;[5] especially when the alleged non-

v. Lawrence, 17 How. Pr. (N. Y.) 554; Lee *v.* Stanley, 9 How. Pr. (N. Y.) 272. *A fortiori* this is true where the place is not one where business is regularly transacted by the debtor. Bowman *v.* Perine, 7 N. Y. Suppl. 155, 23 Abb. N. Cas. (N. Y.) 236.

Pennsylvania.— Chase *v.* New York Ninth Nat. Bank, 56 Pa. St. 355.

See 5 Cent. Dig. tit. "Attachment," § 70.

Place of business, though accompanied with actual residence for a short period, was held not to make defendant a resident. Houghton *v.* Ault, 8 Abb. Pr. (N. Y.) 89 note, 16 How. Pr. (N. Y.) 77.

The place of residence of a man's family is *prima facie* his residence (Keith *v.* Stetter, 25 Kan. 100; Hatch *v.* Smith, 6 Kan. App. 645, 49 Pac. 698. But see St. Louis Exch. Bank *v.* Cooper, 40 Mo. 169, where the court held that the mere fact that a person's family resided without the state was insufficient to constitute him a non-resident), and resorting to actual place of abode on Sundays and holidays only does not affect the doctrine of business domicile (Chaine *v.* Wilson, 8 Abb. Pr. (N. Y.) 78, Pierrepont, J., dissenting. *Contra,* Towner *v.* Church, 2 Abb. Pr. (N. Y.) 299). *Compare* Barron *v.* Burke, 82 Ill. App. 116; Long *v.* Ryan, 30 Gratt. (Va.) 718, both to the effect that a person might have a residence in two states at the same time. *Contra,* Robinson *v.* Morrison, 2 App. Cas. (D. C.) 105

Failure of court to find whether defendant's wife and family remain settled in the country is not error on a default against a non-resident defendant in an attachment suit, for that is a matter of defense. Dronillard *v.* Whistler, 29 Ind. 552.

97. Brundred *v.* Del Hoyo, 20 N. J. L. 328.

The place of business of a firm at which its operations are carried on and where the partners are either continually or at times to manage the business is the residence of each of the partners for the purpose of attachment proceedings. McKinlay *v.* Fowler, 67 How. Pr. (N. Y.) 388.

1. Ten years' absence without communication of any sort will justify an attachment. Walker *v.* Barrelli, 32 La. 467.

Nature of absentee's business or employment may be looked to in determining the probable duration of his absence. Burrill *v.* Jewett, 2 Rob. (N. Y.) 701; Wheeler *v.* Cobb, 75 N. C. 21.

2. Witbeck *v.* Marshall-Wells Hardware Co., 188 Ill. 154, 58 N. E. 929 [*affirming* 88 Ill. App. 101]; Wood *v.* Hamilton, 14 Daly (N. Y.) 41, 1 N. Y. St. 779; Pech Mfg. Co. *v.* Groves, 6 S. D. 504, 62 N. W. 109.

Leasing one's dwelling and departure with intention to travel for two years has been held to make the absentee a non-resident. Leathers *v.* Cannon, 27 La. Ann. 522.

3. A general intention to return eventually will not continue a residence (Hanson *v.* Graham, 82 Cal. 631, 23 Pac. 56, 7 L. R. A. 127; Risewick *v.* Davis, 19 Md. 82; Weitkamp *v.* Loehr, 53 N. Y. Super. Ct. 79; Carden *v.* Carden, 107 N. C. 214, 12 S. E. 197, 22 Am. St. Rep. 876. But *compare* Egan *v.* Lumsden, 2 Disn. (Ohio) 168), and such general intention becomes even less important where the absentee acquires a place of abode in another state (Jenks *v.* Rounds, 87 Ill. App. 284; Stevens *v.* Ellsworth, 95 Iowa 231, 63 N. W. 683; Carden *v.* Carden, 107 N. C. 214, 12 S. E. 197, 22 Am. St. Rep. 876; Wolf *v.* McGavock, 23 Wis. 516).

An unfulfilled intention to return within a definite time (Eberly *v.* Rowland, 1 Pearson (Pa.) 312; Nailor *v.* French, 4 Yeates (Pa.) 241) or soon (Henderson *v.* Travis, 6 La. Ann. 174) will have no effect toward retaining residence.

Contingent intention to return.—Where the debtor left the state with an intention to return on one contingency and to remain on another, and neither contingency happened, he was held not to have lost his residence. Smith *v.* Dalton, 1 Cinc. Super. Ct. (Ohio) 150.

Definite intention to return prevented the loss of a residence, although the debtor was absent nearly a year establishing a business which was subsequently to be put in charge of a collector. Hurlbut *v.* Seeley, 2 Abb. Pr. (N. Y.) 138, 11 How. Pr. (N. Y.) 507.

Evidence of intention to return is material when alleged non-residence is traversed. Wallace *v.* Lodge, 5 Ill. App. 507.

4. No definite rule as to exact duration of absence which will render a person a non-resident can be laid down (Johnson *v.* May, 49 Nebr. 601, 68 N. W. 1032), but a prominent idea involved is whether the absence of the party is of such character and so prolonged that he cannot be served with ordinary process (Morgan *v.* Nunes, 54 Miss. 308).

5. *Illinois.*— Jenks *v.* Rounds, 87 Ill. App. 284; Wells *v.* Parrott, 43 Ill. App. 656.

Louisiana.— Gordon *v.* Baillio, 13 La. Ann. 473; Watson *v.* Pierpoint, 7 Mart. (La.) 413.

Maryland.— Risewick *v.* Davis, 19 Md. 82.

resident has a place of abode within the state,[6] or lacks any intention of acquiring a fixed residence elsewhere.[7]

3. Changing Residence — a. Losing. A resident of a state becomes a non-resident by actually leaving the state[8] with the intention of becoming a non-resident.[9]

Minnesota.— Keller *v.* Carr, 40 Minn. 428, 42 N. W. 292.

Nebraska.— Johnson *v.* May, 49 Nebr. 601, 68 N. W. 1032.

New Jersey.— State *v.* Mills, 57 N. J. L. 570, 31 Atl. 1023; Likens *v.* Clark, 26 N. J. L. 207.

Pennsylvania.— Shipman *v.* Woodbury, 2 Miles (Pa.) 67; Sibley *v.* Dougherty, 9 Kulp (Pa.) 185.

Tennessee.— Springfield People's Bank *v.* Williams, (Tenn. Ch. 1896) 36 S. W. 983.

Wisconsin.— Cooper *v.* Smith, 8 Wis. 358.

6. Croft *v.* Apel, 8 Houst. (Del.) 162, 32 Atl. 172; Chariton County *v.* Moberly, 59 Mo. 238; Hentz *v.* Asahl, 1 Wkly. Notes Cas. (Pa.) 282; Barth *v.* Burnham, 105 Wis. 548, 81 N. W. 809 (where a year's absence in search of work with wife and family residing within the state was held not to make absentee a non-resident). But see Haggart *v.* Morgan, 5 N. Y. 422, 55 Am. Dec. 350 (where three years' absence made the absentee a non-resident, although he kept house within the jurisdiction); Taylor *v.* Knox, 1 Dall. (Pa.) 158, 1 L. ed. 80 (where three months' absence, although there was a place of abode within the state, had a like effect).

7. Erickson *v.* Drazkowski, 94 Mich. 551, 54 N. W. 283; Fitzgerald *v.* McMurran, 57 Minn. 312, 59 N. W. 199; Fuller *v.* Bryan, 20 Pa. St. 144.

Absconding debtors for this reason are usually not non-residents (Lindsey *v.* Dixon, 52 Mo. App. 291; State *v.* Mills, 57 N. J. L. 570, 31 Atl. 1023; Morrison *v.* Goldstein, 23 Pa. Co. Ct. 399, 16 Montg. Co. Rep. (Pa.) 76; Scott *v.* Hilgert, 14 Wkly. Notes Cas. (Pa.) 305), though an absconding debtor with fixed abode in another state is a non-resident (Ross *v.* Clark, 32 Mo. 296).

Absence on account of political agitation lasting only a short time will not make the absentee a non-resident. Clark *v.* Pratt, 19 La. Ann. 102.

Absence prolonged by sickness will not make the absentee a non-resident. Garlinghouse *v.* Mulvane, 40 Kan. 428, 19 Pac. 798; Johnson *v.* May, 49 Nebr. 601, 68 N. W. 1032.

Absence to evade criminal process does not usually make the fugitive a non-resident. New York *v.* Genet, 4 Hun (N. Y.) 487; Starke *v.* Scott, 78 Va. 180. But see Burrill *v.* Jewett, 2 Rob. (N. Y.) 701, where the court, held that an absence of two and one half years, while engaged in the navigation of a trading vessel in foreign waters, made the absentee a non-resident.

Dividing time between two states, spending winters in New York and summers in New Jersey, constituted a person a non-resident of New Jersey during the winter months (Stout *v.* Leonard, 37 N. J. L. 492 [*reversing* 36 N. J. L. 370]); and on similar facts an attachment issued immediately upon an attempt to rent the New Jersey residence was sustained (Baldwin *v.* Flagg, 43 N. J. L. 495).

Temporary recurring absences at periodic intervals do not make the absentee a non-resident (Winter Iron Works *v.* Toy, 12 La. Ann. 200; Burch *v.* Taylor, 1 Phila. (Pa.) 224, 8 Leg. Int. (Pa.) 130; Raub *v.* Eakin, 2 Leg. Chron. (Pa.) 25); unless the stay within the state is so short in duration that it amounts only to a succession of visits (Southern R. Co. *v.* McDonald, (Tenn. Ch. 1900) 59 S. W. 370).

Volunteer soldiers, therefore, are usually held not to be non-residents (Tibbitts *v.* Townsend, 15 Abb. Pr. (N. Y.) 221; Lyon *v.* Vance, 46 W. Va. 781, 34 S. E. 761. But see Ludlow *v.* Ramsey, 11 Wall. (U. S.) 581, 20 L. ed. 216, where the contrary was held of a volunteer soldier engaged in hostilities in rebellion against the United States), but joining an army in active service, accompanied by the departure of soldier's family from their usual place of abode, will make the absentee subject to attachment as a non-resident (Tiller *v.* Abernathy, 37 Mo. 196).

8. *Iowa.*— Mann *v.* Taylor, 78 Iowa 355, 43 N. W. 220.

Kansas.—Ballinger *v.* Lantier, 15 Kan. 608.

Kentucky.— Southwood *v.* Myers, 3 Bush (Ky.) 681.

New York.— Chaine *v.* Wilson, 8 Abb. Pr. (N. Y.) 78.

Pennsylvania.— Lyle *v.* Foreman, 1 Dall. (Pa.) 480, 1 L. ed. 232.

Tennessee.— Smith *v.* Story, 1 Humphr. (Tenn.) 420.

Contra, Clark *v.* Ward, 12 Gratt. (Va.) 440.

It is not sufficient actual removal that a person has made preparations to leave the state (State *v.* Mills, 57 N. J. L. 570, 31 Atl. 1023; Smith *v.* Story, 1 Humphr. (Tenn.) 420), partially executed a plan for removing goods (Kugler *v.* Shreve, 28 N. J. L. 129), or has started for the state line without actually reaching it (Ballinger *v.* Lantier, 15 Kan. 608. *Contra,* State *v.* Allen, 48 W. Va. 154, 35 S. E. 990, 50 L. R. A. 284).

Where there is actual removal the change is none the less effected by an intention to retain a residence (Robinson *v.* Morrison, 2 App. Cas. (D. C.) 105), or by a temporary residence of the family at the former domicile (Reed *v.* Ketch, 1 Phila. (Pa.) 105, 7 Leg. Int. (Pa.) 183).

9. **Intention to reside in another state** is sufficient. Farrow *v.* Barker, 3 B. Mon. (Ky.) 217; Whitehill *v.* Eicherly, 15 Pa. Co. Ct. 593; State *v.* Allen, 48 W. Va. 154, 35 S. E. 990, 50 L. R. A. 284.

Intention not to return coupled with actual

b. Acquiring. Residence is acquired by actual presence [10] in the state, coupled with an intention [11] to remain there permanently [12] or for an indefinite period.[13]

M. Overdue Instruments For Direct Payment of Money, or Book-Account. In Colorado it is a specific ground for attachment that the action is brought upon an overdue promissory note, bill of exchange, other written instrument for the direct payment of money, or upon book-account.[14]

N. Refusal to Pay or Secure Debt. Under a statute making it a ground for attachment that a contract debtor [15] will not, on demand,[16] either secure or pay

absence has been held sufficient. Moore *v.* Holt, 10 Gratt. (Va.) 284.

Intention merely to abandon residence has been held sufficient (Ritter *v.* Phœnix Mut. L. Ins. Co., 32 Kan. 504, 4 Pac. 1032), but mere intention to seek new abode is not sufficient (Smith *v.* Dalton, 1 Cinc. Super. Ct. (Ohio) 150; Reed's Appeal, 71 Pa. St. 378; Pfoutz *v.* Comford, 36 Pa. St. 420; Labe *v.* Brauss, 12 Pa. Co. Ct. 255).

One voting, paying taxes, and having a fixed place of abode in another state is undoubtedly a non-resident. Canda *v.* Robbins, 5 Silv. Supreme (N. Y.) 8, 7 N. Y. Suppl. 896, 28 N. Y. St. 96.

Time at which intention is material.—Defendant's intention to return to the state at the time when the writ against him issues is the material inquiry. Charles *v.* Amos, 10 Colo. 272, 15 Pac. 417.

10. Adams *v.* Evans, 19 Kan. 174.

Remaining long enough to acquire a political domicile is not necessary. Lurty *v.* Skilton, 19 La. Ann. 136; Wesson *v.* Marshall, 13 La. Ann. 436; Amis *v.* State Bank, 9 Rob. (La.) 348; Blair *v.* Winston, 84 Md. 356, 35 Atl. 1101. *Contra*, under an earlier Louisiana statute. Boone *v.* Savage, 14 La. 169; State *v.* Judge New Orleans Probate Ct., 2 Rob. (La.) 449.

11. An intention not to become a resident of the state has the effect of preventing a person from acquiring a residence by remaining within the state for short or recurring intervals. Loder *v.* Littlefield, 39 Mich. 512; Quebec Bank *v.* Carroll, 1 S. D. 372, 47 N. W. 397.

Lack of all intention as to permanence has been held not to interfere with the acquiring of a residence. Heidenbach *v.* Schland, 10 How. Pr. (N. Y.) 477; Burrows *v.* Miller, 4 How. Pr. (N. Y.) 349, 2 Edm. Sel. Cas. (N. Y.) 157. *Contra*, Hickson *v.* Brown, 92 Ga. 225, 17 S. E. 1035, where the court held that proof of an offer by a non-resident to buy an interest in a business situated in the state was not evidence of his intention to remain.

12. *Illinois.*— Wells *v.* People, 44 Ill. 40; Barron *v.* Burke, 82 Ill. App. 116.

Mississippi.— Brown *v.* Crane, 69 Miss. 678, 13 So. 855.

Nebraska.— Swaney *v.* Hutchins, 13 Nebr. 266, 13 N. W. 282.

New York.— Brown *v.* Ashbough, 40 How. Pr. (N. Y.) 260.

South Carolina.— Munroe *v.* Williams, 37 S. C. 81, 16 So. 533, 19 L. R. A. 665.

Tennessee.— Whitly *v.* Steakly, 3 Baxt. (Tenn.) 393.

United States.— Knapp *v.* Gerson, 25 Fed. 197.

13. New York City Bank *v.* Merrit, 13 N. J. L. 131; Stratton *v.* Brigham, 2 Sneed (Tenn.) 420; Didier *v.* Patterson, 93 Va. 534, 25 S. E. 661; Long *v.* Ryan, 30 Gratt. (Va.) 718; Andrews *v.* Mundy, 36 W. Va. 22, 14 S. E. 414.

Transient stay in the state will not give residence (Cawker City State Bank *v.* Jennings, 89 Iowa 130, 56 N. W. 494; Greene *v.* Beckwith, 38 Mo. 384; Malone *v.* Lindley, 1 Phila. (Pa.) 192, 8 Leg. Int. (Pa.) 82), and the presence of a member of congress in Washington does not make him a resident (Howard *v.* Citizens' Bank, etc., Co., 12 App. Cas. (D. C.) 222). But s Egener *v.* Juch, 101 Cal. 105, 35 Pac. 432, 873, where the court held that members of a theatrical troop, domiciled in one state and playing temporarily in another while *en route*, were residents of the latter state.

An absconder hiding within the state does not become a resident. Shugart *v.* Orr, 5 Yerg. (Tenn.) 191.

14. Gurley *v.* Tomkins, 17 Colo. 437, 30 Pac. 344; Herfort *v.* Cramer, 7 Colo. 483, 4 Pac. 896; Simmons *v.* California Powder Works, 7 Colo. 285, 3 Pac. 420.

Right to attachment in actions on contracts, generally, see *infra*, VI, B

In action on a certified check, with payment refused, an undenied statement in the affidavit that "the action is brought upon an instrument of writing overdue, and for the direct payment of money," shows a good cause of attachment. Breene *v.* Merchants', etc., Bank, 11 Colo. 97, 101, 17 Pac. 280.

A written agreement to pay a mortgage given as security for a promissory note is an instrument for the direct payment of money on which an attachment will lie. Stuyvesant *v.* Western Mortgage, etc., Co., 22 Colo. 28, 43 Pac. 144.

An appeal-bond, conditioned that, if defendant shall duly prosecute his appeal and pay the judgment in case the same shall be affirmed, then the obligation shall be void, otherwise it shall remain in full force, is not a written instrument for the direct payment of money within the meaning of Colo. Code Civ. Proc. § 92, subd. 14. Hurd *v.* McClellan, 14 Colo. 213, 23 Pac. 792.

15. **Applies only to contracts.**— Attachment on this ground is authorized only in actions founded on contract. Raver *v.* Webster, 3 Iowa 502, 66 Am. Dec. 96.

16. **Demand of payment is a prerequisite** to an attachment by the state on this ground. State *v.* Morris, 50 Iowa 203.

the debt, no attachment will be allowed if the debtor is willing to give reasonable security for the debt, even though the creditor cannot convert such security into cash as quickly as he might desire.[17]

O. Removal and Concealment of Property — 1. In General. Actual or contemplated removal[18] of property[19] from the jurisdiction of the court[20] or the concealment of property and effects[21] is usually made by statute a ground for attachment. Whether the debtor must have an intention to defraud his creditor depends upon the wording of the various state statutes.[22]

2. What Constitutes Removal — a. Actual. To constitute the removal of property within the meaning of the attachment acts the debtor[23] must make an

What a sufficient demand.— Plaintiff, a surety for defendants on a note, requested them, after the maturity of the note, to pay or secure it to the holder. Defendants positively refused so to do. A draft which plaintiff procured the holder to draw upon defendants was returned unpaid, and a letter accompanying it was not answered. Plaintiff then paid the note, and sued out an attachment, on the ground that defendants were about to remove from the county, and that they refused to pay or secure plaintiff. It was held, that the attachment was not defeated because plaintiff made no demand upon defendants for payment or security after he took up the note. Ruthven *v.* Beckwith, 84 Iowa 715, 45 N. W. 1073, 51 N. W. 153.

17. Drummond *v.* Stewart, 8 Iowa 341.

What not sufficient security.— The execution of a chattel mortgage by a debtor to a creditor upon property which is subject to prior liens of the same kind, if done by the debtor, without the knowledge or request of the creditor, and if not accepted by him, is not such a giving of property in payment or security for the debt as the law requires in order to preclude an attachment. Burrows *v.* Lehndorff, 8 Iowa 96.

18. Haslett *v.* Rodgers, 107 Ga. 239, 33 S. E. 44; Stephens *v.* Whitehead, 75 Ga. 294; Walker *v.* Welch, 13 Ill. 674; Pecquet *v.* Golis, 1 Mart. N. S. (La.) 438. But see Sims *v.* Charleston Bank, 3 W. Va. 415, to the effect that this was not a ground of attachment under W. Va. Code (1860), c. 151.

Threatened removal by a mortgagor of mortgaged property in his possession furnishes a ground for attachment by the mortgagee. Patton *v.* Harris, 15 B. Mon. (Ky.) 607.

Intended removal of property during pendency of action at law furnishes ground for attachment in equity against defendant who contemplates the removal. Isaacks *v.* Edwards, 7 Humphr. (Tenn.) 464, 46 Am. Dec. 86; Fisher *v.* Cummings, 7 Humphr. (Tenn.) 231.

19. **Intangible property such as a patent right cannot be removed** so as to afford a ground for attachment. Logan *v.* Sibley, 67 Ill. App. 579.

Removal of the debtor's person need not accompany the removal of property (Lester *v.* Cummings, 8 Humphr. (Tenn.) 384); and under a statute allowing an attachment against an administrator or executor who is removing his decedent's property out of any county, the removal of the person of the executor or administrator does not justify an attachment (Holloway *v.* Chiles, 40 Ga. 346).

20. Steele *v.* Dodd, 14 Nebr. 496, 16 N. W. 909.

Removal of property from county is a ground in Texas. Whitemore *v.* Wilson, 1 Tex. Unrep. Cas. 213.

21. Boyd *v.* Buckingham, 10 Humphr. (Tenn.) 433.

Secreting property and falsely transferring property are separate and distinct grounds for attachment. Culbertson *v.* Cabeen, 29 Tex. 247; Garner *v.* Burleson, 26 Tex. 348; Hopkins *v.* Nichols, 22 Tex. 206.

22. **No intention to defraud is necessary** on the debtor's part.

Arkansas.— Goodbar *v.* Bailey, 57 Ark. 611, 22 S. W. 568; Simon *v.* Sevier, 54 Ark. 58, 14 S. W. 1101; Durr *v.* Hervey, 44 Ark. 301, 51 Am. Rep. 594. But see Rice *v.* Pertuis, 40 Ark. 157.

Michigan.— Stock *v.* Reynolds, 121 Mich. 356, 80 N. W. 289.

Mississippi.— Stephenson *v.* Sloan, 65 Miss. 407, 4 So. 342.

Missouri.— Dodson-Hills Mfg. Co. *v.* Payton, 65 Mo. App. 311.

Tennessee.— Freidlander *v.* Pollock, 5 Coldw. (Tenn.) 490.

United States.— Mack *v.* McDaniel, 2 McCrary (U. S.) 198, 4 Fed. 294, construing Arkansas statute.

Contra, Hunter *v.* Soward, 15 Nebr. 215, 18 N. W. 58; Steele *v.* Dodd, 14 Nebr. 496, 16 N. W. 909; McAllister *v.* Davey, 7 Ohio S. & C. Pl. Dec. 354, 5 Ohio N. P. 274; Hurd *v.* Jarvis, 1 Pinn. (Wis.) 475.

Showing of intent.— An intention to defraud was sufficiently made out in McEntee *v.* Aris, 21 N. Y. Suppl. 857, 50 N. Y. St. 541; Weiss *v.* Hobbs, 84 Va. 489, 5 S. E. 367; but not in Bernhard *v.* Cohen, 56 N. Y. Suppl. 271; Sowers *v.* Leiby, 4 Pa. Co. Ct. 223; Simpson *v.* Dall, 3 Wall. (U. S.) 460, 18 L. ed. 265.

23. **Only a resident** can remove property so as to afford ground for attachment in Louisiana (McClintock *v.* Cairnes, 5 Mart. N. S. (La.) 450); but departure of a resident previous to removal will not prevent a ground for attachment from arising (Sloan *v.* Bangs, 10 Rich. (S. C.) 15).

The withdrawal of individual property by copartners for individual purposes affords a

actual physical removal[24] of a material part of his property[25] for more than a temporary period.[26]

b. Intended. To constitute intended removal of property the debtor must be engaged in the act or be near to the performance of the act of "removal,"[27] and if he entertains the purpose and is making preparations to carry it out, the creditor is entitled to attachment.[28]

3. What Constitutes Concealment. To constitute concealment within the meaning of attachment statutes, it is held that there must be a physical[29] hiding

ground for attachment (Globe Woolen Co. *v.* Carhart, 67 How. Pr. (N. Y.) 403), and the removal of firm effects by one partner with the consent of his copartners has the same effect (Bryant *v.* Simoneau, 51 Ill. 324).

24. Selling the property and pocketing the proceeds is not removal (Monroe *v.* Cutter, 9 Dana (Ky.) 93), nor is a false denial of the receipt of certain funds (Rohan Bros. Boiler Mfg. Co. *v.* Latimore, 18 Mo. App. 16); but shipments, although in the regular course of trade, may furnish a ground for attachment (Queen City Mfg. Co. *v.* Blalack, (Miss. 1896) 18 So. 800; Wilkinson *v.* Dockery, (Miss. 1893) 12 So. 585; Mack *v.* McDaniel, 2 McCrary (U. S.) 198, 4 Fed. 294). See also Stock *v.* Reynolds, 121 Mich. 356, 80 N. W. 289, Grant, C. J., dissenting (where the court held that property passing through the county in the regular course of trade can be attached as property which is being removed); Crow *v.* Lemon, etc., Co., 69 Miss. 799, 11 So. 110 (where it was held that a debtor who shipped his property to consignee without the state, for the purpose of raising a fund against which he could draw to pay debts due others, was liable to an attachment on the ground that he had removed his property without the state).

Proof of removal.— This ground for attachment was held to be established by evidence that a manufacturing company ceased business, and that part of its manufactured material and machinery had been removed to an unknown place (MacTaggart *v.* Putnam Corset Co., 5 Silv. Supreme (N. Y.) 473, 8 N. Y. Suppl. 800, 29 N. Y. St. 552), and by proof that a check given in payment of purchases of gold coin had been dishonored and the gold had mysteriously disappeared (Greenleaf *v.* Mumford, 30 How. Pr. (N. Y.) 30); but the facts were held not necessarily to raise a presumption of fraudulent removal when it appeared that a man had sent his family away two days previously and closed his store and packed up his goods by night (Mott *v.* Lawrence, 9 Abb. Pr. (N. Y.) 196, 17 How. Pr. (N. Y.) 559). See also Brown *v.* Hawkins, 65 N. C. 645; Miller *v.* Paine, 2 Kulp (Pa.) 304; Sowers *v.* Leiby, 4 Pa. Co. Ct. 223.

25. Sufficient property to endanger collection of plaintiff's claim must be removed.

Alabama.— Stewart *v.* Cole, 46 Ala. 646.

Arkansas.— Goodbar *v.* Bailey, 59 Ark. 611, 22 S. W. 568; Rice *v.* Pertuis, 40 Ark. 157.

Florida.— Haber *v.* Nassitts, 12 Fla. 589.

Mississippi.— Lowenstein *v.* Bew, 68 Miss. 265, 8 So. 674, 24 Am. St. Rep. 269; Montague *v.* Gaddis, 37 Miss. 453.

Tennessee.— Wrompelmeir *v.* Moses, 3 Baxt. (Tenn.) 467; Freidlander *v.* Pollock, 5 Coldw. (Tenn.) 490.

Texas.— Wright *v.* Smith, 19 Tex. 297; Messner *v.* Hutchins, 17 Tex. 597.

See 5 Cent. Dig. tit. "Attachment," § 90.

The burden of proof is on defendant removing property to show that he has other ample visible property within the state to meet the demands of his creditors (Pickard *v.* Samuels, 64 Miss. 822, 2 So. 250); and it is not sufficient to show that enough property remains to satisfy the attaching creditor's claim (Holliday *v.* Cohen, 34 Ark. 707).

The value of the property remaining in the state should be reckoned by its fair market value and not upon what it would bring at a forced sale. Foster *v.* Pitts, 63 Ark. 387, 38 S. W. 1114; Nesbit *v.* Schwab Clothing Co., 62 Ark. 22, 34 S. W. 79.

Refusing to give peremptory instructions was error when defendant took all his property with him out of the state (Philadelphia Invest. Co. *v.* Bowling, 72 Miss. 565, 17 So. 231); and the facts showed a material part was removed in Tingle *v.* Beasley, 8 Ky. L. Rep. 878.

26. Warder *v.* Thrilkeld, 52 Iowa 134, 2 N. W. 1073; Lowenstein *v.* Bew, 68 Miss. 265, 8 So. 674, 24 Am. St. Rep. 269; Nyack, etc., Gas-Light Co. *v.* Tappan Zee Hotel Co., 2 Silv. Supreme (N. Y.) 567, 6 N. Y. Suppl. 113, 24 N. Y. St. 723; Freidlander *v.* Pollock, 5 Coldw. (Tenn.) 490. *A fortiori* temporary removal in the course of trade will not furnish a ground for attachment. Lyons *v.* Mason, 4 Coldw. (Tenn.) 525; Clinch River Mineral Co. *v.* Harrison, 91 Va. 122, 21 S. E. 660.

27. Probable injury to the creditor if the removal had been effected must be shown. White *v.* Williams, 10 Ill. 25; White *v.* Wilson, 10 Ill. 21; Montgomery *v.* Tilley, 1 B. Mon. (Ky.) 155; Harrison *v.* King, 9 Ohio St. 388.

Actual removal soon after the attachment is proof of a previous intention to remove. Freidlander *v.* Pollock, 5 Coldw. (Tenn.) 490. But intention to remove was not shown by the evidence in Jaycox *v.* Wing, 66 Ill. 182; Stow *v.* Stacey, 9 N. Y. Suppl. 1, 30 N. Y. St. 308.

28. Myers *v.* Farrell, 47 Miss. 281.

29. Thus an under-estimation of the value of property by a debtor seeking compromise is not concealment (Roach *v.* Brannon, 57 Miss. 490); nor is a threat by the debtor to have judgment entered against him, which

or secreting[30] of property[31] so that it cannot be seized to satisfy creditors' claims.[32]

P. Return of "Not Found" Upon Ordinary Process. As has been remarked heretofore, the principal object of the earlier attachment acts was to compel the appearance of a defendant who could not be reached by ordinary process.[33] Under such statutes, where ordinary process has been issued and returned by the officer "not found,"[34] a so-called "judicial" attachment may issue.[35]

would exhaust his property (Stokes *v.* Schlecht, 14 Wkly. Notes Cas. (Pa.) 328), or concealment of title by means of fraudulent conveyance or mortgage though the last is a separate ground for attachment; but depositing money in another's name has been held actual concealment (Treadwell *v.* Lawlor, 15 How. Pr. (N. Y.) 8); as has the allowance of a liquidated mortgage to remain unsatisfied with a view to having it continue apparently a live instrument to cover new stock (Bauer Grocery Co. *v.* Smith, 61 Mo. App. 665, 74 Mo. App. 419) and a fraudulent assignment of notes (Wilson *v.* Beadle, 2 Head (Tenn.) 510).

30. **The word "secrete,"** as used in the attachment acts, means to hide, to put where the officer of the law will not be able to find it. Pearre *v.* Hawkins, 62 Tex. 434.

Concealment was made out by evidence that defendant boasted that he had money in a safe place and would not pay (Ziegler *v.* Ziegler, 68 Hun (N. Y.) 177, 22 N. Y. Suppl. 812, 51 N. Y. St. 891); and by evidence of a hurried division of property followed by placing it in various different places (McDonald *v.* Marquardt, 52 Nebr. 820, 73 N. W. 288); and failure to make return of a large cash sale of goods consigned to a debtor by his creditor to sell and account for proceeds (Powell *v.* Matthews, 10 Mo. 49); or the transmission of money through the post-office (Albuquerque First Nat. Bank *v.* Lesser, 9 N. M. 604, 58 Pac. 345) tended to show concealment. Failure to keep a cash-book is evidence of concealment in a doubtful case (Lippincott *v.* Prendergast, 2 Del. Co. (Pa.) 322); and the hiding of books of account is evidence of actual or threatened concealment where it was done with defendant's authority (Fitzgerald *v.* Belden, 49 How. Pr. (N. Y.) 225). See also Mahner *v.* Linck, 70 Mo. App. 380.

It is not concealment to fail to deliver property according to contract (Powers *v.* O'Brien, 44 Mich. 317, 6 N. W. 679), or to deny the possession of money, although the debtor actually has the money in his possession (Keith *v.* McDonald, 31 Ill. App. 17). See also Roach *v.* Brannon, 57 Miss. 490, 498, where it was said: "Money is never visible ordinarily, and so long as there is no attempt to secrete it, by clandestine removal or fictitious transfers or otherwise, and so long as it is kept and used as money ordinarily is, no ground of attachment is afforded."

Evidence of the amount of money paid by defendant to plaintiff during their business dealings is inadmissible on the question of fraudulent concealment. Finlay Brewing Co. *v.* Prost, 111 Mich. 635, 70 N. W. 137. See also Stapleton *v.* Ewell, 21 Ky. L. Rep. 1534, 55 S. W. 917, where the court held that the facts justified an attachment under the statutes allowing the writ to issue when the plaintiff had a future interest in property or lien against it and it appeared that the property was "about to be sold, concealed, or removed from the State."

31. **Money** is property which may be concealed. Treadwell *v.* Lawlor, 15 How. Pr. (N. Y.) 8; Terry *v.* Knoll, 3 Kulp (Pa.) 272.

Title to the concealed property need not be in defendant. Treadwell *v.* Lawlor, 15 How. Pr. (N. Y.) 8.

A portion only of the debtor's property need be concealed to afford a ground for attachment. Taylor *v.* Myers, 34 Mo. 81.

32. **The ulterior purpose for which the concealment is made** is immaterial.— Kleine *v.* Nie, 88 Ky. 542, 11 Ky. L. Rep. 583, 11 S. W. 590; Mathews *v.* Loth, 45 Mo. App. 455.

A pretense of returning the secreted property will not prevent a ground for attachment from arising. Kleine *v.* Nie, 88 Ky. 542, 11 Ky. L. Rep. 583, 11 S. W. 590.

33. See *supra*, II, B.

34. **Return substituted for plaintiff's affidavit.**— The return of the sheriff upon the original process is substituted for plaintiff's affidavit to procure an attachment writ. Welch *v.* Robinson, 10 Humphr. (Tenn.) 263.

The form of the return by the sheriff should be that "defendant is not to be found within his county" (Welch *v.* Robinson, 10 Humphr. (Tenn.) 263, 265; Gray *v.* Smith, 17 Tex. 389) or that "defendant is not found within his bailiwick" (Craig *v.* Saven, Hard. (Ky.) 46; Irons *v.* Allen, Hard. (Ky.) 44). But see Thompson *v.* Hair, 7 Ala. 313, where the court sustained an attachment although the sheriff's return was not a regular one, or in the precise words of the statute, because its meaning could not be mistaken.

Diligent search and inquiry should be made by the sheriff before he makes his return of "not found" (Welch *v.* Robinson, 10 Humphr. (Tenn.) 263); and such return is not justified where defendant was absent temporarily for only two or three days (Robeson *v.* Hunter, 90 Tenn. 242, 16 S. W. 466). But where defendant cannot be found at his usual place of residence so as to be served with process, the sheriff may make a return of *non est inventus* (Moore *v.* Simpson, 5 Litt. (Ky.) 49) even though the impossibility of serving process is due to a *bona fide* change of residence (James *v.* Hall, 1 Swan (Tenn.) 297).

35. Mason *v.* Anderson, 3 T. B. Mon. (Ky.) 293; McNair *v.* Kaiser, 62 Miss. 783; Grewar *v.* Henderson, 1 Tenn. Ch. 76.

VI. ON WHAT DEMANDS REMEDY LIES.

A. In General — 1. ONLY WHERE AUTHORIZED BY STATUTE. To warrant the issue of an attachment there must be a cause of action,[36] and the remedy being purely statutory,[37] it will lie only where the cause of action is of a kind to which the statute is clearly intended to apply.[38] Where the action is not one in which the remedy is authorized by statute the issue and levy of an attachment will give the

A substitute for personal service.— In such cases the attachment is sued out to take the place of personal service and publication is unnecessary. Briggs *v.* Smith, 13 Tex. 269.

Lies only against residents of state.—Such a judicial attachment lies only against residents (Deaver *v.* Keith, 61 N. C. 428), and the fact that defendant is a resident must appear of record (Blair *v.* Cleveland, 1 Stew. (Ala.) 421; Evans *v.* Saltmarsh, 1 Stew. (Ala.) 43; Wyatt *v.* Campbell, Minor (Ala.) 390).

36. City Nat. Bank *v.* Jeffries, 73 Ala. 183; Mears *v.* Adreon, 31 Md. 229; Manton *v.* Poole, 67 Barb. (N. Y.) 330.

Right to attach before maturity of demand see *infra*, VI, D.

Where only nominal damages recoverable. —Attachment will not issue where the facts stated in the affidavit do not show a right to recover more than nominal damages. Walts *v.* Nichols, 32 Hun (N. Y.) 276.

37. See *supra*, II, A, 1.

38. *Alabama.*— Le Baron *v.* James, 4 Ala. 687.

California.— Mudge *v.* Steinhart, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17.

Georgia.— Monroe *v.* Bishop, 29 Ga. 159.

Iowa.— Ogilvie *v.* Washburn, 4 Greene (Iowa) 548.

Kansas.— Travelers' Ins. Co. *v.* Stucki, 4 Kan. App. 424, 46 Pac. 42.

Mississippi.— Netbery *v.* Belden, 66 Miss. 490, 6 So. 464.

Nebraska.— Rouss *v.* Wright, 14 Nebr. 457, 16 N. W. 765, 18 Nebr. 234, 25 N. W. 80.

New York.— Edick *v.* Green, 38 Hun (N. Y.) 202; Remington Paper Co. *v.* O'Dougherty, 32 Hun (N. Y.) 255, 6 N. Y. Civ. Proc. 79.

North Carolina.— Mullen *v.* Norfolk, etc., Canal Co., 114 N. C. 8, 19 S. E. 106.

Ohio.— Pope *v.* Hibernia Ins. Co., 24 Ohio St. 481; Hoover *v.* Gibson, 24 Ohio St. 389.

South Carolina.—Addison *v.* Sujette, (S. C. 1897) 27 S. E. 631.

Tennessee.—Turner *v.* Newman, 4 Humphr. (Tenn.) 328.

Wisconsin.—Zechman *v.* Haak, 85 Wis. 656, 56 N. W. 158.

United States.— McCracken *v.* Covington City Nat. Bank, 4 Fed. 602, construing Ohio statute.

See also cases cited *supra*, II, A, 4, a.

Averments as to cause of action or nature of demand see *infra*, VII, D, 7, c, (v), (D).

Equitable demands.— As to when attachment is authorized in a suit in equity or on an equitable demand see *infra*, VII, B, 8.

New Jersey — When capias might issue.— Under the New Jersey statutes attachment is maintainable only in actions arising out of contract in which a capias ad respondendum might issue against defendant. Kipp *v.* Salyer, 64 N. J. L. 160, 44 Atl. 843; Liveright *v.* Greenhouse, 61 N. J. L. 156, 38 Atl. 697; Mercantile Nat. Bank *v.* Pequonnock Nat. Bank, 58 N. J. L. 300, 33 Atl. 474; Boyd *v.* King, 36 N. J. L. 134; Day *v.* Bennett, 18 N. J. L. 287; Van Emburgh *v.* Pullinger, 16 N. J. L. 457; Barber *v.* Robeson, 15 N. J. L. 17; Jeffery *v.* Wooley, 10 N. J. L. 123.

Action of debt — Foreign attachment.— In Victor *v.* Abrams, 13 Pa. Co. Ct. 298 (holding that Pancake *v.* Harris, 10 Serg. & R. (Pa.) 109, was not authority to the contrary) it was held that a foreign attachment would lie in an action of debt.

Action of account.— Under a statute authorizing any creditor to sue out an attachment and not specifying the nature or form of the action in which the writ might issue it was held that the remedy was available in an action of account. Humphreys *v.* Matthews, 11 Ill. 471.

Scire facias to bring in party.—An attachment may be sued out in aid of a scire facias to make a defendant, not served with process, party to a judgment recovered against his co-defendant, where the action is such that an attachment could have issued in aid thereof as originally instituted. Firebaugh *v.* Hall, 63 Ill. 81; Ryder *v.* Glover, 4 Ill. 547.

Real actions.— In New Hampshire a writ of attachment may be used in the commencement of a real action and goods attached to secure the costs. Rand *v.* Sherman, 6 N. H. 29. But in an early Maine case it was held that no lien could be created by attachment in such an action under the statutes of that state. Holmes *v.* Fernald, 7 Me. 232.

Limitation as to amount of claim.— Sometimes the statutes limit the right to attachment to claims above a specified amount. Thus, under the Maryland act of 1795, c. 56, attachment would not lie for a debt under the value of twenty dollars (Dix *v.* Nicholls, 2 Cranch C. C. (U. S.) 581, 7 Fed. Cas. No. 3,926); and under the Iowa statutes (Iowa Code (1897), § 3880) plaintiff's demand must be for not less than five dollars to authorize attachment where the cause arises out of contract (Bradley *v.* McCall, 2 Greene (Iowa) 214), but this provision is not applicable to demands arising *ex delicto* (Weller *v.* Hawes, 49 Iowa 45).

court no jurisdiction,[39] but it has been held that defendant may waive this objection by pleading to the merits.[40]

2. Joining Causes Not Authorizing With Causes Authorizing Attachment. A party holding a claim on which attachment lies cannot join with it another claim on which the remedy will not lie and then obtain an attachment covering both.[41] If he does so the attachment may be dissolved *in toto*.[42]

B. Demands Arising Ex Contractu — 1. Express Contracts — a. In General. Under some statutes the right to issue attachments is confined to causes of action arising *ex contractu*,[43] and where this is the case, in order for plaintiff to be entitled to the writ, it is essential that contractual relations exist between him and defendant,[44] or else that the contract be made for his

39. Mudge *v.* Steinhart, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17. But see Hardin *v.* Lee, 51 Mo. 241.

40. Hoopes *v.* Pusey, 2 Chest. Co. Rep. (Pa.) 306.

As to effect of appearance, generally, see *infra*, XVI, B, 3.

41. Willman *v.* Freidman, (Ida. 1893) 35 Pac. 37; Mayer *v.* Zingre, 18 Nebr. 458, 25 N. W. 727; Oconto Co. *v.* Esson, (Wis. 1901) 87 N. W. 855; C. D. Smith Drug Co. *v.* Casper Drug Co., 5 Wyo. 510, 40 Pac. 979, 42 Pac. 213.

Action for conversion — Joinder of other tortious demands.—Where an attachment can issue only in an action arising on contract for the recovery of money, or in an action for the wrongful conversion of personal property, the writ will be denied where several causes of action for different torts are joined with an action for conversion. Union Consol. Min. Co. *v.* Raht, 9 Hun (N. Y.) 208.

Fraud in contracting part only of debt.—An attachment sued out on the ground that the debt was fraudulently contracted cannot be sustained where it appears that part only of the debt was so contracted. See *supra*, V, G, 1.

Joinder of contractual and statutory demands.— If an attachment may be granted only in suits on contract or for the wrongful conversion of personal property, none can issue in an action in which causes of action on an implied contract are joined with one given by statute. Wilson *v.* Harvey, 52 How. Pr. (N. Y.) 126.

As to right to attachment on statutory liabilities see *infra*, VI, G.

South Carolina — Joinder of legal and equitable causes.— Under the code practice where the complaint sets out two causes of action, one legal and the other equitable in nature, if the legal cause is sufficient to authorize attachment and judgment could be rendered thereon independently of the equitable relief sought, it is error to set the attachment aside on the ground that the action is one of purely equitable cognizance. Ferst *v.* Powers, 58 S. C. 398, 36 S. E. 744.

42. Vollmer *v.* Spencer, (Ida. 1897) 51 Pac. 609.

43. Right to attachment in actions ex delicto see *infra*, VI, C.

Must be debt within meaning of statute.— In a suit by foreign attachment to subject property of a non-resident it must be shown that the debt on which the proceeding is based is such a one as comes within the meaning of the statute authorizing attachment and not merely such a one as might be established by a suit for the specific performance of a contract, out of which, if enforced, the debt would arise. Barksdale *v.* Hendree, 2 Patt. & H. (Va.) 43.

Breach of duty.— Under a statute authorizing the remedy only on demands arising upon contract an attachment is not authorized in an action based solely on a breach of duty, unless it appears that such duty arose by contract. Pope *v.* Hibernia Ins. Co., 24 Ohio St. 481.

Instituting suit in violation of contract.— An action to recover damages for instituting suit in violation of a contract for the extension of the time of payment upon a note, and wantonly and maliciously attaching plaintiff's property therein, whereby plaintiff's credit was greatly injured, is not an action for "a debt or demand arising upon contract," within the meaning of Ohio Rev. Stat. § 5521. McCracken *v.* Covington City Nat. Bank, 4 Fed. 602.

Action to adjust partnership accounts.— An action by one partner against his copartner, before the adjustment of partnership accounts, for an accounting and to recover an unascertained balance, is not an action upon a "demand arising upon contract" so as to justify an attachment on the ground of non-residence, under Kan. Gen. Stat. (1899), § 4440, where the cause of action did not arise wholly within the limits of Kansas. Stone *v.* Boone, 24 Kan. 337 [*following* Treadway *v.* Ryan, 3 Kan. 437].

Appeal from justice's judgment.— An action pending in a circuit court on an appeal from the judgment of a justice of the peace, where the trial is not *de novo*, is not an action *ex contractu* to recover money. Zechman *v.* Haak, 85 Wis. 656, 56 N. W. 158.

44. Rouss *v.* Wright, 14 Nebr. 457, 16 N. W. 765, 18 Nebr. 234, 25 N. W. 80, where it was held that an action for failure to deliver goods, brought against the vendor by a stranger to the contract of sale, to whom the purchaser had directed that the goods be shipped, was not an action on contract.

Person entitled to lien by subrogation.— Where a purchaser of property, to protect himself from enforcement of a lien against the premises for an indebtedness created by his vendor, pays the lien, and thus becomes en-

benefit.[45] Under such statutes the remedy has been held to be authorized in actions on bonds and undertakings,[46] for breach of warranty,[47] for breach of contract to deliver goods,[48] and in other actions on money demands arising *ex contractu*.[49] Where the claim grows out of contract its character as such is not

titled by subrogation to the lien and debt, an action by him against the vendor is an action arising out of contract, express or implied, within a statutory provision permitting an attachment in such case. Alford *v.* Cobb, 28 Hun (N. Y.) 22.

45. Edick *v.* Green, 38 Hun (N. Y.) 202.

46. Monterey County *v.* McKee, 51 Cal. 255 (official bond of county treasurer); San Francisco *v.* Brader, 50 Cal. 506 (bail-bond in criminal case); Hathaway *v.* Davis, 33 Cal. 161 (appeal-bond); Williams *v.* Jones, 38 Md. 555 (bond conditioned for payment of money); Withers *v.* Brittain, 35 Nebr. 436, 53 N. W. 375 (attachment bond); Reg. *v.* Stewart, 8 Ont. Pr. 297 (forfeited recognizance).

Contra under Colorado statute.— Under Mills' Anno. Stat. Colo. § 2700, authorizing an attachment in an action on an "overdue" instrument for the direct payment of money, no attachment can be maintained on an administrator's bond. Such statute applies only to instruments for a definite sum of money payable absolutely at a specified time. People *v.* Boylan, 25 Fed. 594. For the same reason no attachment will lie in an action on an appeal-bond conditioned that if appellant shall duly prosecute his appeal and pay the judgment, if the same be affirmed, then the obligation shall be void; otherwise it shall remain in full force. Hurd *v.* McClellan, 14 Colo. 213, 23 Pac. 792.

47. *Alabama.*— Guy *v.* Lee, 81 Ala. 163, 2 So. 273; Weaver *v.* Puryear, 11 Ala. 941.

Louisiana.—Butchert *v.* Ricker, 11 La. Ann. 489.

Mississippi.— Woolfolk *v.* Cage, Walk. (Miss.) 300.

Nebraska.— Cheney *v.* Straube, 35 Nebr. 521, 53 N. W. 479.

New Jersey.— Barber *v.* Robeson, 15 N. J. L. 17.

New York.— Haebler *v.* Bernharth, 115 N. Y. 459, 22 N. E. 167, 26 N. Y. St. 230; Cunningham *v.* Von Pustan, 9 N. Y. Suppl. 255, 31 N. Y. St. 255.

United States.— Pollard *v.* Dwight, 4 Cranch (U. S.) 421, 2 L. ed. 666, construing Connecticut statute.

See 5 Cent. Dig. tit. "Attachment," § 15.

48. *Colorado.*— Hyman *v.* Newell, 7 Colo. App. 78, 42 Pac. 1016.

New York.— Ward *v.* Begg, 18 Barb. (N. Y.) 139; Clews *v.* Rockford, etc., R. Co., 4 Thomps. & C. (N. Y.) 669 (breach of contract to deliver bonds).

Ohio.—Ward *v.* Howard, 12 Ohio St. 158.

Tennessee.— Runyan *v.* Morgan, 7 Humphr. (Tenn.) 210.

Texas.— Stiff *v.* Stevens, (Tex. Civ. App. 1893) 21 S. W. 295; Stiff *v.* Fisher, 2 Tex. Civ. App. 346, 21 S. W. 291.

United States.— Fisher *v.* Consequa, 2 Wash. (U. S.) 382, 9 Fed. Cas. No. 4,816, which was an action to recover for the delivery of goods of a poorer quality than that called for by the contract, and which construed the Pennsylvania statute.

See 5 Cent. Dig. tit. "Attachment," § 13.

49. Overdue bill or note.— A debt evidenced by an overdue bill or note is a demand arising out of contract so as to be enforceable by attachment. Nesbitt *v.* Campbell, 5 Nebr. 429; Brown *v.* Wyatt, 72 Tex. 60, 10 S. W. 321.

Account stated.— The charge that an account had been stated between plaintiff and defendant, and had not been paid, is a sufficient charge of breach of "contract" to entitle plaintiff to attachment, under N. Y. Code Civ. Proc. § 636. Johnston *v.* Ferris, 14 Daly (N. Y.) 302, 12 N. Y. St. 666.

Failure to deliver possession of land.— An action for damages for breach of an agreement to complete a building on certain land and deliver possession not later than a stipulated time is one "arising on contract for the recovery of money only." Coats *v.* Arthur, 5 S. D. 274, 58 N. W. 675.

Breach of lease.— An action for damages accruing to plaintiff through acts done by defendant in violation of a lease from defendant to plaintiff is one arising on contract. Doblinger *v.* Dickson, 71 Fed. 635, construing Ohio statute.

Refusal to receive and pay for goods.— An action for failure to receive and pay for goods which plaintiff had promised to sell and defendant had promised to buy is founded on contract and not in tort. Donnelly *v.* Strueven, 63 Cal. 182.

Refusal to buy bank stock.— An agreement to buy bank stock at not less than a certain price, after notice, is a contract within Cal. Code Civ. Proc. § 537, providing that a writ of attachment may issue in an action upon a contract, express or implied, for the direct payment of money. Flagg *v.* Dare, 107 Cal. 482, 40 Pac. 804.

An action for the price of cattle sold and delivered to defendant is an action on an express contract, within the meaning of the attachment law, although the cattle agreed to be sold were not all delivered, and the amount claimed is consequently less than the consideration expressed in the memorandum of sale. Littlejohn *v.* Jacobs, 66 Wis. 600, 29 N. W. 545.

An action for a commission for selling real estate, where the owner agreed that plaintiff should have as compen ation all that he could sell it for above a certain sum, but, on plaintiff's procuring an offer above that sum, refused to comply with his agreement, is a demand arising on contract, for which an attachment on the ground of non-residence may be issued. Ammen *v.* Morris, 7 Ohio Dec. (Reprint) 304, 2 Cinc. L. Bul. 94.

affected, so as to preclude an attachment, by the fact that tortious elements are involved.[50]

b. Breach of Promise of Marriage. In some cases it has been held that an action for breach of promise to marry comes within a statute allowing attachment in actions for demands arising on contract;[51] but in other jurisdictions the contrary view is maintained.[52]

c. Contracts Made or Payable Within or Outside State. The question whether the contract out of which the cause of action arose was made or payable within the state, as limiting the right to attach, depends upon the terms of the statutes authorizing attachment.[53] Under a statute limiting the remedy by attachment to contracts made or payable within the state, if the contract be not made in the state there must be an express stipulation that it shall be payable there to warrant an attachment.[54]

2. Implied Contracts — a. In General. Under a statute authorizing attachments in actions arising out of contract an attachment may be maintained on a

Action to recover upon coupons and scrip certificates.— Under N. Y. Code Civ. Proc. § 635, authorizing an attachment to be granted "in actions to recover a sum of money only, whether for breach of contract, express or implied, other than a contract of marriage," it was held that an attachment might be issued in an action against a railroad company to recover upon coupons and scrip certificates representing interest payable semi-annually out of the company's net or surplus income. Seeley *v.* Missouri, etc., R. Co., 39 Fed. 252.

Pennsylvania — Foreign attachment.— Under the Pennsylvania statutes a writ of foreign attachment may issue in an action of account render. The remedy lies in all actions sounding in contract where the amount can be definitely ascertained. Strock *v.* Little, 45 Pa. St. 416.

50. Whitney *v.* Hirsch, 39 Hun (N. Y.) 325 [*criticizing* and *distinguishing* Wittner *v.* Von Minden, 27 Hun (N. Y.) 234]. See also Blackinton *v.* Rumpf, 12 Wash. 279, 40 Pac. 1063.

Waiving tort and suing on implied contract see *infra*, VI, B, 2, a.

51. Halbert *v.* Armstrong, 14 Ohio Cir. Ct. 296; Caldwell *v.* Spillman, 1 Ohio Dec. (Reprint) 308, 7 West. L. J. 149. But see Conley *v.* Creighton, 5 Ohio Dec. (Reprint) 402, 5 Am. L. Rec. 421.

Georgia — "Money demand."— Under the Georgia act of 1857, permitting attachments in actions for "money demands," an attachment was allowed in an action for breach of promise of marriage. Morton *v.* Pearman, 28 Ga. 323.

52. Barnes *v.* Buck, 1 Lans. (N. Y.) 268 (not an action "arising on contract for the recovery of money only"); Price *v.* Cox, 83 N. C. 261; Maxwell *v.* McBrayer, 61 N. C. 527; Isett *v.* Binder, 2 Chest. Co. Rep. (Pa.) 430.

53. Kansas — Action against non-resident on promissory note.— Under Kan. Gen. Stat. (1899), § 4440, an attachment lies on the ground of non-residence only for debts or demands arising upon contract, judgment, or decree, unless the cause of action arose wholly within the limits of Kansas. Under this statute, where the cause of action is founded on a promissory note, an attachment will lie on the ground of non-residence, although the cause of action arose outside the state. Payne *v.* Kansas City First Nat. Bank, 16 Kan. 147.

New York — Defendant "indebted within the state."— Under 1 N. Y. Rev. Laws 157, attachment lay only where defendant was indebted within the state, either by reason that the contract was made there or that the creditor resided there. Matter of Marty, 3 Barb. (N. Y.) 229; Matter of Fitch, 2 Wend. (N. Y.) 298; *Ex p.* Schroeder, 6 Cow. (N. Y.) 603.

Virginia — Contract of bailment made outside state.— In Peter *v.* Butler, 1 Leigh (Va.) 285, it was held that a claim, arising on a contract of bailment, made out of Virginia, against a non-resident, was a claim for debt, for which foreign attachment in chancery would lie.

54. Eck *v.* Hoffman, 55 Cal. 501; Dulton *v.* Shelton, 3 Cal. 207; Trabant *v.* Rummell, 14 Oreg. 17, 12 Pac. 56.

Presumption as to place of payment.— Where a contract is made in a foreign state it will be presumed that it will be performed there, and an attachment will not issue within the state in an action thereon, though in a general sense the amount due would be payable anywhere the debtor might be found. Tuller *v.* Arnold, 93 Cal. 166, 28 Pac. 863.

What not a contract made or payable in state.— The indorsement of the words, "The above balance, fourteen hundred and ninety-three 96–100 dollars, due Ordenstein & Co., is correct. Bones & Spenser," made in Arizona on an open account of goods sold in California, though making an account stated, does not operate to create such a contract as will entitle O. & Co., in a suit on the account against B. & S., to a writ of attachment under Ariz. Comp. Laws, § 2257, providing for the issue of that writ only where plaintiff sues to recover an indebtedness upon a contract, express or implied, made or payable in the territory, for the direct payment of money. Ordenstein *v.* Bones, (Ariz. 1887) 12 Pac. 614, 615.

demand founded on an implied contract,[55] and the fact that the demand involves tortious elements will not preclude the right to the writ if plaintiff elects to waive the tort and sue on the implied contract.[56]

55. Instances in which attachments allowed.— Attachments have been allowed in the following cases under statutes authorizing attachment on demands arising out of contract:— An action against a common carrier to recover for damage or loss of goods (Bausman *v.* Smith, 2 Ind. 374; Hunt *v.* Norris, 4 Mart. (La.) 517. *Contra*, Atlantic Mut. Ins. Co. *v.* McLoon, 48 Barb. (N. Y.) 27); or for personal injuries to a passenger (Pennsylvania R. Co. *v.* Peoples, 31 Ohio St. 537). Assumpsit for money embezzled by a clerk. Farmers' Nat. Bank *v.* Fonda, 65 Mich. 533, 32 N. W. 664. But see Babcock *v.* Briggs, 52 Cal. 502. Assumpsit for money had and received against a thief to recover stolen money. Gould *v.* Baker, 12 Tex. Civ. App. 669, 35 S. W. 708. An action to recover money obtained by fraud. Foote *v.* Ffoulke, 55 N. Y. App. Div. 617, 67 N. Y. Suppl. 368; Barth *v.* Graf, 101 Wis. 27, 76 N. W. 1100; Western Assur. Co. *v.* Towle, 65 Wis. 247, 26 N. W. 104. But see U. S. *v.* Lilly, 6 Ky. L. Rep. 582. An action to recover money received by defendant from plaintiff to be loaned to others but which was converted to his own use by the receiver. Hart *v.* Barnes, 24 Nebr. 782, 40 N. W. 322. An action to recover back money paid on contract, where there is an entire failure of consideration. Santa Clara Valley Peat Fuel Co. *v.* Tuck, 53 Cal. 304. An action to recover money wrongfully obtained by attachment or garnishment. Garrott *v.* Jaffray, 10 Bush (Ky.) 413. An action for conversion of personalty, where the property and its value was specially averred and no exemplary damages were asked. Felker *v.* Douglass, (Tex. Civ. App. 1900) 57 S. W. 323. But *compare* Elliott *v.* Jackson, 3 Wis. 649. An action by a principal against his agent for money received, based on the agent's failure to pay over on demand money intrusted to him by the principal for use in making certain payments, and which was converted by the agent. Nevada Co. *v.* Farnsworth, 89 Fed. 164. An action against a factor to recover the difference between the price at which goods were sold and that authorized by contract. Hanson *v.* Watson, 13 Wkly. Notes Cas. (Pa.) 534. An action for breach of contract for the value of books delivered to be bound and not returned. Turner *v.* Collins, 1 Mart. N. S. (La.) 369. An action on an account containing an item for damages for injury to a horse while in possession of a bailee for hire. Nethery *v.* Belden, 66 Miss. 490, 6 So. 464. An action by the United States to recover a sum claimed to be due as duties on imported goods. U. S. *v.* Graff, 4 Hun (N. Y.) 634, 67 Barb. (N. Y.) 304.

Contracts implied in law as well as in fact.— In Nevada Co. *v.* Farnsworth, 89 Fed. 164, it was held that a statute permitting attachment in an action on a contract should be construed as including contracts implied in law as well as those implied in fact. See also Grevell *v.* Whiteman, 32 Misc. (N. Y.) 279, 65 N. Y. Suppl. 974.

Where no contract implied by law.— The law implies no contract on the part of a child to pay for necessaries furnished, without his request, to an indigent parent, and therefore attachment will not lie in an action against the child to recover for such necessaries. Wilson *v.* Harvey, 52 How. Pr. (N. Y.) 126.

Implied promise of principal to indemnify sureties.— There was no default on a bond of a trustee of an estate conditioned to pay an annuity, to pay over the profits of the trust property, and to account therefor to the county court, where the principal absconded after giving the bond and depositing trust funds in a bank which he wrecked, but where no legal proceedings were had to establish a default on the bond, and no demand was made on the trustee; so that there was no liability of sureties on which to found an implied contract as a basis of an action in attachment. Barth *v.* Graf, 101 Wis. 27, 76 N. W. 1100.

56. *Louisiana.*—Crane *v.* Lewis, 4 La. Ann. 320.

Mississippi.— Nethery *v.* Belden, 66 Miss. 490, 6 So. 464.

Nebraska.— Hart *v.* Barnes, 24 Nebr. 782, 40 N. W. 322.

New York.— Foote *v.* Ffoulke, 55 N. Y. App. Div. 617, 67 N. Y. Suppl. 368.

Ohio.— Pennsylvania R. Co. *v.* Peoples, 31 Ohio St. 537; Hart *v.* Walter, 7 Ohio S. & C. Pl. Dec. 409.

Pennsylvania.— Hanson *v.* Watson, 13 Wkly. Notes Cas. (Pa.) 534.

Texas.—Felker *v.* Douglass, (Tex. Civ. App. 1900) 57 S. W. 323; Gould *v.* Baker, 12 Tex. Civ. App. 669, 35 S. W. 708.

Wisconsin.— Barth *v.* Graf, 101 Wis. 27, 76 N. W. 1100; Western Assur. Co. *v.* Towle, 65 Wis. 247, 26 N. W. 104. But see Elliott *v.* Jackson, 3 Wis. 649.

Contra, under Colorado statutes.— Under Colo. Code, § 91, giving writs of attachment in actions on contracts, express or implied, an attachment cannot issue in actions of trespass to mines, involving conversion of ore, even though plaintiff elects to waive the trespass, and sue as for money had and received to his use. Tabor *v.* Big Pittsburg Consol. Silver Min. Co., 4 McCrary (U. S.) 299, 14 Fed. 636, 15 Reporter (U. S.) 164.

Whenever assumpsit will lie.— In Nethery *v.* Belden, 66 Miss. 490, 493, 6 So. 464, the court said: "We construe the statute quoted, to mean, as far as implied contracts are concerned, that whenever assumpsit will lie for the breach of an implied contract, attachment may be maintained to recover damages therefor, although the breach of the contract may be tortious."

b. Judgments. Under the statutes of most states an attachment may be maintained in an action on a judgment, either domestic[57] or foreign,[58] even though plaintiff be entitled to execution upon the judgment at the time of issuing the writ.[59] An action on a money judgment is one "arising on contract" whether such judgment were recovered on a contract or for a tort.[60]

3. Necessity For Demand to Be Liquidated. As a general rule no attachment will lie, where the contract itself does not furnish the measure of defendant's liability and the damages claimed are speculative or so uncertain that plaintiff cannot swear with any certainty to the amount that will be found due him.[61]

Where tort not waivable.— Under the Tennessee acts of 1836, c. 43, and 1838, c. 166, an attachment bill will not lie to subject property which has been bought with money stolen from plaintiff, that being a case arising *ex delicto*, in which the tort cannot be waived, and such suits being only authorized where the relation of debtor and creditor exists. Union Bank *v.* Baker, 8 Humphr. (Tenn.) 447.

57. Young *v.* Cooper, 59 Ill. 121; Morse *v.* Pearl, 67 N. H. 317, 36 Atl. 255, 68 Am. St. Rep. 672; Harter *v.* Harter, 4 Pa. Dist. 211. See also Mellier *v.* Bartlett, 106 Mo. 381, 17 S. W. 295, where it was held that where a creditor permitted his judgment lien to expire and the time to elapse within which the judgment could be revived by a scire facias, he might bring an action at law on the judgment aided by attachment.

Not allowed pending appeal from judgment. — Where an appeal has been taken and a proper supersedeas bond executed by appellant, further action on the judgment is suspended and consequently an attachment issued thereon is improper. Johnson *v.* Williams, 82 Ky. 45, 5 Ky. L. Rep. 733.

Where one joint defendant not served with process.— Under a statute allowing attachment in an action on a judgment, the remedy is not available where the original proceeding was against two joint defendants, only one of whom was served with process. The one not served not being bound by such judgment plaintiff has no joint demand against defendants "arising upon a judgment." Oakley *v.* Aspinwall, 1 Duer (N. Y.) 1.

58. Witbeck *v.* Marshall-Wells Hardware Co., 188 Ill. 154, 58 N. E. 929 [*affirming* 88 Ill. App. 101]; Cockey *v.* Milne, 16 Md. 200; Clark *v.* Conner, 2 Strobh. (S. C.) 346. *Contra*, under former New York statute. Besley *v.* Palmer, 1 Hill (N. Y.) 482.

59. Young *v.* Cooper, 59 Ill. 121. But see Frellson *v.* Stewart, 14 La. Ann. 832, where it was held that a judgment creditor had no right to proceed against the property of his debtor by attachment, but must collect his judgment by writ of fieri facias.

As to attachment in aid of execution see Executions.

Debtor having visible property subject to execution.— In an action on a judgment, foreign attachment may issue to secure property of the debtor which cannot be taken by execution, though the debtor has visible property on which execution may be levied. Morse *v.* Pearl, 67 N. H. 317, 36 Atl. 255, 68 Am. St. Rep. 672.

Before expiration of a year and a day.—A writ in attachment may be issued in South Carolina, on a judgment recovered in another state, before the expiration of a year and a day from the date of its recovery. Clark *v.* Conner, 2 Strobh. (S. C.) 346.

60. Gutta Percha, etc., Mfg. Co. *v.* Houston, 108 N. Y. 276, 15 N. E. 402, 2 Am. St. Rep. 412 [*reversing* 46 Hun (N. Y.) 237, 11 N. Y. St. 302, 12 N. Y. Civ. Proc. 326]; Meyer *v.* Brooks, 29 Oreg. 203, 44 Pac. 281, 54 Am. St. Rep. 790; Nashua First Nat. Bank *v.* Van Vooris, 6 S. D. 548, 62 N. W. 378.

61. *California.*— De Leonis *v.* Etchepare, 120 Cal. 407, 52 Pac. 718.

District of Columbia.— Hoover *v.* Hathaway, 20 D. C. 591.

Louisiana.—West *v.* Chew, 18 La. Ann. 630.

Maryland.— Maryland Agricultural College *v.* Baltimore, etc., R. Co., 43 Md. 434; Hough *v.* Kugler, 36 Md. 186; Warwick *v.* Chase, 23 Md. 154.

New Jersey.— Goldmark *v.* Magnolia Metal Co., 65 N. J. L. 341, 47 Atl. 720; Heckscher *v.* Trotter, 48 N. J. L. 419, 5 Atl. 581; Cheddick *v.* Marsh, 21 N. J. L. 463; Day *v.* Bennett, 18 N. J. L. 287; Jeffery *v.* Wooley, 10 N. J. L. 123; Cocks *v.* Varney, 45 N. J. Eq. 72, 17 Atl. 108. But see Dickerson *v.* Simms, 1 N. J. L. 199.

New York.— Story *v.* Arthur, 35 Misc. (N. Y.) 244, 71 N. Y. Suppl. 776; Farquhar *v.* Wisconsin Condensed Milk Co., 30 Misc. (N. Y.) 270, 62 N. Y. Suppl. 305.

North Carolina.—Wilson *v.* Louis Cook Mfg. Co., 88 N. C. 5.

Pennsylvania.— International Oil Works *v.* Wells, 7 Pa. Co. Ct. 271; Walker *v.* Beury, 7 Pa. Co. Ct. 258; Isett *v.* Binder, 2 Chest. Co. Rep. (Pa.) 430.

Texas.— El Paso Nat. Bank *v.* Fuchs, 89 Tex. 197, 34 S. W. 206; Hochstadler *v.* Sam, 73 Tex. 315, 11 S. W. 408.

United States.— Zerega *v.* McDonald, 1 Woods (U. S.) 496, 30 Fed. Cas. No. 18,212 (construing Georgia statute); Clark *v.* Wilson, 3 Wash. (U. S.) 560, 5 Fed. Cas. No. 2,841 (construing Pennsylvania statute).

See 5 Cent. Dig. tit. "Attachment," § 30.

In Canada an attachment will be granted under the absconding debtor's act only for sums certain, where such an affidavit could be made as would enable a plaintiff, without a judge's order, to sue out bailable process. Clock *v.* Alfield, 5 U. C. Q. B. O. S. 504.

However, the remedy is not confined to cases where a debt, in the technical sense, exists; it extends to every demand arising *ex contractu* where any fixed standard for determining the amount is supplied by the contract itself or the law acting upon it.[62]

When an accounting is necessary to determine the amount, attachment will not lie. Ackroyd *v.* Ackroyd, 20 How. Pr. (N. Y.) 93; Hawes *v.* Clement, 64 Wis. 152, 25 N. W. 21.

Will not lie for a penalty.— When a sum named in a contract is in the nature of a penalty rather than liquidated damages, no attachment will lie in an action therefor. Hough *v.* Kugler, 36 Md. 186; State *v.* Beall, 3 Harr. & M. (Md.) 347; Cheddick *v.* Marsh, 21 N. J. L. 463.

What demands too uncertain.— In the following cases the amounts claimed were not deemed sufficiently certain to authorize attachments: A claim arising out of the alleged breach of a covenant in certain articles of agreement for the exchange of property, which contained numerous and complicated terms and conditions, embracing many things to be performed by the parties thereto. Hough *v.* Kugler, 36 Md. 186. An action against agents for not selling a cargo of flour, and investing the proceeds in coffee, the amount of damages being ascertained by a hypothetical account purporting to show what profits might have been made upon sale of the coffee. Warwick *v.* Chase, 23 Md. 154. A claim for breach of a covenant by a lessee to mine and remove a specified amount of ore annually. Heckscher *v.* Trotter, 48 N. J. L. 419, 5 Atl. 581. A claim for unadjudicated damages arising from the cutting of timber from lands in dispute. Walker *v.* Beury, 7 Pa. Co. Ct. 258.

Actions for settlement of partnership accounts.— An attachment will not lie in an action for the settlement of partnership accounts before any liquidation of the same, when from the nature of the business it is impossible for plaintiff to swear with any certainty to the amount that will be found due to him on a final settlement. Barrow *v.* McDonald, 12 La. Ann. 110; Brinegar *v.* Griffin, 2 La. Ann. 154; Johnson *v.* Short, 2 La. Ann. 277; Levy *v.* Levy, 11 La. 577.

62. *Alabama.*—Tennessee River Transp. Co. *v.* Kavanaugh, 93 Ala. 324, 9 So. 395; Guy *v.* Lee, 81 Ala. 163, 2 So. 273; Weaver *v.* Puryear, 11 Ala. 941.

Arkansas.— Messinger *v.* Dunham, 62 Ark. 326, 35 S. W. 435; Jones *v.* Buzzard, 2 Ark. 415.

California.— Dunn *v.* Mackey, 80 Cal. 104, 22 Pac. 64.

Colorado.— Hyman *v.* Newell, 7 Colo. App. 78, 42 Pac. 1016.

Connecticut.— New Haven Steam Saw-Mill Co. *v.* Fowler, 28 Conn. 103.

Georgia.— Brown *v.* Clayton, 12 Ga. 564.

Louisiana.— Hyde *v.* Higgins, 15 La. Ann. 1; Cross *v.* Richardson, 2 Mart. N. S. (La.) 323.

Maryland.— Failey *v.* Fee, 83 Md. 83, 34 Atl. 839, 55 Am. St. Rep. 326, 32 L. R. A. 311; Pinckney *v.* Dambmann, 72 Md. 173, 19 Atl. 450; Wilson *v.* Wilson, 8 Gill (Md.) 192, 50 Am. Dec. 685.

Michigan.— Roelofson *v.* Hatch, 3 Mich. 277.

Minnesota.—Baumgardner *v.* Dowagiac Mfg. Co., 50 Minn. 381, 52 N. W. 964; Davidson *v.* Owens, 5 Minn. 69.

Nebraska.— Withers *v.* Brittain, 35 Nebr. 436, 53 N. W. 375.

New Jersey.— Moore *v.* Richardson, 65 N. J. L. 531, 47 Atl. 424; Jeffery *v.* Wooley, 10 N. J. L. 123.

New York.— U. S. *v.* Graff, 4 Hun (N. Y.) 634, 67 Barb. (N. Y.) 304; Lawton *v.* Kiel, 51 Barb. (N. Y.) 30, 34 How. Pr. (N. Y.) 465; Matter of Marty, 3 Barb. (N. Y.) 229; Farquhar *v.* Wisconsin Condensed Milk Co., 30 Misc. (N. Y.) 270, 62 N. Y. Suppl. 305; Lenox *v.* Howland, 3 Cai. (N. Y.) 323.

Ohio.— Landis *v.* Case, 7 Ohio Dec. 454, 5 Ohio N. P. 366.

Pennsylvania.— Snowden *v.* Fulford Planing Mill Co., 5 Pa. Dist. 720, 19 Pa. Co. Ct. 65; Hanson *v.* Watson, 13 Wkly. Notes Cas. (Pa.) 534.

South Dakota.— Coats *v.* Arthur, 5 S. D. 274, 58 N. W. 675.

Texas.— Cohen *v.* Grimes, 18 Tex. Civ. App. 327, 45 S. W. 210; Loeb *v.* Crow, 15 Tex. Civ. App. 537, 40 S. W. 506; Hereford Cattle Co. *v.* Powell, 13 Tex. Civ. App. 496, 36 S. W. 1033.

United States.— Goldsborough *v.* Orr, 8 Wheat. (U. S.) 217, 5 L. ed. 600 (construing Maryland statute); Fisher *v.* Consequa, 2 Wash. (U. S.) 382, 9 Fed. Cas. No. 4,816 (construing Pennsylvania statute).

See 5 Cent. Dig. tit. "Attachment," § 30.

North Carolina — Uncertain damages.— Under N. C. Code, § 347, an attachment lies for damages growing out of a breach of contract even where they are purely uncertain. Foushee *v.* Owen, 122 N. C. 360, 29 S. E. 770; Judd *v.* Crawford Gold Min. Co., 120 N. C. 397, 27 S. E. 81.

What claims sufficiently certain.— The following demands have been held sufficiently certain to authorize an attachment: A bond for a deed, which recited as the consideration a cash payment to the grantor, and the payment of two certain mortgages, of specific amount, to the mortgagee. Stuyvesant *v.* Western Mortg. Co., 22 Colo. 28, 43 Pac. 144. A bond conditioned for the payment of money, where the exact amount it was intended to secure was not stated in the condition but could be ascertained with certainty, and which the appellee might properly verify by oath. Williams *v.* Jones, 38 Md. 555. A claim for unpaid commissions already earned, and for commissions which probably would have been earned during the remainder of the period covered by the contract, had the de-

C. Demands Arising Ex Delicto — 1. In Absence of Express Provision. Attachment will not lie on demands *ex delicto* unless it very clearly appears from the language of the statute that the legislature intended to extend the remedy to such cases.[63] When it can be seen from the wording of the statute that it intends to require the relationship of debtor and creditor to exist between the parties, no attachment will lie on demands sounding in tort.[64] If an attachment be issued in

fendant continued to perform its part. Farquhar *v.* Wisconsin Condensed Milk Co., 30 Misc. (N. Y.) 270, 62 N. Y. Suppl. 305. A claim for a breach of contract for the purchase of a commodity, where the damages claimed were the difference between the cost and the price at which the product was sold. Lawton *v.* Kiel, 51 Barb. (N. Y.) 30, 34 How. Pr. (N. Y.) 465. A claim for a loss which a seller agreed to stand good for, and which was caused by the buyer being compelled to sell the goods at a reduced price, because they were damaged. Foushee *v.* Owen, 122 N. C. 360, 29 S. E. 770. A claim for services rendered under an agreement to pay their value, which could be definitely ascertained. Evans *v.* Breneman, (Tex. Civ. App. 1898) 46 S. W. 80. A claim on the bond of a claimant of attached property, who had converted the property, and against whom judgment for the conversion had been rendered. Fleming *v.* Stansell, 13 Tex. Civ. App. 558, 36 S. W. 504. A claim under a stipulation in a draft for payment of reasonable attorney's fees in case of collection by an attorney. Waples-Platter Grocer Co. *v.* Basham, 9 Tex. Civ. App. 638, 29 S. W. 1118. A claim for the agreed price of goods sold, with interest since the date of delivery. Woldert *v.* Nedderhut Packing Provision Co., 18 Tex. Civ. App. 602, 46 S. W. 378.

63. *Arkansas.*— Hynson *v.* Taylor, 3 Ark. 552.

California.— Mudge *v.* Steinhart, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17; Griswold *v.* Sharpe, 2 Cal. 17.

Delaware.— Smith *v.* Armour, 1 Pennew. (Del.) 361, 40 Atl. 720.

Georgia.— Mills *v.* Findlay, 14 Ga. 230.

Louisiana.— Young *v.* The Ship Princess Royal, 22 La. Ann. 388, 2 Am. Rep. 731; West *v.* Chew, 18 La. Ann. 630; Childs *v.* Wilson, 15 La. Ann. 512; Barrow *v.* McDonald, 12 La. Ann. 110; Holmes *v.* Barclay, 4 La. Ann. 63; Swagar *v.* Pierce, 3 La. Ann. 435; Greiner *v.* Prendergast, 3 La. Ann. 376; Prewitt *v.* Carmichael, 2 La. Ann. 943; Baune *v.* Thomassin, 6 Mart. N. S. (La.) 563.

Maryland.— Hough *v.* Kugler, 36 Md. 186.

Missouri.— McDonald *v.* Forsyth, 13 Mo. 549.

Nebraska.— Hart *v.* Barnes, 24 Nebr. 782, 40 N. W. 322; Rouss *v.* Wright, 14 Nebr. 457, 16 N. W. 765, 18 Nebr. 234, 25 N. W. 80; Handy *v.* Brong, 4 Nebr. 60.

New Jersey.— Goldmark *v.* Magnolia Metal Co., 65 N. J. L. 341, 47 Atl. 720; Day *v.* Bennett, 18 N. J. L. 287.

North Carolina.— Minga *v.* Zollicoffer, 23 N. C. 278.

Ohio.— Squair *v.* Shea, 7 Ohio Dec. (Reprint) 71, 1 Cinc. L. Bul. 99.

Oregon.—Sheppard *v.* Yocum, 11 Oreg. 234, 3 Pac. 824.

South Carolina.— Sargeant *v.* Helmbold, Harp. (S. C.) 219.

South Dakota.— Nashua First Nat. Bank *v.* Van Vooris, 6 S. D. 548, 62 N. W. 378.

Texas.— El Paso Nat. Bank *v.* Fuchs, 89 Tex. 197, 34 S. W. 206; Hochstadler *v.* Sam, 73 Tex. 315, 11 S. W. 408.

Wisconsin.—Elliott *v.* Jackson, 3 Wis. 649.

See 5 Cent. Dig. tit. "Attachment," § 24 *et seq.*

Waiver tort and suing on implied contract see *supra*, VI, B, 2, a.

Pennsylvania—Foreign attachment.—Previous to the Pennsylvania act of May 15, 1874, foreign attachment was not in any case permissible in actions *ex delicto*. Boyer *v.* Bullard, 102 Pa. St. 555; Coleman's Appeal, 75 Pa. St. 441; Strock *v.* Little, 45 Pa. St. 416; Carland *v.* Cunningham, 37 Pa. St. 228; Porter *v.* Hildebrand, 14 Pa. St. 129; Jacoby *v.* Gogell, 5 Serg. & R. (Pa.) 450; Piscataqua Bank *v.* Turnley, 1 Miles (Pa.) 31.; Krohn *v.* Wolf, 7 Del. Co. (Pa.) 420, 7 Northampt. Co. Rep. (Pa.) 18; Fisher *v.* Consequa, 2 Wash. (U. S.) 382, 9 Fed. Cas. No. 4,816. *Compare* Brown *v.* Wilson, 1 Phila. (Pa.) 120, 7 Leg. Int. (Pa.) 199. Under that act, where defendant, after the arising of a liability *ex delicto*, removes from the state to avoid service of process, foreign attachment will lie. Krohn *v.* Wolf, 7 Del. Co. (Pa.) 420, 7 Northampt. Co. Rep. (Pa.) 18.

Action against clerk for misfeasance in office.— An action for misfeasance in office against a clerk of court who has given no official bond is one for a mere tort, and not a claim for debt for which a foreign attachment in chancery will lie. Dunlop *v.* Keith, 1 Leigh (Va.) 430, 19 Am. Dec. 755.

To recover money embezzled and lost at gambling.— Cal. Code Civ. Proc. §§ 537, 538, not allowing a writ of attachment where the gravamen is a tort, it will not lie in an action to recover from defendants money which plaintiffs intrusted to their clerk and defendants won from him in gambling. Babcock *v.* Briggs, 52 Cal. 502.

Iowa — Where defendant refuses to pay or secure debt.— Iowa Code, § 1848, as amended in 1853, providing that an attachment may issue in an action on plaintiff's sworn petition that defendant has property "which he refuses to give either in payment or security of said debt," authorizes attachment, on the ground stated, only in actions founded on contract, and not in tort. Raver *v.* Webster, 3 Iowa 502, 66 Am. Dec. 96.

64. Hart *v.* Barnes, 24 Nebr. 782, 40 N. W. 322; Day *v.* Bennett, 18 N. J. L. 287. See also Smith *v.* Armour, 1 Pennew. (Del.) 361,

such an action without statutory authority, a judgment against the attached property is void and may be collaterally attacked.[65]

2. Where Expressly Authorized by Statute. Under the statutes in many of the states the remedy is now extended to claims sounding in tort.[66] By some statutes it is expressly authorized on certain specified demands arising *ex delicto*, such as the wrongful conversion of personal property,[67] or injuries to personal

364, 40 Atl. 720 (where the court said: "The statute therefore in its express terms, seems to be based upon the existence of a subsisting indebtedness as the foundation of the right of the writ"); El Paso Nat. Bank *v.* Fuchs, 89 Tex. 197, 34 S. W. 206 [*reversing* (Tex. Civ. App. 1895) 34 S. W. 203] (where it was held that the persistent use of the words "debt" and "creditor" in the statute showed that the remedy was not intended to apply to torts).

Under statutes founded on the custom of London, an attachment will lie only on contracts, express or implied, for payment of money, to enforce which debt or *indebitatus assumpsit* can be maintained. Mills *v.* Findlay, 14 Ga. 230. See also Hazard *v.* Jordan, 12 Ala. 180.

Action founded on "any indebtedness."— In Fellows *v.* Brown, 38 Miss. 541, it was held that a statute confining the remedy by attachment to "actions or demands, founded on any indebtedness, or for the recovery of damages for the breach of any contract, express or implied, and the actions founded on any penal statute," had no application to actions of tort.

Action "for the recovery of money."— Under a former statute in New York authorizing attachment in actions "for the recovery of money," it was held in some cases that the remedy lay on demands arising *ex delicto* (Ward *v.* Begg, 18 Barb. (N. Y.) 139; Floyd *v.* Blake, 11 Abb. Pr. (N. Y.) 349, 19 How. Pr. (N. Y.) 542; Hernstien *v.* Matthewson, 5 How. Pr. (N. Y.) 196); but the contrary doctrine is supported by the weight of authority (Shaffer *v.* Mason, 43 Barb. (N. Y.) 501, 18 Abb. Pr. (N. Y.) 455, 29 How. Pr. (N. Y.) 55; Knox *v.* Mason, 3 Rob. (N. Y.) 681; Knapp *v.* Meigs, 11 Abb. Pr. N. S. (N. Y.) 405; Gordon *v.* Gaffey, 11 Abb. Pr. (N. Y.) 1; Crossman *v.* Lindsley, 42 How. Pr. (N. Y.) 107; Saddlesvene *v.* Arms, 32 How. Pr. (N. Y.) 280).

"An action on the case is not founded upon any indebtedness: but on the mere justice and conscience of the plaintiff's right to recover." Hynson *v.* Taylor, 3 Ark. 552.

Trover not a "money demand."— Under a statute authorizing attachment only on money demands, the remedy is not available in an action of trover. Marshall *v.* White, 8 Port. (Ala.) 551.

Detinue is not a "money demand."— Le Baron *v.* James, 4 Ala. 687.

65. Mudge *v.* Steinhart, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17. But see Hardin *v.* Lee, 51 Mo. 241.

66. *Alabama.*— Hadley *v.* Bryars, 58 Ala. 139.

Iowa.— Curry *v.* Allen, 55 Iowa 318, 7 N. W. 635.

Michigan.— McCrea *v.* Russell, 100 Mich. 375, 58 N. W. 1118.

Minnesota.— Davidson *v.* Owens, 5 Minn. 69.

Missouri.— Pearson *v.* Gillett, 55 Mo. App. 312.

Tennessee.— Swan *v.* Roberts, 2 Coldw. (Tenn.) 153; Barber *v.* Denning, 4 Sneed (Tenn.) 266; Thompson *v.* Carper, 11 Humphr. (Tenn.) 542.

Washington.— Blackinton *v.* Rumpf, 12 Wash. 279, 40 Pac. 1063.

United States.— Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931, construing Tennessee statute.

Meaning of "right of action."— Under a statute authorizing attachment where the person having "the right of action" should make a certain complaint on oath, it was held that the words "right of action" embraced demands *ex delicto*. Lum *v.* Steamboat Buckeye, 24 Miss. 564.

Connecticut — Trover.— Remedy by attachment lies in aid of an action of trover. Lewis *v.* Morse, 20 Conn. 211.

Georgia — Seduction of plaintiff's daughter. — Under Ga. Code, § 4524, authorizing attachments in all cases of "money demands," whether arising *ex contractu* or *ex delicto*, a claim for damages for the seduction of plaintiff's daughter is such a "money demand" as entitles plaintiff to sue out an attachment. Graves *v.* Strozier, 37 Ga. 32.

Oklahoma — Cause arising wholly within territory.— Plaintiff in a civil action for damages arising from tort, where the cause of action arose wholly within the limits of the territory, is entitled to an attachment when defendant is a non-resident of the territory. Kidd *v.* Seifert, (Okla. 1901) 65 Pac. 931.

67. Barry *v.* Fisher, 8 Abb. Pr. N. S. (N. Y.) 369, 39 How. Pr. (N. Y.) 521; Scott *v.* Simmons, 34 How. Pr. (N. Y.) 66; Smith *v.* Walker, 6 S. C. 169.

What is a wrongful conversion of personal property.— A statute allowing attachment in an action for wrongful conversion of personal property applies to a wrongful detention of personal property (Barry *v.* Fisher, 8 Abb. Pr. N. S. (N. Y.) 369, 39 How. Pr. (N. Y.) 521); a conversion of money (Arming *v.* Monteverde, 8 N. Y. St. 812); a conversion by a foreign corporation of its own stock (Condouris *v.* Imperial Turkish, etc., Co., 3 Misc. (N. Y.) 66, 22 N. Y. Suppl. 695, 51 N. Y. St. 772).

Effect of resort to wrong remedy.— Where, after an executor's accounts had been settled and the balance in his hands ascertained, and

property in consequence of negligence, fraud, or other wrongful act;[68] and where this is the case the remedy will not be extended by construction beyond the clear intention of the statute.[69] Under a statute allowing the remedy where defendant's liability[70] was criminally incurred, attachment will lie in an action to recover unliquidated damages for assault and battery,[71] or to recover money lost at gambling,[72] or to recover on a demand arising out of a rape on plaintiff's daughter.[73]

D. Immatured Demands — 1. In Absence of Statutory Provision — a. In General. As a general rule no attachment will lie, in the absence of express statutory authority, to secure a demand which is not due and payable.[74]

he had failed to pay over such balance, an action was brought against him for "conversion of personal property," it was held that an attachment was properly granted, being given by statute in such action, and that the fact that plaintiff may have resorted to the wrong remedy did not affect his right to the writ. The court said: "The jurisdiction to grant an attachment does not, we think, involve a preliminary determination by the officer to whom the application for the writ is made, whether in law the case presented by the complaint will entitle the plaintiff to the relief he asks. It is sufficient to authorize him to grant the writ that it appears that the action is brought for one of the causes where attachment may issue, and the other facts are shown which authorize the process to be issued." Van Camp *v.* Searle, 147 N. Y. 150, 161, 41 N. E. 427, 70 N. Y. St. 878.

68. What is an injury to personal property. — Under a statute authorizing the remedy in an action for an injury to personal property in consequence of negligence, fraud, or other wrongful act, an attachment will lie in an action by one who has been induced to advance money on forged business paper (Bogart *v.* Dart, 25 Hun (N. Y.) 395), or who has been induced to part with personal property by fraud (Campion Card, etc., Co. *v.* Searing, 47 Hun (N. Y.) 237; Weiller *v.* Schreiber, 11 Abb. N. Cas. (N. Y.) 175, 63 How. Pr. (N. Y.) 491. But see Wittner *v.* Von Minden, 27 Hun (N. Y.) 234); or in an action by a gas company for damages caused by the wrongful breaking by defendant of its gas pipes, which extended from its own land and works under the streets throughout a city, by which wrongful breaking gas was caused to escape (Newbern Gas Light Co. *v.* Lewis Mercer Constr. Co., 113 N. C. 549, 18 S. E. 693).

What not an injury to personal property. — Under such a provision an attachment will not lie in an action for a false warranty or a deceit in the sale of personal property (Webb *v.* Bowler, 50 N. C. 362); an action by an administrator to recover for the death of his intestate caused by defendant's negligence (James *v.* Signell, 60 N. Y. App. Div. 75, 69 N. Y. Suppl. 680); an action by a merchant for damages against a broker, who, having been employed to sell a quantity of goods for plaintiff, reported a sale which plaintiff accepted but afterward repudiated on the ground that defendant was himself the purchaser — the goods remaining all the while in the plaintiff's hands and the damages claimed arising from a fall in the market (Roome *v.* Jennings, 61 N. Y. Super. Ct. 361, 19 N. Y. Suppl. 825, 46 N. Y. St. 894).

69. South Carolina — Action for slander. — In Addison *v.* Sujette, (S. C. 1897) 27 S. E. 631, it was held that S. C. Code Civ. Proc. § 248, allowing attachments to issue "in any action for the recovery of money or . . . property, whether real or personal, and for damages for the wrongful conversion and detention of personal property, or an action for the recovery of damages for injury done to either person or property," etc., did not authorize an attachment in a suit for slander.

70. Ohio — "Obligation" equivalent to "liability." — In the Ohio statute allowing attachment where defendant has "fraudulently or criminally contracted the debt, or incurred the obligation" sued on, the word "obligation" is equivalent to "liability." Sturdevant *v.* Tuttle, 22 Ohio St. 111.

71. Kirk *v.* Whitaker, 22 Ohio St. 115; Sturdevant *v.* Tuttle, 22 Ohio St. 111.

72. Wise *v.* Martin, 5 Ohio S. & C. Pl. Dec. 550; Jenks *v.* Richardson, 71 Fed. 365 (construing the Ohio statute).

73. Kuehm *v.* Paroni, 20 Nev. 203, 19 Pac. 273.

74. *Illinois.* — Schilling *v.* Deane, 36 Ill. App. 513.

Massachusetts. — Swift *v.* Crocker, 21 Pick. (Mass.) 241; Pierce *v.* Jackson, 6 Mass. 242.

Michigan. — Hinchman *v.* Town, 10 Mich. 508; Hale *v.* Chandler, 3 Mich. 531; Galloway *v.* Holmes, 1 Dougl. (Mich.) 330.

Mississippi. — Henderson *v.* Thornton, 37 Miss. 448, 75 Am. Dec. 70.

New York. — Johnson *v.* Buckel, 65 Hun (N. Y.) 601, 20 N. Y. Suppl. 566, 48 N. Y. St. 924; Smadbeck *v.* Sisson, 66 How. Pr. (N. Y.) 225; Reilly *v.* Sisson, 66 How. Pr. (N. Y.) 224.

Pennsylvania. — Under the Pennsylvania act of 1869, an attachment will not lie for a debt not due (Jones *v.* Brown, 167 Pa. St. 395, 31 Atl. 647 [*affirming* 3 Pa. Dist. 294, 15 Pa. Co. Ct. 202]; Coaks *v.* White, 11 Wkly. Notes Cas. (Pa.) 271, 15 Phila. (Pa.) 295, 39 Leg. Int. (Pa.) 60); but under the domestic attachment act it was held that the remedy was available, although the debt was not due and payable (McCullough *v.* Grishobber, 4 Watts & S. (Pa.) 201 [*overruling* Pratt *v.* Styer, 1 Browne (Pa.) 282)].

Virginia. — Batchelder *v.* White, 80 Va. 103;

b. Where Plaintiff Rescinds Contract. Where a party to a contract not yet matured is guilty of fraud or other conduct entitling the other party to rescind,[75] a cause of action arises in favor of the latter which is immediately enforceable; and if such cause of action, left to plaintiff after rescission, be of a nature to warrant the issue of an attachment,[76] he may resort to that remedy notwithstanding the immaturity of the rescinded contract.[77]

2. Where Expressly Authorized by Statute — a. In General. Provision is quite commonly made by statute for the issue of attachments in certain cases where the demand sued on is not yet due.[78] The statutes usually limit the

McCluny *v.* Jackson, 6 Gratt. (Va.) 96. But see Williamson *v.* Bowie, 6 Munf. (Va.) 176.

Canada.— Kyle *v.* Barnes, 10 Ont. Pr. 20.

See 5 Cent. Dig. tit. "Attachment," § 31.

Void as against creditors.— An attachment issued, without statutory authority, upon a debt not due, is void as against creditors whose rights are injuriously affected by it. Davis *v.* Eppinger, 18 Cal. 378, 79 Am. Dec. 184.

75. Fraud must be of nature to warrant rescission.— In Meyers *v.* Rauch, 4 Pa. Dist. 333, it was held that attachment would not lie for a debt not due unless the fraud in contracting the debt was such that the creditor could rescind the contract.

As to rescission of contracts, generally, see Contracts.

76. Demand not authorizing attachment.— Where plaintiff sold on credit, taking notes in extension of the time of payment, it was held that he could not rescind the contract and sue for the contract price, but that his only remedy after such rescission was replevin for the goods or trover for their value, in neither of which actions could attachment be maintained under the Pennsylvania statutes. Jones *v.* Brown, 167 Pa. St. 395, 31 Atl. 647. In Emerson *v.* Detroit Steel, etc., Co., 100 Mich. 127, 58 N. W. 659, the court said that where plaintiff, by rescinding an immatured contract for fraud, has acquired a cause of action sounding in tort, he could not, by waiving the tort, transform it back into an implied contract, and by such juggling entitle himself to an attachment as upon a matured contractual obligation. See also Lederer *v.* Rosenthal, 99 Wis. 235, 74 N. W. 971.

Cannot attach on strength of rescinded contract.— Plaintiff cannot rescind the contract and at the same time maintain his attachment on the strength of it. If he elects to sue on the express contract he must wait until its maturity, in the absence of any statute to the contrary. Johnson *v.* Buckel, 65 Hun (N. Y.) 601, 20 N. Y. Suppl. 566, 48 N. Y. St. 924. See also Jones *v.* Brown, 167 Pa. St. 395, 31 Atl. 647.

Inconsistent grounds.— In attachment to recover claims not due, on the grounds of fraudulent contraction of the liability by defendant and of fraudulent disposition of his property, both grounds must be proved, the former to entitle defendant to sue before maturity, and the latter to entitle him to attachment. Hence, if the alleged fraudulent representations are statements of defendant that he owed nothing, and his property was unencumbered, and the alleged fraudulent disposition is a subsequent mortgaging of his property to secure his indebtedness, then plaintiff is not entitled to attachment; since, if the representations were false, and defendant was in fact indebted, then the mortgages to cover such indebtedness were not fraudulent. Johnson *v.* Buckel, 65 Hun (N. Y.) 601, 20 N. Y. Suppl. 566, 48 N. Y. St. 924.

77. *Alabama.*— Russell *v.* Gregory, 62 Ala. 454, action to recover purchase-money, vendor having disabled himself from complying with his contract to deliver goods.

California.— Patrick *v.* Montader, 13 Cal. 434.

Maryland.— Summers *v.* Oberndorf, 73 Md. 312, 20 Atl. 1068.

New York.— Muser *v.* Lissner, 67 How. Pr. (N. Y.) 509.

Pennsylvania.— Schack *v.* Loucheim, (Pa. 1885) 1 Atl. 429; Lippincott *v.* Prendergast, 2 Del. Co. (Pa.) 322.

Tennessee.— Douglas *v.* Bank of Commerce, 97 Tenn. 133, 36 S. W. 874, action based on original debt in payment of which plaintiff had received negotiable paper which proved unbankable.

United States.— Perry *v.* Sharpe, 8 Fed. 15, action for deceit whereby plaintiff was induced to sell goods on credit, attachment being authorized in such action by the Ohio statute.

See 5 Cent. Dig. tit. "Attachment," § 33.

78. *Alabama.*— Ware *v.* Seasongood, 92 Ala. 152, 9 So. 138.

Georgia.— Selleck *v.* Twesdall, Dudley (Ga.) 196.

Iowa.— Brown *v.* Cairns, 107 Iowa 727, 77 N. W. 478; Bacon *v.* Marshall, 37 Iowa 581; Brace *v.* Grady, 36 Iowa 352; Stacy *v.* Stichton, 9 Iowa 399; Churchill *v.* Fulliam, 8 Iowa 45.

Kentucky.— Hey *v.* Harding, 21 Ky. L. Rep. 771, 53 S. W. 33; Schnabel *v.* Jacobs, 20 Ky. L. Rep. 1596, 49 S. W. 774.

Louisiana.— Irish *v.* Wright, 8 Rob. (La.) 428; Tyson *v.* Lansing, 10 La. 444; Fisk *v.* Chandler, 7 Mart. (La.) 24.

Michigan.— Chase *v.* Wayne Cir. Judge, 118 Mich. 358, 76 N. W. 913; Mosher *v.* Bay Cir. Judge, 108 Mich. 503, 66 N. W. 384; Gunn Hardware Co. *v.* Denison, 83 Mich. 40, 46 N. W. 940.

Nebraska.— Cox *v.* Peoria Mfg. Co., 42 Nebr. 660, 60 N. W. 933.

remedy on such demands within specified limits prescribing the conditions which must exist to authorize it;[79] and where the grounds on which the attachment may issue in this class of cases are specially enumerated, the remedy is available only where one or more of the specified grounds exists.[80] Generally the pro-

Ohio.—Smead *v.* Chrisfield, 1 Handy (Ohio) 442, 12 Ohio Dec. (Reprint) 227.

South Carolina.—*Ex p.* Chase, (S. C. 1901) 38 S. E. 718.

South Dakota.— Finch *v.* Armstrong, 9 S. D. 255, 68 N. W. 740.

Tennessee.— McBee *v.* Bearden, 7 Lea (Tenn.) 731; Greene *v.* Starnes, 1 Heisk. (Tenn.) 582; Swan *v.* Roberts, 2 Coldw. (Tenn.) 153; Howell *v.* Cobb, 2 Coldw. (Tenn.) 104, 88 Am. Dec. 591.

Texas.— Cleveland *v.* Boden, 63 Tex. 103; Cox *v.* Reinhardt, 41 Tex. 591; Pioneer Sav., etc., Co. *v.* Peck, 20 Tex. Civ. App. 111, 49 S. W. 160; Rabb *v.* White, (Tex. Civ. App. 1898) 45 S. W. 850; Sims *v.* Howell Bros. Shoe Co., (Tex. App. 1890) 15 S. W. 120; Mack *v.* James, 1 Tex. App. Civ. Cas. § 547.

Wisconsin.— Lederer *v.* Rosenthal, 99 Wis. 235, 74 N. W. 971.

Wyoming.— Crain *v.* Bode, 5 Wyo. 255, 39 Pac. 747.

United States.— Perry *v.* Sharpe, 8 Fed. 15; Ely *v.* Hanks, 8 Fed. Cas. No. 4,430, 1 West. L. Month. 107, both cases construing Ohio statute.

Constitutionality of statute.—A statute authorizing the commencement of an action by attachment before the maturity of the debt is not in conflict with a constitutional provision that the legislature shall pass no bill of attainder, *ex post facto* law, or law impairing the obligation of contracts. Mosher *v.* Bay Cir. Judge, 108 Mich. 503, 66 N. W. 384.

Alabama — Equitable attachment — Ala. Code (1886), §§ 3489, 2929, authorize the issue of an equitable attachment for a demand not due. Ware *v.* Seasongood, 92 Ala. 152, 9 So. 138.

79. Strict construction of statute.— The rule requiring attachment proceedings to be confined strictly within the limits of the statute by which they are authorized is especially applicable to a case where the debt is not yet due. Lederer *v.* Rosenthal, 99 Wis. 235, 74 N. W. 971.

Contingent liabilities.— A statute allowing attachment for a demand not due does not apply where defendant's liability is contingent only. Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391; Ellis *v.* Harrison, 104 Mo. 270, 16 S. W. 198.

As to contingent demands, generally, see *infra*, VI, E.

Alabama — Only in actions for "collection of a debt."— Under Ala. Civ. Code (1896), § 524, attachment will issue before maturity of the obligation only where the action is one to enforce the "collection of a debt;" and consequently the remedy is not available against one who has agreed to deliver cotton at a future date, such demand not being a "debt." Moore *v.* Dickerson, 44 Ala. 485.

Michigan—Showing reasons for immediate issue.— Under 3 How. Anno. Stat. Mich. § 8016*a*, in order to obtain an attachment on a debt not due, it must be shown to the satisfaction of the judge that reasons exist for the immediate issue of the writ, in addition to the reasons required in cases of debts past due. Chase *v.* Wayne Cir. Judge, 118 Mich. 358, 76 N. W. 913; Mosher *v.* Bay Cir. Judge, 108 Mich. 503, 66 N. W. 384; Pierce *v.* Johnson, 93 Mich. 125, 53 N. W. 16, 18 L. R. A. 486; Ripon Knitting Works *v.* Johnson, 93 Mich. 129, 53 N. W. 17; Howell *v.* Dickerman, 88 Mich. 361, 50 N. W. 306 (discussing exhaustively the conditions necessary to the issue of attachments on immatured demands).

Nebraska — Order need not appear in writ. — Under the Nebraska statutes, where a writ of attachment is issued on a demand not due, the order allowing such issue need not appear on the face of the writ. Armstrong *v.* Lynch, 29 Nebr. 87, 45 N. W. 274.

South Carolina — No presumption that clerk was satisfied.— Under the South Carolina act of 1883, attachment is allowed for a debt not due only where it is shown by affidavit to the satisfaction of the judge, clerk, or justice who issues the writ, that a ground for attachment for an immatured demand exists; and under this statute no presumption arises that a clerk was satisfied of the facts authorizing an attachment in such case, where it was not shown to him by the affidavit or the complaint in the action that the debt was not yet due. Correll *v.* Georgia Constr., etc., Co., 37 S. C. 444, 16 S. E. 156.

80. *Georgia.*— Levy *v.* Millman, 7 Ga. 167.

Iowa.— Allerton *v.* Eldridge, 56 Iowa 709, 10 N. W. 252; Stacy *v.* Stichton, 9 Iowa 399; Danforth *v.* Carter, 1 Iowa 546.

Kentucky.— Wolfstein *v.* Steinharter, 10 Ky. L. Rep. 635; McChord *v.* Barker, 8 Ky. L. Rep. 790; Cowherd *v.* Harding, 7 Ky. L. Rep. 217.

Mississippi.— Thomason *v.* Wadlington, 53 Miss. 560.

Nebraska.— Dayton Spice-Mills Co. *v.* Sloan, 49 Nebr. 622, 68 N. W. 1040; Caulfield *v.* Bittenger, 37 Nebr. 542, 56 N. W. 302.

Ohio.— Chamberlin *v.* Strong, 3 Ohio Dec. (Reprint) 296, L. & Bank. Bul. 296.

Tennessee.— Swan *v.* Roberts, 2 Coldw. (Tenn.) 153.

Washington.— Cox *v.* Dawson, 2 Wash. 381, 26 Pac. 973.

United States.— Black *v.* Zacharie, 3 How. (U. S.) 483, 11 L. ed. 690, construing Louisiana statute.

See 5 Cent. Dig. tit. "Attachment," § 32.

Iowa — Defendant about to dispose of his property.— Under a statute authorizing attachment before maturity of the debt where defendant is about to dispose of his property to defraud his creditors, or is about to remove

ceedings can go no further before maturity than to create a lien, and no final judgment can be rendered until after the maturity of the demand.[81]

b. Joinder of Demands Due and Demands Not Due. Under some statutes a debt not due may be joined with one that is due and an attachment be issued for the aggregate amount, where grounds of attachment applicable to both debts are stated in the affidavit.[82]

E. Contingent Demands. No attachment can be sued out where the indebtedness of defendant to plaintiff depends upon a contingency which may never happen,[83] and the improper issue of an attachment on such a demand is not

from the state and refuses to provide for the payment of the debt on its maturity, it was held that the clause regarding the refusal to secure the debt applied only where the ground for the attachment was the intended removal from the state, and not where the ground was the intention to dispose of his property. Danforth *v.* Carter, 1 Iowa 546; Pitkins *v.* Boyd, 4 Greene (Iowa) 255.

Louisiana — Construction of statutes.—The Louisiana act of 1826, § 7, allowing an attachment on a debt not due, when the creditor swears to the existence of the debt, and one of the grounds specified in the act, "and, moreover, swears" that the debtor is about to remove his property out of the state before the debt becomes due, was amended by La. Code Prac. art. 244, by substituting "or swears" for "and moreover swears." It was held, that article 244 could not be construed as typographically incorrect, but must be read "or swears;" hence a creditor seeking an attachment for a debt not due need only swear to one of the other grounds, without also swearing that defendant is about to remove his property out of the state. Merchants', etc., Bank *v.* McKellar, 44 La. Ann. 940, 11 So. 592.

South Dakota — Intent to remove property from state.— It is only when an action is brought on a claim not due that plaintiff is entitled to an attachment on the ground that his debtor is about to remove his property, with the intent to hinder and delay him in the collection of his debt, under S. D. Stat. (1895), § 5014. Foley-Wadsworth Implement Co. *v.* Porteous, 8 S. D. 74, 65 N. W. 429.

Tennessee — When ground other than non-residence.— Under Tenn. Code, § 3456, providing that an attachment may be sued out on a debt not due, except when defendant resides out of the state, an attachment may issue as well against a non-resident as against a resident where the debt is not due, if such non-residence is not the only ground laid for such attachment. Merchants' Nat. Bank *v.* McCarger, 9 Heisk. (Tenn.) 401.

81. Cox *v.* Peoria Mfg. Co., 42 Nebr. 660, 60 N. W. 933; Rabb *v.* White, (Tex. Civ. App. 1898) 45 S. W. 850.

In New Mexico an attachment on debts not yet due is separate fro- any action at law to recover judgment thereon, and can go no further than to create an attachment lien in advance of the commencement of such action. Staab *v.* Hersch, 3 N. M. 153, 3 Pac. 248.

Effect of refusal to grant attachment.— The issue of a writ of attachment upon a debt not due because of the fraudulent intent of the debtor is, under the Nebraska statutes, discretionary with the court or judge; and if the order is refused, the action must be dismissed, as it cannot be maintained on a debt not due unless accompanied by the attachment. Cox *v.* Peoria Mfg. Co., 42 Nebr. 660, 60 N. W. 933.

Where attachment invalid, action abates. — Since the power to attach furnishes the only authority to sue on a demand not due, it follows that where the attachment is invalid the action necessarily abates. Streissguth *v.* Reigelman, 75 Wis. 212, 43 N. W. 1116 [*approving* Gowan *v.* Hanson, 55 Wis. 341, 13 N. W. 238].

82. Kahn *v.* Kuhn, 44 Ark. 404; Selleck *v.* Twesdall, Dudley (Ga.) 196. In Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391, the court was inclined to doubt whether attachment proceedings for debts due and debts not due could be joined in the same suit, but did not decide the point.

Practice in federal court.—Although the decisions and statutes of Kansas require that where an action is brought for demands due in part, and not due in part, separate petitions must be filed, these provisions are not binding upon the federal courts sitting within the state. The petition in an attachment suit was therefore sustained, although claims already due were joined with claims not yet matured. O'Connell *v.* Reed, 56 Fed. 531, 12 U. S. App. 369, 5 C. C. A. 586 [*followed* in Bowden *v.* Burnham, 59 Fed. 752, 19 U. S. App. 448, 8 C. C. A. 248].

83. Miller *v.* McMillan, 4 Ala. 527; Mobile Planters', etc., Bank *v.* Andrews, 8 Port. (Ala.) 404; Natchez First Nat. Bank *v.* Moss, 41 La. Ann. 227, 6 So. 25; Denegre *v.* Milne, 10 La. Ann. 324; Shannon *v.* Langhorn, 9 La. Ann. 526; Henderson *v.* Thornton, 37 Miss. 448, 75 Am. Dec. 70; Aultman *v.* Smyth, (Tex. Civ. App. 1897) 43 S. W. 932. See also cases cited *supra*, III, A. But by statute in Tennessee any accommodation indorser or surety may sue out an attachment against the property of his principal as a security for his liability, whether the debt on which he is bound be due or not. McBee *v.* Bearden, 7 Lea (Tenn.) 731; Greene *v.* Starnes, 1 Heisk. (Tenn.) 582; Howell *v.* Cobb, 2 Coldw. (Tenn.) 104, 88 Am. Dec. 591.

The liability of the person primarily liable on a draft to a surety thereon is purely contingent until the maturity and dishonor of the draft; hence the surety cannot sue the

cured by a subsequent happening of the contingency which fixes defendant's liability.[84] The rule, however, applies only to such a contingency as must happen in order to fix an absolute indebtedness, and not to one which may merely go to defeat an indebtedness already fixed.[85]

F. Demands Otherwise Secured. In the absence of any statutory provision to the contrary, the fact that a demand is otherwise secured will not prevent the issue of an attachment upon it;[86] though where a creditor expressly agrees, upon

principal by attachment before maturity. Mobile Planters', etc., Bank *v.* Andrews, 8 Port. (Ala.) 404; Benson *v.* Campbell, 6 Port. (Ala.) 455.

Liability of acceptor to drawer.— The drawer of a bill of exchange cannot support an attachment against the acceptor before the bill has matured, and the drawer's liability thereon has become fixed by its dishonor. Black *v.* Zacharie, 3 How. (U. S.) 483, 11 L. ed. 690.

Liability of maker to indorser.— Before a promissory note is due, an indorser thereof cannot attach property of the maker on the ground that the latter is about to remove from the state, and the indorser will have to pay the note. Taylor *v.* Drane, 13 La. 62. But see Williamson *v.* Bowie, 6 Munf. (Va.) 176.

Liability of maker to sureties.— The sureties on a promissory note cannot sue the maker by attachment until they have been obliged to pay the note or become primarily liable for the amount. Hearne *v.* Keith, 63 Mo. 84. But see Moore *v.* Holt, 10 Gratt. (Va.) 284.

Liability of drawer to holder.—An attachment cannot be maintained against the property of the drawer of a bill of exchange before maturity, although the acceptor has been attached and has become insolvent before the attachment, for until maturity the drawer is not the unconditional debtor of the holder. Natchez First Nat. Bank *v.* Moss, 41 La. Ann. 227, 6 So. 25; Denegre *v.* Milne, 10 La. Ann. 324.

Liability of drawer to accommodation acceptor.—An accommodation acceptor has no right of action against the drawer until the maturity of the bill and payment by the acceptor, and therefore cannot maintain attachment before such payment. Todd *v.* Shouse, 14 La. Ann. 426; Shannon *v.* Langhorn, 9 La. Ann. 526; Read *v.* Ware, 2 La. Ann. 498; Henderson *v.* Thornton, 37 Miss. 448, 75 Am. Dec. 70; Ellis *v.* Harrison, 104 Mo. 270, 16 S. W. 198.

Liability of sureties.— Suit by attachment against the sureties before the time fixed by their contract for payment cannot be maintained on the theory that the insolvency of the principal debtor matures the debt and authorizes suits and attachments against the sureties. When the code for specific purposes matures the debt of the insolvent debtor, the insolvency contemplated by the code is a cession of property by the debtor. State Nat. Bank *v.* New Orleans Brewing Assoc., 49 La. Ann. 934, 22 So. 48.

Liability of indorser.—The indorser of a note becomes the debtor of the holder only after compliance with the conditions of presentment at maturity, failure of maker to pay, and due notice given, and until then the demand will not support an attachment against him. H. B. Claflin Co. *v.* Feibelman, 44 La. Ann. 518, 10 So. 862; Harrod *v.* Burgess, 5 Rob. (La.) 449. But see Smead *v.* Chrisfield, 1 Handy (Ohio) 442, 12 Ohio Dec. (Reprint) 227.

Liability of obligors to assignor of note.— Since the assignor of a note is not liable thereon till the assignee has exercised due diligence in prosecuting the obligors, the assignor, before the note matures, is not entitled to an attachment against them under Ky. Code, § 237. Steinharter *v.* Wolfstein, 13 Ky. L. Rep. 871.

Attorney's fee payable in case of default.— A percentage payable as attorney fees upon the amount of an immatured promissory note in case of default as to the principal thereof is a contingent liability and not within the statute allowing attachment for an existing debt or demand though not yet due. Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391.

84. Barth *v.* Graf, 101 Wis. 27, 76 N. W. 1100, where the right of action on an agreement of a principal to indemnify his sureties arose after the issue of the attachment.

85. Brown *v.* Cairns, 107 Iowa 727, 77 N. W. 478, where it was held that a claim for future rent provided by a lease was not contingent, though the lessor reserved the right to sell off part of the property, reducing the future rental sixty cents an acre for such reduction, or to sell the entire property, subject to the lease, or upon forfeiture to the lessee of one year's rent, being the rent for the last year's occupancy.

86. Sandel *v.* George, 18 La. Ann. 526; Whitwell *v.* Brigham, 19 Pick. (Mass.) 117; Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068; Branshaw *v.* Tinsley, 4 Tex. Civ. App. 131, 23 S. W. 184.

Where plaintiff secured by chattel mortgage.—A creditor whose claim is secured by a mortgage on personal property may waive his lien under the mortgage and maintain attachment against the debtor's property.

Maine.— Whitney *v.* Farrar, 51 Me. 418; Libby *v.* Cushman, 29 Me. 429.

Massachusetts.—Buck *v.* Ingersoll, 11 Metc. (Mass.) 226 [*limiting* Atkins *v.* Sawyer, 1 Pick. (Mass.) 351, 11 Am. Dec. 188, where the debt was secured by a mortgage on land]. *Compare* Cleverly *v.* Brackett, 8 Mass. 150, which holds that a pledgee cannot attach

sufficient consideration, to take no step to collect his debt within a given time, he cannot maintain an attachment thereon within the time specified.[87] In some jurisdictions it is provided by statute that attachment shall not lie where the demand is secured by mortgage, lien, or pledge. Where this is the case the security given must be of the kind contemplated by the statute,[88] and of a fixed, determinate character capable of being enforced with certainty.[89] Where the statute authorizes attachment in case the security has become valueless, without any act of plaintiff or the person to whom such security was given,[90] such provision is not applicable to a case where the security was originally worthless,[91] or has become so through plaintiff's fault.[92]

other property of the debtor without first returning the pledge. This case is of very doubtful authority.

New Hampshire.— Danforth *v.* Denny, 25 N. H. 155. See also Morse *v.* Woods, 5 N. H. 297.

Pennsylvania.— Coble *v.* Nonemaker, 78 Pa. St. 501.

South Dakota.— Pech Mfg. Co. *v.* Groves, 6 S. D. 504, 62 N. W. 109; Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

Vermont.— See Chapman *v.* Clough, 6 Vt. 123.

See 5 Cent. Dig. tit. "Attachment," § 37.

87. Craigmiles *v.* Hays, 7 Lea (Tenn.) 720.

88. A pledge of personal property is sufficient security under the California statute to prevent an attachment. Payne *v.* Bensley, 8 Cal. 260, 68 Am. Dec. 318.

Shares of stock as collateral security.— Where a creditor has received shares of stock as collateral security for his demand, it must be deemed secured by a lien under the California statute. Beaudry *v.* Vache, 45 Cal. 3.

Vendor's lien.—Where a vendor of land reserves title in himself until payment of the purchase-price, a lien exists in his favor which will prevent him from suing out an attachment (Gessner *v.* Palmateer, 89 Cal. 89, 24 Pac. 608, 26 Pac. 789, 13 L. R. A. 187; Hill *v.* Grigsby, 32 Cal. 55; Willman *v.* Freidman, (Ida. 1893) 35 Pac. 37); but where land is conveyed by absolute deed, the vendor has no lien thereon within the contemplation of the statute (Porter *v.* Brooks, 35 Cal. 199); and where the title has not passed no lien exists under an executor's contract for the sale of personalty, so as to preclude an attachment (Eads *v.* Kessler, 121 Cal. 244, 53 Pac. 656).

What not sufficient security.— Plaintiff's affidavit for attachment alleged that defendant was indebted to him on a certain promissory note made to the order of K, and indorsed by defendant. Defendant's motion to dissolve the attachment alleged that the debt was K's, and that he had died leaving a will by which he made his wife executrix and conferred on her full authority, without any order of court, to pay his just debts, for which purpose he bequeathed her a large estate. It was held that this did not give plaintiff a lien securing his debt, within the meaning of the California attachment law. State Bank *v.* Boyd, 86 Cal. 386, 25 Pac. 20.

A bond with sureties executed by the debtor is not a "mortgage or lien upon real or personal property or any pledge of personal property" under Cal. Code Civ. Proc. § 538. Slosson *v.* Glosser, (Cal. 1896) 46 Pac. 276.

Unaccepted bill of sale.—A creditor making a loan to defendant was informed by his attorney that a bill of sale, which had been drawn up, would afford him no protection, unless he took possession of the goods. The bill of sale was left with the attorney, and plaintiff never went into possession, but authorized the debtor to sell the goods and to make payment on the loan as he could spare the money. Thereafter plaintiff, in a suit on the note, issued an attachment on the goods alleging in his affidavit that the payment of the debt had not been secured by any mortgage, lien, or pledge of property by defendant. It was held, on motion to dissolve attachment, that the evidence showed no acceptance of the bill of sale, so as to render the affidavit false. Rodley *v.* Lyons, 129 Cal. 681, 62 Pac. 313.

89. Porter *v.* Brooks, 35 Cal. 199; Watson *v.* Loewenberg, 34 Oreg. 323, 56 Pac. 289, the latter case holding that the security was not sufficient if its validity was denied by defendant and it could be enforced, if at all, only at the end of a lawsuit.

90. **Sale of collateral security.**— Collateral security which has been sold in accordance with the conditions of the pledge, and the proceeds applied on the debt, has become valueless, as security, by act or authority of defendant, and the holder of the debt is not debarred from an attachment in an action for the amount remaining due. Williams *v.* Hahn, 113 Cal. 475, 45 Pac. 815.

Surrender of security.— Under the Idaho and Montana statutes it is held that, after the creditor has surrendered the security given, he may bring attachment for the debt. Wooddy *v.* Jamieson, (Ida. 1895) 40 Pac. 61; Parberry *v.* Woodson Sheep Co., 18 Mont. 317, 45 Pac. 278.

91. Barbieri *v.* Ramelli, 84 Cal. 154, 157, 23 Pac. 1086, where the court said: "Section 537 refers to a case where the security has changed in the value it had when originally taken,— has so depreciated as to become of no value. It has no reference to a case where there has been no change in valne."

92. **Allowing statute of limitations to run.** — One cannot have an attachment in a suit on a note on the ground that a mortgage given to secure its payment has become valueless from lapse of time. If defendant does

G. Statutory Liabilities. Where defendant's liability to plaintiff arises purely from statute it is not ordinarily regarded as a demand on which an attachment will lie under a statute authorizing the remedy only on causes arising out of contract, express or implied;[93] but where the demand is regarded as arising on contract as well as by virtue of the statute, attachment will lie.[94] Under a statute authorizing attachment for "any money demand" the remedy will lie on a statutory penalty where the amount is fixed or can be certainly ascertained.[95]

VII. PROCEEDINGS TO PROCURE.

A. In General. The jurisdiction of attachment proceedings being a special one, it cannot be legitimately exercised unless the attaching creditor pursues substantially the essential requirements of the statute,[96] and the court can act only

not choose to plead the statute of limitations, the security remains good; and, in any event, it is plaintiff's own fault if he allows the statute to run against him so as to render the security valueless. Page *v.* Latham, 63 Cal. 75.

93. Walker *v.* McCusker, 65 Cal. 360, 4 Pac. 206 (liability of tenant in possession to purchaser of land at foreclosure sale, for use and occupation from day of sale to expiration of time for redemption); Remington Paper Co. *v.* O'Dougherty, 32 Hun (N. Y.) 255, 6 N. Y. Civ. Proc. 79 (statutory liability for costs of a person who had prosecuted an action in the name of another for his own benefit).

94. The statutory liability of a stockholder for the debts of an insolvent corporation is one that arises out of a contract, or upon contract, as well as by the statute, and an attachment may issue on such demand under a statute limiting the remedy to contractual demands. Kohler *v.* Agassiz, 99 Cal. 9, 33 Pac. 741; Kennedy *v.* California Sav. Bank, 97 Cal. 93, 31 Pac. 846, 33 Am. St. Rep. 163; Cleveland Gas Co. *v.* Collins, 19 Ohio Cir. Ct. 247, 10 Ohio Cir. Dec. 475.

Action by borough for expense of laying sidewalk.—Under N. J. Pamph. Laws (1891), p. 389, § 2, giving to boroughs a right of action on contract against lot-owners, for the expense of laying sidewalks, such action against a non-resident owner may be properly begun by attachment. The statute is regarded as creating a debt for an ascertained sum of money due from defendant to plaintiff upon the former's implied contract to pay whatever the law ordered him to pay. State *v.* Spring Lake, 58 N. J. L. 136, 32 Atl. 77.

Liability of special partner where capital reduced.— Under Brightly's Purd. Dig. Pa. 937, providing that, if by payment to a special partner the original capital be reduced, such partner should be bound to make good his share of the capital with interest, it was held that the action to enforce such liability, being *ex contractu* and for a determinate sum, could be commenced by foreign attachment. Guillou *v.* Fontain, 11 Fed. Cas. No. 5,861, 2 Am. L. T. N. S. 502, 8 Chic. Leg. N. 25, 21 Int. Rev. Rec. 348, 7 Leg. Gaz. (Pa.) 321, 32 Leg. Int. (Pa.) 362, 1 N. Y. Wkly. Dig. 269, 23 Pittsb. L. J. (Pa.) 33.

95. Dittman Boot, etc., Co. *v.* Mixon, 120 Ala. 206, 24 So. 847 [*citing* U. S. Rolling Stock Co. *v.* Clark, 95 Ala. 322, 10 So. 917], where it was held that attachment would lie in an action to recover a statutory penalty for failure of a mortgagee, whose mortgage had been satisfied, to enter the satisfaction of record after being requested to do so.

96. *California.*— Rudolph *v.* Saunders, 111 Cal. 233, 43 Pac. 619. An attachment is regularly issued when the requirements of the code are complied with. Kohler *v.* Agassiz, 99 Cal. 9, 33 Pac. 741.

Georgia.— Garrett *v.* Taylor, 88 Ga. 467, 14 S. E. 869.

Iowa.— Courrier *v.* Cleghorn, 3 Greene (Iowa) 523.

Maryland.—Morton *v.* Grafflin, 68 Md. 545, 13 Atl. 341, 15 Atl. 298; Randle *v.* Mellen, 67 Md. 181, 8 Atl. 573; Rodemer *v.* Detmold, 9 Gill (Md.) 249.

Missouri.— Bryant *v.* Duffy, 128 Mo. 18, 30 S. W. 317 [*citing* Stanton *v.* Boschert, 104 Mo. 393, 16 S. W. 393; Gates *v.* Tusten, 89 Mo. 13; Norvell *v.* Porter, 62 Mo. 309; Cabeen *v.* Douglass, 1 Mo. 336].

Ohio.— Endel *v.* Leibrock, 33 Ohio St. 254.

Order of preparing papers.— No objection can be made to the preparation of all the papers requisite to the writ of attachment before or at the same time the complaint is prepared, so that the undertaking and affidavit be not filed in advance of the complaint, and the writ be not issued before the summons. Wheeler *v.* Farmer, 38 Cal. 203.

Allowance of amount to be attached.— In Iowa the statute provides that, where an attachment issues in an action "founded on contract," the petition must state that something is due, and the amount thus sworn to shall be a guide to the sheriff, but if the action is "not founded on contract," the petition must be presented to some judge, who shall make an allowance thereon of the amount of property that may be attached. These provisions were intended to draw the line between actions *ex contractu* and *ex delicto*. Johnson *v.* Butler, 2 Iowa 535. For cases founded on contract, in which an allowance was not necessary, see Decorah *v.* Dunston, 34 Iowa 360; McGinn *v.* Butler, 31 Iowa 160; Swan *v.* Smith, 26 Iowa 87; Lord *v.* Gaddis, 6 Iowa 57. Where this writ was is-

under the special power limited by the statute and according to the forms of procedure it prescribes.[97]

B. Jurisdiction and Venue — 1. Jurisdiction in General. The term "jurisdiction," as used in attachment cases, refers both to the power of the court to move in any event by means of this particular process — jurisdiction over the subject-matter[98]— and to the authority to move in the proceeding (conceding the power to adopt the particular form of process), as dependent upon compliance with the formalities prescribed, or the existence of peculiar grounds at the time the remedy is invoked.[99]

2. Strict Control of Statute. Attachment proceedings being in derogation of the common law, jurisdiction thereof is special and limited. Courts, even those of general jurisdiction,[1] cannot proceed by attachment unless the power rests upon express statutory sanction.[2]

3. Necessity of Presence of Property. The court cannot exercise its jurisdiction unless there is something upon which it can operate. There must be personal service upon defendant or property belonging to him must be within the state and a levy made thereupon.[3] The issue of the writ and its levy upon

sued in a suit on an unliquidated demand, and the petition was not presented to a court or judge for allowance thereon of the amount in value of property to be attached, it was held that the attachment should be dissolved on motion (Gates *v.* Reynolds, 13 Iowa 1); but under the statute permitting attachments to be amended at any time when objection is made thereto, if an attachment is issued without such allowance, in a case where the allowance is required, an amendment adding it will be permitted (Magoon *v.* Gillett, 54 Iowa 54, 6 N. W. 131). The allowance may be made by the judge as well when sitting in term as in vacation (Magoon *v.* Gillett, 54 Iowa 54, 6 N. W. 131), and his signature need not be certified under the seal of the court (Sherrill *v.* Fay, 14 Iowa 292).

An amendment supplying an element essential to jurisdiction will not give vitality to an attachment previously issued. Pope *v.* Hibernia Ins. Co., 24 Ohio St. 481.

97. West *v.* Woolfolk, 21 Fla. 189; Estlow *v.* Hanna, 75 Mich. 219, 42 N. W. 812; Buckley *v.* Lowry, 2 Mich. 418.

98. Quarl *v.* Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662 (holding that power to issue a writ effective to seize property is jurisdiction); Hall *v.* Hall, 12 W. Va. 1; Voorhees *v.* Jackson, 10 Pet. (U. S.) 449, 9 L. ed. 490.

99. Evesson *v.* Selby, 32 Md. 340; Strickler *v.* Hargis, 34 Nebr. 468, 51 N. W. 1039. See *infra*, VII, D; VII, E.

1. Randle *v.* Mellen, 67 Md. 181, 8 Atl. 573; Estlow *v.* Hanna, 75 Mich. 219, 42 N. W. 812.

2. *Alabama.*— Pullman Palace Car Co. *v.* Harrison, 123 Ala. 149, 25 So. 697, 82 Am. St. Rep. 68.

Florida.— West *v.* Woolfolk, 21 Fla. 189.

Iowa.— Tiffany *v.* Glover, 3 Greene (Iowa) 387.

Maryland.— Randle *v.* Mellen, 67 Md. 181, 8 Atl. 573.

Michigan.— Buckley *v.* Lowry, 2 Mich. 418.

New York.— Where the jurisdiction of a court is limited to a city, and it has no jurisdiction of a non-resident unless personally served within a city, and may only issue an attachment in a pending action, there is no authority to issue an attachment against the property of a non-resident debtor who cannot be served with summons. Fisher *v.* Curtis, 2 Sandf. (N. Y.) 660, 2 Code Rep. (N. Y.) 62. But where a court has authority to entertain all suits against joint debtors, where the summons has been personally served upon any one of them, an attachment may issue against the property of one non-resident joint defendant not served, if the other has been personally served within the jurisdiction. ——— *v.* ———, 1 Duer (N. Y.) 662.

The custom of London is not recognized, but everything depends upon the attachment act in determining jurisdiction. Tolman *v.* Thompson, 2 McCord (S. C.) 43.

Consent cannot confer such jurisdiction. Abernathy *v.* Moore, 83 Mo. 65; Rocheport Bank *v.* Doak, 75 Mo. App. 332.

Act regulating practice does not abrogate jurisdiction.—N. Y. Acts (1831), c. 300, §§ 33, 47, authorizing attachments against the property of non-residents of the county to issue from the marine court, was not abrogated by the act of 1872, c. 639, assimilating the practice and form of the attachment to the code provisions, and enlarging the jurisdictional amount. Nugent *v.* Garvey, 1 N. Y. City Ct. 319.

3. *Illinois.*—Bates *v.* Kaestner, 69 Ill. App. 620; Schroeer *v.* Pettibone, 58 Ill. App. 436; Lord *v.* Babel, 16 Ill. App. 434.

Kentucky.— Bradford *v.* Gillaspie, 8 Dana (Ky.) 67.

Maine.— Stephenson *v.* Davis, 56 Me. 73.

Minnesota.— Kenney *v.* Goergen, 36 Minn. 190, 31 N. W. 210; Stone *v.* Myers, 9 Minn. 303, 86 Am. Dec. 104.

New York.— Douglass *v.* Phenix Ins. Co., 138 N. Y. 209, 33 N. E. 938, 52 N. Y. St. 164, 34 N. Y. St. 448, 20 L. R. A. 118; Carr *v.* Corcoran, 44 N. Y. App. Div. 97, 60 N. Y. Suppl. 763.

property within the state bring the property under the jurisdiction of the court.[4]

4. Construction of Statutes Conferring Jurisdiction. Where jurisdiction is expressly conferred upon particular courts, this will not necessarily abolish the jurisdiction of other courts already recognized by law, as exclusive jurisdiction cannot be implied.[5] Where the statutes confer upon certain officers or courts all powers and jurisdiction to the same extent as they are possessed by other designated

North Carolina.—Balk *v.* Harris, 122 N. C. 64, 30 S. E. 318, 45 L. R. A. 257, 260.

Ohio.— Oil Well Supply Co. *v.* Koen, 64 Ohio St. 472, 60 N. E. 603; Buckeye Pipe Line Co. *v.* Fee, 62 Ohio St. 543, 57 N. E. 446, 78 Am St. Rep. 743; Evans *v.* Justine, 7 Ohio 273.

Oklahoma.— Central L. & T. Co. *v.* Campbell Commission Co., 5 Okla. 396, 49 Pac. 48.

Pennsylvania.—Noble *v.* Thompson Oil Co., 79 Pa. St. 354, 21 Am. Rep. 66; Pennsylvania R. Co. *v.* Pennock, 51 Pa. St. 244.

Texas.— Ward *v.* Lathrop, 11 Tex. 287.

United States.—Graham *v.* Spencer, 14 Fed. 603 (construing Vermont statute); Zerega *v.* McDonald, 1 Woods (U. S.) 496, 30 Fed. Cas. No. 18,212 (construing Georgia statute).

See 5 Cent. Dig. tit. "Attachment," § 200.

4. *Connecticut.*— O'Sullivan *v.* Overton, 56 Conn. 102, 14 Atl. 300.

Illinois.— Buck *v.* Coy, 73 Ill. App. 160.

Indiana.— Quarl *v.* Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662.

Iowa.— Rowan *v.* Lamb, 4 Greene (Iowa) 468.

Missouri.— Abernathy *v.* Moore, 83 Mo. 65.

Ohio.— Paine *v.* Mooreland, 15 Ohio 435, 45 Am. Dec. 585.

West Virginia.— Hall *v.* Hall, 12 W. Va. 1.

Wisconsin.— Cox *v.* North Wisconsin Lumber Co., 82 Wis. 141, 51 N. W. 1130.

Jurisdiction from time of issue of writ.— In New York it was held that in an action against a non-resident the court acquired jurisdiction from the time of the allowance of the warrant of attachment. Treadwell *v.* Lawlor, 15 How. Pr. (N. Y.) 8; Burkhardt *v.* Sanford, 7 How. Pr. (N. Y.) 329.

Notice.— As to whether the mere levy is sufficient to confer jurisdiction so that a judgment without further notice would be void, or only voidable, see *infra,* XVI, A, 1, a.

Attachment by vendee of money paid express company.—Where a vendee in Georgia received goods by express, C. O. D., from New York, paid the charges, then discovered that the goods were not those ordered, immediately tendered the goods back to the express company, and notified the vendor of such action, it was held that attachment would lie in favor of the vendee against the non-resident vendor for the purchase-money paid the express company. Cohen *v.* Lasky, 102 Ga. 846, 30 S. E. 531.

Corporate stock.— It is held that for the purposes of an attachment, stock in a corporation has its *situs* where the corporation is located. Winslow *v.* Fletcher, 53 Conn. 390, 4 Atl. 250, 55 Am. Rep. 122; Reid Ice Cream Co. *v.* Stephens, 62 Ill. App. 334; New Jersey Sheep, etc., Co. *v.* Traders Deposit Bank, 104 Ky. 90, 20 Ky. L. Rep. 565, 46 S. W. 677; Pinney *v.* Nevills, 86 Fed. 97. And stock of a non-resident in a corporation organized under the laws of one state cannot be attached in another state if the stock is not actually or constructively in the latter state, though the business of the corporation is being conducted there. Ireland *v.* Globe Milling, etc., Co., 19 R. I. 180, 32 Atl. 921, 61 Am. St. Rep. 756, 29 L. R. A. 429. See also Moore *v.* Gennett, 2 Tenn. Ch. 375. But stock of a domestic corporation owned by a non-resident may be attached. Gordon *v.* Baltimore, 5 Gill (Md.) 231.

In Missouri it was held that there was nothing in the statute in that state which limited the right of attachment to shares of domestic corporations; that shares of a foreign corporation which had its principal place of business in that state, kept its stock-books and exercised all its corporate franchises and functions there, were subject to attachment. Smith *v.* Pilot Min. Co., 47 Mo. App. 409 [*distinguishing* Plimpton *v.* Bigelow, 93 N. Y. 592, *infra*].

In New York it is held that the statute under which shares of corporate stock owned by a non-resident might be levied on applied only to shares of stock in a domestic corporation (Plimpton *v.* Bigelow, 93 N. Y. 592. But see National F. Ins. Co. *v.* Chambers, 53 N. J. Eq. 468, 32 Atl. 663), and to shares of stock in a foreign corporation the certificates of which are within the state (Simpson *v.* Jersey City Contracting Co., 165 N. Y. 193, 58 N. E. 896).

County warrants.— County warrants, payable to bearer and capable of transfer without indorsement, may be seized as the *res* in the state where they are found. Thum *v.* Pingree, 21 Utah 348, 61 Pac. 18.

Evidence of debt in another state.— Where the statute gives the creditor living within the state the right to attach a debt, it does not matter that the evidence of the debt is held in another state. Olcott *v.* Guerinck, 19 Ohio Cir. Ct. 32 [*approving* Wilson *v.* Gifford, 12 Ohio Cir. Ct. 597]. Conversely, however, where a debtor absconds an attachment of notes and mortgages received by him as security for the purchase-price of land in another state, the notes being made by residents of such other state, is void, as such notes are merely evidences of the debt. Owen *v.* Miller, 10 Ohio St. 136, 75 Am. Dec. 502.

Attachment of debts of non-residents see Garnishment.

5. Shillaber *v.* Waldo, 1 Hawaii 31.

courts, jurisdiction is thereby conferred by necessary implication on the former to entertain proceedings by attachment when such jurisdiction is possessed by the courts whose powers furnish the measure of those which the act purports to confer.[6]

5. Relation of Auxiliary Attachment to Principal Action. The special proceeding by attachment must be in the same court as that in which the action is pending and to which the attachment is auxiliary.[7]

6. Jurisdiction of Subject-Matter of Action — a. In General. The jurisdiction over attachment proceedings is not entirely apart from and independent of the jurisdiction which the court may otherwise exercise over the subject-matter of the suit. That is to say, if the cause of action itself is beyond the pale of the court's jurisdiction, such court cannot assume to exercise jurisdiction over the cause simply because the party has invoked it through the process of attachment;

6. Bain *v.* Mitchell, 82 Ala. 304, 2 So. 706; Rice *v.* Watts, 71 Ala. 593; Griffin *v.* Appleby, 69 Ala. 409; Sturman *v.* Stone, 31 Iowa 115; Scott Hardware Co. *v.* Riddle, 84 Mo. App. 275; Brown *v.* Bissett, 21 N. J. L. 46; Morrel *v.* Buckley, 20 N. J. L. 667, in which last case, under the first clause of the act constituting the circuit courts, it was provided that those courts "shall be, and are hereby constituted, courts of original jurisdiction and of record; and be vested with, and have, all the power and authority incident to courts of common law." It was said that these words alone would be sufficient to sustain the objection that the act constituting these courts extended to them only the common-law powers and jurisdiction, but that as the act immediately proceeds to amplify the jurisdiction by adding the words that they shall have "power, authority and jurisdiction, in like manner, and to the like extent, as the Courts of Common Pleas, and Supreme Court of this State now have, to institute, hear, try, and determine all actions and causes," these last words were sufficient to confer jurisdiction to proceed by writs of attachment to the extent that the supreme court and common pleas court possess such jurisdiction.

Contra — Limited jurisdiction increased.— Where the limited jurisdiction of a city court did not include the power to issue attachments, an act enlarging the jurisdiction or declaring that such court should have concurrent jurisdiction with the court of general sessions and common pleas, in all cases of misdemeanors, etc., and in "all civil cases, to the amount of $500," was held to add only to the jurisdiction of the city court in the cases particularly mentioned, and as nothing was said about the process of attachment, the act conferred no jurisdiction in that regard. Tolman *v.* Thompson, 2 McCord (S. C.) 43; Roddy *v.* Aitken, Dudley (S. C.) 232.

Power of courts of record conferred.—When a particular court is made a court of record with all the powers and duties of such court, the modes prescribed by the general law of the land for the institution of suits in courts of record being either by summons upon a party, or attachment against his property, the particular court is invested with power to proceed by attachment. Lackey *v.* Seibert, 23 Mo. 85, referring to the jurisdiction of law commissioners of St. Louis county under such a provision.

7. Moore *v.* Sheppard, 1 Metc. (Ky.) 97; Richardson *v.* Jenks, 56 Ohio St. 422, 47 N. E. 49.

Action pending on proceedings in error.— Under a code provision that plaintiff in a civil action for the recovery of money may, at or after the commencement of the action, have an attachment upon certain grounds, and that an order shall be made by the clerk of the court "in which the action is brought," etc., it is held that, upon the filing of an affidavit and bond in the district court, that court has jurisdiction to issue the attachment in the action which was originally brought in the justice's court and is pending in the district court on proceedings in error. Strickler *v.* Hargis, 34 Nebr. 468, 51 N. W. 1039.

Motion to vacate — Waiver of objection.— Where an attachment issued from a court of chancery as process auxiliary to a case pending in a law court, defendant compelled complainant to elect whether he would proceed at law or in equity, and thereupon complainant dismissed the action at law, it was held that defendant could not afterward object to the jurisdiction of the chancery court, although the attachment should have issued from, and been made returnable to, the court in which the original suit was pending. Isaacks *v.* Edwards, 7 Humphr. (Tenn.) 464, 46 Am. Dec. 86.

8. *Alabama.*— Pullman Palace Car Co. *v.* Harrison, 122 Ala. 149, 25 So. 697, 82 Am. St. Rep. 68, where, under a statute providing that the affidavit must set out the cause of action, that the complaint must be filed by plaintiff, and the cause tried by the court as in suits commenced by summons and complaint, it was held that the power of the court to decide upon the cause of action as presented by the pleadings must determine the jurisdiction.

Arkansas.— Lemay *v.* Williams, 32 Ark. 166, holding that the statute which provided for the attachment of mortgaged personal property applied only to circuit courts and that justices of the peace had no jurisdiction under it.

Indiana.—Wilkinson *v.* Moore, 79 Ind. 397; Boorum *v.* Ray, 72 Ind. 151.

and if under particular circumstances plaintiff may sue out an attachment, while in the absence of such circumstances he could not sue, as where the debt is not due, then, if the attachment is wrongly sued out because of the non-existence of the required condition, the writ and the action must fall together.[9]

b. Amount in Controversy. When the jurisdiction of particular causes, as between different courts, depends upon the amount in controversy, the same consideration will control the power to proceed by attachment.[10]

7. On Transfer of Cause After Levy. If the writ is issued by an inferior court having jurisdiction, but by reason of the character of the levy, as where the levy is made upon land, the proceedings must be transferred to a court of higher jurisdiction, the jurisdiction of the latter court is considered original.[11]

8. In Equity — a. In General. Attachment statutes generally provide a special legal remedy.[12] Statutes of various states, however, authorize proceedings by attachment in suits in equity, or in suits of an equitable nature, as well as in actions at law, where the grounds of attachment exist,[13] even where the suit is based upon a purely legal demand,[14] but the jurisdiction depends upon the

New York.— Kerr *v.* Mount, 28 N. Y. 659.
Tennessee.— Walker *v.* Wynne, 3 Yerg. (Tenn.) 61.

9. Seidentopf *v.* Annabil, 6 Nebr. 524; Harrison *v.* King, 9 Ohio St. 388; August *v.* Seeskind, 6 Coldw. (Tenn.) 166, the last case distinguishing the writ of original attachment, which is the original leading process in a cause to bring the property of defendant into court and thereby give the court jurisdiction of the action against defendant, from a writ issued in a cause pending, over which the court has already acquired jurisdiction, as in a creditor's bill upon a judgment to set aside fraudulent conveyances, where the original process is the writ of subpœna which issues upon the filing of the bill and defendant is brought into court by service of the subpœna, or, if he is a non-resident or for other sufficient cause, by publication.

10. Benedict *v.* Bray, 2 Cal. 251, 56 Am. Dec. 332; Hawkins *v.* Com., 1 T. B. Mon. (Ky.) 144; Wragg *v.* Kelley, 42 Miss. 231; Stewart *v.* Vaughn, 3 Coldw. (Tenn.) 22. See also Monks *v.* Strange, 25 Mo. App. 12.

Determination of amount.— In determining the jurisdiction of the county court in a suit by attachment and service of citation out of the state, the amount in controversy is the alleged indebtedness rather than the value of the property attached. Barnett *v.* Rayburn, (Tex. App. 1890) 16 S. W. 537.

11. Vancleve *v.* Wilson, 2 Ohio 202.

12. McPherson *v.* Snowden, 19 Md. 197.

Equitable claim.—An attachment can issue only on a legal and not an equitable claim. Beyer *v.* Continental Trust Co., 63 Mo. App. 521 [*citing* Lackland *v.* Garesche, 56 Mo. 267; Beach *v.* Baldwin, 14 Mo. 597; Bachman *v.* Lewis, 27 Mo. App. 81]. The proceeding is essentially legal, and is not an appropriate action in which to ascertain and adjust partnership affairs, and to establish the interest of defendant in a fund which may be attached. Peoples' Bank *v.* Shryock, 48 Md. 427, 30 Am. Rep. 476. A bill to compel the marshaling of assets is not a proceeding in which an attachment will lie. Buck *v.* Bransford, 58 Ark. 289, 24 S. W. 103.

13. *Alabama.*— Ware *v.* Seasongood, 92 Ala. 152, 9 So. 138, holding that under Ala. Code (1886), § 3498, providing that a court of equity may issue an attachment on equitable demands in any case in which an attachment at law is authorized, and section 2929 allowing the issue of an attachment on a debt not due, an equitable attachment might be properly issued on an immatured debt.

Arkansas.—Bonner *v.* Little, 38 Ark. 397; American Land Co. *v.* Grady, 33 Ark. 550.

Indiana.— Quarl *v.* Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662, holding that as under the code the distinction between suits in equity and actions at law is abolished, all actions are brought in one form and in the same tribunal, and in such tribunal all issues are tried, whether legal or equitable, and as there is nothing in the attachment statute limiting the remedy to particular civil actions, an attachment may issue in any action, whether it be of a legal or equitable nature.

Iowa.— Curry *v.* Allen, 55 Iowa 318, 7 N. W. 635; Baldwin *v.* Buchanan, 10 Iowa 277; Crouch *v.* Crouch, 9 Iowa 269.

Kentucky.—Lyon *v.* Johnson, 3 Dana (Ky.) 544; Bibb *v.* Smith, 1 Dana (Ky.) 580; Wallace *v.* Hanley, 4 J. J. Marsh. (Ky.) 622.

New York.— Corson *v.* Ball, 47 Barb. (N. Y.) 452.

Virginia.— Chesapeake, etc., R. Co. *v.* Paine, 29 Gratt. (Va.) 502.

West Virginia.— Reed *v.* McCloud, 38 W. Va. 701, 18 S. E. 924; Peyton *v.* Cabell, 25 W. Va. 540.

Same process as at law.—An attachment in equity under the Tennessee act of 1801 was held to be the same process as at law and expressly upon the same footing. Terril *v.* Rogers, 3 Hayw. (Tenn. 203.

14. Lee *v.* Wilson, 5 Ky. L. Rep. 765; Johnson *v.* Rankin, (Tenn. Ch. 1900) 59 S. W. 638; Klepper *v.* Powell, 6 Heisk. (Tenn.) 503; Wilson *v.* Beadle, 2 Head (Tenn.) 510; Isaacks *v.* Edwards, 7 Humphr. (Tenn.) 464, 46 Am. Dec. 86; Reed *v.* McCloud, 38 W. Va. 701, 18 S. E. 924.

statute.[15] If the demand is purely legal a bill will not lie where the remedy by attachment at law is adequate,[16] and the doctrine that the court of equity should take jurisdiction in analogy to the proceeding at law can be applied only where the demand is equitable or there is some special ground for equitable interference.[17] If, moreover, there is anything in the provisions relating to attachments which limits the remedy to certain civil actions, such limitations must control, and will exclude it from certain equitable suits where the limitation recognizes the former distinction between suits in equity and actions at law.[18]

Constitutionality.— W. Va. Code (1887), c. 106, § 13, which provides that an attachment may be sued out in equity for the recovery of damages for a wrong, is constitutional. McKinsey *v.* Squires, 32 W. Va. 41, 9 S. E. 55.

Removal or absconding — Inadequacy of legal remedy.— In Kentucky the legislature allowed a party to proceed against an absent debtor in equity and it was held that this was intended to supply the defect of the legal remedy by reason of the fact that no action in the usual course of the common law could be maintained for want of service of process, because, if defendant removes from the state, a return of *non est inventus* would not authorize an attachment. Moore *v.* Simpson, 5 Litt. (Ky.) 49. A creditor may have process of attachment from a court of equity against an absent debtor, though the debtor might have been sued at law before leaving the state, if such debtor has been absent while one term of the circuit court elapsed in the county of his residence. Dudley *v.* Porter, 1 B. Mon. (Ky.) 403.

Exclusive jurisdiction.— In Tennessee it was held that although debtor and creditor are non-residents of that state, and both residents of the same state, the chancery courts had jurisdiction, expressly conferred by statute, independently of the attachment laws, to aid such creditor to subject his debtor's "real or personal property" situate in the state to the payment of his debt, where the creditor had exhausted his legal remedy in the state of their common residence; that the statute made the jurisdiction exclusive under those conditions and under no other, and was not repealed or affected by the subsequent modification of the attachment laws, forbidding the issue of original attachment where both creditor and debtor are non-residents of the state and residents of the same state, except upon affidavit that the debtor has fraudulently removed his property to the state of Tennessee to evade process of law in the state of their common residence. Taylor *v.* Badoux, 92 Tenn. 249, 21 S. W. 522.

15. Allen *v.* Montgomery, 48 Miss. 101; Sims *v.* Charleston Bank, 3 W. Va. 415, the latter case holding that, under the West Virginia code of 1860, unless plaintiff's claim was an equitable one, the only remedy in equity was in a suit against a non-resident debtor.

Jurisdiction of chancery against its own debtors.— In Rutland *v.* Cummings, 7 Humphr. (Tenn.) 279, it was held that the chancery court had primary jurisdiction, on general grounds, without any aid by statute, upon a petition under oath by the clerk and master in the case to which the fund belonged, to issue an attachment against a person who was about to remove his property from the state, or otherwise conceal and dispose of it, when indebted by note to the clerk and master for the benefit of a suitor, although suit had been brought upon the note at law and was then pending.

Jurisdiction in rem.— Where the demand is purely legal and the ground of the attachment is the intention of the debtor to remove his property out of the commonwealth, that ground alone gives jurisdiction to a court of equity, and the jurisdiction which it acquires is prescribed by the statute and limited in its operation to the property of the debtor. Farmer *v.* Bascom, 9 B. Mon. (Ky.) 23.

16. *Alabama.*— Smith *v.* Moore, 35 Ala. 76; McKenzie *v.* Bentley, 30 Ala. 139.

Indiana.— Latham *v.* Barlow, 6 Blackf. (Ind.) 97.

Mississippi.— Echols *v.* Hammond, 30 Miss. 177.

Virginia.—Chesapeake, etc., R. Co. *v.* Paine, 29 Gratt. (Va.) 502.

West Virginia.— Peyton *v.* Cabell, 25 W. Va. 540.

17. Smith *v.* Moore, 35 Ala. 76; Sims *v.* Charleston Bank, 3 W. Va. 415.

But where the claim is of an equitable nature the remedy by attachment for the recovery of a legal demand is administered in equity by analogy. Kirkman *v.* Vanlier, 7 Ala. 217.

Equitable nature of claim not sufficient.— On the other hand, it is held that there must be something more than the mere equitable nature of the demand, where the grounds of the equitable jurisdiction to issue an attachment are prescribed. Graham *v.* Merrill, 5 Coldw. (Tenn.) 622.

18. Accounting, being purely for specific equitable relief, is not an action for the recovery of money under provisions giving the remedy of attachment in such actions. Stone *v.* Boone, 24 Kan. 337; Treadway *v.* Ryan, 3 Kan. 437; Thorington *v.* Merrick, 101 N. Y. 5, 3 N. E. 794; Williams *v.* Freeman, 12 N. Y. Civ. Proc. 334; Guilhorn *v.* Lindo, 9 Bosw. (N. Y.) 601 (which was an action for an injunction to restrain the use of a trademark and for an accounting); Ebner *v.* Bradford, 3 Abb. Pr. N. S. (N. Y.) 248 (action for cancellation of deed and accounting); Wallace *v.* Hitchcock, 18 Abb. Pr. (N. Y.) 291 note; Adkins *v.* Loucks, 107 Wis. 587, 83 N. W. 934 (where the provisional remedy of

b. Retention of Jurisdiction For Complete Relief. If the court obtains jurisdiction for the purpose of issuing the attachment it will retain jurisdiction for all purposes.[19]

9. Federal Courts. Federal courts have jurisdiction to issue attachments according to the form and manner of procedure of the state where the court sits, where defendant can be served with process;[20] but where defendant is not a resident of the district, a federal court cannot acquire jurisdiction to entertain an original suit against him by attachment of his property within the district. Jurisdiction of the person by service of process or appearance is necessary,[21] and

attachment of property under the statutes of that state was held to be confined to actions at law to recover money due upon contract); Sbiel *v.* Patrick, 59 Fed. 992, 20 U. S. App. 407, 8 C. C. A. 440 (as to action by shareholder of dissolved corporation to recover moneys of the corporation wrongfully diverted from it by another while the corporation was a going concern and construing New York statute).

Where personal money judgment cannot be rendered attachment will not lie under such a statute. Hoover *v.* Gibson, 24 Ohio St. 389. A surety on commercial paper not yet due, who sues his principal for indemnity on his own behalf, and not on behalf of the payee to enforce payment, will be deemed to be suing for specific relief, and not upon a "debt or demand arising on contract;" hence he cannot issue attachment against defendant on the ground of non-residence. Brannin *v.* Smith, 2 Disn. (Ohio) 436.

Action to set aside assignment and to enforce plaintiff's debt against his debtor is held to be an action for the "recovery of money," within the code provision authorizing attachment in such actions. National Exch. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028.

Foreclosure.— Under Kan. Civ. Code, § 190, allowing an attachment in every "civil action for the recovery of money," an order of attachment may properly issue in an action to foreclose a mechanic's lien for the amount of money claimed on an account. Gillespie *v.* Lovell, 7 Kan. 419, which case was followed in Martin *v.* Holland, 87 Ind. 105, and the principle applied in an action to foreclose a mortgage where plaintiff was entitled to a personal judgme t. See also Reynolds *v.* Wright, 18 Ky. L. Rep. 1017, 38 S. W. 861, 39 S. W. 424. But in New York it was held that an action to foreclose a mortgage is not an action for the recovery of money only. Van Wyck *v.* Bauer, 9 Abb. Pr. N. S. (N. Y.) 142; Wallace *v.* Hitchcock, 18 Abb. Pr. (N. Y.) 291 note.

Specific relief and recovery of money.— Though the action is for specific relief, if it is also for the recovery of money, an attachment will lie. Goble *v.* Howard, 12 Ohio St. 165 (holding that one partner in an action, after the dissolution of the firm, against his copartner, to recover a general balance claimed upon an unsettled partnership account between them, may have an order of attachment, as in other cases of civil actions, for the recovery of money); Hendrickson *v.* Brown, (Okla. 1901) 65 Pac. 935; Bingham *v.* Keylor, 19 Wash. 555, 53 Pac. 729.

19. McHaney *v.* Cawthorn, 4 Heisk. (Tenn.) 508.

20. Adler *v.* Cole, 12 Wis. 188; North *v.* McDonald, 1 Biss. (U. S.) 57, 18 Fed. Cas. No. 10,312. But see U. S. *v.* Stevenson, 1 Abb. (U. S.) 495, 27 Fed. Cas. No. 16,395, where the authority to issue an attachment seems to be recognized without regard to any sanction in the state practice therefor.

District of Columbia.— In Hard *v.* Stone, 5 Cranch C. C. (U. S.) 503, 11 Fed. Cas. No. 6,046, it was held that the circuit court of the District of Columbia had jurisdiction of an attachment issued by its clerk on a warrant from a justice of the peace, under Md. Acts (1795), c. 56; that the statute made such warrant and the evidence on which it was granted the basis for an attachment to be issued by the clerk of the general or county court; and that the act of congress of Feb. 27, 1801, continued the Maryland laws in force in the District of Columbia, and gave the circuit court jurisdiction of all cases arising under the adopted laws. The circuit court of the United States has jurisdiction and authority to award an attachment under Md. Acts (1715), c. 40, on the return of two *non est* to writs of capias ad respondendum sued out, in the name of the United States, against the property of a defendant, whether he be in fact a resident of the state or not. Barney *v.* Patterson, 6 Harr. & J. (Md.) 182. In Hough *v.* Smoot, 2 Cranch C. C. (U. S.) 318, 12 Fed. Cas. No. 6,723, it was held that under the act of congress of June 24, 1812, § 4, and the Maryland acts of 1715, c. 40, and 1795, c. 56, the process was extended to Alexandria c nty.

21. *Exp.* Des Moines, etc., R. Co., 103 U. S. 794, 26 L. ed. 461; Toland *v.* Sprague, 12 Pet. (U. S.) 300, 9 L. ed. 1093; Harland *v.* United Lines Tel. Co., 40 Fed. 308, 6 L. R. A. 252; Noyes *v.* Canada, 30 Fed. 665; Boston Electric Co. *v.* Electric Gas Lighting Co., 23 Fed. 838; Anderson *v.* Shaffer, 10 Fed. 266; Dormitzer *v.* Illinois, etc., Bridge Co., 6 Fed. 217; Richmond *v.* Dreyfous, 1 Sumn. (U. S.) 131, 20 Fed. Cas. No. 11,799; Picquet *v.* Swan, 5 Mason (U. S.) 35, 19 Fed. Cas. No. 11,134; Day *v.* Newark India-Rubber Mfg. Co., 1 Blatchf. (U. S.) 628, 7 Fed. Cas. No. 3,685, 1 Fish. Pat. Rep. 394; Sadlier *v.* Fallen, 2 Curt. (U. S.) 579, 21 Fed. Cas. No. 12,210; Nazro *v.* Cragin, 3 Dill. (U. S.) 474,

this rule is not changed by the provision of the United States revised statutes which authorizes the practice and modes of procedure and remedies by attachment in the federal courts which are provided for by state laws.[22] If, however, a state court has acquired jurisdiction of the case to the extent of being entitled to enforce its judgment against the property attached, the federal court will not, where the non-resident has voluntarily removed the cause, allow him to dismiss it as to that property, on the sole ground that the latter court could not have acquired original jurisdiction of such property by the issue of an attachment.[23]

10. Property Subject to Maritime Jurisdiction. State courts may acquire jurisdiction of a suit against a non-resident debtor by the seizure of his property within territorial limits of the state, notwithstanding the property is of such character as to make it the subject of the maritime jurisdiction of the United States courts in proceedings *in rem*.[24]

11. Venue — a. Where Person or Property Is Found. Attachment suits must be brought where defendant can be found or his property is located.[25] When the

17 Fed. Cas. No. 10,062; Chittenden *v.* Darden, 2 Woods (U. S.) 437, 5 Fed. Cas. No. 2,688.

Joint defendants.—Where a state contains more than one district, and the suit is not of a local nature, defendant must, under U. S. Rev. Stat. (1872), § 740, be sued in a district in which one of them resides, and where defendants, not residing in different districts, are sued in a district in which neither resides, and the writ of attachment is directed to the district of the residence of the owner of the property, the property will be discharged from a levy thereunder. Seidenbach *v.* Hollowell. 5 Dill. (U. S.) 382, 21 Fed. Cas. No. 12,635.

Writ directed into other districts.—The circuit court of the eastern district of New York has been held to have power, after jurisdiction of the person has been acquired, to issue an attachment and direct the same for service to the marshal of any district in the state. Treadwell *v.* Seymour, 41 Fed. 579.

22. Harland *v.* United Lines Tel. Co., 40 Fed. 308, 6 L. R. A. 252; Chittenden *v.* Darden, 2 Woods (U. S.) 437, 5 Fed. Cas. No. 2,688. *Contra*, Guillou *v.* Fontain, 11 Fed. Cas. No. 5,861, 2 Am. L. T. N. S. 502, 8 Chic. Leg. N. 25, 21 Int. Rev. Rec. 348, 7 Leg. Gaz. (Pa.) 321, 32 Leg. Int. (Pa.) 362, 1 N. Y. Wkly. Dig. 269, 23 Pittsb. Leg. J. (Pa.) 33.

23. Vermilya *v.* Brown, 65 Fed. 149; Richmond *v.* Brookings, 48 Fed. 241; Crocker Nat. Bank *v.* Pagenstecher, 44 Fed. 705 (relying upon the doctrine of Amsinck *v.* Balderston, 41 Fed. 641, that the statute regarding the jurisdiction of federal courts applies only to cases originating in those courts, and *overruling* Perkins *v.* Hendryx, 40 Fed. 657, in so far as it lays down a contrary rule); Clarke *v.* Chase, Brunn. Col. Cas. (U. S.) 638, 5 Fed. Cas. No. 2,845, 21 Law Rep. 34.

Right to transfer.— In Martin *v.* Thompson, 3 McCord (S. C.) 167, it was held that where a non-resident of the state is proceeded against by attachment of his property, he may procure a transfer of the proceedings to the federal court of the district where the attachment issued, and the lien of the attachment will be maintained to answer the final judgment. So, also, it is held that, although judgment in an action commenced by a foreign attachment in the state court against a non-resident can bind the property only and not the person of defendant, defendant is nevertheless a party in the sense that the action may be removed to the federal circuit court on the ground of diverse citizenship, and the objection to the removal on the ground that the action is *in rem* is not tenable because, while the judgment can bind only the property, it is nevertheless in form against the person. Richmond *v.* Brookings, 48 Fed. 241.

24. Eaton *v.* Pennywit, 25 Ark. 144; Bird *v.* The Steamboat Josephine, 50 Barb. (N. Y.) 501; Com. *v.* Fry, 4 W. Va. 721.

Construction of clause saving common-law remedy.—The act of congress which conferred on the district courts of the United States exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, but saving to suitors in all cases their common-law remedies, does not preclude a suitor from proceeding by attachment in the state court, although the remedy by attachment is purely statutory. The intention of the act was to confer exclusive admiralty and maritime jurisdiction upon the district courts, at the same time leaving the suitor his option of seeking redress at common law. Walter *v.* Kierstead, 74 Ga. 18.

25. Hinman *v.* Rushmore, 27 Ill. 509. See also *supra*, VII, B, 3.

A bill in chancery to attach the lands of a non-resident must be filed in the county where the land is situated. Where personal property is in the hands of a third person, the bill must be brought in the county of the residence of the debtor, or in the county of the residence of the holder of his effects, or in the county in which either of them may be served with process. Milward *v.* Lair, 13 B. Mon. (Ky.) 207.

Change of boundary after levy on land.— When a court has obtained jurisdiction by an attachment of real estate within the county, a change of county lines putting the attached property outside the county does not defeat the jurisdiction of the court. Tyrell *v.* Roun-

debtor is a non-resident of the state the action may be brought in any county where his property may be found.[26]

b. Residence or Place of Performance. Where there is personal service or defendant is not a non-resident, the statutes fixing the venue of actions in the county of defendant's residence or where he may be found, or at the place where the contract is to be performed, are held to control, notwithstanding property subject to seizure may be situated elsewhere,[27] and the fact that property is attached in another county will not give the courts of the latter county jurisdiction, when defendant is served with process.[28] Under other statutes the presence of property in a county furnishes sufficient reason for suing there without regard to the residence of defendant. If grounds for the attachment exist, the seizure of the property gives jurisdiction.[29]

tree, 1 McLean (U. S.) 95, 24 Fed. Cas. No. 14,313.

26. Stern *v.* Frazer, 105 Mich. 685, 63 N. W. 968; Pendleton *v.* Smith, 1 W. Va. 16; Central L. & T. Co. *v.* Campbell Commission Co., 173 U. S. 84, 19 S. Ct. 346, 43 L. ed. 623.

27. Boorum *v.* Ray, 72 Ind. 151; Robbins *v.* Alley, 38 Ind. 553; Haller *v.* Parrott, 82 Iowa 42, 47 N. W. 996; Wasson *v.* Millsap, 70 Iowa 348, 30 N. W. 612; Hedrick *v.* Brandon, 9 Iowa 319 (holding that Iowa Code, § 1704, providing that suits may be brought in a county where the contract is by its terms to be performed, relates to cases where there is personal service, and not to those where jurisdiction arises from a levy of attachment on defendant's property, and that if there be no personal service but attachment only, the action must be brought in the county in which the property to be attached is situated); Rochereau *v.* Guidry, 24 La. Ann. 311; Thomas *v.* Dixon, 3 La. 125; Hoagland *v.* Wilcox, 42 Nebr. 138, 60 N. W. 376. See also Courtney *v.* Carr, 6 Iowa 238.

County where defendant last resided.—An attachment must issue from a justice of the county where defendant was last commorant. McMeekin *v.* Johnson, 2 Dana (Ky.) 459; Plumpton *v.* Cook, 2 A. K. Marsh. (Ky.) 450; Robertson *v.* Roberts, 1 A. K. Marsh. (Ky.) 247; Lanier *v.* Grant, Hard. (Ky.) 95 note.

Absconding debtor.—Although an ordinary action must be brought in the county where defendant resides or service of summons can be made upon him, yet, where a debtor absconds, and an attachment is issued against his property, the action may be brought in the county of his former residence, and where his property is found. Smith *v.* Johnson, 43 Nebr. 754, 62 N. W. 217; Gandy *v.* Jolly, 34 Nebr. 536, 52 N. W. 376.

Under the North Carolina act of 1877, § 65, authorizing a justice to issue an attachment against the estate of a person removing out of the county privately, returnable to the county court of such county, the writ must be issued from and made returnable to the county court of the county from which the debtor removed. Skinner *v.* Moore, 19 N. C. 138, 30 Am. Dec. 155.

An attachment against an absconding debtor can legally issue only, in the county where he last resided, or through which he is privately passing, or wherein he is absconding at the time of its issue. Barnett *v.* Darnielle, 3 Call (Va.) 413.

Joint defendants.—An attachment suit against joint defendants must be brought in a county where one of them resides. Boorum *v.* Ray, 72 Ind. 151), and such service is sufficient (Collier *v.* Hanna, 71 Md. 253, 17 Atl. 1017 [*affirming* (Md. 1889) 17 Atl. 390]. Personal service within a county on one of two joint defendants gives jurisdiction over the co-defendant, although he is not served and has no property in the county. Haywood *v.* McCrory, 33 Ill. 459. But where two joint makers of a promissory note, residing in different counties, were sued before the note was due, in the county in which one of them resided, a summons was served upon a defendant residing in the county in which the action was commenced, and a summons and order of attachment were issued to the other county, there served upon defendant residing in that county, and his property situated therein attached, no order of attachment having been issued, and no ground for an attachment existing against defendant residing in the county where the action was commenced, it was held that the action was not brought in the proper county, and that defendant in the other county might have the attachment dissolved. Rullman *v.* Hulse, 33 Kan. 670, 7 Pac. 210 [*affirming* 32 Kan. 598, 5 Pac. 176].

28. Chevallier *v.* Williams, 2 Tex. 239.

A code provision that actions to subject property to an encumbrance must be brought in the county where the property is situated applies only to the enforcement of existing encumbrances, and not to an attachment lien. Nixon *v.* Jack, 16 B. Mon. (Ky.) 174.

29. Baum *v.* Burns, 66 Miss. 124, 5 So. 697; Smith *v.* Mulhern, 57 Miss. 591; Barnett *v.* Ring, 55 Miss. 97; Slaughter *v.* Bevans, 1 Pinn. (Wis.) 348.

General venue statute inapplicable.—Actions commenced by attachment are not within the requirement of a statute providing that suits on contracts must be brought in the county in which defendant or one of defendants reside, but may be brought in any county in which the levy may be made McPhillips *v.* Hubbard, 97 Ala. 512, 12 So. 711; North Alabama Home Protection *v.* Richards, 74

c. Writ Issued to Another County. A writ cannot be sued out to attach property in a foreign county unless there is an attachment of property within the county where the suit is brought, or personal service on defendant within the county to give the court jurisdiction,[30] or unless where defendant, at the time suit is begun, is removing his property from the county and the officer may pursue it.[31] But if there is property of the non-resident defendant in the county where the action is brought, another writ may at the same time issue to the sheriff of another county where other property may be.[32]

d. Change of Venue. By consent of the parties an attachment suit may be transferred from one county to another;[33] but if the proceedings are brought in the wrong county and the court has no jurisdiction, a change of venue to another county will confer no jurisdiction upon the court there.[34]

12. Objections — a. In General. Where, through some fatal defect or omission in the proceedings, the court has not acquired jurisdiction, the objection may be raised at any stage of the cause,[35] or even collaterally.[36] The jurisdiction is

Ala. 466; Atkinson *v.* Wiggins, 69 Ala. 190; Herndon *v.* Givens, 16 Ala. 261; Smith *v.* Mulhern, 57 Miss. 591.

Attachment and personal service in different counties.— Where, under attachment proceedings in a justice's court, personal property was seized, and personal service was made on defendant in another county, where he resided, it was held that the justice had jurisdiction to render a judgment *in rem*, to the extent of property attached. Flohrs *v.* Forsyth, 78 Minn. 87, 80 N. W. 852.

30. House *v.* Hamilton, 43 Ill. 185; Fuller *v.* Langford, 31 Ill. 248; Hinman *v.* Rushmore, 27 Ill. 509; Monarch Rubber Co. *v.* Bunn, 82 Mo. App. 603.

Where suit must be brought in county of defendant's residence, the writ may run into another county where property of defendant is located. Gibbs *v.* Petree, 7 Tex. Civ. App. 526, 27 S. W. 685.

Statute relating to land.—A statute directing that suits affecting real estate shall be brought in the county where the land or part thereof is situated refers to suits in equity, ejectment, and the like, and not to attachment suits. If property is levied on in the county where the suit is instituted, that is sufficient to confer jurisdiction, whether such property be real or personal, and it is no objection to the levy upon land elsewhere that the suit is not instituted in the county where that land is situated. Huxley *v.* Harrold, 62 Mo. 516.

31. House *v.* Hamilton, 43 Ill. 185; Taylor *v.* Carney, 4 Kan. 542.

32. Kahn *v.* Sippili, 35 La. Ann. 1039; Pendleton *v.* Smith, 1 W. Va. 16.

Exhaustion of property where action brought.—The mere fact that the property in the county where the action is brought is subsequently exhausted in satisfying prior attachment liens does not invalidate the attachment to another county. Platt, etc., Refining Co. *v.* Smith, 10 Ohio Dec. (Reprint) 424, 21 Cinc. L. Bul. 122.

33. Wessinger *v.* Mausur, etc., Implement Co., 75 Miss. 64, 21 So. 757.

34. Boorum *v.* Ray, 72 Ind. 151.

Transfer of action before attachment.— In Iowa the statute was such that if property was attached in a county other than that of defendant's residence the court had no jurisdiction if defendant appeared and demanded a change of venue. Langworthy *v.* Root, 10 Iowa 260. If the attachment issues before the action is transferred to the proper county at the instance of defendant, under the statute, it is void. Wasson *v.* Millsap, 70 Iowa 348, 30 N. W. 612. And in such a case a levy, made before transfer, gives no rights as against a mortgagee of the attached property, even though when the levy is made the attaching creditor has no notice, actual or constructive, of the mortgage. Haller *v.* Parrott, 82 Iowa 42, 47 N. W. 996.

Removal of whole cause by change of venue. —A change of venue in a suit by attachment carries the whole cause and every incident belonging to it to the court to which the cause is transferred, and that court has jurisdiction of a receiver appointed in the cause by the court in which it originated. *Ex p.* Haley, 99 Mo. 150, 12 S. W. 667.

35. Dew *v.* State Bank, 9 Ala. 323 (issue by unauthorized officer); Bruce *v.* Cook, 6 Gill & J. (Md.) 345 (holding that the objection may be raised after verdict on a motion in arrest of judgment; after the jury has been sworn, by a prayer for instruction; or, after verdict and judgment, without raising the objection below, it might on appeal or writ of error be assigned as error in the appellate court).

36. Mudge *v.* Steinhart, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17; Wyeth Hardware, etc., Co. *v.* Lang, 54 Mo. App. 147.

Judgment of court of sister state.—In Balk *v.* Harris, 122 N. C. 64, 30 S. E. 318, 45 L. R. A. 257, 260, it was held that where a court of another state, in attachment proceedings against the property of a resident of North Carolina, acquired no jurisdiction by reason of the failure of the affidavit upon which the warrant was issued to state that defendant had property in that state, the judgment of such court could be collaterally attacked in the courts of North Carolina.

placed upon the same footing with that of courts of limited and special jurisdiction, and no presumption is indulged in its favor.[37] On the other hand, where the defects are considered mere irregularities, and the parties are before the court, they must raise the objection at the proper time and in appropriate form,[38] and the lien of the attachment cannot be displaced by showing such irregularities in the process as would have entitled defendant in the writ to abate it on plea.[39]

b. Irregularities in Progress of Action. After compliance with the preliminary steps which lead to the acquirement of jurisdiction by the actual seizure of the property, irregularities in the further progress of the cause will not render the judgment void.[40]

c. Appearance. Although, as already pointed out, consent cannot give jurisdiction over attachment as to the subject-matter,[41] yet, if the court is by law invested with jurisdiction, appearance and pleading to the merits covers all defects in the process and irregularities in the proceedings. It confers jurisdiction over the person and perfects the right to try and determine the controversy.[42]

37. Pullman Palace Car Co. *v.* Harrison, 122 Ala. 149, 25 So. 697, 82 Am. St. Rep. 68; Randle *v.* Mellen, 67 Md. 181, 8 Atl. 573.

Record.— In this connection it is held that the record must show affirmatively that the requirements of the statute have been complied with. Coward *v.* Dillinger, 56 Md. 59; Mears *v.* Adreon, 31 Md. 229; Matthews *v.* Dare, 20 Md. 248; Boarman *v.* Patterson, 1 Gill (Md.) 372. On the other hand it has been held that, while all the requisites of the law are conditions precedent to the exercise of jurisdiction, yet, when the provisions of the law do not prescribe what shall be deemed evidence that such acts have been done, or direct that their performance shall appear on the record, where the record fails to show compliance with the prerequisites, as the court issuing the attachment had authority under the statute, was a court of general civil jurisdiction, and had ordered sale of the property and confirmed it, this was a judgment of a court of competent jurisdiction and could not be collaterally attacked. Voorhees *v.* Jackson, 10 Pet. (U. S.) 449, 9 L. ed. 490. See also Hall *v.* Hall, 12 W. Va. 1, holding that if the writ of attachment is a lawful writ of the court and is issued in proper form by the clerk and levied by the proper officer upon property liable to attachment, when the writ is returned into court the power over the *res* is established.

38. Cherry *v.* Nelson, 52 N. C. 141.

Irregularities first noticed on appeal.—Irregularities in the proceedings to procure an attachment cannot be objected to for the first time on appeal. American Express Co. *v.* Smith, 57 Iowa 242, 10 N. W. 655. So also it is held that it is only when the want of compliance with the requirements of the statute appears on the face of the proceedings that an objection to the jurisdiction can be taken for the first time on appeal. Hadden *v.* Linville, 86 Md. 210, 38 Atl. 37, 900.

39. *Alabama.*— Kirkman *v.* Patton, 19 Ala. 32.

California.— Dixey *v.* Pollock, 8 Cal. 570.

Nebraska.—Winchell *v.* McKinzie, 35 Nebr. 813, 53 N. W. 975.

New York.— Bascom *v.* Smith, 31 N. Y. 595; Matter of Griswold, 13 Barb. (N. Y.) 412.

North Carolina.— Skinner *v.* Moore, 19 N. C. 138, 30 Am. Dec. 155.

40. Gere *v.* Gundlach, 57 Barb. (N. Y.) 13; Spillman *v.* Williams, 91 N. C. 483; Cochran *v.* Loring, 17 Ohio 409; Paine *v.* Mooreland, 15 Ohio 435, 45 Am. Dec. 585.

The appointment of trustees under the absconding debtor's act was held conclusive as to the regularity of the previous proceedings (Wood *v.* Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Matter of Clark, 3 Den. (N. Y.) 167); but want of jurisdiction of the subject-matter on the part of the officer granting the attachment may be objected to, even after trustees are appointed (Matter of Hurd, 9 Wend. (N. Y.) 465), and such appointment will not preclude an inquiry as to whether or not a *prima facie* case for an attachment was made out in the first instance (Matter of Faulkner, 4 Hill (N. Y.) 598). In a collateral proceeding, however, the appointment is sufficient evidence of the jurisdiction of the officer granting the attachment. Hubbell *v.* Ames, 15 Wend. (N. Y.) 372.

41. See *supra*, VII, B, 2, note 2.

42. *California.*— Porter *v.* Pico, 55 Cal. 165.

Colorado.— Charles *v.* Amos, 10 Colo. 272, 15 Pac. 417.

Georgia.— Wheelwright *v.* Murray, 99 Ga. 249, 25 S. E. 171; Wheelwright *v.* Dyal, 99 Ga. 247, 25 S. E. 170.

Minnesota.— McCubrey *v.* Lankis, 74 Minn. 302, 77 N. W. 144.

New Mexico.— Wagner *v.* Romero, 3 N. M. 131, 3 Pac. 50.

Wisconsin.— Fairfield *v.* Madison Mfg. Co., 38 Wis. 346; Blackwood *v.* Jones, 27 Wis. 498.

See also for effect of appearance *infra*, XVI, B, 3.

Non-residence—Plea in abatement.—Where the statute does not authorize attachment by a non-resident, the fact of plaintiff's non-residence must be pleaded in abatement. It is not matter in bar nor can it be taken advantage of for the first time on error. Pearce *v.* Baldridge, 7 Ark. 413. So, where proper

Appearance and pleading to the merits will also operate as a waiver of objection to the venue.[43]

C. Authority to Issue Writ — 1. Dependent Upon Statute. The authority to issue an attachment, like the jurisdiction of the court over such proceedings, must be found in the statute. Unless there is authority in the statute, there is no power to issue the writ, and such authority as the statute confers must be strictly pursued.[44]

2. Delegation of Ministerial Duty. Under some statutes which contain particular requirements as to what shall be stated in the affidavit for attachment, so that the grounds of attachment may be alleged in the language of the statute, the authority to grant the writ is ministerial in its nature and may be delegated to another, as to the clerk,[45] and it may be delegated to the judge of another court or other officer to be returned into the court having jurisdiction of the subject-matter.[46]

matter is shown *prima facie* for the jurisdiction of the court, an exception to the jurisdiction on the ground that defendant is not a non-resident is waived unless pleaded in abatement. Voorhees *v.* Hoagland, 6 Blackf. (Ind.) 232; Middleton *v.* White, 5 W. Va. 572 [*following* Valley Bank *v.* Gettinger, 3 W. Va. 309].

43. Appearance by one of two joint defendants.—In an attachment against two joint defendants, an appearance and general denial entered by one acts as a waiver of all objections to venue by both; although previously the one not putting in the general denial had pleaded in abatement to the jurisdiction. Sanger *v.* Overmier, 64 Tex. 57.

A subsequently attaching creditor cannot object if defendant does not. Payne *v.* Dicus, 88 Iowa 423, 55 N. W. 483.

Federal court.—The voluntary appearance of defendant in a suit in the federal circuit court commenced by process of foreign attachment would cure the defect of jurisdiction, though service of summons made upon him *in invitum* while in the district would not. Toland *v.* Sprague, 12 Pet. (U. S.) 300, 9 L. ed. 1093; Pollard *v.* Dwight, 4 Cranch (U. S.) 421, 2 L. ed. 666; Chittenden *v.* Darden, 2 Woods (U. S.) 437, 5 Fed. Cas. No. 2,688.

Release bond not appearance.— If the court has no jurisdiction where defendant is a non-resident, he does not waive the objection by executing a bond for the release of the attached property. Chittenden *v.* Darden, 2 Woods (U. S.) 437, 5 Fed. Cas. No. 2,688.

44. Vann *v.* Adams, 71 Ala. 475; Noyes *v.* Phipps, (Kan. App. 1890) 63 Pac. 659; Worthington *v.* Damarin, 5 Ky. L. Rep. 684; Morris *v.* Davis, 4 Sneed (Tenn.) 452.

Commission.— In Chittenden *v.* Darden, 2 Woods (U. S.) 437, 5 Fed. Cas. No. 2,688, it was held that the commissioners of the federal courts could exercise only such powers as were expressly conferred, and as the power to issue process for the circuit court was not expressly included in the powers conferred, they had no power to issue attachment for said courts. In New York a judge or a commissioner had authority to issue a warrant in vacation only, and therefore during the sitting of the supreme court an attachment against a foreign corporation could be obtained only by a motion in open court. Bennett *v.* Hartford F. Ins. Co., 19 Wend. (N. Y.) 46; Anonymous, 3 Hill (N. Y.) 454.

45. *Alabama.*— Garner *v.* Johnson, 22 Ala. 494, holding that, under the acts of 1833 and 1845 in that state, upon the filing of the required affidavit, the clerk, either in vacation or in term-time, could issue a judicial attachment against a defendant who avoided service of process.

Kansas.— Reyburn *v.* Brackett, 2 Kan. 221, 83 Am. Dec. 457.

Kentucky.— Scott *v.* Doneghy, 17 B. Mon. (Ky.) 321.

Michigan.— Adams *v.* Hosmer, 98 Mich. 51, 56 N. W. 1051 (distinguishing the proceeding to acquire jurisdiction of a non-resident in chancery); Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288.

Pennsylvania.— Ferris *v.* Carlton, 8 Phila. (Pa.) 549, holding that the duty of a prothonotary in issuing a writ of attachment is ministerial.

Tennessee.— Johnson *v.* Rankin, (Tenn. Ch. 1900) 59 S. W. 638, as to the power of the clerk and master in a suit in chancery to issue an attachment on one of the statutory grounds.

Texas.— Byers *v.* Brannon, (Tex. 1892) 19 S. W. 1091; Bull *v.* Forest, 1 Tex. App. Civ. Cas. § 179.

United States.— Central L. & T. Co. *v.* Campbell Commission Co., 173 U. S. 84, 19 S. Ct. 3, 43 L. ed. 623 [*reversing* 5 Okla. 396, 49 Pac. 48].

See 5 Cent. Dig. tit. "Attachment," § 390.

46. Central L. & T. Co. *v.* Campbell Commission Co., 173 U. S. 84, 19 S. Ct. 346, 43 L. ed. 623 [*reversing* 5 Okla. 396, 49 Pac. 48], holding further that an act of congress empowering the supreme court of a territory or its chief justice to designate any judge to "try" a particular case in any district, where the regular judge is for any reason unable to hold court, does not constitute a prohibition against the conferring by the legislature of authority upon one not a judge of the court in which the main action is pending to perform a ministerial act like that considered;

3. Issue by Clerk — a. In General. Where the court is vested with jurisdiction over attachment proceedings, and the clerk of the court is the person designated by law to issue all process out of the court, it is held that the clerk is sufficiently vested with authority to issue writs of attachment.[47] Sometimes the clerk is expressly authorized,[48] or authorized in specified cases to issue an attachment, in other cases the judge being required to issue the writ.[49]

b. By Deputy. A deputy clerk, acting for his principal, the clerk, may issue the writ ordinarily where the clerk can do so.[50]

4. Issue by One Other Than Before Whom Returnable. Under statutory provisions the power to issue the writ is often conferred upon officers and judges other than those before whom the writ is made returnable,[51] and it does not

that a provision of the organic act of Oklahoma conferring on the supreme and district courts "chancery as well as common-law jurisdiction" does not give such courts exclusive jurisdiction to issue attachments so as to render void an act of the legislature authorizing the probate judge to issue attachments.

47. Shillaber *v.* Waldo, 1 Hawaii 31.

But the mere broadening of the jurisdiction of an inferior court over attachments, to the extent before possessed by a court of superior jurisdiction, will not operate to confer upon the clerk of the former court the organized powers which had before been committed to the clerk of the latter. Stevenson *v.* O'Hara, 27 Ala. 362 [*followed* in Lewis *v.* Dubose, 29 Ala. 219; Flash *v.* Paul, 29 Ala. 141; Mathews *v.* Sands, 29 Ala. 136].

Ratification of unauthorized issue.—A writ will not be quashed if rightfully issued after affidavit filed and recognized by the clerk as a writ out of his court, although it was in fact sealed and delivered to the officer by the attorney without actual knowledge or express authority of the clerk. Morrel *v.* Buckley, 20 N. J. L. 667.

48. Cherry *v.* Nelson, 52 N. C. 141.

Power confined to clerk.—In Toby *v.* Bowen, 3 Ark. 352, it was held that, under the constitution, no writ issuing out of and returnable to a court of record in that state could be issued by any person or officer other than the clerk of such court, that a justice could not issue a writ of attachment returnable to a circuit court, and that a statute authorizing him to do so was void.

Authority restricted to particular county. — Under a statute requiring the clerk "to issue a writ of attachment to be directed to the sheriff of his county," when certain prerequisites were complied with, a counterpart writ running into another county, issued by a clerk, is without authority and can give no jurisdiction of the person or property of the defendant. Smith *v.* Block, 7 Ark. 358.

49. Atkinson *v.* James, 96 Ala. 214, 10 So. 846, holding that under Ala. Code, §§ 2929, 2931, providing that any civil action may be commenced by attachment, and authorizing a clerk of the circuit court to issue such attachment for the collection of "any moneyed demand," the amount of which can be certainly ascertained, but that in actions to recover "damages for a breach of contract when the damages are not certain or liquidated," or when "the action sounds in damages merely," only the judge or chancellor can issue the attachment; in an action to recover damages for the removal of cotton on which plaintiff held a landlord's lien for rent and advances, the clerk had authority to issue an attachment.

50. Minniece *v.* Jeter, 65 Ala. 222; Finn *v.* Rose, 12 Iowa 565.

Same person acting as granting officer.—A writ of attachment is not void because issued by the same person as deputy clerk of the district court who allowed the writ as a court commissioner. The two offices are not incompatible and the one is not subordinate to the other. Kenney *v.* Goergen, 36 Minn. 190, 31 N. W. 210.

Deputy not under oath.—An attachment issued by a deputy clerk in the performance of the duties of the office under appointment by the clerk is not voidable, nor subject to be abated on plea, because such deputy has never taken the official oath prescribed by law. His official acts, like those of any other *de facto* officer, have the same force and effect, so far as the public and third persons are concerned, as the acts of an officer *de jure*. Joseph *v.* Cawthorn, 74 Ala. 411.

51. Wanet *v.* Corbet, 13 Ga. 441; Armitage *v.* Rector, 62 Miss. 600.

One judge vested with power of another.— Where the statute vests the judge of a particular court with all the powers of a circuit court judge, "including the authority to issue writs of injunction, mandamus, certiorari, prohibition, and ne exeat," and a judge of the circuit court has authority to issue attachments, returnable to any county in the state, the judge of the first-mentioned court has authority to issue an original attachment, returnable to any county in the state. Bledsoe *v.* Gary, 95 Ala. 70, 10 So. 502.

Abolition of office which furnished measure of power.— In New York an act of 1827 authorized supreme court commissioners to grant attachments, and a subsequent act of 1830 declared justices of the superior court to be *ex officio* supreme court commissioners. In May, 1847, a statute was enacted providing that justices of the superior court, whose election was therein provided for, should have the same powers as the justices of that court then had, and in July of the same year the office of the supreme court commissioner was

matter that the officer issuing it would not have jurisdiction in his judicial character of the subject-matter of the cause;[52] but the power can be exercised only in the cases expressly provided and under such circumstances as are expressly prescribed.[53]

5. Order For Attachment — a. Necessity. The statute often contemplates or requires an application and an order of allowance by a judge, the latter being of a *quasi*-judicial character,[54] as where the officer is required to weigh and determine the sufficiency of the proof, and in such cases the clerk of the court cannot in the first instance allow the writ. There must be an order granting it.[55]

abolished. It was held that, when the act of May, 1847, was passed, justices of the superior court had power to grant an attachment by reason of their being *ex officio* commissioners, and that this power was not destroyed by the subsequent act in the same year abolishing the office of supreme court commissioners. Renard *v.* Hargous, 2 Duer (N. Y.) 540.

52. Matter of Fitch, 2 Wend. (N. Y.) 298; Galbraith *v.* McFarland, 3 Coldw. (Tenn.) 267, 91 Am. Dec. 281.

53. **Power to issue writ and jurisdiction to hear cause distinguished.**— Where a notary public is invested with the jurisdiction of a justice of the peace, he has authority to issue an attachment, returnable before himself, for the collection of a demand within a justice's jurisdiction. See *supra*, VII, B, 4, note 6. But he cannot issue writs of attachment returnable into the circuit court, because such power is a special statutory one conferred upon the justice and is not included under the term "jurisdiction," which means the power to hear and determine causes. Jackson *v.* Bain, 74 Ala. 328; Nordlinger *v.* Gordon, 72 Ala. 239; Vann *v.* Adams, 71 Ala. 475.

Confined to county.— Where a court is confined to the issue of an attachment in the county of its jurisdiction, it has no power to issue an attachment to the sheriff of another county. Neely *v.* McGrandle, 4 N. Y. Civ. Proc. 327. The general grant of authority to issue the writ is not construed to enlarge the circle of the jurisdiction of the officers upon whom the power is conferred. Caldwell *v.* Meador, 4 Ala. 755.

Presumption.— Under the code provision in Nebraska for granting an attachment by the judge of the court in which the action is brought, it is held that if the probate judge of the county grants an attachment on a debt not due, and signs the order officially, it will be presumed that he is judge of the county where the order was made and that the judge of the district court was absent from said county. Reed *v.* Bagley, 24 Nebr. 332, 38 N. W. 827.

54. Webb *v.* Bailey, 54 N. Y. 164 (holding that the authority of a county judge under the statute to issue an attachment was not restricted to cases in the supreme court to be tried in his county); Farquhar *v.* Wisconsin Condensed Milk Co., 30 Misc. (N. Y.) 270, 62 N. Y. Suppl. 305 (holding that since N. Y. Code Civ. Proc. § 769, providing that a motion on notice cannot be made in the first department (New York county) in an action triable elsewhere, does not apply to an *ex parte* proceeding, an *ex parte* attachment might properly be obtained in New York county in an action triable in Richmond county).

Warrant of justice.— In Maryland, under the act of 1795, c. 56, a justice of the peace had authority to issue his warrant to the clerk of the county court to issue an attachment but could not issue such warrant to the clerk of the general court. Smith *v.* Greenleaf, 4 Harr. & M. (Md.) 162. But under Md. Code, art. 9, § 24, on the issue of an attachment, after several returns of *non est* on successive summons, the order of the judge takes the place of and renders the magistrate's warrant unnecessary. Dirickson *v.* Showell, 79 Md. 49, 28 Atl. 896 [*citing* Randle *v.* Mellen, 67 Md. 181, 8 Atl. 573].

55. *Alabama.*— McKenzie *v.* Bentley, 30 Ala. 139.

Georgia.— Thompson *v.* Davison, 107 Ga. 238, 33 S. E. 47; Bates *v.* Shelton, 99 Ga. 164, 25 S. E. 16.

Kentucky.— Kleine *v.* Nie, 88 Ky. 542, 11 Ky. L. Rep. 583, 11 S. W. 590; McChord *v.* Barker, 8 Ky. L. Rep. 790.

Michigan.— Howell *v.* Dickerman, 88 Mich. 369, 50 S. W. 308, holding that where the statute requires the order of the judge to be entered on the affidavit, an indorsement on the writ itself, which appeared to have been attached to the affidavit when it was presented to the judge, would not be sufficient.

Minnesota.— Jacoby *v.* Drew, 11 Minn. 408; Merritt *v.* St. Paul, 11 Minn. 223; Guerin *v.* Hunt, 8 Minn. 477; Zimmerman *v.* Lamb, 7 Minn. 421; Morrison *v.* Lovejoy, 6 Minn. 183.

Nebraska.— Philpott *v.* Newman, 11 Nebr. 299, 9 N. W. 94; Seidentopf *v.* Annabil, 6 Nebr. 524.

Tennessee.— Where the statute provides that upon the filing of a bill in particular cases writs of attachment may be granted on complainant's giving bond and security in such sums as the chancellor or judge may order, etc., the clerk has no authority to issue the writ without such order. Dillin *v.* O'Donnell, 4 Baxt. (Tenn.) 213; August *v.* Seeskind, 6 Coldw. (Tenn.) 166.

Wyoming.— Crain *v.* Bode, 5 Wyo. 255, 39 Pac. 747.

See 5 Cent. Dig. tit. "Attachment," § 392.

Particular action.—The allowance of a judge is not required in an action for deceit, under an Ohio statute requiring such allow-

Sometimes, however, the judge himself would seem to issue, as well as grant, the writ, in which event he need not spread on his docket the order allowing it.[56] On the other hand, the statute sometimes reposes in the clerk the authority to make an order of attachment, which is said to be a *quasi*-judicial act on his part,[57] but it has been held under such statutes that the clerk may issue the writ directly, without first granting an order upon himself for its issue.[58]

b. Sufficiency. The order for an attachment should be in writing,[59] but it may, in some states, be informal and in general terms.[60]

6. Nature of Duty to Issue. When the evidence which entitles one to an attachment is presented to the proper officer, he is not concerned with the validity or justice of the cause of action but should issue the writ without reference to such an inquiry.[61] If there are several applications it is the duty of the officer

ance when the action is on a claim not due. Perry *v.* Sharpe, 8 Fed. 15.

New order after amendment.— Where an amended petition is filed to correct an error in defendant's name in the original petition, and there are a new bond and affidavit, but no new order authorizing the writ, the attachment is null. Purdee *v.* Cocke, 18 La. 482.

Amendment of justice's warrant.—The circuit court has no power to amend a warrant addressed to the clerk of the circuit court directing him to issue a writ of attachment. Halley *v.* Jackson, 42 Md. 254.

Clerk may issue under order of judge.— If the writ is granted by the judge in a case requiring such allowance, the issue of the writ may be by the clerk under the order as the clerical servant of the judge. Bates *v.* Shelton, 99 Ga. 164, 25 S. E. 16 [*citing* Loeb *v.* Smith, 78 Ga. 504, 3 S. E. 458].

56. Winchell *v.* McKinzie, 35 Nebr. 813, 53 N. W. 975.

Judicial officer.—A statutory provision authorizing a chancellor to issue a writ of attachment is not in conflict with the statutory requirement that writs shall bear teste and be signed by the respective clerks (Lyle *v.* Longley, 6 Baxt. (Tenn.) 286), and, indeed, before this case, it was held, in Morris *v.* Davis, 4 Sneed (Tenn.) 452, that an attachment issued by the clerk of the circuit court in an action of tort upon the fiat of a judge was void, because under the statute attachment in such cases was required to be issued by judges and justices of the peace, and the power had not at that time been conferred upon clerks of the courts.

57. Tessier *v.* Crowley, 16 Nebr. 369, 20 N. W. 264.

58. Baker *v.* Ayers, 58 Ark. 524, 25 S. W. 834; Ouerhacker *v.* Claflin, 96 Ky. 235, 16 Ky. L. Rep. 436, 28 S. W. 506 [*overruling* Glaser *v.* Franks, 16 Ky. L. Rep. 25]; People's Sav. Bank, etc., Co. *v.* Batchelder Egg Case Co., 51 Fed. 130, 4 U. S. App. 603, 2 C. C. A. 126 (construing Arkansas statute). But under a statute in Alabama, authorizing the issue of writs of attachment on legal demands in certain cases out of chancery, and providing that chancellors, circuit judges, and registrars of the court in which the bill is filed may make all necessary orders for the issuing of such writs, it was held that, conceding the authority of the registrar to be equal to that of the chancellor or the circuit judge to make such order, yet the making of the order by the registrar or a chancellor or circuit judge was a prerequisite to the issue of the attachment, and that, if it should be issued by the registrar without such order, it would be a nullity. McKenzie *v.* Bentley, 30 Ala. 139.

59. Loeb *v.* Smith, 78 Ga. 504, 3 S. E. 458, holding that under Ga. Code, § 3207, if the order is not in writing the affidavit or testimony upon which the attachment is granted is traversable, may be attacked by motion to dismiss or demurrer, and may be collaterally impeached.

60. Howard *v.* Jenkins, 5 Lea (Tenn.) 176, holding that the order need not contain all the recitals prescribed for a notice by publication.

Designation of amount.—An order for attachment directing it to issue for the amount claimed in the petition is sufficient without specifying such amount. Kleine *v.* Nie, 88 Ky. 542, 11 Ky. L. Rep. 583, 11 S. W. 590.

Seal, teste, signature.—An order of a clerk granting a writ of attachment need not be under the seal of the court (Seeligson *v.* Rigmaiden, 37 La. Ann. 722), and so the failure of a judge granting an order to attach thereto the seal of the court does not render the order void (Winchell *v.* McKinzie, 35 Nebr. 813, 53 N. W. 975). In New York it was held that under the code a formal teste, the signature of the clerk, and the seal are not necessary to a warrant of attachment, which is simply the written order of the judge that the case is one in which an attachment should issue, but that the signature of plaintiff's attorney to the warrant should be required. Genin *v.* Tompkins, 12 Barb. (N. Y.) 265.

Surplusage in warrant.— Words in the address of a warrant for an attachment which are not necessary may be stricken out as surplusage, as where the warrant was addressed "to the clerk of Baltimore county court" and "Mr. Norwood," the clerk of the court of common pleas was directed to issue the writ, there being a court of common pleas but no Baltimore county court. McCoy *v.* Boyle, 10 Md. 391.

61. Alexander *v.* Brown, 2 Disn. (Ohio) 395.

The officer has no discretion when the affidavit which the statute prescribes is pre-

to issue the writs in the order in which the applications upon proper papers are presented to him.[62] Where the moving papers fairly call for the exercise of judgment on the part of the officer who is to grant the writ, the proceeding will not be void for want of jurisdiction, although the officer err in his judgment upon the weight of the evidence.[63]

7. DISQUALIFICATION OF OFFICER. The clerk usually acts ministerially in the issue of a writ of attachment, and therefore in such a case he may issue that writ in an action on his own behalf;[64] but an officer granting an attachment should not stand in any relation of interest to the party applying,[65] and where the statute prohibits any judicial officer from acting in a cause in which he is pecuniarily interested, or where he has been the counsel for either party, such an officer, who has authority to issue writs of attachment, cannot exercise such authority contrary to the provisions of this statute.[66]

D. Affidavits — 1. NATURE AND OBJECT. The affidavit is a jurisdictional instrument which is the base or foundation of the proceeding,[67] but is no part of the action where the attachment is a mere ancillary remedy.[68] It is not a pleading, to be construed by the rules applicable thereto, nor in some states is the same particularity of statement required.[69] It should, however, be reasonably

sented, but he must then issue the writ. Mayhew *v.* Dudley, 1 Pinn. (Wis.) 95.

62. Lick *v.* Madden, 25 Cal. 202, holding that it makes no difference that the officer's fees are not paid or tendered in advance, unless he refuses to proceed without such payment.

63. Haslett *v.* Rodgers, 107 Ga. 239, 33 S. E. 44; Matter of Faulkner, 4 Hill (N. Y.) 598.

64. Evans *v.* Etheridge, 96 N. C. 42, 1 S. E. 633.

Sheriff forbidden to fill up process.— In Massachusetts a statute prohibited sheriffs from making or filling up any process and provided that all such acts done by them should be void, and it was held that an attachment and levy on land was defeated as to persons not parties to the action who claimed by an intermediate conveyance by the owner, where the original writ was drawn and issued by the deputy sheriff who served it. Smith *v.* Saxton, 6 Pick. (Mass.) 483.

65. It is not proper for plaintiff's attorney, acting as supreme court commissioner, to allow the writ to issue. Hurd *v.* Jarvis, 1 Pinn. (Wis.) 475.

Judge related to officer of corporation.— That the judge who granted an attachment was a brother-in-law of the president of plaintiff, a corporation, will not disqualify him nor affect the validity of the attachment. Lansinghurgh Bank *v.* McKie, 7 How. Pr. (N. Y.) 360.

66. King *v.* Thompson, 59 Ga. 380 (where the judge who issued the writ in a case in which a corporation was interested was a director and stockholder in the corporation, and he was held to be incompetent); Wilkowski *v.* Halle, 37 Ga. 678, 95 Am. Dec. 374 (holding that under such a statutory provision an attorney who was a notary public was a judicial officer and had no authority to issue an attachment for his client in a case in which the attorney appeared as such for the client). But the mere fact that a notary public was an employee of a bank in which a member of the firm desiring an attachment was also an employee and stockholder was held not to create such relation between the two as made it improper for the notary to issue the writ. Georgia Ice Co. *v.* Porter, 70 Ga. 637.

67. *Illinois.*— Eddy *v.* Brady, 16 Ill. 306.

Indiana.—Powers *v.* Hurst, 3 Blackf. (Ind.) 229.

Maryland.— Halley *v.* Jackson, 48 Md. 254.

Mississippi.— Wallis *v.* Wallace, 6 How. (Miss.) 254.

South Carolina.— Wando Phosphate Co. *v.* Rosenberg, 31 S. C. 301, 9 S. E. 969; Ivy *v.* Caston, 21 S. C. 583.

South Dakota.— Finch *v.* Armstrong, 9 S. D. 255, 68 N. W. 740; Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

Tennessee.— Maples *v.* Tunis, 11 Humphr. (Tenn.) 108, 53 Am. Dec. 779.

West Virginia.— Hudkins *v.* Haskins, 22 W. Va. 645.

Wisconsin.— Hubbard *v.* Haley, 96 Wis. 578, 71 N. W. 1036.

General nature of affidavits see AFFIDAVITS, 2 Cyc. 4.

68. Fox *v.* Mackenzie, 1 N. D. 298, 47 N. W. 386.

69. O'Connor *v.* Roark, 108 Cal. 173, 41 Pac. 465; State Bank *v.* Boyd, 86 Cal. 388, 25 Pac. 20; Boston *v.* Wright, 3 Kan. 220; Citizens' Bank *v.* Corkings, 10 S. D. 98, 72 N. W. 99 [*reversing* 9 S. D. 614, 70 N. W. 1059, 62 Am. St. Rep. 891].

In Colorado the affidavit stands as a pleading, not alone in cases commenced originally by attachment, but where sued out in aid of an attachment, in which case it answers to the complaint in that proceeding; and hence is so far a pleading that it is properly brought up by the record on appeal, without being included in the statement required by the code. Goss *v.* Boulder County, 4 Colo. 468.

specific,[70] as it is intended to be a safeguard against abuse of the right of attachment, and a protection to the debtor against the wrongful employment of that remedy;[71] and it should be so direct and unequivocal that perjury can be assigned for swearing to it falsely.[72]

2. Necessity — a. In General — (i) *Rule Stated.* In some few instances an affidavit is unnecessary to authorize the grant of an attachment;[73] but if an affidavit, petition, or the like, containing legal evidence of the facts required by statute, is a prerequisite to the issue of an attachment, none can lawfully issue unless such an instrument is presented or filed.[74]

(ii) *Verified Pleading as Substitute.* In some jurisdictions if the petition, duly verified, alleges facts sufficient to justify the issue of the writ it is

70. Goodman *v.* Henry, 42 W. Va. 526, 26 S. E. 528, 35 L. R. A. 847.

71. Smith *v.* Mulhern, 57 Miss. 591; Wheeler *v.* Slavens, 13 Sm. & M. (Miss.) 623; Wallis *v.* Wallace, 6 How. (Miss.) 254.

72. *Louisiana.*— Cross *v.* Richardson, 2 Mart. N. S. (La.) 323.

Mississippi.— Wallis *v.* Wallace, 6 How. (Miss.) 254.

Pennsylvania.— Hallowell *v.* Tenney Canning Co., 16 Pa. Super. Ct. 60.

Texas.—Whitemore *v.* Wilson, 1 Tex. Unrep. Cas. 213.

Wisconsin.—Goodyear Rubber Co. *v.* Knapp, 61 Wis. 103, 20 N. W. 651; Mairet *v.* Marriner, 34 Wis. 582; Miller *v.* Munson, 34 Wis. 579, 17 Am. Rep. 461 (wnere this was said to be the true test of the sufficiency of an affidavit couched in the language of the statute).

73. *Alabama.*—No affidavit is necessary in an action by the state. *Ex p.* Macdonald, 76 Ala. 603.

Kentucky.— Under the Kentucky act of 1837 an action to subject the effects of a non-resident debtor to the payment of an indebtedness may be maintained without an affidavit, where no order for attachment or seizure is required or obtained. Kerr *v.* Smith, 5 B. Mon. (Ky.) 552. And Ky. Civ. Code, §§ 476, 477, provides that where a judgment creditor begins equitable proceedings, after execution returned "no property found," he may have an attachment similar to a general attachment without the affidavit required in the latter cases. See Lewis *v.* Quinker, 2 Metc. (Ky.) 284. But a mere statement that execution was issued and returned "no property found" is insufficient. Maddox *v.* Fox, 8 Bush (Ky.) 402.

Pennsylvania.— No affidavit as required in case of a domestic attachment is necessary before a foreign attachment can issue, except where the arrest of the garnishee is sought lest he carry off or use the effects. Eberly *v.* Rowland, 1 Pearson (Pa.) 312.

South Carolina.— A statute permitting the issue of an attachment by a magistrate on behalf of a party who makes out a proper case by oath does not require that the affidavit shall be in writing. Goss *v.* Gowing, 5 Rich. (S. C.) 477 [*following* McKenzie *v.* Buchan, 1 Nott & M. (S. C.) 205]. See also Foster *v.* Jones, 1 McCord (S. C.) 116.

Texas.—Where an officer makes a return of the original citation that defendant cannot be found in the county, and a judicial attachment is issued on that ground, plaintiff need not make an affidavit that defendant so secretes himself that ordinary process of law cannot be served on him. Walker *v.* Birdwell, 21 Tex. 92.

74. *Alabama.*— Mobile L. Ins. Co. *v.* Teague, 78 Ala. 147; Smith *v.* Moore, 35 Ala. 76; McGown *v.* Sprague, 23 Ala. 524; Kirkman *v.* Patton, 19 Ala. 32; Jones *v.* Pope, 6 Ala. 154.

Arkansas.—Thompson *v.* Robinson, 34 Ark. 44.

Colorado.—Skinner *v.* Beshoar, 2 Colo. 383.

Indiana.— Bond *v.* Patterson, 1 Blackf. (Ind.) 34.

Iowa.— Eads *v.* Pitkin, 3 Greene (Iowa) 77.

Kentucky.—Kerr *v.* Smith, 5 B. Mon. (Ky.) 552. And see Farmers Nat. Bank *v.* National Bank, 4 Ky. L. Rep. 451.

Michigan.—Estlow *v.* Hanna, 75 Mich. 219, 42 N. W. 812; Borland *v.* Kingsbury, 65 Mich. 59, 31 N. W. 620; Greenvault *v.* Farmers', etc., Bank, 2 Dougl. (Mich.) 498.

Minnesota.— Duxbury *v.* Dahle, 78 Minn. 427, 81 N. W. 198, 79 Am. St. Rep. 408.

Mississippi.— Page *v.* Ford, 2 Sm. & M. (Miss.) 266; Tyson *v.* Hamer, 2 How. (Miss.) 669. See also Ford *v.* Woodward, 2 Sm. & M. (Miss.) 260; Lindner *v.* Aaron, 5 How. (Miss.) 581.

Missouri.— Burnett *v.* McCluey, 78 Mo. 676; Bray *v.* McClury, 55 Mo. 128.

North Carolina.—Toms *v.* Warson, 66 N. C. 417; State Bank *v.* Hinton, 12 N. C. 397.

Ohio.— Endel *v.* Leibrock, 33 Ohio St. 254.

Pennsylvania.— Curwensville Mfg. Co. *v.* Bloom, 10 Pa. Co. Ct. 295.

Tennessee.— Watt *v.* Carnes, 4 Heisk. (Tenn.) 532; McReynolds *v.* Neal, 8 Humphr. (Tenn.) 12.

Virginia.—Brien *v.* Pittman, 12 Leigh (Va.) 379.

Washington.— Tacoma Grocery Co. *v.* Draham, 8 Wash. 268, 36 Pac. 31, 40 Am. St. Rep. 907.

West Virginia.— Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

See 5 Cent. Dig. tit. "Attachment," § 204.

Necessity of separate application.— The affidavit itself is a sufficient application for an order allowing an attachment. Consequently merely filing it is enough. Winchell

not necessary that the facts therein stated should be set forth in a separate affidavit.[75]

b. New or Additional Affidavits. In many cases new or additional affidavits are not required,[76] as when writs are issued to different counties,[77] or a second attachment is rendered necessary because of failure to serve the summons within a prescribed time after the first was granted,[78] or after it has been vacated,[79] or upon the revivor of an action by the personal representative of a plaintiff who died before service of the writ.[80] So where several orders of attachment may be issued at the same time, or in succession, a single affidavit will be sufficient,[81] and it in no way affects the validity of the proceedings that a second unnecessary affidavit was presented or filed.[82]

3. Accompanying Pleadings. If it is requisite that plaintiff should file or present a complaint or declaration, or that it should accompany the affidavit, noncompliance with the statutory requirement is fatal.[83] However, in some jurisdictions, an affidavit containing the requisites of both an affidavit and a complaint will dispense with a separate complaint,[84] or the absence of a complaint under such circumstances will be regarded as a mere irregularity curable by amendment;[85] and no declaration or complaint need be presented or filed in the absence of a requirement to that effect.[86]

4. Who May Make — a. In General. Generally plaintiff may show the facts upon which he bases his right to an attachment, by his own affidavit, or by the affidavit of his agent, attorney in fact or at law, or of others having knowledge of the facts.[87] When made by a party other than plaintiff authority to make it

v. McKinzie, 35 Nebr. 813, 53 N. W. 975.

75. Clark *v.* Miller, 88 Ky. 108, 10 Ky. L. Rep. 691, 10 S. W. 277; Burnam *v.* Romans, 2 Bush (Ky.) 191; Franklin Sav. Inst. *v.* Wheeling M. M. Bank, 1 Metc. (Ky.) 156; Scott *v.* Doneghy, 17 B. Mon. (Ky.) 321; Moses *v.* Rountree, 11 Ky. L. Rep. 438; Gathright *v.* McNeil, 4 Ky. L. Rep. 907, 5 Ky. L. Rep. 165; Ferst *v.* Powers, 58 S. C. 398, 36 S. E. 744; Peak *v.* Buck, 3 Baxt. (Tenn.) 71; Lewis *v.* Woodfolk, 2 Baxt. (Tenn.) 25; Huffman *v.* Hardeman, (Tex. 1886) 1 S. W. 575; Watts *v.* Harding, 5 Tex. 386; Whitemore *v.* Wilson, 1 Tex. Unrep. Cas. 213. See also Endel *v.* Leibrock, 33 Ohio St. 254, where the court, without expressly deciding whether the omission of a separate affidavit would be supplied by the allegation of the necessary facts in the petition, said that if it could the petition must contain all the requisites of a valid affidavit.

76. Affidavit to obtain writ and order of publication.— If the affidavit sets forth sufficient facts to authorize the issue of the writ and an order of publication, both the writ and the order may be granted without the filing of another affidavit. Avery *v.* Good, 114 Mo. 290, 21 S. W. 815; Bray *v.* Marshall, 75 Mo. 327.

When an attachment is sought after the commencement of the action a separate petition must be filed, but if sought at the commencement of the suit either a separate petition may be filed or the original petition in the main action, properly verified, may state the grounds for attachment, in which case no other petition is necessary. Van Winkle *v.* Stevens, 9 Iowa 264 (holding that no additional petition need be filed, although the attachment be not issued until several days after the filing of the original); Shapleigh *v.* Root, 6 Iowa 524.

77. Simpson *v.* East, 124 Ala. 293, 27 So. 436.

78. Mojarrieta *v.* Saenz, 80 N. Y. 547, 58 How. Pr. (N. Y.) 505.

79. Acker *v.* Jackson, 3 How. Pr. N. S. (N. Y.) 160.

80. Rhenbottom *v.* Sadler, 19 Ark. 491, where the declaration, affidavit, and bond were filed before plaintiff's decease, and an alias writ issued without a new affidavit.

81. Thompson *v.* Stetson, 15 Nebr. 112, 17 N. W. 368.

82. Wharton *v.* Conger, 9 Sm. & M. (Miss.) 510.

83. Jones *v.* Howard, 42 Ala. 483; Beck *v.* Irby, 36 Miss. 188.

84. Sannoner *v.* Jacobson, 47 Ark. 31, 14 S. W. 458; Kurtz *v.* Dunn, 36 Ark. 648; Dunn *v.* Crocker, 22 Ind. 324.

Sufficiency of allegations.— An affidavit setting out evidence of the facts and not specifically pleading them cannot be regarded as a substitute for a petition. Garrett *v.* Taylor, 88 Ga. 467, 14 S. E. 869.

85. Lehman *v.* Lowman, 50 Ark. 444, 8 S. W. 187.

If affidavit recites matters which should appear in complaint the omission of them from the pleading is a mere irregularity. Baker *v.* Ayers, 58 Ark. 524, 25 S. W. 834.

86. Smith *v.* Wilson, 58 Ga. 322; Moore *v.* Hawkins, 6 Dana (Ky.) 289; Toms *v.* Warson, 66 N. C. 417; Redwood *v.* Consequa, 2 Browne (Pa.) 62.

87. *Alabama.*— Flake *v.* Day, 22 Ala. 132.

Indiana.— Abbott *v.* Zeigler, 9 Ind. 511. *Compare* Foulks *v.* Falls, 91 Ind. 315, 321, where it was said: "It is not the duty of attorneys to make affidavits in attachment

should appear expressly [88] or by recitals showing the capacity in which affiant

proceedings. They sometimes do so, but the propriety of such course has always been doubted by the profession, and in some instances the right has been questioned. Such a practice should be discouraged rather than imposed as a duty."

Iowa.— Rausch *v.* Moore, 48 Iowa 611, 30 Am. Rep. 412; Chittenden *v.* Hobbs, 9 Iowa 417; Pitkins *v.* Boyd, 4 Greene (Iowa) 255.

Kansas.— Manley *v.* Headley, 10 Kan. 88.

Kentucky.— Patton *v.* Harris, 15 B. Mon. (Ky.) 607.

Louisiana.— Hardie *v.* Colvin, 43 La. Ann. 851, 9 So. 745; Allen *v.* Champlin, 32 La. Ann. 511; De Poret *v.* Gusman, 30 La. Ann. 930; Clark *v.* Morse, 16 La. 575. A writ of provisional seizure cannot be supported by an affidavit made by a person not the party or an attorney in the suit. Fernandez *v.* Miller, 26 La. Ann. 120. An attorney of one state has no authority under a general employment to make an affidavit to procure an attachment in another state. Wetmore *v.* Daffin, 5 La. Ann. 496.

Maryland.— Didier *v.* Kerr, 12 Gill & J. (Md.) 499.

Mississippi.—Beer *v.* Hooper, 32 Miss. 246; Parker *v.* Stovall, 31 Miss. 446.

New Jersey.—Trenton Banking Co. *v.* Haverstick, 11 N. J. L. 171.

New York.— Hanson *v.* Marcus, 8 N. Y. App. Div. 318, 40 N. Y. Suppl. 951; Washburn *v.* Carthage Nat. Bank, 86 Hun (N. Y.) 396, 33 N. Y. Suppl. 505, 67 N. Y. St. 218; James *v.* Richardson, 39 Hun (N. Y.) 399; Edick *v.* Green, 38 Hun (N. Y.) 202; Stewart *v.* Brown, 16 Barb. (N. Y.) 367; Morgan *v.* Avery, 7 Barb. (N. Y.) 656; Billwiller *v.* Marks, 16 N. Y. Suppl. 541, 21 N. Y. Civ. Proc. 162; Lampkin *v.* Douglass, 10 Abb. N. Cas. (N. Y.) 342, 63 How. Pr. (N. Y.) 47; Matter of Bliss, 7 Hill (N. Y.) 187.

Pennsylvania.— Simon *v.* Johnson, 7 Kulp (Pa.) 166; Long *v.* Goodwin, 5 Pa. Dist. 335, 26 Pittsb. Leg. J. N. S. (Pa.) 449.

South Carolina.— Grollman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272.

South Dakota.—Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

Tennessee.— McElwee *v.* Steelman, (Tenn. Ch. 1896) 38 S. W. 275; Lyons *v.* Mason, 4 Coldw. (Tenn.) 525.

Virginia.— Benn *v.* Hatcher, 81 Va. 25, 59 Am. Rep. 645; Fisher *v.* March, 26 Gratt. (Va.) 765.

Wisconsin.— Eureka Steam Heating Co. *v.* Sloteman, 67 Wis. 118, 30 N. W. 241.

See 5 Cent. Dig. tit. "Attachment," §§ 217, 221; and, generally, AFFIDAVITS, 2 Cyc. 5.

Action for use of another.— In an attachment by one party for the use of another the affidavit may be made by the usee. Grand Gulf R., etc., Co. *v.* Conger, 9 Sm. & M. (Miss.) 505.

Affidavit as guardian.— An affidavit sworn to by plaintiff as "guardian" will be regarded as the individual oath of the party swearing thereto. Wade *v.* Roberts, 53 Ga. 26.

An affidavit may be made by two agents: one swearing to the justice of the demand, and the other to the ground for attachment. Lewis *v.* Stewart, 62 Tex. 352. And there may be more than one affidavit based on different grounds. Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791. But under the Texas statute the facts necessary to authorize the issue of an attachment must appear in one affidavit, and cannot be made piecemeal by the affidavit of different parties to separate facts. Scram *v.* Duggan, 1 Tex. App. Civ. Cas. § 1269.

Interest of affiant.— If the common-law rules as to evidence are in full force an interested party may not make the affidavit (Matter of Bliss, 7 Hill (N. Y.) 187); but where persons making affidavits as to the existence of the grounds of attachment do not appear to have any interest in the indebtedness the presumption is that they are disinterested (Van Alstyne *v.* Erwine, 11 N. Y. 331; Staples *v.* Fairchild, 3 N. Y. 41).

The affidavit need not state that affiant is a credible person, under a statute permitting the affidavit to be made by any "credible person," as that will be presumed until the contrary appears. Ruhl *v.* Rogers, 29 W. Va. 779, 2 S. E. 798.

The complaint on which an attachment is issued ought to be made by the creditor himself and not by his attorney at law. Mantz *v.* Hendley, 2 Hen. & M. (Va.) 308.

88. *Illinois.*— American Cent. Ins. Co. *v.* Hettler, 46 Ill. App. 416.

Kentucky.— Anderson *v.* Sutton, 2 Duv. (Ky.) 480.

Louisiana.— Wetmore *v.* Daffin, 5 La. Ann. 496; Parham *v.* Murphee, 4 Mart. N. S. (La.) 355; Baker *v.* Hunt, 1 Mart. (La.) 194.

Missouri.— Mackey *v.* Hyatt, 42 Mo. App. 443.

New York.—Biddle *v.* McLoughlin, 17 Misc. (N. Y.) 748, 39 N. Y. Suppl. 837.

Contra, Simpson *v.* McCarty, 78 Cal. 175, 20 Pac. 406, 12 Am. St. Rep. 37.

See 5 Cent. Dig. tit. "Attachment," § 222.

Defendant may demand proof of the agent's authority to make the affidavit. Shewell *v.* Stone, 12 Mart. (La.) 386.

When authority may be questioned.— The authority of an agent to sign an affidavit to procure an attachment for his principal cannot be collaterally questioned after judgment. Augusta Bank *v.* Jaudon, 9 La. Ann. 8. See also Rutledge *v.* Stribling, 26 Ill. App. 353, holding that if the omission of the affidavit to state that affiant is plaintiff's agent is a defect it must be first objected to in the trial court.

The unauthorized insertion by the notary, in the body of the affidavit, of the existence of a ground for attachment will not cure an affidavit defective for the omission to state material facts relative thereto. Hudkins *v.* Haskins, 22 W. Va. 645.

Want of authority — Ratification.— Where one, as agent of another, makes the affidavit without sufficient authority, the attachment

acts,[89] as well as that it is made on behalf of plaintiff,[90] or some reason should be given why the affidavit is not made by plaintiff.[91] It is held, however, in many cases, that, in the absence of any implied necessity that affiant's authority should appear, a statement thereof is unnecessary.[92] One of several plaintiffs is competent to make the affidavit on behalf of all.[93]

b. Plaintiff Disabled or Absent. In some jurisdictions the affidavit may be made by plaintiff's attorney, when, because of the former's disability[94] or absence,[95]

must be dissolved, though the agent's acts be subsequently ratified by the principal. Grove *v.* Harvey, 12 Rob. (La.) 221.

89. *Alabama.*— Murray *v.* Cone, 8 Port. (Ala.) 250.

Indiana.— Fremont Cultivator Co. *v.* Fulton, 103 Ind. 393, 3 N. E. 135.

Michigan.— Adams *v.* Kellogg, 63 Mich. 105, 29 N. W. 679.

Minnesota.— Smith *v.* Victorin, 54 Minn. 338, 56 N. W. 47.

Nebraska.— Tessier *v.* Crowley, 16 Nebr. 369, 20 N. W. 264.

Ohio.— Winchester *v.* Pierson, 1 Ohio Dec. (Reprint) 169, 3 West. L. J. 131.

South Dakota.— Hardenberg *v.* Roberts, 6 S. D. 487, 61 N. W. 1128.

Tennessee.— Baker *v.* Huddleston, 3 Baxt. (Tenn.) 1.

Texas.— Evans *v.* Lawson, 64 Tex. 199.

See 5 Cent. Dig. tit. "Attachment," § 222.

Affidavit by an attorney at law need not state that he is plaintiff's attorney in fact. Austin *v.* Latham, 19 La. 88.

Affidavit by next friend.— Affidavit alleging that affiant "has commenced an action in said court, as next friend for L, an infant," etc., sufficiently declares an agency, within a statute, requiring an affidavit for attachment to be made by plaintiff, his agent, or attorney. McDowell *v.* Nims, 9 Ohio Dec. (Reprint) 624, 15 Cinc. L. Bul. 359.

Authority appearing from pleading.— Although the affidavit does not show that it was made by any one representing plaintiff yet, if the petition shows that affiant is plaintiff's attorney, the affidavit is sufficient. Bauer Grocery Co. *v.* Smith, 61 Mo. App. 665, 1 Mo. App. Rep. 439.

Setting out capacity.— Under a requirement that the affidavits shall be made by plaintiff, his agent, or attorney, it need not show by which one of such persons it is made. Sutliff *v.* Chenango Bank, 2 Ohio Dec. (Reprint) 52, 1 West. L. Month. 214.

90. Borland *v.* Kingsbury, 65 Mich. 59, 31 N. W. 620.

It must appear on the face of the affidavit that it is made on behalf of the plaintiff. Maguire *v.* Bolen, 94 Wis. 48, 68 N. W. 408; Miller *v.* Chicago, etc., R. Co., 58 Wis. 310, 17 N. W. 130 [*following* Wiley *v.* Aultman, 53 Wis. 560, 11 N. W. 32]. *Contra*, Mandel *v.* Peet, 18 Ark. 236; Simpson *v.* McCarty, 78 Cal. 175, 20 Pac. 406, 12 Am. St. Rep. 37.

Affidavit by attorney of record.— An affidavit for an attachment made by the same person who signs the petition as plaintiff's attorney is sufficient, though it does not state that it was made for plaintiff. Johnson *v.* Gilkeson, 81 Mo. 55; Gilkeson *v.* Knight, 71 Mo. 403.

Presumption.— Where affiant states that he makes the affidavit as the attorney of plaintiff the legal inference is that he made it on behalf of the latter. Stringer *v.* Dean, 61 Mich. 196, 27 N. W. 886.

91. Phelps *v.* Wetherby, 3 Ohio Dec. (Reprint) 205, 4 Wkly. L. Gaz. 385.

Excusing plaintiffs' non-action.— In Ohio an affidavit by plaintiff's attorney need not show why plaintiff did not make it. White *v.* Stanley, 29 Ohio St. 423. But under N. Y. Code Civ. Proc. § 636, the affidavit may be made by an agent or other person than plaintiff only when some excuse is given for not producing the affidavit of plaintiff. Raymond *v.* Ganss, 18 N. Y. Suppl. 609, 45 N. Y. St. 826; Gribbon *v.* Ganss, 18 N. Y. Suppl. 608, 45 N. Y. St. 825.

92. *California.*— Simpson *v.* McCarty, 78 Cal. 175, 20 Pac. 406, 12 Am. St. Rep. 37.

Louisiana.— Schneider *v.* Vercker, 11 La. Ann. 274; Austin *v.* Latham, 19 La. 88.

Maryland.— Stockbridge *v.* Fahnestock, 87 Md. 127, 39 Atl. 95.

Missouri.—Godman *v.* Gordon, 61 Mo. App. 685.

Nebraska.— Reed *v.* Bagley, 24 Nebr. 332, 38 N. W. 827.

New Mexico.— Robinson *v.* Hesser, 4 N. M. 144, 13 Pac. 204.

Wisconsin.— Anderson *v.* Wehe, 58 Wis. 615, 17 N. W. 426 [*overruling* Wiley *v.* Aultman, 53 Wis. 560, 11 N. W. 32].

93. Acker *v.* Jackson, 3 How. Pr. N. S. (N. Y.) 160; Birch *v.* Butler, 1 Cranch C. C. (U. S.) 319, 3 Fed. Cas. No. 1,425.

94. Schneider *v.* Vercker, 11 La. Ann. 274, plaintiff disabled by sickness.

95. Franklin Sav. Inst. *v.* Wheeling M. M. Bank, 1 Metc. (Ky.) 156; Fuqua *v.* Farmers', etc., Nat. Bank, 18 Ky. L. Rep. 101, 35 S. W. 545; Murphy *v.* Jack, 76 Hun (N. Y.) 356, 27 N. Y. Suppl. 802, 58 N. Y. St. 481 [*affirmed* in 142 N. Y. 215, 36 N. E. 882, 58 N. Y. St. 458, 40 Am. St. Rep. 590].

Attachment void if plaintiff not absent.— An attachment issued upon the affidavit of an attorney when one of the plaintiffs was in the county is void, though the attorney believed that all the plaintiffs were absent from the county and so stated in his affidavit. Harbour-Pitt Shoe Co. *v.* Dixon, 22 Ky. L. Rep. 1169, 60 S. W. 186.

Ratification of unauthorized affidavit.— The Kentucky code contemplates that the affidavit shall be made by an attorney who is such at the time the affidavit is filed; and where suit is begun and the affidavit made by an unauthorized attorney, a subsequent

which absence is usually required to be shown by affiant,[96] he cannot make it himself.

c. On Behalf of Copartnership. When the attachment is sought on behalf of a firm, any member thereof may make the required affidavit.[97]

d. On Behalf of Corporation. Affidavits for attachment may be made on behalf of a corporation by its agent, attorney, or any of its duly authorized officers.[98]

5. Who May Take — a. In General. If the statute does not prescribe the officer before whom the affidavit shall be sworn it may be taken before any officer acting within his jurisdiction and invested with the power to administer oaths;[99] but if the statute expressly provides before whom it is to be verified it

ratification by plaintiff of all that had been done in the case is insufficient to sustain the writ on a motion to quash. Johnson *v.* Johnson, 31 Fed. 700.

96. Pool *v.* Webster, 3 Metc. (Ky.) 278; Westcott *v.* Sharp, 50 N. J. L. 392, 13 Atl. 243.

Failure to allege plaintiff's absence will render the affidavit irregular, but not void (Westcott *v.* Sharp, 50 N. J. L. 392, 13 Atl. 243), but if the accompanying petition sufficiently shows the absence, the affidavit will be held sufficient (Clark *v.* Miller, 88 Ky. 108, 10 Ky. L. Rep. 691, 10 S. W. 277; Farley *v.* Farior, 6 La. Ann. 725).

Affidavit on behalf of corporation.— In Kentucky when an affidavit is made by an attorney on behalf of a corporation, it must show the attorney's authority and that the officer of the company, who would be required to verify it, was at the time absent, or a nonresident of the county. Northern Lake Ice Co. *v.* Orr, 102 Ky. 586, 19 Ky. L. Rep. 1634 44 S. W. 216. But see *infra*, VII, D, 4, d.

97. *Indiana.*— Fellows *v.* Miller, 8 Blackf. (Ind.) 231.

Louisiana.— Barriere *v.* McBean, 12 La. Ann. 493.

Mississippi.— Bosbyshell *v.* Emanuel, 12 Sm. & M. (Miss.) 63.

Tennessee.— Moody *v.* Alter, 12 Heisk. (Tenn.) 142.

United States.— Drake *v.* Cleveland, 3 Cranch C. C. (U. S.) 3, 7 Fed. Cas. No. 4,059, construing Maryland statute.

See 5 Cent. Dig. tit. "Attachment," § 218.

Affidavit in firm-name.—An affidavit signed in the firm-name is insufficient, for the reason that it cannot be regarded as the oath of the individual members of the firm, or of either of them, and it would be impossible to convict either of them for perjury upon the affidavit alone. Norman *v.* Horn, 36 Mo. App. 419.

Surplusage.— An affidavit which on its face purports to have been made by one partner is not vitiated by the fact that in affixing his name to it he adds the name of his copartner. Moody *v.* Alter, 12 Heisk. (Tenn.) 142.

98. *Alabama.*— Faver *v.* State Bank, 10 Ala. 616.

Kentucky.— Kentucky Jeans Clothing Co. *v.* Bohn, 104 Ky. 387, 20 Ky. L. Rep. 612, 47 S. W. 250; Northern Lake Ice Co. *v.* Orr, 102 Ky. 586, 19 Ky. L. Rep. 1634, 44 S. W. 216. But see *supra*, VII, D, 4, b, note 96.

Nebraska.— Moline, etc., Co. *v.* Curtis, 38 Nebr. 520, 57 N. W. 161.

New Jersey.—Trenton Banking Co. *v.* Haverstick, 11 N. J. L. 171.

Texas.— C. B. Carter Lumber Co. *v.* De Grazier, 3 Tex. App. Civ. Cas. § 176.

Sufficiency.— A paper reciting that plaintiff (a corporation) being sworn, deposes, etc., and signed in the name of the corporation by a person who describes himself as managing agent is insufficient as an affidavit to procure an attachment. Blyth, etc., Co. *v.* Swensen, 7 Wyo. 303, 51 Pac. 873. See *infra*, VII, D, 7, c, (v), (c), (3), (c).

99. *Alabama.*— Wright *v.* Smith, 66 Ala. 545.

Georgia.— Wicker *v.* Schofield, 59 Ga. 210.

Illinois.— Moore *v.* Mauck, 79 Ill. 391; Dyer *v.* Flint, 21 Ill. 80, 74 Am. Dec. 73; Rowley *v.* Berrian, 12 Ill. 198; Stout *v.* Slattery, 12 Ill. 162.

Kentucky.—Harbour-Pitt Shoe Co. *v.* Dixon, 22 Ky. L. Rep. 1169, 60 S. W. 186.

Maryland.— Dickinson *v.* Barnes, 3 Gill (Md.) 485.

Mississippi.— Cassedy *v.* Mayer, 64 Miss. 356, 1 So. 510.

Pennsylvania.— Wagonhorst *v.* Dankel, 1 Woodw. (Pa.) 221.

Wisconsin.— Mayhew *v.* Dudley, 1 Pinn. (Wis.) 95.

United States.—James *v.* Jenkins, Hempst. (U. S.) 189, 13 Fed. Cas. No. 7,181*a*, construing Arkansas statute.

Who may take affidavits, generally, see 2 Cyc. 9.

Clerk in vacation.— Unless authorized by statute the clerk of the circuit court may not take an affidavit in vacation. Greenvault *v.* Farmers', etc., Bank, 2 Dougl. (Mich.) 498.

Clerk of court of another county.—A clerk of a court of a county other than that out of which the writ issues is competent to administer the oath. Wright *v.* Smith, 66 Ala. 545. *Contra*, Goldsoll *v.* Votaw, 1 Tex. Unrep. Cas. 90.

Clerk of a court who is a director and stockholder of the plaintiff corporation is competent to administer the oath to one who makes an affidavit for an attachment on its behalf. Laning *v.* Iron City Nat. Bank, (Tex. Civ. App. 1896) 36 S. W. 481.

will be of no avail unless sworn to before such officer,[1] and if sworn to before an officer expressly prohibited by statute it will be a nullity.[2]

b. Officers Without the Jurisdiction. Unless the officer who may take the affidavit is expressly designated, and where the simple administration of an oath is all that is required, affidavits taken before non-resident commissioners of the state, or officers in other jurisdictions having general authority to administer oaths, will be sufficient.[3]

6. Time of Making. When it is required that the affidavit be made prior to or contemporaneously with the issue of the attachment it cannot be made subsequently.[4] In some of the states under statutes providing in effect that when any

Deputy clerk.— A deputy clerk may administer the oath (Kirkman *v.* Wyer, 10 Mart. (La.) 126; Dorr *v.* Clark, 7 Mich. 310), even though he be a minor and on that account not eligible to appointment as deputy. Under the circumstances he will be recognized as an officer *de facto* (Wimberly *v.* Boland, 72 Miss. 241, 16 So. 905).

De facto officer.— An oath administered by a notary who has failed to comply with all the statutory requirements authorizing him to administer oaths is good against collateral attack, because the act of a *de facto* officer. Schiff *v.* Leipziger Bank, 65 N. Y. App. Div. 33, 72 N. Y. Suppl. 513.

1. Chattanooga First Nat. Bank *v.* Willingham, 36 Fla. 32, 18 So. 58; Heard *v.* Illinois Nat. Bank, (Ga. 1901) 40 S. E. 267; Tallant *v.* Thompson, 4 Mart. N. S. (La.) 514.

Judicial officers.— A statute contemplating that the affidavit should be made before a judicial officer is not complied with by the administration of the oath by a court clerk. Heard *v.* Illinois Nat. Bank, (Ga. 1901) 40 S. E. 266.

Foreign attachment.— In Illinois an affidavit for a foreign attachment cannot be taken by a justice of the peace. Campbell *v.* Whetstone, 4 Ill. 361.

2. Attorneys of record.— As where it is provided by statute that affidavits may not be taken before the attorney of the party or a person interested in the result of the action or proceeding. Wilkowski *v.* Halle, 37 Ga. 678, 95 Am. Dec. 374; Ward *v.* Ward, 20 Ohio Cir. Ct. 136, 10 Ohio Cir. Dec. 656. But see Horkey *v.* Kendall, 53 Nebr. 522, 73 N. W. 953, 68 Am. St. Rep. 623, where it was held that an affidavit sworn to before plaintiff's attorney as a notary was not a nullity but a mere irregularity which could not be attacked collaterally. See Affidavits, 2 Cyc. 9.

3. *Arkansas.*—Grider *v.* Williams, 25 Ark. 1.

District of Columbia.—Howard *v.* Citizens' Bank, etc., Co., 12 App. Cas. (D. C.) 222.

Illinois.— Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124.

Louisiana.— Irving *v.* Edrington, 41 La. Ann. 671, 6 So. 177.

Maryland.— Smith *v.* Greenleaf, 4 Harr. & M. (Md.) 291.

Mississippi.— Griffing *v.* Mills, 40 Miss. 611.

Missouri.— Posey *v.* Buckner, 3 Mo. 604; Hays *v.* Bouthalier, 1 Mo. 346.

West Virginia.— Kesler *v.* Lapham, 46 W. Va. 293, 33 S. E. 289.

See 5 Cent. Dig. tit. "Attachment," § 229.

Presumption.— It will be presumed that an officer acted within the territorial limits of his jurisdiction, where the affidavit describes the officer, in the jurat, as "Commissioner of the District of Columbia in Maryland, residing in Baltimore city." Matthai *v.* Conway, 2 App. Cas. (D. C.) 45.

"Any judge of any other of the United States."— A provision that the affidavit may be made before any judge of any other of the United States does not require that it shall be taken before a judge of the highest court of a sister state. Smith *v.* Greenleaf, 4 Harr. & M. (Md.) 291.

"Judge of any other place."— An affidavit made before the mayor of a city situated in another state is not sufficient as an affidavit taken "before the judge of any other place." Tallant *v.* Thompson, 4 Mart. N. S. (La.) 514.

Affidavits taken without jurisdiction.— An oath administered by an officer at a place within which he has no jurisdiction to act is a nullity. Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391.

See *infra*, VII, D, 7, c, (v), (p), (2).

4. Wright *v.* Smith, 66 Ala. 545; Benedict *v.* Bray, 2 Cal. 251, 56 Am. Dec. 332. And see Wilson *v.* Arnold, 5 Mich. 98, holding that the affidavit must be verified on the day of the application for the writ.

Failure of clerk to affix jurat.— If the affidavit is actually sworn to before the clerk before he issues the writ, and he repair his omission to sign and certify it before the return of the writ, the irregularity will not invalidate the proceedings. Farrow *v.* Hoyes, 31 Mich. 498.

Prior issue of writ.— Where the affidavit must be presented before the issue of the writ, if the writ is delivered to plaintiff's attorneys in blank, and they subsequently fill in the blanks and attach the affidavits thereto the attachment is void. Buckley *v.* Lowry, 2 Mich. 418.

Presumption.— If the statute requires the affidavit to be made before the warning order, and both are made at the same time, the affidavit will be considered to take effect first (Webster *v.* Daniel, 47 Ark. 131, 14 S. W. 550); and an affidavit filed on the same day on which the writ issues will be presumed to have been filed before the sealing of the writ (Morrel *v.* Buckley, 20 N. J. L. 667).

suit is instituted plaintiff may forthwith sue out an attachment against the estate of a non-resident, it is held that the affidavit may be made either before or after the filing of the bill,[5] before abatement of the suit by return of the officer,[6] or before rights have accrued in favor of third persons.[7]

7. Form and Requisites[8] — a. In General. To entitle plaintiff to an attachment the affidavit or affidavits presented or filed must show by legal evidence all the material facts prescribed by the statute, or the court acquires no jurisdiction to issue it.[9] For that purpose, however, it is sufficient to make out a *prima facie*

5. O'Brien *v.* Stephens, 11 Gratt. (Va.) 610; Hall *v.* Hall, 12 W. Va. 1.

6. Pulliam *v.* Aler, 15 Gratt. (Va.) 54.

7. Cirode *v.* Buchanan, 22 Gratt. (Va.) 205. And see Moore *v.* Holt, 10 Gratt. (Va.) 284.

8. For forms of affidavit for attachment, either in whole, in part, or in substance, see the following cases:

Arkansas.—Webster *v.* Daniel, 47 Ark. 131, 14 S. W. 550; Kinney *v.* Heald, 17 Ark. 397; Boothe *v.* Estes, 16 Ark. 104; Cheadle *v.* Riddle, 6 Ark. 480; Steam Boat Napoleon *v.* Etter, 6 Ark. 103.

California.— O'Conor *v.* Roark, 108 Cal. 173, 41 Pac. 465; Flagg *v.* Dare, 107 Cal. 482, 40 Pac. 804; Kohler *v.* Agassiz, 99 Cal. 9, 33 Pac. 741; Simpson *v.* McCarty, 78 Cal. 175, 20 Pac. 406, 12 Am. St. Rep. 37.

District of Columbia.—Cissell *v.* Johnston, 4 App. Cas. (D. C.) 335; Wielar *v.* Garner, 4 App. Cas. (D. C.) 329; Robinson *v.* Morrison, 2 App. Cas. (D. C.) 105.

Florida.— West *v.* Woolfolk, 21 Fla. 189.

Georgia.— Irvin *v.* Howard, 37 Ga. 18; Cox *v.* Felder, 36 Ga. 597; Kennon *v.* Evans, 36 Ga. 89; Ginnis *v.* Bacon, Dudley (Ga.) 195.

Indiana.— Abbott *v.* Zeigler, 9 Ind. 511; Marnine *v.* Murphy, 8 Ind. 272; O'Brien *v.* Daniel, 2 Blackf. (Ind.) 290; U. S. Capsule Co. *v.* Isaacs, 23 Ind. App. 533, 55 N. E. 832.

Iowa.— Shaffer *v.* Sundwall, 33 Iowa 579.

Maryland.— Dickinson *v.* Barnes, 3 Gill (Md.) 485; Washington *v.* Hodgskin, 12 Gill & J. (Md.) 353.

Missouri.— Mahner *v.* Linck, 70 Mo. App. 380.

Nebraska.— Moline, etc., Co. *v.* Curtis, 38 Nebr. 520, 57 N. W. 161; Caulfield *v.* Bittenger, 37 Nebr. 542, 56 N. W. 302; Whipple *v.* Hill, 36 Nebr. 720, 55 N. W. 227, 38 Am. St. Rep. 742, 20 L. R. A. 213; Strickler *v.* Hargis, 34 Nebr. 468, 51 N. W. 1039; Nagel *v.* Loomis, 33 Nebr. 499, 50 N. W. 441; Miller *v.* Eastman, 27 Nebr. 408, 43 N. W. 179; Hart *v.* Barnes, 24 Nebr. 782, 40 N. W. 322; Rawlings *v.* Powers, 24 Nebr. 681, 41 N. W. 651; Reed *v.* Bagley, 24 Nebr. 332, 38 N. W. 827; Tessier *v.* Englehart, 18 Nebr. 167, 24 N. W. 734; Tessier *v.* Reed, 17 Nebr. 105, 22 N. W. 225.

New Mexico.—Robinson *v.* Hesser, 4 N. M. 144, 13 Pac. 204.

New York.— Buell *v.* Van Camp, 119 N. Y. 160, 23 N. E. 538, 28 N. Y. St. 947; New York *v.* Genet, 63 N. Y. 646; Bascom *v.* Smith, 31 N. Y. 595; Boyd *v.* Miller, 88 Hun (N. Y.) 617, 34 N. Y. Suppl. 1026, 69 N. Y. St. 2; Waterbury *v.* Waterbury, 76 Hun (N. Y.) 51, 27 N. Y. Suppl. 1114, 59 N. Y. St. 289; Gribbon *v.* Back, 35 Hun (N. Y.) 541; Ross *v.* Wigg, 34 Hun (N. Y.) 192, 6 N. Y. Civ. Proc. 268 note; Sickles *v.* Sullivan, 5 Hun (N. Y.) 569; Kissock *v.* Grant, 34 Barb. (N. Y.) 144; Ketchum *v.* Vidvard, 4 Thomps. & C. (N. Y.) 138; Birdsall *v.* Emmons, 34 N. Y. Suppl. 1056; Williams *v.* Barnaman, 19 Abb. Pr. (N. Y.) 69; Taylor *v.* Frost, 2 How. Pr. (N. Y.) 214.

Ohio.—Constable *v.* White, 1 Handy (Ohio) 44, 12 Ohio Dec. (Reprint) 18; Northern Nat. Bank *v.* Maumee Rolling Mill Co., 2 Ohio S. & C. Pl. Dec. 67, 2 Ohio N. P. 260; Mansfield Sav. Bank *v.* Post, 22 Ohio Cir. Ct. 644; Winchester *v.* Pierson, 1 Ohio Dec. (Reprint) 169, 3 West. L. J. 131.

Pennsylvania.—Sharpless *v.* Ziegler, 92 Pa. St. 467; Walls *v.* Campbell, 23 Wkly. Notes Cas. (Pa.) 506; Vansant *v.* Lunger, 15 Wkly. Notes Cas. (Pa.) 549.

South Carolina.— Turner *v.* McDaniel, 1 McCord (S. C.) 552.

South Dakota.— Coats *v.* Arthur, 5 S. D. 274, 58 N. W. 675; Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

Tennessee.— Runyon *v.* Morgan, 7 Humphr. (Tenn.) 210.

Texas.— La Force *v.* Wear, etc., Dry Goods Co., 8 Tex. Civ. App. 572, 29 S. W. 75.

West Virginia.— Altmeyer *v.* Caulfield, 37 W. Va. 847, 17 S. E. 409; Andrews *v.* Mundy, 36 W. Va. 22, 14 S. E. 414; Ruhl *v.* Rogers, 29 W. Va. 779, 2 S. E. 798; Gutman *v.* Virginia Iron Co., 5 W. Va. 22.

Wisconsin.— Le Clerc *v.* Wood, 2 Pinn. (Wis.) 37; Morrison *v.* Fake, 1 Pinn. (Wis.) 133.

9. *Alabama.*— Staggers *v.* Washington, 56 Ala. 225.

Arkansas.—Delano *v.* Kennedy, 5 Ark. 457.

Colorado.—Mentzer *v.* Ellison, 7 Colo. App. 315, 43 Pac. 464.

Hawaii.— Shillaber *v.* Waldo, 1 Hawaii 31.

Idaho.—Murphy *v.* Montandon, 2 Ida. 1048, 29 Pac. 851, 35 Am. St. Rep. 279.

Illinois.— Moore *v.* Mauck, 79 Ill. 391.

Indiana.— U. S. Capsule Co. *v.* Isaacs, 23 Ind. App. 533, 55 N. E. 832.

Louisiana.— Irving *v.* Edrington, 41 La. Ann. 671, 6 So. 177.

Maryland.— Gumby *v.* Porter, 80 Md. 402, 31 Atl. 324; Wever *v.* Baltzell, 6 Gill & J. (Md.) 335.

Michigan.— Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288; Borland *v.* Kingsbury, 65 Mich. 59, 31 N. W. 620.

Minnesota.— Duxbury *v.* Dahle, 78 Minn.

case;[10] and if the facts and circumstances stated in the affidavit have a legal tendency to make out a good reason for issuing an attachment and fairly call upon the judge or officer to whom it is presented to exercise his judgment on the weight of the evidence, the proceeding is not void for lack of jurisdiction, although the officer may have erred in his estimate as to the weight of the evidence.[11]

427, 81 N. W. 198, 79 Am. St. Rep. 408; Pierse *v.* Smith, 1 Minn. 82.

Mississippi.—Hopkins *v.* Grissom, 26 Miss. 143; Thompson *v.* Chambers, 12 Sm. & M. (Miss.) 488; Wallis *v.* Wallace, 6 How. (Miss.) 254.

New York.— Clearwater *v.* Brill, 61 N. Y. 625; People *v.* St. Nicholas Bank, 44 N. Y. App. Div. 313, 60 N. Y. Suppl. 719; Smith *v.* Holt, 37 N. Y. App. Div. 24, 55 N. Y. Suppl. 731; Dintruff *v.* Tuthill, 62 Hun (N. Y.) 591, 17 N. Y. Suppl. 556, 43 N. Y. St. 704; Marinette Iron Works *v.* Riddaway, 59 N. Y. Super. Ct. 575, 13 N. Y. Suppl. 426; Mott *v.* Lawrence, 9 Abb. Pr. (N. Y.) 196, 17 How. Pr. (N. Y.) 559; Morgan *v.* House, 36 How. Pr. (N. Y.) 326 [*following* Bennett *v.* Brown, 4 N. Y. 254].

Ohio.— Cook *v.* Olds Gasoline Engine Works, 19 Ohio Cir. Ct. 732.

Pennsylvania.— Hallowell *v.* Tenney Canning Co., 16 Pa. Super. Ct. 60.

South Carolina.— Ivy *v.* Caston, 21 S. C. 583.

South Dakota.—Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

Tennessee.— Maples *v.* Tunis, 11 Humphr. (Tenn.) 108, 53 Am. Dec. 779.

West Virginia.— U. S. Baking Co. *v.* Bachman, 38 W. Va. 84, 18 S. E. 382; Altmeyer *v.* Caulfield, 37 W. Va. 847, 17 S. E. 409; Sandheger *v.* Hosey, 26 W. Va. 221; Hudkins *v.* Haskins, 22 W. Va. 645; Capehart *v.* Dowery, 10 W. Va. 130; Sims *v.* Charleston Bank, 3 W. Va. 415.

Wisconsin.— Eureka Steam Heating Co. *v.* Sloteman, 67 Wis. 118, 30 N. W. 241.

Formal requisites of affidavits, generally, see 2 Cyc. 17.

Material facts which affiant is required to state are those which must produce in the minds of the court the conclusion that the ground for the attachment exists. Sandheger *v.* Hosey, 26 W. Va. 221; Delaplain *v.* Armstrong, 21 W. Va. 211.

Necessity of averring jurisdiction.— The affidavit need not state that the court has jurisdiction of the subject-matter of the action. Branch *v.* Frank, 81 N. C. 180.

Omission to comply with a rule of court requiring applicant to show whether or not a previous application had been made is not necessarily fatal. Ross *v.* Wigg, 34 Hun (N. Y.) 192, 6 N. Y. Civ. Proc. 268 note.

Presumptions.— Where a lost affidavit is collaterally attacked its sufficiency will be presumed (Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911), and an affidavit sufficient to authorize an attachment under different statutes will be presumed to have been issued under the statute with which the subsequent proceedings are in conformity (Reinmiller *v.* Skidmore, 7 Lans. (N. Y.) 161).

An affidavit for a foreign attachment in equity which shows a purely legal claim which should be enforced in a court of law is insufficient. Sims *v.* Charleston Bank, 3 W. Va. 415.

Failure to affix internal revenue stamps to the affidavit has been held to render the attachment void. Hoyt *v.* Benner, 22 La. Ann. 353.

That the affidavit might have been amended does not make an attachment issued on an insufficient affidavit the less void. Goodyear Rubber Co. *v.* Knapp, 61 Wis. 103, 20 N. W. 651.

10. Allen *v.* Meyer, 7 Daly (N. Y.) 229; Easton *v.* Malavazi, 7 Daly (N. Y.) 147; Rothschild *v.* Mooney, 13 N. Y. Suppl. 125, 36 N. Y. St. 565; Leiser *v.* Rosnan, 10 N. Y. Suppl. 415, 32 N. Y. St. 739; Lee *v.* La Compagnie Universelle, etc., 2 N. Y. St. 612; Mott *v.* Lawrence, 9 Abb. Pr. (N. Y.) 196, 17 How. Pr. (N. Y.) 559; Wyman *v.* Wilmarth, 1 S. D. 172, 46 N. W. 190; Hubbard *v.* Haley, 96 Wis. 578, 71 N. W. 1036.

Unnecessary averments.— It is immaterial that an affidavit sufficient in itself also states facts which will entitle plaintiff to proceed by way of garnishment (Fremont Cultivator Co. *v.* Fulton, 103 Ind. 393, 3 N. E. 135), or includes the requirements of an affidavit for publication (Raymond *v.* Nix, 5 Okla. 656, 49 Pac. 1110).

11. Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391; Schoonmaker *v.* Spencer, 54 N. Y. 366; Hall *v.* Stryker, 27 N. Y. 596; Waterbury *v.* Waterbury, 76 Hun (N. Y.) 51, 27 N. Y. Suppl. 1114, 59 N. Y. St. 289; Rowles *v.* Hoare, 61 Barb. (N. Y.) 266; Ketchum *v.* Vidvard, 4 Thomps. & C. (N. Y.) 138; Allen *v.* Meyer, 7 Daly (N. Y.) 229; Easton *v.* Malavazi, 7 Daly (N. Y.) 147; Furman *v.* Walter, 13 How. Pr. (N. Y.) 348; Conklin *v.* Dutcher, 5 How. Pr. (N. Y.) 386, Code Rep. N. S. (N. Y.) 49; Matter of Faulkner, 4 Hill (N. Y.) 598.

The principle established by the New York cases is that to obtain a warrant of attachment there must be presented to the justice granting the attachment competent common-law evidence of the facts upon which the right to the attachment is based. The question is always whether this evidence of affiant in the affidavits presented to the justice granting the attachment would, if introduced upon the trial, justify a verdict for plaintiff, or in other words, upon the facts sworn to by affidavit being testified to by a competent witness before a jury, would the jury be justified in rendering a verdict for plaintiff. An-

b. Affidavit as Separate Paper. While it has been held that an affidavit made on the same paper with the complaint is too indefinite and uncertain to meet the requirements of the statute,[12] it has also been held that an affidavit written upon the original petition by leave of the court after the interposition of an answer was sufficient, though the petition was not refiled.[13]

c. Mode of Allegation — (I) *Statutory Language.* Unless the statute requires the affidavit to be made by a specified formula no particular language is necessary,[14] and as a rule it is sufficient in this respect if the affidavit either follows or substantially follows, by equivalent words, the language of the statute respecting the nature of the action, the requirement as to the statement of plaintiff's claim, the grounds upon which the attachment is sought, and the like.[15]

thony *v.* Fox, 53 N. Y. App. Div. 200, 65 N. Y. Suppl. 806.

Extent of proof.— The officer must not only be personally satisfied, but must also be satisfied judicially upon legal proof. Mott *v.* Lawrence, 9 Abb. Pr. (N. Y.) 196, 17 How. Pr. (N. Y.) 559.

False affidavit.— In states where the affidavit can be controverted, when the attachment is granted upon a statement of alleged facts, part of which are untrue, the whole writ may be quashed upon proof of the falsity of that allegation. Vollmer *v.* Spencer, (Ida. 1897) 51 Pac. 609.

12. Fremont Cultivator Co. *v.* Fulton, 103 Ind. 393, 3 N. E. 135.

13. Pinson *v.* Kirsh, 46 Tex. 26.

14. Whitemore *v.* Wilson, 1 Tex. Unrep. Cas. 213.

15. *Arkansas.*— Cheadle *v.* Riddle, 6 Ark. 480.

District of Columbia.— Cissell *v.* Johnston, 4 App. Cas. (D. C.) 335.

Georgia.— Loeb *v.* Smith, 78 Ga. 504, 3 S. E. 438.

Hawaii.— Shillaber *v.* Waldo, 1 Hawaii 31.

Indiana.— Sweeny *v.* Cochran, 19 Ind. 206.

Iowa.— Crew *v.* McClung, 4 Greene (Iowa) 153.

Kansas.— Robinson *v.* Burton, 5 Kan. 293; Reyburn *v.* Brackett, 2 Kan. 227, 83 Am. Dec. 457.

Kentucky.— Cabell *v.* Patterson, 98 Ky. 520, 32 S. W. 746.

Mississippi.—Dandridge *v.* Stevens, 12 Sm. & M. (Miss.) 723; Jones *v.* Leake, 11 Sm. & M. (Miss.) 591; Wallis *v.* Wallace, 6 How. (Miss.) 254.

Missouri.— Tufts *v.* Volkening, 122 Mo. 631, 27 S. W. 522 [*affirming* 51 Mo. App. 7].

Nebraska.— McDonald *v.* Marquardt, 52 Nebr. 820, 73 N. W. 288; Burnham *v.* Ramge, 47 Nebr. 175, 66 N. W. 277; Tessier *v.* Englehart, 18 Nebr. 167, 24 N. W. 734; Hilton *v.* Ross, 9 Nebr. 406, 2 N. W. 862; Tallon *v.* Ellison, 3 Nebr. 63; Ellison *v.* Tallon, 2 Nebr. 14.

New York.—Edick *v.* Green, 38 Hun (N. Y.) 202; Lamkin *v.* Douglass, 27 Hun (N. Y.) 517.

North Dakota.— Severn *v.* Giese, 6 N. D. 523, 72 N. W. 922.

Ohio.— Creasser *v.* Young, 31 Ohio St. 57; Emmitt *v.* Yeigh, 12 Ohio St. 335; Coston *v.* Paige, 9 Ohio St. 397; Harrison *v.* King, 9 Ohio St. 388; Hockspringer *v.* Ballenburg, 16 Ohio 304; Mansfield Sav. Bank *v.* Post, 22 Ohio Cir. Ct. 644; Cook *v.* Olds Gasoline Engine Works, 19 Ohio Cir. Ct. 732.

Pennsylvania.— Werner *v.* Gross, 174 Pa. St. 622, 38 Wkly. Notes Cas. (Pa.) 149, 34 Atl. 327; Sharpless *v.* Ziegler, 92 Pa. St. 467 [*reversing* 36 Leg. Int. (Pa.) 244]; Rubinsky *v.* Ullman, 4 Pa. Dist. 126; Miller *v.* Paine, 2 Kulp (Pa.) 304; Vansant *v.* Lunger, 15 Wkly. Notes Cas. (Pa.) 549; Pearce *v.* Landenberger, 16 Phila. (Pa.) 12, 40 Leg. Int. (Pa.) 130; Richards *v.* Donaughey, 13 Phila. (Pa.) 514, 34 Leg. Int. (Pa.) 98, 24 Pittsb. Leg. J. (Pa.) 127; Ferris *v.* Carlton, 8 Phila. (Pa.) 549; Moyer *v.* Kellogg, 1 Wkly. Notes Cas. (Pa.) 134. *Contra*, Hall *v.* Kintz, 2 Pa. Dist. 615, 13 Pa. Co. Ct. 24; Miller *v.* Smith, 2 Pearson (Pa.) 265, 34 Leg. Int. (Pa.) 68; Chase *v.* Lennox, 2 Wkly. Notes Cas. (Pa.) 487; Born *v.* Zimmerman, 8 Phila. (Pa.) 233; Boyd *v.* Lippencott, 2 Pa. Co. Ct. 585, 44 Leg. Int. (Pa.) 46.

South Dakota.— Finch *v.* Armstrong, 9 S. D. 255, 68 N. W. 740.

Tennessee.— Lowenstine *v.* Gillespie, 6 Lea (Tenn.) 641.

Texas.— Caldwell *v.* Haley, 3 Tex. 317.

Virginia.— Clinch River Mineral Co. *v.* Harrison, 91 Va. 122, 21 S. E. 660.

West Virginia.— Altmeyer *v.* Caulfield, 37 W. Va. 847, 17 S. E. 409.

Wisconsin.— Mairet *v.* Marriner, 34 Wis. 582; Oliver *v.* Town, 28 Wis. 328.

Wyoming.— C. D. Smith Drug Co. *v.* Casper Drug Co., 5 Wyo. 510, 40 Pac. 979, 42 Pac. 213; Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743.

Language should be unequivocally identical with statutory language.— Where other language than that of the statute is used it should be unequivocally identical in meaning. Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391.

Test of proper use of statutory language.— Though the affidavit is in the exact language of the statute yet it will be deemed insufficient if perjury cannot be assigned upon it. Miller *v.* Munson, 34 Wis. 579, 17 Am. Rep. 461.

Sufficient prima facie.—An affidavit simply setting forth a ground for the attachment in the language of the statute is *prima facie* sufficient to authorize its issue, but must be supported by competent proof when challenged by the positive oath of defendant. Hilton *v.* Ross, 9 Nebr. 406, 2 N. W. 862. In Wyoming where the ground of attachment is

Mere technical defects, verbal inaccuracies, and immaterial departures from the words of the statute may be disregarded if the material requirements of the act are fulfilled.[16]

(II) *Affidavits on Knowledge*—(A) *In General.* It is the better practice and always desirable that affiant should state his means of knowledge, notwithstanding positive statements, and this has been held necessary in many cases, especially where the affidavit is by a third party.[17]

(B) *Presumptions.* Actual knowledge may be presumed, as where from the circumstances it appears that affiant has such knowledge or the circumstances are such that knowledge can be inferred,[18] when the relation of affiant to the parties or to the transactions is such as to warrant an inference of personal knowledge,[19]

an assignment of property with intent to defraud creditors a recital in the language of the statute that "affiant has good reason to believe and does believe," etc., without stating specified facts is sufficient. But where the ground is that defendant fraudulently contracted the debt or incurred the obligation sued on, an allegation that "affiant has good reason to believe and does believe," etc., without alleging the facts upon which the affiant bases his belief, is insufficient. Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743.

16. Fairbanks *v.* Lorig, 4 Ind. App. 451, 29 N. E. 452; Ferguson *v.* Smith, 10 Kan. 396; Lynn *v.* Stark, 6 Ky. L. Rep. 586; Harrison *v.* King, 9 Ohio St. 388.

Material departure.— A statement that plaintiff "should recover" is not equivalent to a statement that he is "entitled" to recover, the statutory language; and the affidavit is therefore insufficient. Sommers *v.* Allen, 44 W. Va. 120, 28 S. E. 787. See *infra*, VII, D, 7, c, (v), (H), (4), (5).

17. *Iowa.*— Bates *v.* Robinson, 8 Iowa 318.

Louisiana.— Bergh *v.* Jayne, 7 Mart. N. S. (La.) 609.

Missouri.—Johnson *v.* Gilkeson, 81 Mo. 55; Gilkeson *v.* Knight, 71 Mo. 403.

New York.— James *v.* Signell, 60 N. Y. App. Div. 75, 69 N. Y. Suppl. 680; Tucker *v.* E. L. Goodsell Co., 14 N. Y. App. Div. 89, 43 N. Y. Suppl. 460; Marine Bank *v.* Ward, 45 Hun (N. Y.) 395; Claflin *v.* Silberg, 4 Silv. Supreme (N. Y.) 11, 8 N. Y. Suppl. 557, 29 N. Y. St. 362; Taintor *v.* Charles Beseler Co., 33 Misc. (N. Y.) 720, 68 N. Y. Suppl. 980; Weehawken Wharf Co. *v.* Knickerbocker Coal Co., 24 Misc. (N. Y.) 683, 53 N. Y. Suppl. 982 [*reversing* 22 Misc. (N. Y.) 559, 768, 49 N. Y. Suppl. 1001, 1150]; McVicker *v.* Campanini, 2 N. Y. Suppl. 577 [*affirmed* in 2 Silv. Supreme (N. Y.) 238, 5 N. Y. Suppl. 577, 24 N. Y. St. 643]; Lampkin *v.* Douglass, 10 Abb. N. Cas. (N. Y.) 342, 63 How. Pr. (N. Y.) 47.

Ohio.— Phelps *v.* Wetherby, 3 Ohio Dec. (Reprint) 205, 4 Wkly. L. Gaz. 385.

Contra, see Jones *v.* Leake, 11 Sm. & M. (Miss.) 591.

If affiant states of his own knowledge that defendant is indebted to plaintiff it is unnecessary that the facts constituting such knowledge should be stated. Matthai *v.* Conway, 2 App. Cas. (D. C.) 45.

18. James *v.* Signell, 60 N. Y. App. Div. 75, 69 N. Y. Suppl. 680; Anthony *v.* Fox, 53 N. Y. App. Div. 200, 65 N. Y. Suppl. 806 [*reversing* 30 Misc. (N. Y.) 637, 64 N. Y. Suppl. 273]; Martin *v.* Aluminum Compound Plate Co., 44 N. Y. App. Div. 412, 60 N. Y. Suppl. 1010; Einstein *v.* Climax Cycle Co., 13 N. Y. App. Div. 624, 42 N. Y. Suppl. 1124; Buhl *v.* Ball, 41 Hun (N. Y.) 61; Globe Yarn Mills *v.* Bilbrough, 2 Misc. (N. Y.) 100, 21 N. Y. Suppl. 2, 49 N. Y. St. 702.

Unless stated to be on information and belief statements and affidavits will be presumed to have been made on personal knowledge. Patterson *v.* Delaney, 14 N. Y. Suppl. 100, 37 N. Y. St. 585, 20 N. Y. Civ. Proc. 427.

19. Hoormann *v.* Climax Cycle Co., 9 N. Y. App. Div. 579, 41 N. Y. Suppl. 710, 75 N. Y. St. 1100; Ladenburg *v.* Commercial Bank, 5 N. Y. App. Div. 219, 39 N. Y. Suppl. 119; Nason Mfg. Co. *v.* Craft Refrigerating Mach. Co., 81 Hun (N. Y.) 578, 30 N. Y. Suppl. 1031, 63 N. Y. St. 224; American Exch. Nat. Bank *v.* Voisin, 44 Hun (N. Y.) 85; Marine Nat. Bank *v.* Ward, 35 Hun (N. Y.) 395; Yellow Pine Co. *v.* Atlantic Lumber Co., 21 Misc. (N. Y.) 164, 47 N. Y. Suppl. 79; Globe Yarn Mills *v.* Bilbrough, 2 Misc. (N. Y.) 100, 21 N. Y. Suppl. 2, 49 N. Y. St. 702 [*affirming* 19 N. Y. Suppl. 176, 22 N. Y. Civ. Proc. 186, 28 Abb. N. Cas. (N. Y.) 426]; Raymond *v.* Ganss, 18 N. Y. Suppl. 609, 45 N. Y. St. 826; Gribbon *v.* Ganss, 18 N. Y. Suppl. 608, 45 N. Y. St. 825; Hamilton *v.* Steck, 10 N. Y. Suppl. 177, 32 N. Y. St. 150 [*affirming* 5 N. Y. Suppl. 831]; Lee *v.* La Compagnie Universelle, etc., 2 N. Y. St. 612; Rice *v.* Morner, 64 Wis. 599, 25 N. W. 668; Anderson *v.* Wehe, 58 Wis. 615, 17 N. W. 426.

Assigned claim.— In Hill *v.* Knickerbocker Electric Light, etc., Co., 14 N. Y. Suppl. 517, 38 N. Y. St. 417, 21 N. Y. Civ. Proc. 141, an action on two demands, one of which had accrued personally and the other had been assigned, both being for services rendered, the positive affidavit of plaintiff was held sufficient, it appearing that plaintiff's employment continued during nearly the whole of the time during which the assigned demand accrued.

Officer of trading corporation.— No presumption will arise as to the personal knowledge of the president of a trading corpora-

or in some states in the absence of a statutory requirement that affiant shall state whether or not the averments of the affidavit are based on direct knowledge, or on information and belief.[20] But unqualified statements of facts will not be sufficient if it is apparent that affiant's relation to the parties or to the transaction is not such as to import personal knowledge or it appears affirmatively, or by fair inference, that they could not have been and were not made on such knowledge.[21]

(III) *Affidavits on Information and Belief*—(A) *In General.* Generally, where the ground upon which the attachment is sought is of such a character as to admit of definite statements respecting its existence, the allegations relative thereto must set out such facts and circumstances as may be necessary to establish the ground relied on positively and unequivocally and not simply on information and belief;[22] but if sufficient is shown positively to authorize the issue of an attachment other statements on information and belief may be disregarded as

tion. Manufacturers' Nat. Bank *v.* Hall, 60 Hun (N. Y.) 466, 15 N. Y. Suppl. 208, 39 N. Y. St. 463, 21 N. Y. Civ. Proc. 131.

20. Simpson *v.* McCarty, 78 Cal. 175, 20 Pac. 406, 12 Am. St. Rep. 37; Nicolls *v.* Lawrence, 30 Mich. 395.

21. Lacker *v.* Dreher, 38 N. Y. App. Div. 75, 55 N. Y. Suppl. 979; Wallace *v.* Baring, 21 N. Y. App. Div. 477, 48 N. Y. Suppl. 692; Tucker *v.* E. L. Goodsell Co., 14 N. Y. App. Div. 89, 43 N. Y. Suppl. 460, 4 N. Y. Annot. Cas. 86; Hoormann *v.* Climax Cycle Co., 9 N. Y. App. Div. 579, 41 N. Y. Suppl. 710, 75 N. Y. St. 1100 [*affirming* 17 Misc. (N. Y.) 734, 40 N. Y. Suppl. 1067, 26 N. Y. Civ. Proc. 25, 3 N. Y. Annot. Cas. 201]; Ladenburg *v.* Commercial Bank, 5 N. Y. App. Div. 219, 39 N. Y. Suppl. 119; Kahle *v.* Muller, 57 Hun (N. Y.) 144, 11 N. Y. Suppl. 26, 32 N. Y. St. 448; Crowns *v.* Vail, 51 Hun (N. Y.) 204, 4 N. Y. Suppl. 324, 21 N. Y. St. 208; James *v.* Richardson, 39 Hun (N. Y.) 399; National Broadway Bank *v.* Barker, 16 N. Y. Suppl. 75, 40 N. Y. St. 771; Thomas *v.* Dickerson, 11 N. Y. Suppl. 436, 33 N. Y. St. 786; Doctor *v.* Schnepp, 7 N. Y. Civ. Proc. 144, 2 How. Pr. N. S. (N. Y.) 52; Ellison *v.* Bernstein, 60 How. Pr. (N. Y.) 145.

22. *Arkansas.*— Sannoner *v.* Jacobson, 47 Ark. 31, 14 S. W. 458; Hellman *v.* Fowler, 24 Ark. 235 [*overruling* Heard *v.* Lowry, 5 Ark. 522]. But an affidavit made on belief and not positively is merely irregular, not void, and the irregularity may be waived by failure to object. Landfair *v.* Lowman, 50 Ark. 446, 8 S. W. 188.

District of Columbia.— See Newman *v.* Hexter, MacArthur & M. (D. C.) 88.

Florida.— Ross *v.* Steen, 20 Fla. 443.

Georgia.— Moore *v.* Neill, 86 Ga. 186, 12 S. E. 222; Meinhard *v.* Neill, 85 Ga. 265, 11 S. E. 613; Enneking *v.* Clay, 79 Ga. 598, 7 S. E. 257; Krutina *v.* Culpepper, 75 Ga. 602; Horn *v.* Guiser Mfg. Co., 72 Ga. 897; Chronicle, etc. *v.* Rowland, 72 Ga. 195; Brown *v.* Massman, 71 Ga. 859; Neal *v.* Gordon, 60 Ga. 112; Stowers *v.* Carter, 28 Ga. 351; Deupree *v.* Eisenach, 9 Ga. 598. *Contra*, Ginnis *v.* Bacon, Dudley (Ga.) 195, decided prior to the act of 1856, under which the foregoing decisions were made.

Illinois.— Archer *v.* Claflin, 31 Ill. 306; Dyer *v.* Flint, 21 Ill. 80, 74 Am. Dec. 73; Syndicate des Cultivators, etc. *v.* Currie, 72 Ill. App. 122; Adams *v.* Merritt, 10 Ill. App. 275.

Kansas.—Campbell *v.* Hall, McCahon (Kan.) 53.

Kentucky.— Williams *v.* Martin, 1 Metc. (Ky.) 42.

Louisiana.— Reding *v.* Ridge, 14 La. Ann. 36.

Minnesota.— Ely *v.* Titus, 14 Minn. 125; Murphy *v.* Purdy, 13 Minn. 422; Morrison *v.* Lovejoy, 6 Minn. 183; Pierse *v.* Smith, 1 Minn. 82.

New York.— Hitner *v.* Boutilier, 67 Hun (N. Y.) 203, 22 N. Y. Suppl. 64, 51 N. Y. St. 518; Farley *v.* Shoemaker, 49 Hun (N. Y.) 606, 1 N. Y. Suppl. 729, 17 N. Y. St. 205; Bennett *v.* Edwards, 27 Hun (N. Y.) 352; Sickles *v.* Sullivan, 5 Hun (N. Y.) 569; Monette *v.* Chardon, 16 Misc. (N. Y.) 165, 37 N. Y. Suppl. 2, 72 N. Y. St. 135; Bernhard *v.* Cohen, 56 N. Y. Suppl. 271 [*affirmed* in 27 Misc. (N. Y.) 794, 58 N. Y. Suppl. 363]; White *v.* Goodson Type Casting, etc., Mach. Co., 34 N. Y. Suppl. 797, 24 N. Y. Civ. Proc. 411; Norfolk, etc., Hosiery Co. *v.* Arnold, 18 N. Y. Suppl. 910, 46 N. Y. St. 491; Brown *v.* Keogh, 14 N. Y. Suppl. 915; McCulloh *v.* Aeby, 9 N. Y. Suppl. 361, 31 N. Y. St. 125; St. Amant *v.* De Beixcedon, 3 Sandf. (N. Y.) 703; Hill *v.* Bond, 22 How. Pr. (N. Y.) 272; Matter of Bliss, 7 Hill (N. Y.) 187; Matter of Faulkner, 4 Hill (N. Y.) 598; *Ex p.* Haynes, 18 Wend. (N. Y.) 611; Smith *v.* Luce, 14 Wend. (N. Y.) 237; Gilbert *v.* Tompkins, 2 Edm. Sel. Cas. (N. Y.) 232, Code Rep. N. S. (N. Y.) 16. But see *contra*, Morgan *v.* Avery, 7 Barb. (N. Y.) 656; Cammann *v.* Tompkins, 2 Edm. Sel. Cas. (N. Y.) 227, Code Rep. N. S. (N. Y.) 12.

Ohio.— Garner *v.* White, 23 Ohio St. 192.

Pennsylvania.— Simons *v.* Hickman, 24 Wkly. Notes Cas. (Pa.) 92; Curwensville Mfg. Co. *v.* Bloom, 10 Pa. Co. Ct. 295.

Rhode Island.— Greene *v.* Tripp, 11 R. I. 424.

South Carolina.— Wando Phosphate Co. *v.* Rosenberg, 31 S. C. 301, 9 S. E. 969; Kerchner *v.* McCormac, 25 S. C. 461; Ivy *v.* Caston, 21 S. C. 583; Claussen *v.* Fultz, 13 S. C. 476; Brown *v.* Morris, 10 S. C. 467.

immaterial.[23] In some jurisdictions positive statements as to the ground upon which the affidavit is sought are unnecessary, for the reason that the statute permits the affidavit to be made on information and belief, or upon belief only, or because sanctioned by the practice;[24] but where the statute prescribes the form in which this belief may be stated, unless there is a substantial compliance therewith the affidavit will be insufficient.[25]

(B) *As to Intent.* Intent to depart, to remove or to dispose of property, or to defraud creditors is not usually the subject of direct or positive proof, but is to be inferred from the acts and conduct of the debtor. Hence to authorize such an inference there must be appropriate allegation of such facts, circumstances, acts, or declarations as will enable the court or officer to judge whether or not such an intent may be implied.[26]

South Dakota.—Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

Texas.— Sydnor *v.* Totham, 6 Tex. 189.

Virginia.— Clowser *v.* Hall, 80 Va. 864; Sublett *v.* Wood, 76 Va. 318.

West Virginia.— Roberts *v.* Burns, 48 W. Va. 92, 35 S. E. 922; Sandheger *v.* Hosey, 26 W. Va. 221.

See 5 Cent. Dig. tit. "Attachment," § 249.

Sufficiency of positive allegation.— If the existence of the grounds upon which the attachment is asked for is made to appear by positive allegation, the omission of specific, particular facts and circumstances tending to establish the ground is immaterial. Furman *v.* Walter, 13 How. Pr. (N. Y.) 348.

23. Allen *v.* Meyer, 7 Daly (N. Y.) 229; Patterson *v.* Delaney, 14 N. Y. Suppl. 100, 37 N. Y. St. 585, 20 N. Y. Civ. Proc. 427; Steele *v.* Raphael, 13 N. Y. Suppl. 664, 37 N. Y. St. 623.

Verification of petition.— Where an affidavit states all the necessary facts positively as of affiant's own knowledge, a statement in the verification thereto that "so far as the same are matters of information, he verily believes them to be true" is mere surplusage. Pitkins *v.* Boyd, 4 Greene (Iowa) 255. To same effect, Lanier *v.* Houston City Bank, 9 N. Y. Civ. Proc. 161.

24. *Florida.*— Zinn *v.* Dzialynski, 13 Fla. 597.

Indiana.— McNamara *v.* Ellis, 14 Ind. 516; Reed *v.* Kentucky Bank, 5 Blackf. (Ind.) 227.

Kentucky.— Fuqua *v.* Farmers', etc., Nat. Bank, 18 Ky. L. Rep. 101, 35 S. W. 545.

Louisiana.— Dinkelspiel *v.* New Albany Woolen Mills, 46 La. Ann. 576, 15 So. 282; Walker *v.* Barrelli, 32 La. Ann. 467; Clements *v.* Cassily, 2 La. Ann. 567.

Maryland.— Boarman *v.* Patterson, 1 Gill (Md.) 372.

Michigan.— Nicolls *v.* Lawrence, 30 Mich. 395; Macumber *v.* Beam, 22 Mich. 395. *Contra*, Anonymous, 2 Mich. N. P. 118.

Missouri.— Tufts *v.* Volkening, 51 Mo. App. 7.

New Mexico.— Leitensdorfer *v.* Webb, 1 N. M. 34.

Pennsylvania.— Boyd *v.* Lippencott, 2 Pa. Co. Ct. 585, 44 Leg. Int. (Pa.) 46.

Tennessee.— Phipps *v.* Burnett, 96 Tenn. 175, 33 S. W. 925 [*approving* Alabama Bank *v.* Berry, 2 Humphr. (Tenn.) 442, and *distinguishing* Nelson *v.* Fuld, 89 Tenn. 466, 14 S. W. 1079]; Lester *v.* Cummings, 8 Humphr. (Tenn.) 384.

25. Dean *v.* Oppenheimer, 25 Md. 368 (where a statement that affiant knew or believed was held not to comply with the statutory requirement that the affidavit should be made on the knowledge or belief of plaintiff; and it was also held that an affidavit stating the knowledge of affiant or that he had good reason to believe was not a compliance with the requirement that the affidavit should state that plaintiff knows or believes); Stevenson *v.* Robbins, 5 Mo. 18 (where the statute authorizes an attachment where there was good reason to believe that the debtor is about fraudulently to dispose of his property, etc., and the affidavit merely alleged "that it is the belief of the affiant"); Delaplain *v.* Armstrong, 21 W. Va. 211; Rittenhouse *v.* Harman, 7 W. Va. 380 (where a statement that affiant thinks was held not to be the equivalent of the statement that affiant believes).

26. *Minnesota.*— Morrison *v.* Lovejoy, 6 Minn. 183.

New Jersey.— Kennedy *v.* Chumar, 26 N. J. L. 305.

New York.— Bennett *v.* Edwards, 27 Hun (N. Y.) 352; Stevens *v.* Middleton, 26 Hun (N. Y.) 470; Fulton *v.* Heaton, 1 Barb. (N. Y.) 552; Ketchum *v.* Vidvard, 4 Thomps. & C. (N. Y.) 138; Denzer *v.* Mundy, 5 Rob. (N. Y.) 636; St. Amant *v.* De Beixcedon, 3 Sandf. (N. Y.) 703; Camp *v.* Tibbetts, 2 E. D. Smith (N. Y.) 20, 3 Code Rep. (N. Y.) 45; Monette *v.* Chardon, 16 Misc. (N. Y.) 165, 37 N. Y. Suppl. 2, 72 N. Y. St. 135; Goldschmidt *v.* Herschorn, 13 N. Y. St. 560; Johnson *v.* Moss, 20 Wend. (N. Y.) 145.

North Carolina.— See Hess *v.* Brower, 76 N. C. 428.

Ohio.— Dunlevy *v.* Schartz, 17 Ohio St. 640.

South Carolina.— Ivy *v.* Caston, 21 S. C. 583. See Roddey *v.* Erwin, 31 S. C. 36, 9 S. E. 729; Kerchner *v.* McCormac, 25 S. C. 461; Claussen *v.* Fultz, 13 S. C. 476.

Tennessee.—McHaney *v.* Cawthorn, 4 Heisk. (Tenn.) 508.

West Virginia.— Delaplain *v.* Armstrong, 21 W. Va. 211.

United States.— Ely *v.* Hanks, 8 Fed. Cas.

(c) *Sources of Information and Grounds of Belief.* In an affidavit on information and belief it must, as a general rule, appear that affiant's information was derived from a competent source, that is, the sources of information together with the grounds of the belief must be disclosed in such a manner as to enable the court to decide upon the probable truth of the statements and the authenticity of the jurisdictional facts.[27] Hence, the names of third persons from whom the

No. 4,430, 1 West. L. Month. 107, construing Ohio statute.

Canada.— Wakefield *v.* Bruce, 5 Ont. Pr. 77.

Conjecture.— If the allegations are as consistent with an honest purpose as with a dishonest intent, an attachment should not be granted on mere conjecture. Bernhard *v.* Cohen, 27 Misc. (N. Y.) 794, 58 N. Y. Suppl. 363.

"May" depart.— An allegation that plaintiff really believes, and has just grounds to apprehend, that defendant "may" depart from the state, etc., is insufficient. Reding *v.* Ridge, 14 La. Ann. 36.

Sufficiency.— An affidavit stating that plaintiff believes that defendant has fraudulently conveyed his property to prevent the collection of plaintiff's debt and that defendant has informed affiant that he has sold all his personalty and would pay when he got ready is sufficient. Bowers *v.* Beck, 2 Nev. 139. Under a statute requiring affiant to declare that he verily believes, etc., an affidavit by plaintiff's attorney that to the best of plaintiff's knowledge and belief the defendants had disposed of part and were about to dispose of the whole of their property with intent, etc., is insufficient. Stadler *v.* Parmlee, 10 Iowa 23. Under the Pennsylvania act of 1836, requiring the affidavit to state facts, the creditor must swear that defendant absconded with intent to defraud his creditors as distinguished from his own belief in such intention. Simons *v.* Hickman, 24 Wkly. Notes Cas. (Pa.) 92.

27. Byles *v.* Rowe, 64 Mich. 522, 31 N. W. 463; Hunt *v.* Strew, 39 Mich. 368; Murphy *v.* Jack, 142 N. Y. 215, 36 N. E. 882, 58 N. Y. St. 458, 40 Am. St. Rep. 590 [*reversing* 76 Hun (N. Y.) 356, 27 N. Y. Suppl. 802, 58 N. Y. St. 481]; Steuben County Bank *v.* Alberger, 78 N. Y. 252; Mowry *v.* Sanborn, 65 N. Y. 581; Barrell *v.* Todd, 65 N. Y. App. Div. 22, 72 N. Y. Suppl. 527; Hunt *v.* Robinson, 52 N. Y. App. Div. 539, 65 N. Y. Suppl. 386; Hawkins *v.* Pakas, 39 N. Y. App. Div. 506, 57 N. Y. Suppl. 317; Smith *v.* Holt, 37 N. Y. App. Div. 24, 55 N. Y. Suppl. 731, 89 N. Y. St. 731; Haskell *v.* Osborn, 33 N. Y. App. Div. 127, 53 N. Y. Suppl. 361; Wallace *v.* Baring, 21 N. Y. App. Div. 477, 48 N. Y. Suppl. 692; Shuler *v.* Birdsall, etc., Mfg. Co., 17 N. Y. App. Div. 228, 45 N. Y. Suppl. 725; Lehmaier *v.* Buchner, 14 N. Y. App. Div. 263, 43 N. Y. Suppl. 438, 4 N. Y. Annot. Cas. 82; Hoormann *v.* Climax Cycle Co., 9 N. Y. App. Div. 579, 41 N. Y. Suppl. 710, 75 N. Y. St. 1100; Hoosick Falls First Nat. Bank *v.* Wallace, 4 N. Y. App. Div. 382, 38 N. Y. Suppl. 851, 74 N. Y. St. 787; Empire Warehouse Co. *v.* Mallett, 84 Hun (N. Y.) 561, 32 N. Y. Suppl. 861, 66 N. Y. St. 313; Hitner *v.* Boutilier, 67 Hun (N. Y.) 203, 22 N. Y. Suppl. 64, 51 N. Y. St. 518; Kokomo Straw-Board Co. *v.* Inman, 53 Hun (N. Y.) 39, 5 N. Y. Suppl. 888, 24 N. Y. St. 663; Crowns *v.* Vail, 51 Hun (N. Y.) 204, 4 N. Y. Suppl. 324, 21 N. Y. St. 208 [*affirming* 2 N. Y. Suppl. 218]; Buhl *v.* Ball, 41 Hun (N. Y.) 61; James *v.* Richardson, 39 Hun (N. Y.) 399; Marine Nat. Bank *v.* Ward, 35 Hun (N. Y.) 395; Cribben *v.* Schillinger, 30 Hun (N. Y.) 248; Genin *v.* Tompkins, 12 Barb. (N. Y.) 265, Code Rep. N. S. (N. Y.) 12; Cadwell *v.* Colgate, 7 Barb. (N. Y.) 253; Claflin *v.* Silberg, 4 Silv. Supreme (N. Y.) 11, 8 N. Y. Suppl. 557, 29 N. Y. St. 362; Appleton *v.* Speer, 57 N. Y. Super. Ct. 119, 6 N. Y. Suppl. 511, 25 N. Y. St. 816; Taintor *v.* Charles Beseler Co., 33 Misc. (N. Y.) 720, 68 N. Y. Suppl. 980; Foster *v.* Rogers, 31 Misc. (N. Y.) 14, 64 N. Y. Suppl. 652; Harroway *v.* Flint, 19 Misc. (N. Y.) 411, 44 N. Y. Suppl. 335; Einstein *v.* Climax Cycle Co., 18 Misc. (N. Y.) 88, 41 N. Y. Suppl. 837, 3 N. Y. Annot. Cas. 203 note; Monette *v.* Chardon, 16 Misc. (N. Y.) 165, 37 N. Y. Suppl. 2, 72 N. Y. St. 135; Globe Yarn Mills *v.* Bilbrough, 2 Misc. (N. Y.) 100, 21 N. Y. Suppl. 2, 49 N. Y. St. 702; Newwitter *v.* Mansell, 14 N. Y. Suppl. 506, 38 N. Y. St. 595; Dickson *v.* Mayer, 12 N. Y. Suppl. 359, 35 N. Y. St. 616; Thomas *v.* Dickerson, 11 N. Y. Suppl. 436, 33 N. Y. St. 786; McCulloh *v.* Aeby, 9 N. Y. Suppl. 361, 31 N. Y. St. 125; Lewis *v.* Vail, 5 N. Y. Suppl. 946; Geneva Non-Magnetic Watch Co. *v.* Payne, 5 N. Y. Suppl. 68; Pride *v.* Indianapolis, etc., R. Co., 4 N. Y. Suppl. 15, 21 N. Y. St. 261; Strauss *v.* Seamon, 13 N. Y. St. 740; Smith *v.* Fogarty, 6 N. Y. Civ. Proc. 366; Dolz *v.* Atlantic, etc., Transp. Co., 3 N. Y. Civ. Proc. 162; Brewer *v.* Tucker, 13 Abb. Pr. (N. Y.) 76; King *v.* Southwick, 66 How. Pr. (N. Y.) 282; Ellison *v.* Bernstein, 60 How. Pr. (N. Y.) 145; Wentzler *v.* Ross, 59 How. Pr. (N. Y.) 397; Claflin *v.* Baere, 57 How. Pr. (N. Y.) 78; Skiff *v.* Stewart, 39 How. Pr. (N. Y.) 385; Gilbert *v.* Tompkins, Code Rep. N. S. (N. Y.) 16, 2 Edm. Sel. Cas. (N. Y.) 232; Cammann *v.* Tompkins, Code Rep. N. S. (N. Y.) 12, 2 Edm. Sel. Cas. (N. Y.) 227; Guckenheimer *v.* Libbey, 42 S. C. 162, 19 S. E. 999; Ketchin *v.* Landecker, 32 S. C. 155, 10 S. E. 936; Wando Phosphate Co. *v.* Rosenberg, 31 S. C. 301, 9 S. E. 969; Kerchner *v.* McCormac, 25 S. C. 461; Myers *v.* Whiteheart, 24 S. C. 196; Brown *v.* Morris, 10 S. C. 467; Upper Canada Bank *v.* Spafford, 2 U. C. Q. B. O. S. 373. *Contra*, Hess *v.* Brower, 76 N. C. 428.

Information by telephone.— Though an at-

alleged information was derived should be given,[28] or their affidavits presented;[29] and, where information is derived from books or papers they should be produced, if practicable, or if not copies or extracts should be furnished with appropriate reference thereto.[30]

(D) *Excusing Non-Production of Best Evidence.* If the affidavit of the informant or other source of information is not produced, satisfactory reasons

tachment may be granted on an affidavit based on information transmitted by telephone, it must appear that affiant recognized the voice of the sender, or he must identify the informer in some way. Murphy *v.* Jack, 142 N. Y. 215, 36 N. E. 882, 58 N. Y. St. 458, 40 Am. St. Rep. 590 [*reversing* 76 Hun (N. Y.) 356, 27 N. Y. Suppl. 802, 58 N. Y. St. 481]. Information derived by telephone from a person whose voice was recognized is not competent where it appears that the statement by the informant was of itself hearsay. Andrews *v.* Schofield, 27 N. Y. App. Div. 90, 50 N. Y. Suppl. 132.

Information from written admissions.—An affidavit by the attorney of a non-resident plaintiff is sufficient if it appears that the statement as to the amount and nature of defendant's indebtedness was made upon information and belief derived from the written admissions of defendant in the possession of affiant. Howell *v.* Kingsbury, 15 Wis. 272.

Knowledge of informants.— An affidavit is insufficient which fails to show that affiant's informants had knowledge of the facts which they communicated, or where the belief of affiant is founded on the past record of defendant. Nevada Bank *v.* Cregan, 17 Misc. (N. Y.) 241, 40 N. Y. Suppl. 1065.

Reference to return to writ.— A statement that defendant has left the county to avoid the service of summons as shown by the return of a constable to the writ is sufficient. Webster *v.* Daniel, 47 Ark. 131, 14 S. W. 550.

Sufficiency.—For cases in which the sources of information stated were held sufficient to support the averment of information and belief see Anthony *v.* Fox, 53 N. Y. App. Div. 200, 65 N. Y. Suppl. 806; Everitt *v.* Park, 88 Hun (N. Y.) 368, 34 N. Y. Suppl. 827, 68 N. Y. St. 765, 2 N. Y. Annot. Cas. 205; Mann *v.* Carter, 71 Hun (N. Y.) 72, 24 N. Y. Suppl. 591, 54 N. Y. St. 212; Minck *v.* Levey, 17 Misc. (N. Y.) 315, 40 N. Y. Suppl. 348; Adams *v.* Hilliard, 14 N. Y. Suppl. 120, 37 N. Y. St. 314; Matter of Bliss, 7 Hill (N. Y.) 187; Gashine *v.* Baer, 64 N. C. 108; Guckenheimer *v.* Libbey, 42 S. C. 162, 19 S. E. 999; Sharp *v.* Palmer, 31 S. C. 444, 10 S. E. 98; Roddey *v.* Erwin, 31 S. C. 36, 9 S. E. 729.

Ability to prove matters as alleged.— In Pennsylvania an affidavit upon information and belief must aver an ability to prove the matters as alleged. Simon *v.* Johnson, 7 Kulp (Pa.) 166; Ross *v.* Behringer, 21 Pa. Co. Ct. 260.

28. Acker *v.* Saynisch, 25 Misc. (N. Y.) 415, 54 N. Y. Suppl. 937.

29. Sill Stove Works *v.* Scott, 62 N. Y. App. Div. 566, 71 N. Y. Suppl. 181; Pride *v.* Indianapolis, etc., R. Co., 4 N. Y. Suppl. 15, 21 N. Y. St. 261; Wallach *v.* Sippilli, 65 How. Pr. (N. Y.) 501; Matter of Bliss, 7 Hill (N. Y.) 187.

Date of informants' affidavits.— In Belden *v.* Wilcox, 47 Hun (N. Y.) 331, a statement by plaintiff's attorney that the sources of affiant's information and the grounds of his belief were affidavits filed more than five weeks previously was held to be insufficient, where no reason was shown for not producing the affidavit of plaintiff and it was not shown that the condition of affairs might not have changed since last filing.

30. Pride *v.* Indianapolis, etc., R. Co., 4 N. Y. Suppl. 15, 21 N. Y. St. 261.

An affidavit by a receiver containing general statements as to the effect of the books and papers of plaintiff without the disclosure of facts, and which does not state enough of the agreement upon which the action is based to enable the court to determine whether or not defendant is in default is insufficient. McCulloh *v.* Aeby, 9 N. Y. Suppl. 361, 31 N. Y. St. 125.

Correspondence and telegrams.— An affidavit by a third person on information and belief derived from correspondence and telegrams received from plaintiff is insufficient, where the correspondence is not set out and only copies of some of the telegrams are given (Barrell *v.* Todd, 65 N. Y. App. Div. 22, 72 N. Y. Suppl. 527; Stewart *v.* Lyman, 62 N. Y. App. Div. 182, 70 N. Y. Suppl. 936); and an affidavit alleging as a source of information and belief a cablegram received from the correspondent, deponent's firm, which fails to state the contents of the cablegram, is insufficient (Ladenburg *v.* Commercial Bank, 87 Hun (N. Y.) 269, 33 N. Y. Suppl. 821, 67 N. Y. St. 466 [*reversing* 84 Hun (N. Y.) 503, 32 N. Y. Suppl. 873, 66 N. Y. St. 153, 24 N. Y. Civ. Proc. 234, and *affirmed* in 146 N. Y. 406, 42 N. E. 543]).

Extracts from other affidavits.— Plaintiff may embody in his affidavit extracts from an affidavit used in attachment proceedings against the same defendant by other parties, where neither affiant nor the original affidavit can be produced (Levy *v.* Goldstein, 18 Misc. (N. Y.) 639, 43 N. Y. Suppl. 774), and it is sufficient to refer to affidavits presented on the application and ordered on file (Buell *v.* Van Camp, 119 N. Y. 160, 23 N. E. 538, 28 N. Y. St. 947). But an affidavit, the material allegations of which are on information and belief, is insufficient where the source of information is in affidavits

should be given for the failure so to do.[31] If the inability to procure the testimony of the informant[32] or, although not so stated in terms, the impracticability of producing his affidavit fairly appears from the moving papers, a sufficient excuse is presented.[33]

(IV) *Reference to Pleadings or Papers*—(A) *In General.* Copies of, or extracts from, the pleadings, affidavits, or depositions on file may properly be considered where the applicant is unable to procure the affidavits of the persons who made the originals,[34] and in support of the affidavits presented on the application the court may consider affidavits made or filed by other parties at the same time in similar proceedings against the same debtor.[35] However, a mere reference to another affidavit on file is insufficient, unless extracts therefrom bearing upon the facts relied on are set out.[36] So is a reference to affidavits without

on file in the court, which are referred to, but are not quoted from, and no part of their contents set out, so that the court may know what facts are stated therein (Selser Bros. Co. *v.* Potter Produce Co., 77 Hun (N. Y.) 313, 28 N. Y. Suppl. 428, 59 N. Y. St. 826), and when copies of affidavits in other attachment cases against defendant are filed to show the source of information, affiant must also show that he believes the statements in such affidavits (Brewster *v.* Van Camp, 8 N. Y. Suppl. 588, 28 N. Y. St. 591. *Contra*, Levy *v.* Goldstein, 18 Misc. (N. Y.) 639, 43 N. Y. Suppl. 774). It is sufficient to state that the information upon which the belief is based is derived from a statement by the assignor of the claim in the nature of a deposition taken in a foreign state, but which could not be used in the courts of this state. Hawkins *v.* Pakas, 39 N. Y. App. Div. 506, 57 N. Y. Suppl. 317.

See, generally, Affidavits, 2 Cyc. 25.

31. Steuben County Bank *v.* Alberger, 78 N. Y. 252; Yates *v.* North, 44 N. Y. 271; Sill Stove Works *v.* Scott, 62 N. Y. App. Div. 566, 71 N. Y. Suppl. 181; Acker *v.* Saynisch, 25 Misc. (N. Y.) 415, 54 N. Y. Suppl. 937; Vietor *v.* Goldberg, 6 Misc. (N. Y.) 46, 25 N. Y. Suppl. 1005, 56 N. Y. St. 620; Wentzler *v.* Ross, 59 How. Pr. (N. Y.) 397.

Informant an employee of defendant.— On a statement that the information as to the non-residence of defendant was derived from the latter's bookkeeper, affiant may be excused from stating that his informant's deposition cannot be obtained (Scott *v.* Beaudet, 62 Hun (N. Y.) 50, 16 N. Y. Suppl. 409, 41 N. Y. St. 675. See also National Bank of Commerce *v.* Whiteman Pulp, etc., Co., 21 N. Y. Suppl. 748, 50 N. Y. St. 193 [*affirmed* in 138 N. Y. 636, 33 N. E. 1084, 51 N. Y. St. 935]); but where it is not shown that any attempt was made to procure the informant's affidavit, a mere statement that such informant was a friend of defendant and would not voluntarily make an affidavit is insufficient (Abrams *v.* Lavine, 90 Hun (N. Y.) 566, 35 N. Y. Suppl. 881, 70 N. Y. St. 542).

Lack of time.— A statement of inability, from lack of time, to procure the affidavits of plaintiff's informants is not a sufficient excuse. Thomas *v.* Dickerson, 11 N. Y. Suppl. 436, 33 N. Y. St. 786.

Mere inconvenience in procuring the affidavits of persons from whom information was obtained will not excuse the failure to produce them where it appears that such persons were accessible and no reason is given for the failure to procure their affidavits. Brewster *v.* Van Camp, 55 Hun (N. Y.) 603, 8 N. Y. Suppl. 588, 28 N. Y. St. 591.

Reasons should be given for not presenting a positive affidavit, instead of one made on information and belief. Dolz *v.* Atlantic, etc., Transp. Co., 3 N. Y. Civ. Proc. 162.

32. Buell *v.* Van Camp, 3 Silv. Supreme (N. Y.) 598, 8 N. Y. Suppl. 207, 28 N. Y. St. 907.

33. Levy *v.* Goldstein, 18 Misc. (N. Y.) 639, 43 N. Y. Suppl. 774.

34. James *v.* Richardson, 39 Hun (N. Y.) 399; Whitney *v.* Hirsch, 39 Hun (N. Y.) 325; Bennett *v.* Edwards, 27 Hun (N. Y.) 352; Moore *v.* Richardson, 3 How. Pr. N. S. (N. Y.) 238.

Adoption of bill.— Where the bill sworn to and filed before the attachment is issued contains the necessary allegations for the issue of an attachment, an affidavit adopting the bill, as a part thereof, by reference, is sufficient. Sims *v.* Tyrer, 96 Va. 5, 26 S. E. 508; Fisher *v.* March, 26 Gratt. (Va.) 765.

Reference to complaint or petition.— An affidavit may be enlarged by incorporating therein by express reference the allegations of the petition. Stifel *v.* Cincinnati Nat. Bank, 9 Ohio Dec. (Reprint) 700, 16 Cinc. L. Bul. 398. But an affidavit merely alleging that the allegations of the complaint which supply the deficiency are true will not be aided by such allegation, where it is not shown that the complaint, or a copy of the same, was presented to or considered by the judge to whom application was made, and the warrant recites that the facts referred to were made to appear by the affidavit. People *v.* St. Nicholas Bank, 44 N. Y. App. Div. 313, 60 N. Y. Suppl. 719.

35. Hallock *v.* Van Camp, 55 Hun (N. Y.) 1, 8 N. Y. Suppl. 588, 28 N. Y. St. 337; Colver *v.* Van Valen, 6 How. Pr. (N. Y.) 102.

36. Wilmerding *v.* Cunningham, 65 How. Pr. (N. Y.) 344.

A mere statement that affiant has a certain deposition in his possession is insufficient, where a copy of it is not attached or no reason assigned for the failure to do so. Moore *v.* Richardson, 3 How. Pr. N. S. (N. Y.) 238.

annexing a copy thereof or stating them to be on file,[37] or a mere reference to, without a copy of, a general assignment and inventory made by the debtor which are filed in another court.[38]

(B) *To Show Cause or Nature of Action* — (1) GENERALLY. If the declaration or complaint is required to be presented or may be considered on the application, the omission of the affidavit to set out the cause of action or to state the nature of the claim, or its insufficiency in that respect, may be supplied or remedied as the case may be,[39] or it will be sufficient to refer to the pleading to show the grounnd upon which the action is brought.[40]

(2) AMOUNT OF CLAIM OR INDEBTEDNESS. If the affidavit lacks precision in stating plaintiff's demand, recourse may be had to the declaration or complaint, and if that pleading is sufficiently specific the proceedings will not be affected by the deficiencies of the affidavit,[41] or the affidavit will be sufficient if the allegations of the complaint in this connection, which are sufficiently made, are incorporated in or annexed to the affidavit or are referred to expressly or by fair implication.[42] In some jurisdictions if the claim or demand is sufficiently stated in the complaint or petition, it is unnecessary again to make the statement in the affidavit,[43] or to repeat it therein with all the detail required in a pleading.[44]

(3) TIME OF MATURITY OF DEBT. It is unnecessary that the affidavit shall state when the debt matured, but it will be sufficient if the petition shows that fact,[45] or if the petition sets forth the contract sued on so that the date of its maturity can be determined.[46]

(C) *To Show Grounds of Attachment.* If the petition states the non-residence of defendant, an affidavit attesting the truth of all the allegations in the petition is sufficient;[47] and it has been held that on collateral attack reference

37. Fitzgerald *v.* Belden, 49 How. Pr. (N. Y.) 225.

38. Smith *v.* Arnold, 33 Hun (N. Y.) 484.

39. Kohler *v.* Agassiz, 99 Cal. 9, 33 Pac. 741; O'Brien *v.* Daniel, 2 Blackf. (Ind.) 290; Wessels *v.* Boettcher, 69 Hun (N. Y.) 306, 23 N. Y. Suppl. 480, 53 N. Y. St. 313; Grevell *v.* Whiteman, 32 Misc. (N. Y.) 279, 65 N. Y. Suppl. 974. But see Constable *v.* White, 1 Handy (Ohio) 44, 12 Ohio Dec. (Reprint) 18.

Presumption.— In the absence of any showing to the contrary it may be presumed on appeal that a defect in the affidavit was supplied by reference to a sufficient complaint. Hill *v.* Knickerbocker Electric Light, etc., Co., 14 N. Y. Suppl. 517, 38 N. Y. St. 417, 21 N. Y. Civ. Proc. 141. But if the affidavit fails to show the existence of a cause of action, jurisdiction to issue the warrant will not be deemed to have been acquired, although the verified complaint shows the existence of the cause, if there is no proof that the complaint was considered. People *v.* St. Nicholas Bank, 44 N. Y. App. Div. 313, 60 N. Y. Suppl. 719, 90 N. Y. St. 719, 30 N. Y. Civ. Proc. 30.

40. Grotte *v.* Nagle, 50 Nebr. 363, 69 N. W. 973.

A reference to a complaint on information and belief which is insufficient because failing to state the sources of plaintiff's knowledge or ground of such belief is bad (Hitner *v.* Boutilier, 67 Hun (N. Y.) 203, 22 N. Y. Suppl. 64, 51 N. Y. St. 518), but if the complaint is sufficient, although upon information and belief, the cause of action is sufficiently stated (Altworth *v.* Flynn, 27 Misc. (N. Y.) 838, 58 N. Y. Suppl. 606).

An allegation that plaintiff will allege in his complaint herein certain facts, etc., is bad. Axford *v.* Seguine, 75 N. Y. Suppl. 35.

Unverified complaint.— An omission is not supplied by reference to an unverified complaint which is annexed. Addison *v.* Sujette, (S. C. 1897) 27 S. E. 631.

41. Harlow *v.* Becktle, 1 Blackf. (Ind.) 237; Bond *v.* Patterson, 1 Blackf. (Ind.) 34; Cleveland *v.* Boden, 63 Tex. 103. And see Shirley *v.* Byrnes, 34 Tex. 625; La Force *v.* Wear, etc., Dry Goods Co., 8 Tex. Civ. App. 572, 29 S. W. 75.

Offsets.— The affidavit need not show that part of the debt has been paid when that fact appears in the petition. Harbour-Pitt Shoe Co. *v.* Dixon, 22 Ky. L. Rep. 1169, 60 S. W. 186.

42. Matthai *v.* Conway, 2 App. Cas. (D. C.) 45; Souberain *v.* Renaux, 6 La. Ann. 201; Crandall *v.* McKaye, 6 Hun (N. Y.) 483; Morgan *v.* Johnson, 15 Tex. 568.

43. Chittenden *v.* Hobbs, 9 Iowa 417; Foster *v.* Hall, 4 Humphr. (Tenn.) 345.

44. Matthai *v.* Conway, 2 App. Cas. (D. C.) 45.

It is not an objection that sworn grounds for attachment stated in the petition are set out a second time in the affidavit. Harrison *v.* Harwood, 31 Tex. 650.

45. Bennett *v.* Rosenthal, 3 Tex. App. Civ. Cas. § 156.

46. Cohen *v.* Grimes, 18 Tex. Civ. App. 327, 45 S. W. 210.

47. Miller *v.* Chandler, 29 La. Ann. 88.

may be had to the bond and petition to explain an allegation of non-residence contained in the affidavit.[48] But an omission in the affidavit of a statement that the absconding or concealment occurred within a prescribed time after the injury, as required by the statute, cannot be supplied by an allegation sufficient in that respect contained in the declaration.[49]

(D) *Producing Evidence of Debt.* Though it may be required that at the time of presenting the affidavit the creditor shall produce the bond, account, or other evidence of the debt claimed,[50] it is not necessary that he should produce all the evidence which he relies on to establish his claim at the trial.[51] Under such a provision it has been held necessary to produce the assignment of the claim by the original creditor,[52] and that an attachment may issue upon the record of a foreign attachment[53] or transcript of a judgment rendered in another state,[54] or if plaintiff produce an agreement containing dependent covenants sued upon.[55] Likewise, an attachment may issue against the indorser of a negotiable promissory note on production of the note without proof of its indorsement by the debtor,[56] or on a note written in a foreign language unaccompanied by a translation thereof.[57]

(V) *Specific Requisites, Statements, and Allegations*—(A) *Venue.* For the purpose of showing that the oath was administered in the jurisdiction of the officer before whom the affidavit was taken the venue or place of the taking should appear.[58]

48. Avery *v.* Good, 114 Mo. 290, 21 S. W. 815.

49. Webb *v.* Bowler, 50 N. C. 362.

50. Md. Pub. Gen. Laws (1888), art. 9, § 4.

The account contemplated must be sufficient to inform defendant as to the real nature and character of the claim. Burk *v.* Tinsley, 80 Md. 98, 30 Atl. 604. An intelligible account made out in the usual mode adopted by merchants will be sufficient (Stewart *v.* Katz, 30 Md. 334), and it has been held sufficient to show the aggregate of the amount claimed to be due without itemization (Bartlett *v.* Wilbur, 53 Md. 485; Cox *v.* Waters, 34 Md. 460, in which latter case the distinction between an action for money loaned and for goods sold and delivered was drawn and the rule stated to be that while the dates and amounts of several sums loaned need not be set out, but might be stated in the aggregate, an account for goods bargained and sold at sundry times should state the items in detail).

Presumption of filing.— If it appears from the introductory certificate of the record and by the writ that the evidence of the debt sued upon has been filed, that will be deemed to have been the fact, although the clerk in his certificate containing the affidavit fails to certify that the instruments were produced. Howard *v.* Oppenheimer, 25 Md. 350.

Withdrawing from files.— If good reason is shown the court may allow the evidences of debt filed with the warrant to be withdrawn from the files, on substituting copies therefor without invalidating the attachment proceedings. Franklin Bank *v.* Matthews, 69 Md. 107, 14 Atl. 703.

For form of a voucher to support affidavit see Burk *v.* Tinsley, 80 Md. 98, 30 Atl. 604.

51. White *v.* Solomonsky, 30 Md. 585; Lee *v.* Tinges, 7 Md. 215; Dawson *v.* Brown, 12 Gill & J. (Md.) 53.

52. Cumberland Coal, etc., Co. *v.* Hoffman Steam Coal Co., 22 Md. 495.

53. Neptune Ins. Co. *v.* Montell, 8 Gill (Md.) 228.

54. Cockey *v.* Milne, 16 Md. 200.

55. Dawson *v.* Brown, 12 Gill & J. (Md.) 53.

56. Dawson *v.* Brown, 12 Gill & J. (Md.) 53; Smith *v.* Greenleaf, 4 Harr. & M. (Md.) 291.

Annexing notes.— A statement of the amount due upon notes, copies of which are appended to the declaration, sufficiently complies with a rule of court requiring a production of a copy of the instrument upon which suit is brought. Woods *v.* Watkins, 40 Pa. St. 458.

57. De Bebian *v.* Gola, 64 Md. 262, 21 Atl. 275.

58. Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288; Englehart-Davidson Mercantile Co. *v.* Burrell, 66 Mo. App. 117; Rudolf *v.* McDonald, 6 Nebr. 163. See also Trow's Printing, etc., Co. *v.* Hart, 9 Daly (N. Y.) 413, 60 How. Pr. (N. Y.) 190.

If the place of taking appears in the caption of the affidavit, although not in its body, the failure of the officer to designate the name of the county for which he was appointed is immaterial (Smith *v.* Runnels, 94 Mich. 617, 54 N. W. 375); and if it appears that the oath was administered by an officer of a designated county, the absence of a formal statement of the venue is immaterial (Kesler *v.* Lapham, 46 W. Va. 293, 33 S. E. 289).

Omission of the letters "ss." is immaterial. McCord, etc., Mercantile Co. *v.* Glenn, 6 Utah 139, 21 Pac. 500.

Presumption.— The affidavit will be presumed to have been sworn to in the county designated by the venue. Kesler *v.* Lapham, 46 W. Va. 293, 33 S. E. 289. It will also

(B) *Entitling.* It has been said to be improper to entitle an affidavit in a cause where the action has not been commenced;[59] or where the affidavit being the foundation of the action, there can be no action pending until the issue of the writ.[60] The general rule, however, is that the affidavit should contain in its caption the title of the cause and should designate the court where the action is pending,[61] although an omission to entitle the affidavit is of no importance, if the court in which the remedy is sought sufficiently appears elsewhere,[62] or the body of the affidavit sufficiently designates the parties.[63]

(C) *Identification and Description of Parties* — (1) IN GENERAL. The affidavit should show which of the parties named is plaintiff and which defendant;[64] but their identity or relation to each other may be sufficiently shown by a reference to the caption,[65] or by resort to the record or other papers.[66]

(2) PLAINTIFF — (a) IN GENERAL — aa. *Rule Stated.* The affidavit should identify plaintiff,[67] but if plaintiff is sufficiently identified from other papers in the action the fact that he is not named in the affidavit,[68] or that it contains no direct allegation that affiant is the plaintiff or one of them[69] is immaterial.

bb. *Citizenship.* Where the fact that plaintiff was a citizen of the state was necessary to be shown to entitle him to an attachment, failure of the affidavit to

he presumed that the officer had jurisdiction to administer the oath within the county stated (Englehart-Davidson Mercantile Co. *v.* Burrell, 66 Mo. App. 117), and that, although the county and state are not definitely set out, the oath was administered within the proper county (Snell *v.* Eckerson, 81 Iowa 284). See, generally, AFFIDAVITS, 2 Cyc. 21.

59. Wakefield *v.* Bruce, 5 Ont. Pr. 77, holding that, though an affidavit was improperly entitled, such fact would not vitiate the affidavit.

60. Quarles *v.* Robinson, 2 Pinn. (Wis.) 97, 1 Chandl. (Wis.) 29.

61. Sweeny *v.* Cochran, 19 Ind. 206; Fargo *v.* Cutshaw, 12 Ind. App. 392, 39 N. E. 532; Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288; Burgess *v.* Stitt, 12 How. Pr. (N. Y.) 401. But see Kinney *v.* Heald, 17 Ark. 397; West *v.* Woolfolk, 21 Fla. 189, which hold that failure to entitle the affidavit in the court and cause is not material.

62. Burnham *v.* Doolittle, 14 Nebr. 214, 15 N. W. 606.

Affidavit annexed to writ.— Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288.

Official designation of officer.— It is immaterial that the affidavit is not styled in any court if the officer, a commissioner for taking affidavits in the queen's bench, appends to his signature the words "A Com'r in B. R.," etc. Scott *v.* Mitchell, 8 Ont. Pr. 518.

63. Cheadle *v.* Riddle, 6 Ark. 480; Fargo *v.* Cutshaw, 12 Ind. App. 392, 39 N. E. 532. See, generally, AFFIDAVITS, 2 Cyc. 18.

64. Burgess *v.* Stitt, 12 How. Pr. (N. Y.) 401.

65. Rubinsky *v.* Ullman, 4 Pa. Dist. 126.

Sufficiency of designation.— If the title shows that the action is brought by persons named against others also designated, there is a sufficient showing as to who are plaintiffs and who defendants. Munzesheimer *v.* Heinze, 74 Tex. 254, 11 S. W. 1094.

66. Robinson *v.* Hesser, 4 N. M. 144, 13 Pac. 204.

Contradictory statements in the affidavit and petition in the christian name of a party cannot be reconciled, since there is nothing to show which is correct. Locke *v.* Hardeman, 67 Tex. 173, 2 S. W. 363.

See, generally, AFFIDAVITS, 2 Cyc. 20.

67. Burnside *v.* Davis, 65 Mich. 74, 31 N. W. 619 (where the affidavit was made in the name of one person as plaintiff, and the writ issued thereon was in favor of two as plaintiffs); Burgess *v.* Stitt, 12 How. Pr. (N. Y.) 401.

Clerical error — Plural for singular.— An affidavit by one of several plaintiffs, alleging that "the plaintiffs aver," etc., is equivalent to a statement that deponent avers. Jamison *v.* Beecher, 4 Abb. Pr. (N. Y.) 230.

Identification not necessary.— An affidavit which states that affiant, the plaintiff and appellant, believes, etc., is not defective because of the failure to state who the appellant is. Voorheis *v.* Eiting, 15 Ky. L. Rep. 161, 22 S. W. 80.

Sufficiency of identification.— If an affidavit is annexed to the writ and bears the same date, plaintiff is sufficiently identified though he is not named in the affidavit. Stringer *v.* Dean, 61 Mich. 196, 27 N. W. 886.

Representative or individual capacity.—An affidavit which in the title of the action shows that it is brought by plaintiff as receiver, but which thereafter refers to him by name, stating that defendant is indebted to him as plaintiff, sufficiently shows an indebtedness to him in his representative capacity. O'Connor *v.* Roark, 108 Cal. 173, 41 Pac. 465.

68. Stringer *v.* Dean, 61 Mich. 196, 27 N. W. 886.

69. Tessier *v.* Englehart, 18 Nebr. 167, 24 N. W. 734.

contain a sufficient allegation of that fact has been held to render it defective,[70] but this allegation seems no longer to be necessary in the jurisdictions in which it was formerly required.[71]

cc. *Residence.* Where, to authorize an affidavit by a person other than plaintiff, it must appear that he is a non-resident, the affidavit must show that fact;[72] but if a non-resident has the same right to sue out an attachment as a resident, his non-residence need not be shown.[73]

(b) Copartners. Where plaintiffs are copartners, if the firm is sufficiently identified, the fact that the names of the individual partners are not set out will not render the affidavit defective,[74] nor will it be objectionable, because of a reference to the firm as the plaintiff.[75]

(3) Defendant — (a) In General — aa. *Rule Stated.* Defendant should be sufficiently identified or described,[76] but extreme particularity is not required,[77]

70. Boarman *v.* Patterson, 1 Gill (Md.) 372; Mandeville *v.* Jarrett, 6 Harr. & J. (Md.) 497; Shivers *v.* Wilson, 5 Harr. & J. (Md.) 130, 9 Am. Dec. 497.

Citizen of the United States.— An allegation that plaintiff is a citizen of the United States is not equivalent to an allegation that he is a citizen of the state. Yerby *v.* Lackland, 6 Harr. & J. (Md.) 446; Shivers *v.* Wilson, 5 Harr. & J. (Md.) 130, 9 Am. Dec. 497.

Specification of county.— An affidavit stating plaintiff to be a citizen within the jurisdiction is sufficient without stating that he is a citizen of a particular county therein. Decatur *v.* Young, 5 Cranch C. C. (U. S.) 502, 7 Fed. Cas. No. 3,722.

Citizenship of several plaintiffs.— If the affidavit alleges citizenship of but one of two plaintiffs the proceedings will be quashed. Wever *v.* Baltzell, 6 Gill & J. (Md.) 335. Where it is necessary that the face of the proceedings show that plaintiff is a citizen of the state, or of some one of the United States, or an inhabitant or resident of the District of Columbia, or of some one of the territories of the United States, that fact must appear with reference to all the plaintiffs, where there are more than one. Baldwin *v.* Neale, 10 Gill & J. (Md.) 274.

71. McCoy *v.* Boyle, 10 Md. 391 (where it is said that since the passage of the Maryland act of 1834, c. 79, § 1, there may be a total omission of the averment of citizenship, and that undoubtedly an averment that plaintiff is a resident of the United States would be clearly sufficient); Hard *v.* Stone, 5 Cranch C. C. (U. S.) 503, 11 Fed. Cas. No. 6,046; Kurtz *v.* Jones, 2 Cranch C. C. (U. S.) 433, 14 Fed. Cas. No. 7,954; Birch *v.* Butler, 1 Cranch C. C. (U. S.) 319, 3 Fed. Cas. No. 1,425.

Proof of citizenship.— After the Maryland act of 1834 dispensed with the allegation of citizenship it was nevertheless necessary to prove it at the trial. Barr *v.* Perry, 3 Gill (Md.) 313.

Under the Maryland act of 1825, c. 114, by which the right to attachment was extended to any inhabitant or resident of any part of the United States, whether of one of the states or the District of Columbia, or other territory, who by the existing laws of the state were entitled to sue out mesne process, it was necessary that the affidavit should clearly show to what class the party belonged. Otherwise the court would not acquire jurisdiction. Wever *v.* Baltzell, 6 Gill & J. (Md.) 335.

72. Morrel *v.* Fearing, 20 N. J. L. 670, holding that an affidavit by an agent that he resides in a city of another state and that plaintiffs are partners doing business there is sufficient *prima facie* to show that they are non-resident creditors.

73. Jackson *v.* Stanley, 2 Ala. 326.

74. Stewart *v.* Katz, 30 Md. 334; Emerson *v.* Detroit Steel, etc., Co., 100 Mich. 127, 58 N. W. 659; Moody *v.* Alter, 12 Heisk. (Tenn.) 142.

Collateral attack.— An affidavit describing plaintiffs by their firm-name but omitting their christian names is erroneous, but it will not render the attachment void, or subject to collateral attack. Barber *v.* Smith, 41 Mich. 138, 1 N. W. 992.

Presumption.— Where affiant states that he is a member of the plaintiff, a copartnership, and one of the plaintiffs above named, another person and himself being so named, it is a fair presumption that he and such other person constitute the firm. Doctor *v.* Schnepp, 7 N. Y. Civ. Proc. 144, 2 How. Pr. N. S. (N. Y.) 52.

75. Clerical error — Singular for plural.— Where an affidavit for attachment by a partnership stated that defendants are justly indebted to the "said plaintiff," and that "plaintiffs" are likely to lose their debt, the use of the word "plaintiff" was held to be a mere immaterial clerical error. Weis *v.* Chipman, 3 Tex. Civ. App. 106, 22 S. W. 225.

76. Omission of name.— An affidavit that said ——— resides without the state limits does not state the non-residence of any person. Black *v.* Scanlon, 48 Ga. 12.

77. Clerical errors.— A mere clerical error in the name of defendant will not vitiate the proceeding (Davidson *v.* Martin, 33 Miss. 530), and an allegation that plaintiff has a claim against defendant will be construed to mean against the parties defendant (McMahon *v.* Perkins, 22 R. I. 116, 46 Atl. 405).

Description in caption.— If defendant is

and the fact that plaintiff's pleading varies from the affidavit in naming or describing the debtors is immaterial where it is apparent that the same parties are intended.[78]

bb. *Citizenship — Residence.* If it is required that the citizenship of defendant shall be alleged, in the absence of such an averment the proceedings will be quashed;[79] but if an allegation of defendant's residence is not a prescribed part of the affidavit it is unnecessary,[80] even where a debtor must be sued in the county of his residence.[81] The remedy of defendant in such a case is by plea in abatement.[82]

cc. *Showing Defendant to Be an Adult.* Notwithstanding a provision in effect prohibiting the issue of an attachment against the property of a minor, it seems that the affidavit need not specifically state that defendant is an adult,[83] but that it will be sufficient if the fact that defendant is an adult appears by implication.[84] And even where such an allegation was held necessary, the court has permitted supplemental proof.[85]

(b) Copartners. While it is more regular to set out the individual names of copartners the omission to do so will not render the attachment void,[86] and the misnomer of defendant in one part of an affidavit may be disregarded where its firm-name is sufficiently stated elsewhere.[87]

(c) Corporations. Unless so required the affidavit need not allege the corporate character of defendant,[88] that the corporation whose property is sought to be

named in the caption it is not necessary that he should be named in the body of the affidavit. Boyd *v.* Lippencott, 2 Pa. Co. Ct. 585, 44 Leg. Int. (Pa.) 46.

Identification by reference.—Where defendants have been once named a reference thereafter to them as "the parties aforesaid" is sufficient. Spitz *v.* Mobr, 86 Wis. 387, 57 N. W. 41.

Naming defendants unconnected with transaction.— That two of the persons named as defendants in the caption were not connected with the transaction out of which the claim arose will not furnish a ground for disturbing the attachment. Cunningham *v.* Von Pustan, 9 N. Y. Suppl. 255, 31 N. Y. St. 255.

Person acting in representative capacity.— An affidavit stating in effect that a person named as commissioner of a lunatic is indebted, etc., will be regarded as a proceeding against the person so named, no such officer being recognized by the law. Ross *v.* Edwards, 52 Ga. 24.

78. Walter *v.* Kierstead, 74 Ga. 18; Sheffield *v.* Key, 14 Ga. 537; Clanton *v.* Laird, 12 Sm. & M. (Miss.) 568; Commercial Bank *v.* Ullman, 10 Sm. & M. (Miss.) 411. See also U. S. Capsule Co. *v.* Isaacs, 23 Ind. App. 533, 55 N. E. 832, holding that an affidavit against a corporation stating that the claim is on a judgment against another corporation described in the complaint, which shows that the judgment was rendered against the last-named company, which with others were thereafter consolidated and organized as the defendant company, is sufficient.

79. Boarman *v.* Patterson, 1 Gill (Md.) 372.

80. Wray *v.* Gilmore, 1 Miles (Pa.) 75, an affidavit for domestic attachment.

81. Toby *v.* Bowen, 3 Ark. 352; Primrose *v.* Roden, 14 Tex. 1. But see Yale *v.* McDaniel, 69 Miss. 337, 12 So. 556, holding that, where an attachment may issue for a debt not due only in the county where the debtor resides, last resided, or where his property may be found, the affidavit must state his residence, last residence, or the location of the property.

82. Primrose *v.* Roden, 14 Tex. 1.

83. Hall *v.* Anderson, 17 Misc. (N. Y.) 270, 40 N. Y. Suppl. 354; Wentzler *v.* Ross, 59 How. Pr. (N. Y.) 397.

84. Doctor *v.* Schnepp, 7 N. Y. Civ. Proc. 144, 2 How. Pr. N. S. (N. Y.) 52, where an allegation that "a short time ago he (defendant) represented himself to deponent to be a man of means" was held sufficient.

85. American Mills Co. *v.* Schnitzer, 7 N. Y. Civ. Proc. 150 note, where the affidavit failed to state that defendant was an adult, and on motion to vacate the attachment because of said omission the court stated that it would grant the motion unless within five days plaintiff produced proof of the omitted fact.

86. Johnston *v.* Smith, 83 Ga. 779, 10 S. E. 354; Blue Grass Canning Co. *v.* Wardman, 103 Tenn. 179, 52 S. W. 137.

Unknown partners.— An allegation that defendant firm is composed of a person named and certain parties unknown is sufficient to justify the issue of an attachment against the copartnership effects. Hines *v.* Kimball, 47 Ga. 587.

87. Foran *v.* Johnson, 58 Md. 144.

88. Mississippi Cent. R. Co. *v.* Plant, 58 Ga. 167.

The omission of the word "company" from defendant's corporate name will not affect the lien of the attachment, especially where defendant appears without objection and answers in its true name. Hammond *v.* Starr, 79 Cal. 556, 21 Pac. 971.

attached is a domestic corporation,[89] or, where corporations which have complied with certain statutory requisites are exempt from attachment, need it negative the proposition that they have complied with the laws.[90]

(D) *Cause or Nature of Action* — (1) IN GENERAL. Although there are exceptions to the rule,[91] it is generally required that the cause of action or nature of the claim should be definitely stated in the affidavit, for the reason among others that it may appear that the action is one of those specified as a case in which an attachment may be granted.[92] While extreme particularity is not

89. Central Min., etc., Co. *v.* Stoven, 45 Ala. 594.

90. Bradley *v.* Interstate Land, etc., Co., 12 S. D. 28, 80 N. W. 141.

91. Irvin *v.* Howard, 37 Ga. 18 (holding it sufficient to set forth the cause of action in the declaration); Gutta Percha, etc., Mfg. Co. *v.* Houston, 108 N. Y. 276, 15 N. E. 402, 2 Am. St. Rep. 412 [*reversing* 46 Hun (N. Y.) 237, 11 N. Y. St. 302, 12 N. Y. Civ. Proc. 326] (holding that an affidavit in an action on a foreign judgment need not show the character of the claim on which the judgment was obtained); Matter of Brown, 21 Wend. (N. Y.) 316 (decided prior to the codes).

92. *California.*— Hisler *v.* Carr, 34 Cal. 641.

District of Columbia.— Boulter *v.* Behrend, 20 D. C. 567; Newman *v.* Hexter, MacArthur & M. (D. C.) 88.

Indiana.— Bond *v.* Patterson, 1 Blackf. (Ind.) 34.

Kansas.— Robinson *v.* Burton, 5 Kan. 293, holding that where the claim is founded on an alleged tort the affidavit should state that the cause of action arose wholly within the limits of the state.

Kentucky.— Worthington *v.* Cary, 1 Metc. (Ky.) 470; Hickman *v.* Gest, 2 Ky. Dec. 297.

Maryland.— Burk *v.* Tinsley, 80 Md. 98, 30 Atl. 604.

Michigan.— Michigan Dairy Co. *v.* Runnels, 96 Mich. 109, 55 N. W. 617.

Minnesota.— It need only be shown that the action is for "the recovery of money" without distinguishing the action as one in tort or one arising out of contract. Folsom *v.* Lockwood, 6 Minn. 186; Davidson *v.* Owens, 5 Minn. 69.

Nebraska.— Grotte *v.* Nagle, 50 Nebr. 363, 69 N. W. 973.

New York.— Thorington *v.* Merrick, 101 N. Y. 5, 3 N. E. 794; Jacobs *v.* Hogan, 85 N. Y. 243; Castellanos *v.* Jones, 5 N. Y. 164; Sizer *v.* Hampton, etc., R. Co., 67 N. Y. App. Div. 547, 73 N. Y. Suppl. 1019; Delafield *v.* J. K. Armsby Co., 62 N. Y. App. Div. 262, 71 N. Y. Suppl. 14; James *v.* Signell, 60 N. Y. App. Div. 75, 69 N. Y. Suppl. 680; Anthony *v.* Fox, 53 N. Y. App. Div. 200, 65 N. Y. Suppl. 806; Hunt *v.* Robinson, 52 N. Y. App. Div. 539, 65 N. Y. Suppl. 386; Fox *v.* Mays, 46 N. Y. App. Div. 1, 61 N. Y. Suppl. 295; Haskell *v.* Osborn, 33 N. Y. App. Div. 127, 53 N. Y. Suppl. 361; Chambers, etc., Glass Co. *v.* Roberts, 2 N. Y. App. Div. 181, 37 N. Y. Suppl. 855, 73 N. Y. St. 68; Carrier *v.* United Paper Co., 73 Hun (N. Y.) 287, 26 N. Y. Suppl. 414, 57 N. Y. St. 748; Wessels *v.* Boettcher, 69 Hun (N. Y.) 306, 23 N. Y. Suppl. 480, 53 N. Y. St. 313 [*affirmed* in 138 N. Y. 654, 34 N. E. 513, 53 N. Y. St. 931]; Hitner *v.* Boutilier, 67 Hun (N. Y.) 203, 22 N. Y. Suppl. 64, 51 N. Y. St. 518; Reilly *v.* Sisson, 31 Hun (N. Y.) 572, 4 N. Y. Civ. Proc. 361, 66 How. Pr. (N. Y.) 228; Smith *v.* Davis, 29 Hun (N. Y.) 306, 3 N. Y. Civ. Proc. 74; Pomeroy *v.* Ricketts, 27 Hun (N. Y.) 242; Manton *v.* Poole, 4 Hun (N. Y.) 638, 67 Barb. (N. Y.) 330; Richter *v.* Wise, 3 Hun (N. Y.) 398, 6 Thomps. & C. (N. Y.) 70; Gould *v.* Bryan, 3 Bosw. (N. Y.) 626; Mitchell *v.* Anderson, 32 Misc. (N. Y.) 13, 66 N. Y. Suppl. 118; Altworth *v.* Flynn, 29 Misc. (N. Y.) 106, 60 N. Y. Suppl. 235 [*reversing* 58 N. Y. Suppl. 606]; Macdonald *v.* Manice, 72 N. Y. Suppl. 543; Blum *v.* Jung, 30 N. Y. Suppl. 611, 63 N. Y. St. 214; Norfolk, etc., Hosiery Co. *v.* Arnold, 18 N. Y. Suppl. 910, 46 N. Y. St. 491; Cattaraugus Cutlery Co. *v.* Case, 9 N. Y. Suppl. 862, 30 N. Y. St. 961; Labalt *v.* Schuloff, 4 N. Y. Suppl. 819, 22 N. Y. St. 532; Skiff *v.* Stewart, 39 How. Pr. (N. Y.) 385. And see Matter of Gilbert, 7 Wend. (N. Y.) 490, an affidavit to procure an attachment against the effects of an absent debtor under the revised statutes.

Ohio.— Driscoll *v.* Kelly, 4 Ohio S. & C. Pl. Dec. 124, 5 Ohio N. P. 243.

Pennsylvania.— Mollet *v.* Fonsera, 4 Serg. & R. (Pa.) 543; Hallowell *v.* Tenney Canning Co., 16 Pa. Super. Ct. 60; May *v.* Pagett, 2 Pa. Dist. 276.

South Carolina.— Ferst *v.* Powers, 58 S. C. 398, 36 S. E. 744; Williamson *v.* Eastern Bldg., etc., Assoc., 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822; Addison *v.* Sujette, (S. C. 1897) 27 S. E. 631; Tabb *v.* Gelzer, 43 S. C. 342, 21 S. E. 261; Munroe *v.* Williams, 37 S. C. 81, 16 S. E. 533, 19 L. R. A. 665; Stevenson *v.* Dunlap, 33 S. C. 350, 11 S. E. 1017.

South Dakota.— Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

Tennessee.— Kenrick *v.* Mason, (Tenn. Ch 1901) 62 S. W. 359; McElwee *v.* Steelman, (Tenn. Ch. 1896) 38 S. W. 275; Willey *v.* Roirden, 2 Baxt. (Tenn.) 227; Lowenheim *v.* Ireland, 2 Baxt. (Tenn.) 214; Lewis *v.* Woodfolk, 2 Baxt. (Tenn.) 25; Boyd *v.* Gentry, 12 Heisk. (Tenn.) 625; Sherry *v.* Divine, 11 Heisk. (Tenn.) 722; Rumbough *v.* White, 11 Heisk. (Tenn.) 260; Robb *v.* Parker, 4 Heisk. (Tenn.) 58; Sullivan *v.* Fugate, 1 Heisk. (Tenn.) 20; Forgey *v.* Anderson, 1 Heisk. (Tenn.) 20 note; Moneyhun *v.* Tar-

required in this respect,[93] the cause of action alleged in the affidavit should be consistent with that stated in the complaint or declaration;[94] such facts should be

ter, 1 Heisk. (Tenn.) 20 note; Woodfolk *v.* Whitworth, 5 Coldw. (Tenn.) 561; Smith *v.* Foster, 3 Coldw. (Tenn.) 139.

Virginia.— Clowser *v.* Hall, 80 Va. 864.

West Virginia.— Sommers *v.* Allen, 44 W. Va. 120, 28 S. E. 787; Crim *v.* Harmon, 38 W. Va. 596, 18 S. E. 753; Cosner *v.* Smith, 36 W. Va. 788, 15 S. E. 977; Hudkins *v.* Haskins, 22 W. Va. 645.

United States.— Laughlin *v.* Queen City Constr. Co., 89 Fed. 482, construing New York statute.

Contra, in New Jersey, where the cause of action need not be specified in the affidavit. Shadduck *v.* Marsh, 21 N. J. L. 434; Day *v.* Bennett, 18 N. J. L. 287. But see Brown *v.* Hoy, 16 N. J. L. 157, which held that an affidavit stating that defendant is indebted to plaintiff in a certain sum, "upon covenant, it being the penalty fixed therein upon breach," is insufficient, because neither stating what the agreement was, nor in what respect, if any, it was broken.

See 5 Cent. Dig. tit. "Attachment," §§ 263, 273.

Action on joint and several note.—An affidavit which fails to show the execution of a joint and several note by any person except the defendant whose property is sought to be attached is not so defective as to invalidate the order of attachment. Dunlap *v.* McFarland, 25 Kan. 488.

Aider.— If the affidavit in describing the nature of the demand shows by general terms that it is the same debt for which the action is prosecuted it will be sufficient. Bowers *v.* London Bank, 3 Utah 417, 4 Pac. 225. See also Goodman *v.* Sondheim, 3 Kulp (Pa.) 87, holding that the affidavit for attachment under the Pennsylvania act of 1869 may be read in connection with a statement annexed and referred to therein, containing a description of the kind of property, and the date when it was purchased by defendant, so as to furnish a statement of "the nature and amount of such indebtedness," as required by the statute.

Conclusiveness.— The preliminary affidavit of a plaintiff in attachment is not conclusive as to the nature of his claim. Heckscher *v.* Trotter, 48 N. J. L. 419, 5 Atl. 581; Shadduck *v.* Marsh, 21 N. J. L. 434; Day *v.* Bennett, 18 N. J. L. 287.

The statement of the cause of action in the affidavit is a sufficient compliance with a statute requiring the creditor to file a petition or other lawful statement of the cause of action. Holman *v.* Kerr, 44 Mo. App. 481. See also Chenault *v.* Chapron, 5 Mo. 438, holding that an ordinary petition in debt is a "lawful statement," etc.

The affidavits were held to sufficiently comply with the statute in this respect in the following cases:

California.— Flagg *v.* Dare, 107 Cal. 482, 40 Pac. 804; Simpson *v.* McCarty, 78 Cal. 175, 20 Pac. 406, 12 Am. St. Rep. 37; Norcross *v.* Nunan, 61 Cal. 640.

Colorado.— Plummer *v.* Struby-Estabrooke Mercantile Co., 23 Colo. 190, 47 Pac. 294.

Georgia.— Force *v.* Hubbard, 26 Ga. 289; Brown *v.* Clayton, 12 Ga. 564.

Illinois.—Haywood *v.* McCrory, 33 Ill. 459; Humphreys *v.* Matthews, 11 Ill. 471.

Indiana.— Willets *v.* Ridgway, 9 Ind. 367; U. S. Capsule Co. *v.* Isaacs, 23 Ind. App. 533, 55 N. E. 832; Redman *v.* Burgess, 20 Ind. App. 371, 50 N. E. 825.

Nebraska.— Grotte *v.* Nagle, 50 Nebr. 363, 69 N. W. 973; Dorrington *v.* Minnick, 15 Nebr. 397, 19 N. W. 456.

New York.— Hanson *v.* Marcus, 8 N. Y. App. Div. 318, 40 N. Y. Suppl. 951; Birdsall *v.* Emmons, 89 Hun (N. Y.) 603, 34 N. Y. Suppl. 1056, 69 N. Y. St. 27; Lewisohn *v.* Kent, etc., Co., 87 Hun (N. Y.) 257, 33 N. Y. Suppl. 826, 67 N. Y. St. 471; Kiefer *v.* Webster, 6 Hun (N. Y.) 526; U. S. *v.* Graff, 4 Hun (N. Y.) 634, 67 Barb. (N. Y.) 304; Johnston *v.* Ferris, 14 Daly (N. Y.) 302, 12 N. Y. St. 666; Foster *v.* Rogers, 31 Misc. (N. Y.) 14, 64 N. Y. Suppl. 652; Condouris *v.* Imperial Turkish, etc., Co., 3 Misc. (N. Y.) 66, 22 N. Y. Suppl. 695, 51 N. Y. St. 772; Hamilton *v.* Steck, 5 N. Y. Suppl. 831 [*affirmed* in 56 Hun (N. Y.) 649, 10 N. Y. Suppl. 177, 32 N. Y. St. 150]; Lanier *v.* Houston City Bank, 9 N. Y. Civ. Proc. 161; Doctor *v.* Schnepp, 7 N. Y. Civ. Proc. 144, 2 How. Pr. N. S. (N. Y.) 52; Furman *v.* Walter, 13 How. Pr. (N. Y.) 348.

North Dakota.— Gans *v.* Beasley, 4 N. D. 140, 59 N. W. 714.

Ohio.— Constable *v.* White, 1 Handy (Ohio) 44, 12 Ohio Dec. (Reprint) 18; Hoover *v.* Haslage, 7 Ohio S. & C. Pl. Dec. 98.

South Carolina.— Central R., etc., Co. *v.* Georgia Constr., etc., Co., 32 S. C. 319, 11 S. E. 192, 638; National Exch. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028.

United States.— Wehrman *v.* Conklin, 155 U. S. 314, 15 S. Ct. 129, 39 L. ed. 167, construing Iowa statute.

93. Redman *v.* Burgess, 20 Ind. App. 371, 50 N. E. 825; Todd *v.* Gates, 20 W. Va. 464; Hard *v.* Stone, 5 Cranch C. C. (U. S.) 503, 11 Fed. Cas. No. 6,046; Hamilton Bank *v.* Baine, 12 Ont. Pr. 439.

94. Deering *v.* Collins, 38 Mo. App. 80.

Mode of objection.— In an action commenced by attachment, if the affidavit alleges a cause of action as for a trespass to land, and the complaint is for conversion, demurrer will not lie but a summary application to set the declaration aside should be made. Longyear *v.* Minnesota Lumber Co., 108 Mich. 645, 66 N. W. 567.

There is no variance between a declaration alleging a breach of warranty as a basis of the action and an affidavit alleging as a cause of action "that the defendant fraudulently incurred the debt." Hambrick *v.* Wil-

alleged as will enable the court or officer to judge of the existence of a cause of action in which the issue of an attachment will be warranted;[95] and, where such a showing is essential, it should appear that the cause is one arising or founded on contract, or to recover for a breach of contract, express or implied, or on a judgment, as the case may be.[96] The sufficiency of the allegations in this respect are necessarily governed by the particular facts stated, but generally it may be said that the requirement will be satisfied by any language from which conformity to the statute may be gathered.[97]

kins, 65 Miss. 18, 3 So. 67, 7 Am. St. Rep. 631. Nor is it a ground to affect the attachment that though the complaint separately states several distinct causes of action the affidavit is sufficient as to some of them only. Wilson *v.* Barbour, 21 Mont. 176, 53 Pac. 315.

95. *Idaho.*— Carter *v.* Watson, 1 Ida. 236.

Kansas.— Quinlan *v.* Danford, 28 Kan. 507.

Michigan.— McCrea *v.* Russell, 100 Mich. 375, 58 N. W. 1118.

New York.— Delafield *v.* J. K. Armsby Co., 62 N. Y. App. Div. 262, 71 N. Y. Suppl. 14; James *v.* Signell, 60 N. Y. App. Div. 75, 69 N. Y. Suppl. 680; Hunt *v.* Robinson, 52 N. Y. App. Div. 539, 65 N. Y. Suppl. 386; Bennett *v.* Edwards, 27 Hun (N. Y.) 352; Manton *v.* Poole, 4 Hun (N. Y.) 638, 67 Barb. (N. Y.) 330; Zerega *v.* Benoist, 7 Rob. (N. Y.) 199, 33 How. Pr. (N. Y.) 129; McCulloh *v.* Aeby, 9 N. Y. Suppl. 361, 31 N. Y. St. 125; Lanier *v.* Houston City Bank, 9 N. Y. Civ. Proc. 161; Morgan *v.* House, 36 How. Pr. (N. Y.) 326.

South Carolina.— Brown *v.* Morris, 10 S. C. 467.

Contra, Hoover *v.* Haslage, 7 Ohio S. & C. Pl. Dec. 98.

96. *Alabama.*— See Flexner *v.* Dickerson, 65 Ala. 129.

Idaho.— Carter *v.* Watson, 1 Ida. 236.

Michigan.—Estlow *v.* Hanna, 75 Mich. 219, 42 N. W. 812; Farmers' Nat. Bank *v.* Fonda, 65 Mich. 533, 32 N. W. 664; People *v.* Blanchard, 61 Mich. 478, 28 N. W. 669; Cross *v.* McMaken, 17 Mich. 511, 97 Am. Dec. 203; Wilson *v.* Arnold, 5 Mich. 98; Hale *v.* Chandler, 3 Mich. 531; Roelofson *v.* Hatch, 3 Mich. 277; Buckley *v.* Lowry, 2 Mich. 418; Galloway *v.* Holmes, 1 Dougl. (Mich.) 330.

Minnesota.— Baumgardner *v.* Dowagiac Mfg. Co., 50 Minn. 381, 52 N. W. 964.

Nebraska.— Hart *v.* Barnes, 24 Nebr. 782, 40 N. W. 322 (holding that an affidavit that affiant has commenced an action for a specified sum which is "now due and payable to the plaintiff from the defendant, on account for money had and received," sufficiently states a claim arising *ex contractu*, and that a petition stating that "sums were received by said defendant from said plaintiff to be loaned by said defendant for said plaintiff, and for the use and benefit of said plaintiff," and that defendant was to repay the money or reloan it for plaintiff, sufficiently shows in an action for the conversion of such sums that the liability arose *ex contractu*. In this case the petition was permitted to be used in aid of the affidavit by reference thereto); Rouss *v.* Wright, 14 Nebr. 457, 16 N. W. 765 (holding that an allegation that the claim "is for damages in not delivering goods purchased" is an insufficient statement that the claim is for a debt or demand arising upon contract, judgment, or decree).

New Jersey.—Jeffery *v.* Wooley, 10 N. J. L. 123.

New York.— Castellanos *v.* Jones, 5 N. Y. 164; Bennett *v.* Brown, 4 N. Y. 254; Staples *v.* Fairchild, 3 N. Y. 41; Smadbeck *v.* Sisson, 31 Hun (N. Y.) 582, 66 How. Pr. (N. Y.) 225 [*affirming* 4 N. Y. Civ. Proc. 353, 66 How. Pr. (N. Y.) 220]; Reilly *v.* Sisson, 31 Hun (N. Y.) 572, 4 N. Y. Civ. Proc. 361, 66 How. Pr. (N. Y.) 228; Matter of Marty, 3 Barb. (N. Y.) 229 [*reversing* 2 Barb. (N. Y.) 436, 3 How. Pr. (N. Y.) 208]; Morgan *v.* House, 36 How. Pr. (N. Y.) 326; Smith *v.* Luce, 14 Wend. (N. Y.) 237; Matter of Hollingshead, 6 Wend. (N. Y.) 553.

Ohio.— Squair *v.* Shea, 7 Ohio Dec. (Reprint) 71, 1 Cinc. L. Bul. 99.

Pennsylvania.— Jacoby *v.* Gogell, 5 Serg. & R. (Pa.) 450.

Wisconsin.— Blackwood *v.* Jones, 27 Wis. 498; Whitney *v.* Brunette, 15 Wis. 61.

The character of the contract should be stated. People *v.* Blanchard, 61 Mich. 478, 28 N. W. 669. But see Drew *v.* Dequindre, 2 Dougl. (Mich.) 193, holding that an affidavit stating that the indebtedness sworn to was upon an express contract is sufficient without stating more particularly the nature of the contract.

Where the basis of the demand is a breach of duty it must be averred that the duty arose by contract. Pope *v.* Hibernia Ins. Co., 24 Ohio St. 481.

If the complaint shows that the action is upon contract express or implied the requirement is satisfied. Kohler *v.* Agassiz, 99 Cal. 9, 33 Pac. 741.

97. *California.*— Flagg *v.* Dare, 107 Cal. 482, 40 Pac. 804; Simpson *v.* McCarty, 78 Cal. 175, 20 Pac. 406, 12 Am. St. Rep. 37; Norcross *v.* Nunan, 61 Cal. 640.

Minnesota.— Baumgardner *v.* Dowagiac Mfg. Co., 50 Minn. 381, 52 N. W. 964.

Montana.— Newell *v.* Whitwell, 16 Mont. 243, 40 Pac. 866.

New York.— Williams *v.* Barnaman, 19 Abb. Pr. (N. Y.) 69.

Utah.— Bowers *v.* London Bank of Utah, 3 Utah 417, 4 Pac. 225.

Wisconsin.— Winslow *v.* Urquhart, 39 Wis. 260; Ruthe *v.* Green Bay, etc., R. Co., 37 Wis. 344; Klenk *v.* Schwalm, 19 Wis. 111.

Express and implied.— Affidavits which

(2) Ownership of Claim. It should also appear from the affidavit that plaintiff is a creditor of defendant and that he is entitled as such to recover the claim or demand for which the action is brought.[98]

(E) *Pendency of Action* — (1) In General. A statute authorizing the issue of an attachment in an action, or requiring the affidavit to show that one of certain specified causes of action exists against defendant does not necessitate a specific showing that the action has been actually commenced or that the summons has been issued or served;[99] but if the commencement or pendency of the action must be alleged, any statement substantially showing its institution or subsequent prosecution will be sufficient.[1]

(2) Identification of Cause. If it is necessary to identify the action in which the auxiliary remedy is sought the affidavit must so describe it as to show unmistakably that it is an adjunct of that particular proceeding.[2]

stated that a debt was due upon "express and implied" (Buehler *v.* De Lemos, 84 Mich. 554, 48 N. W. 42), "upon express contract and implied contract" (Emerson *v.* Detroit Steel, etc., Co., 100 Mich. 127, 58 N. W. 659), and "upon in part of both an express and implied contract" (Cope *v.* Upper Missouri Min., etc., Co., 1 Mont. 53) were held to be sufficient, without stating how much was due on each contract.

Express or implied.— An affidavit is insufficient which avers that the defendant is indebted to plaintiff upon an express or implied contract. Hawley *v.* Delmas, 4 Cal. 195.

98. *New Jersey.*— Frisby *v.* Williamson, 16 N. J. L. 61.

New York.— McLoughlin *v.* Naugle, 34 Misc. (N. Y.) 385, 69 N. Y. Suppl. 871.

Tennessee.— Sherry *v.* Divine, 11 Heisk. (Tenn.) 722.

West Virginia.— Sommers *v.* Allen, 44 W. Va. 120, 28 S. E. 787.

Canada.— McKenzie *v.* Bussell, 3 U. C. Q. B. O. S. 343.

Action by assignee.— An affidavit by plaintiff stating that he is now the owner and holder of the demand sued on under an assignment by the assignee to whom the original holder had transferred it, together with an affidavit by such original holder stating that he had informed defendant that the claim had been duly assigned to plaintiff, is sufficient to show the latter's ownership of the demand. Hall *v.* Stryker, 27 N. Y. 596.

Action by receiver.— An affidavit entitled in the action of plaintiff as receiver in which, omitting his official designation, he states that he is plaintiff in the above-entitled action and that defendant is indebted to him, sufficiently shows an indebtedness to him as receiver. O'Conor *v.* Roark, 108 Cal. 173, 41 Pac. 465.

Action on promissory note.— An affidavit alleging an indebtedness of defendant to plaintiff on a promissory note made to a third party sufficiently shows ownership of the note by plaintiff, though it is not stated in terms that the note was indorsed to him. State Bank *v.* Boyd, 86 Cal. 386, 25 Pac. 20. The failure to state that the note sued on is payable to plaintiff will not render the attachment void. Bourne *v.* Hocker, 11 B. Mon. (Ky.) 23.

Several plaintiffs.— An affidavit by one of two plaintiffs in which affiant states that he ought to recover is not fatally defective because asserting an indebtedness to him personally. Fairbanks *v.* Lorig, 4 Ind. App. 451, 29 N. E. 452.

Negativing defense.—Allegations that notes sued on are not paid, and that plaintiff is a holder for value before maturity are immaterial averments which it is not necessary for plaintiff to rebut in the first instance. Essex County Nat. Bank *v.* Johnson, 16 N. Y. Suppl. 71, 40 N. Y. St. 949, 21 N. Y. Civ. Proc. 321.

99. Blake *v.* Sherman, 12 Minn. 420; Wallace *v.* Castle, 68 N. Y. 370; American Exch. Nat. Bank *v.* Voisin, 44 Hun (N. Y.) 85; Stoiber *v.* Thudium, 44 Hun (N. Y.) 70; Pickhardt *v.* Antony, 27 Hun (N. Y.) 269; Stevens *v.* Middleton, 26 Hun (N. Y.) 470; Lawton *v.* Kiel, 51 Barb. (N. Y.) 30, 34 How. Pr. (N. Y.) 465; Maury *v.* American Motor Co., 57 N. Y. Suppl. 1142 [*affirming* 25 Misc. (N. Y.) 657, 56 N. Y. Suppl. 316]; Conklin *v.* Dutcher, Code Rep. N. S. (N. Y.) 49, 5 How. Pr. (N. Y.) 386.

1. Thus an affidavit made by the attorney for plaintiff, where he swears "that he is the authorized attorney of the plaintiff in the above entitled action. That he has commenced an action," etc., instead of stating that plaintiff has commenced an action, is not void, where it appears from the whole affidavit that the action was brought by plaintiff. Jansen *v.* Mundt, 20 Nebr. 320, 30 N. W. 53. And an affidavit which states that an action has been commenced in effect shows the issue of a summons, and is sufficient. Wallace *v.* Castle, 68 N. Y. 370.

In Alabama it is not necessary to allege the existence of a suit where it is required that the affidavit together with the bond and attachment shall be returned to the court in which the suit was originally commenced and filed with the papers in the original case. Hounshell *v.* Phares, 1 Ala. 580.

2. Lowenheim *v.* Ireland, 2 Baxt. (Tenn.) 214; Lewis *v.* Woodfolk, 2 Baxt. (Tenn.) 25; Robb *v.* Parker, 4 Heisk. (Tenn.) 58; Woodfolk *v.* Whitworth, 5 Coldw. (Tenn.) 561; Smith *v.* Foster, 3 Coldw. (Tenn.) 139; Swan *v.* Roberts, 2 Coldw. (Tenn.) 153.

Sufficiency of identification.— An affidavit

(F) *Claim or Indebtedness* — (1) IN GENERAL. The statutes generally require a statement that defendant is indebted to plaintiff, and also a precise or reasonably certain statement of the amount of the indebtedness claimed. This last statement is necessary and material, not only to confer jurisdiction but also to enable the officer to whom the affidavit is presented to determine the amount of property which may be taken under the attachment and thus avoid an excessive levy.[3] A general averment of damage is insufficient and the indebtedness or

which corresponds with the petition as to the names of the parties, the amount sued for, and the nature of the action, and is indorsed with the file number of the suit, filed with the papers in the cause, and acted upon by the clerk in issuing the writ, sufficiently identifies the action, though not filed on the same day as the petition. Eilers *v.* Forbes, (Tex. Civ. App. 1895) 32 S. W. 709. So an affidavit showing that it was made in a specified cause, and sworn to by the "agent and attorney for plaintiffs," and filed on the same day, in the same court, and with the same file number as the petition and the attachment bond sufficiently identifies the cause in which it was filed. Munzenheimer *v.* Manhattan Cloak, etc., Co., 79 Tex. 318, 15 S. W. 389.

Failure to use technical language.— An affidavit is not deficient in this respect, because it does not technically state that it is made "in the suit." Altmeyer *v.* Caulfield, 37 W. Va. 847, 17 S. E. 409.

In Tennessee the affidavit must allege that a suit has been commenced by plaintiff against defendant, the nature thereof, the tribunal in which it is pending, the amount of the damages claimed, and that the cause of action is just. Walker *v.* Cottrell, 6 Baxt. (Tenn.) 257; Sparkman *v.* Sparkman, 4 Baxt. (Tenn.) 45; Peak *v.* Buck, 3 Baxt. (Tenn.) 71; Gibson *v.* Carroll, 1 Heisk. (Tenn.) 23; Smith *v.* Foster, 3 Coldw. (Tenn.) 139; Swan *v.* Roberts, 2 Coldw. (Tenn.) 153; Morris *v.* Davis, 4 Sneed (Tenn.) 452; Thompson *v.* Carper, 11 Humphr. (Tenn.) 542.

Identification of court.— An affidavit entitled, "State of Florida, Jackson County," sworn to before the clerk, and indorsed "Frank Philips, Clerk Circuit Court," sufficiently shows in what court proceedings were begun. West *v.* Woolfolk, 21 Fla. 189.

3. *Colorado.*— Mentzer *v.* Ellison, 7 Colo. App. 315, 43 Pac. 464.

Georgia.— Krutina *v.* Culpepper, 75 Ga. 602; Camp *v.* Cahn, 53 Ga. 558; Black *v.* Scanlon, 48 Ga. 12; Irvin *v.* Howard, 37 Ga. 18; Brown *v.* Clayton, 12 Ga. 564.

Illinois.— Phelps *v.* Young, 1 Ill. 327.

Iowa.— Kelley *v.* Donnelly, 29 Iowa 70; Blakley *v.* Bird, 12 Iowa 601; Shapleigh *v.* Roop, 6 Iowa 524.

Kansas.— Tootle *v.* Smith, 34 Kan. 27, 7 Pac. 577; Robinson *v.* Burton, 5 Kan. 293.

Kentucky.— Worthington *v.* Cary, 1 Metc. (Ky.) 470; Cowherd *v.* Harding, 7 Ky. L. Rep. 217; Lynn *v.* Stark, 6 Ky. L. Rep. 586.

Louisiana.— Elam *v.* Barr, 11 La. Ann. 622; Friedlander *v.* Myers, 2 La. Ann. 920.

Michigan.— Mathews *v.* Densmore, 43 Mich. 461, 5 N. W. 669; Hale *v.* Chandler, 3 Mich. 531.

Minnesota.— Folsom *v.* Lockwood, 6 Minn. 186; Davidson *v.* Owens, 5 Minn. 69.

Nebraska.— Hart *v.* Barnes, 24 Nebr. 782, 40 N. W. 322.

New York.— Buell *v.* Van Camp, 119 N. Y. 160, 23 N. E. 538, 28 N. Y. St. 947; Walts *v.* Nichols, 32 Hun (N. Y.) 276; Pomeroy *v.* Ricketts, 27 Hun (N. Y.) 242; Marinette Iron Works Co. *v.* Reddaway, 59 N. Y. Super. Ct. 575, 13 N. Y. Suppl. 426, 36 N. Y. St. 1024; Gould *v.* Bryan, 3 Bosw. (N. Y.) 626; McLoughlin *v.* Naugle, 34 Misc. (N. Y.) 385, 69 N. Y. Suppl. 871; Romeo *v.* Garafolo, 21 Misc. (N. Y.) 166, 47 N. Y. Suppl. 91; Dolz *v.* Atlantic, etc., Transp. Co., 3 N. Y. Civ. Proc. 162; Golden Gate Concentrator Co. *v.* Jackson, 13 Abb. N. Cas. (N. Y.) 476; Ackroyd *v.* Ackroyd, 11 Abb. Pr. (N. Y.) 345, 20 How. Pr. (N. Y.) 93; Cruyt *v.* Phillips, 16 How. Pr. (N. Y.) 120.

Pennsylvania.— May *v.* Pagett, 2 Pa. Dist. 276.

South Carolina.— Addison *v.* Sujette, (S. C. 1897) 27 S. E. 631; Munroe *v.* Williams, 37 S. C. 81, 16 S. E. 533, 19 L. R. A. 665.

Tennessee.—Kendrick *v.* Mason, (Tenn. Ch. 1901) 62 S. W. 359; McElwee *v.* Steelman, (Tenn. Ch. 1896) 38 S. W. 275; Lewis *v.* Woodfolk, 2 Baxt. (Tenn.) 25; Boyd *v.* Gentry, 12 Heisk. (Tenn.) 625; Robb *v.* Parker, 4 Heisk. (Tenn.) 58; Sullivan *v.* Fugate, 1 Heisk. (Tenn.) 20; Woodfolk *v.* Whitworth, 5 Coldw. (Tenn.) 561; Smith *v.* Foster, 3 Coldw. (Tenn.) 139; Foster *v.* Hall, 4 Humphr. (Tenn.) 345.

Texas.— City Nat. Bank *v.* Flippen, 66 Tex. 610, 1 S. W. 897 (holding that an affidavit in which the word "is" before the word "indebted" is omitted is fatally defective); Marshall *v.* Alley, 25 Tex. 342; Scram *v.* Duggan, 1 Tex. App. Civ. Cas. § 1269.

Wisconsin.— Talbot *v.* Woodle, 19 Wis. 174; Quarles *v.* Robinson, 2 Pinn. (Wis.) 97, 1 Chandl. (Wis.) 29.

See 5 Cent. Dig. tit. "Attachment," § 285.

"At the least."— In West Virginia, by the act of Mar. 24, 1882, the affidavit is required to state the amount "at the least," that plaintiff is entitled to recover, and the insertion of that phrase or its equivalent is an absolute necessity. Dulin *v.* McCaw, 39 W. Va. 721, 20 S. E. 681; Crim *v.* Harmon, 38 W. Va. 596, 18 S. E. 753; Altmeyer *v.* Caulfield, 37 W. Va. 847, 17 S. E. 409.

On application for a second attachment the continued existence of the debt must be

amount claimed should be specifically stated;[4] but absolute precision is not always necessary, and a slight variance between the amount claimed and the actual

shown. Favrot *v.* Delle Piane, 4 La. Ann. 584.

Necessity of stating facts.— An affidavit which adopts a certain measure of damages as the amount of recovery must state the evidence relied on to establish such recovery. Delafield *v.* J. K. Armsby Co., 62 N. Y. App. Div. 262, 71 N. Y. Suppl. 14.

Third parties who make supporting affidavits as to the non-residence of the debtor need not testify as to the debt. Staples *v.* Fairchild, 3 N. Y. 41.

Where there are several defendants, the indebtedness of each should be alleged. Britton *v.* Gregg, 96 Ill. App. 29.

Positive verification.— The verification of a petition to the effect that the allegations contained therein are true as far as they come within the knowledge of affiant, and that so far as derived from the knowledge of others he believes them to be true, which is positive as to the amount of the debt, is sufficient. Meinhard *v.* Neill, 85 Ga. 265, 11 S. E. 613.

Amount of defendant's liability need not appear on the face of the contract or instrument by or from which that liability is to be determined. De Leonis *v.* Etchepare, 120 Cal. 407, 52 Pac. 718.

The complaint need not specifically state the amount due in the absence of a statutory requirement to that effect. De Leonis *v.* Etchepare, 120 Cal. 407, 52 Pac. 718; Kohler *v.* Agassiz, 99 Cal. 9, 33 Pac. 741.

Necessity of restatement in prayer.— If the amount claimed to be due be stated in the body of the petition, it need not be again stated in that portion of the petition which asks for the attachment. Shaffer *v.* Sundwall, 33 Iowa 579.

The omission of the word "dollars" after a statement of amount is supplied by a correct statement of the amount in the direction to issue an attachment therefor. De Bebian *v.* Gola, 64 Md. 262, 21 Atl. 275.

In an action ex delicto, it is sufficient to state the amount of damages claimed. Thompson *v.* Carper, 11 Humphr. (Tenn.) 542.

An affidavit stating an indebtedness greater than the amount necessary to authorize an attachment is sufficient, without alleging that the defendant is indebted in a greater sum. Hughes *v.* Stinnett, 9 Ark. 211; Hughes *v.* Martin, 1 Ark. 386.

The affidavit was sufficient with respect to the statement of the indebtedness or amount claimed in the following cases:

Alabama.— Ballard *v.* Stephens, 92 Ala. 616, 8 So. 416; Alford *v.* Johnson, 9 Port. (Ala.) 320.

California.— Tibbett *v.* Sue, 122 Cal. 206, 54 Pac. 741; Kohler *v.* Agassiz, 99 Cal. 9, 33 Pac. 741; State Bank *v.* Boyd, 86 Cal. 386, 25 Pac. 20; Dunn *v.* Mackey, 80 Cal. 104, 22 Pac. 64.

Indiana.— Theirman *v.* Vahle, 32 Ind. 400; Redman *v.* Burgess, 20 Ind. App. 371, 50 N. E. 825.

Kentucky.— Lane *v.* Robinson, 18 B. Mon. (Ky.) 623.

Louisiana.— Belden *v.* Read, 27 La. Ann. 103; Flower *v.* Griffith, 12 La. 345.

Minnesota.— Baumgardner *v.* Dowagiac Mfg. Co., 50 Minn. 381, 52 N. W. 964.

New York.— Anthony *v.* Fox, 53 N. Y. App. Div. 200, 65 N. Y. Suppl. 806 [*reversing* 30 Misc. (N. Y.) 637, 64 N. Y. Suppl. 273]; Easton *v.* Durland's Riding Academy Co., 7 N. Y. App. Div. 288, 40 N. Y. Suppl. 283; Nason Mfg. Co. *v.* Craft Refrigerating Mach. Co., 81 Hun (N. Y.) 578, 30 N. Y. Suppl. 1031, 63 N. Y. St. 224; Roth *v.* American Piano Mfg. Co., 35 Misc. (N. Y.) 509, 71 N. Y. Suppl. 1080; Axford *v.* Sequine, 75 N. Y. Suppl. 35; Sperry *v.* Fox, 17 N. Y. Suppl. 740, 45 N. Y. St. 31 [*affirmed* in 133 N. Y. 673, 31 N. E. 625, 45 N. Y. St. 930]. See also Farrington *v.* Root, 10 Misc. (N. Y.) 347, 31 N. Y. Suppl. 126, 63 N. Y. St. 410.

Ohio.— Sleet *v.* Williams, 21 Ohio St. 82; Mansfield Sav. Bank *v.* Post, 22 Ohio Cir. Ct. 644.

South Carolina.— Smith *v.* Walker, 6 S. C. 169.

Canada.— Wakefield *v.* Bruce, 5 Ont. Pr. 77.

4. *Alabama.*—Kirksey *v.* Fike, 27 Ala. 383, 62 Am. Dec. 768.

Colorado.— Leppel *v.* Beck, 2 Colo. App. 390, 31 Pac. 185.

Michigan.— Macumber *v.* Beam, 22 Mich. 395.

New York.— Castellanos *v.* Jones, 5 N. Y. 164; Golden Gate Concentrator Co. *v.* Jackson, 13 Abb. N. Cas. (N. Y.) 476.

Pennsylvania.— Simon *v.* Johnson, 7 Kulp (Pa.) 166; Wells *v.* Hogan, 6 Kulp (Pa.) 475.

South Carolina.— Ferst *v.* Powers, 58 S. C. 398, 36 S. E. 744; Williamson *v.* Eastern Bldg., etc., Assoc., 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822; Addison *v.* Sujette, (S. C. 1897) 27 S. E. 631; Munroe *v.* Williams, 37 S. C. 81, 16 S. E. 533, 19 L. R. A. 665.

Texas.— Marshall *v.* Alley, 25 Tex. 342.

Virginia.— Clowser *v.* Hall, 80 Va. 864.

Wisconsin.— Jones *v.* Webster, 1 Pinn. (Wis.) 345. See also Single *v.* Barnard, 29 Wis. 463.

United States.— Munroe *v.* Cocke, 2 Cranch C. C. (U. S.) 465, 17 Fed. Cas. No. 9,928, construing Maryland statute.

See 5 Cent. Dig. tit. "Attachment," § 287.

In Georgia the debt need not be sworn to with the same positiveness as is required in an allegation as to the grounds. Neal *v.* Gordon, 60 Ga. 112.

In North Carolina it appears by the early cases to have been sufficient to state that plaintiff had good reason to believe that defendant had damaged him in a sum stated.

indebtedness, caused by miscalculation or inadvertence, will be disregarded, where it is evident that plaintiff has acted in good faith.[5] The recital of an indebtedness is *prima facie* and not conclusive evidence thereof.[6]

(2) Affidavits by Attorneys or Agents. In some states the rule requiring the amount of the indebtedness to be definitely shown by positive allegations has been relaxed on behalf of attorneys and agents so as to permit them to swear to the same on information and belief,[7] or to swear positively to the indebtedness without disclosing knowledge of the facts on which they base their allegation.[8]

(3) Particulars of Indebtedness. While it is better, and sometimes necessary, that particulars of the debt should be given, or facts should be stated, which will satisfy the officer of the existence of the indebtedness claimed,[9] there are authorities to the effect that the ultimate fact only need be stated, and not the probative facts out of which the indebtedness arose.[10]

(4) Joint Indebtedness. An allegation that two defendants named are indebted to plaintiffs,[11] or that defendants are copartners,[12] sufficiently alleges a

Bickerstaff *v.* Dellinger, 1 N. C. 388; Powell *v.* Hampton, 1 N. C. 218.

Identification of promissory notes.— A statement that defendant is justly indebted to plaintiff in a specified sum on two notes dated at a given time is sufficient. Fuller *v.* Smith, 58 N. C. 192.

5. Zinn *v.* Dzialynski, 13 Fla. 597; Grotte *v.* Nagle, 50 Nebr. 363, 69 N. W. 973; Rainwater-Boogher Hat Co. *v.* O'Neal, 82 Tex. 337, 18 S. W. 570; Lathrop *v.* Snyder, 16 Wis. 293.

Necessity of calculation.— It is immaterial that the exact amount is not stated, but is left to be determined on calculations to be made from the data furnished by the affidavit. Rowan *v.* Shapard, 2 Tex. App. Civ. Cas. § 295.

Omission to state the amount of interest will not render the affidavit defective. O'Conor *v.* Roark, 108 Cal. 173, 41 Pac. 465; Wright *v.* Ragland, 18 Tex. 289; Briggs *v.* Lane, 1 Tex. App. Civ. Cas. § 960.

6. Treat *v.* Dunham, 74 Mich. 114, 41 N. W. 876, 26 Am. St. Rep. 617; Manning *v.* Bresnahan, 63 Mich. 584, 30 N. W. 189; Cook *v.* Hopper, 23 Mich. 511.

7. Mitchell *v.* Pitts, 61 Ala. 219; Gazan *v.* Royce, 78 Ga. 512, 3 S. E. 753; Horn *v.* Guiser Mfg. Co., 72 Ga. 897; Chronicle, etc. *v.* Rowland, 72 Ga. 195; Neal *v.* Gordon, 60 Ga. 112; Stowers *v.* Carter, 28 Ga. 351; Denpree *v.* Eisenach, 9 Ga. 598; Levy *v.* Millman, 7 Ga. 167 (also holding that an affidavit by plaintiff's attorney stating positively the indebtedness was not objectionable); Bridges *v.* Williams, 1 Mart. N. S. (La.) 98; Bruff *v.* Stern, 81 N. C. 183.

8. White *v.* Stanley, 29 Ohio St. 423 [*overruling* Phelps *v.* Wetherby, 3 Ohio Dec. (Reprint) 205, 4 Wkly. L. Gaz. 385]; Rice *v.* Morner, 64 Wis. 599, 25 N. W. 668; Anderson *v.* Wehe, 58 Wis. 615, 17 N. W. 426 [*disproving dictum* to the contrary in Wiley *v.* Aultman, 53 Wis. 560, 11 N. W. 32]. See also Barber *v.* Smith, 41 Mich. 138, 1 N. W. 992, holding that an affidavit by the attorney stating that defendant was indebted to plaintiff in the sum claimed "over and above all legal set-offs" as near as might be, and as near as affiant could estimate the same is not defective because failing to state the means of knowledge as to the amount of indebtedness.

Under the Louisiana code of practice an agent must swear from his own knowledge and not from his belief as was formerly permissible. Hicks *v.* Duncan, 4 Mart. N. S. (La.) 314.

An affidavit by an attorney positive in form is insufficient if it proceeds to state that the only knowledge which affiant has on the subject was derived from plaintiff and his agent, since such an affidavit amounts to no more than a mere statement that affiant was told that defendant was indebted in the sum mentioned (Streissguth *v.* Reigelman, 75 Wis. 212, 43 N. W. 1116), or where it adds that affiant's information is from letters written by plaintiff and a sworn statement of the account in affiant's possession (Trautmann *v.* Schwalm, 80 Wis. 275, 50 N. W. 99).

9. Greenway *v.* Mead, 26 N. J. L. 303; Dolz *v.* Atlantic, etc., Transp. Co., 3 N. Y. Civ. Proc. 162.

Sufficiency.— A description of the claim as one for "the services of the plaintiff, as the attorney of the defendant, rendered in prosecuting certain suits upon his retainer, and for drawing and engrossing certain instruments in writing," which services were performed, and money advanced, between stated dates, is sufficient. Wenzell *v.* Morrisey, 115 N. Y. 665, 22 N. E. 271, 26 N. Y. St. 492 [*affirming* 2 N. Y. Suppl. 250, 21 N. Y. St. 982, 15 N. Y. Civ. Proc. 311, 51 Hun (N. Y.) 642, 5 N. Y. Suppl. 951].

10. *Alabama.*— Fleming *v.* Burge, 6 Ala. 373; Starke *v.* Marshall, 3 Ala. 44.

California.— Weaver *v.* Hayward, 41 Cal. 117.

Georgia.— Ervin *v.* Howard, 37 Ga. 18.

Illinois.— Phelps *v.* Young, 1 Ill. 327.

Oregon.— Crawford *v.* Roberts, 8 Oreg. 324.

11. Sword *v.* Lane, 71 Mich. 284, 38 N. W. 870, holding that if a joint indebtedness is alleged a further averment that the debt is due from one of the defendants necessarily avers that it is due from both.

12. People *v.* Judge Bay County Cir. Ct., 41 Mich. 326, 2 N. W. 26.

joint indebtedness. Where it is sought to attach the property of one joint debtor the affidavit need not state a joint indebtedness or take notice of the other,[13] and if the property of one joint debtor may be attached, an affidavit alleging the indebtedness of both is sufficient to authorize a judgment against one.[14]

(5) Unliquidated Demands. In an action to recover unliquidated damages special facts and circumstances must be set out, so as to enable the court to judge of the probable amount of damages sustained and recoverable, and to determine the amount for which the levy may be made.[15]

(6) Justice of Claim. The omission of the affidavit to conform to a requirement that plaintiff must state that his claim "is just,"[16] that defendant "is justly indebted" to plaintiff,[17] or that affiant believes plaintiff is justly entitled to

13. Dobbs *v.* Justices Murray County Inferior Ct., 17 Ga. 624.

Failure to designate defendant liable.— An affidavit in an action against two defendants which states that the claim against defendant is for professional services is defective because of the failure to state which defendant is indebted. Kesler *v.* Lapham, 46 W. Va. 293, 33 S. E. 289.

14. Geiges *v.* Greiner, 68 Mich. 153, 36 N. W. 48.

15. Bozeman *v.* Rose, 40 Ala. 212; Warwick *v.* Chase, 23 Md. 154; Thorington *v.* Merrick, 101 N. Y. 5, 3 N. E. 794; Delafield *v.* J. K. Armsby Co., 62 N. Y. App. Div. 262, 71 N. Y. Suppl. 14 [*reversing* on rehearing 58 N. Y. App. Div. 432, 68 N. Y. Suppl. 998]; James *v.* Signell, 60 N. Y. App. Div. 75, 69 N. Y. Suppl. 680; Bloomingdale *v.* Cook, 35 N. Y. App. Div. 360, 54 N. Y. Suppl. 924; Haskell *v.* Osborn, 33 N. Y. App. Div. 127, 53 N. Y. Suppl. 361; Westervelt *v.* Agrumaria Sicula, etc., 58 Hun (N. Y.) 147, 11 N. Y. Suppl. 340; Roth *v.* American Piano Mfg. Co., 35 Misc. (N. Y.) 509, 71 N. Y. Suppl. 1080; Story *v.* Arthur, 35 Misc. (N. Y.) 244, 71 N. Y. Suppl. 776; Farquhar *v.* Wisconsin Condensed Milk Co., 30 Misc. (N. Y.) 270, 62 N. Y. Suppl. 305; Foster *v.* Scurich, 27 Misc. (N. Y.) 25, 57 N. Y. Suppl. 95; Duryea *v.* Rayner, 11 Misc. (N. Y.) 294, 32 N. Y. Suppl. 247, 65 N. Y. St. 429; Narregang *v.* Muscatine Mortg., etc., Co., 7 S. D. 574, 64 N. W. 1129.

Action ex delicto.— Under the Iowa statutes, if a claim is not founded upon a contract the affidavit need not state the amount due. Sherrill *v.* Fay, 14 Iowa 292.

Breach of warranty.— In an action of damages for breach of warranty an affidavit stating that plaintiff is entitled to recover a specified sum over and above all counterclaims is sufficient, although it is not alleged that such sum represents the difference in value between the quality warranted and the goods delivered. Haebler *v.* Bernharth, 115 N. Y. 459, 22 N. E. 167, 26 N. Y. St. 230, 17 N. Y. Civ. Proc. 393 [*reversing* 56 N. Y. Super. Ct. 575, 4 N. Y. Suppl. 873, 23 N. Y. St. 199]. An allegation that "defendant is justly and truly indebted to the plaintiffs in the sum of thirty thousand dollers, and upwards, besides interest, upon a promise made by the defendant, for a valuable consideration, to deliver to the plaintiffs a large quantity of teas, of a certain quality, which promise he has not complied with, but has broken," is sufficiently positive. Redwood *v.* Consequa, 2 Browne (Pa.), 62.

Nominal damages.— An affidavit stating facts which will entitle plaintiff to no more than nominal damages is insufficient to authorize the issue of an attachment. Romeo *v.* Garafolo, 21 Misc. (N. Y.) 166, 47 N. Y. Suppl. 91.

16. *Kansas.*— Robinson *v.* Burton, 5 Kan. 293.

Kentucky.— Worthington *v.* Cary, 1 Metc. (Ky.) 470; Taylor *v.* Smith, 17 B. Mon. (Ky.) 536; Green *v.* Baker, 6 Ky. L. Rep. 214.

Ohio.— Endel *v.* Leibrock, 33 Ohio St. 254; Cook *v.* Olds Gasoline Engine Works, 19 Ohio Cir. Ct. 732.

Tennessee.—Kendrick *v.* Mason, (Tenn. Ch. 1901) 62 S. W. 359; McElwee *v.* Steelman, (Tenn. Ch. 1896) 38 S. W. 275; Lewis *v.* Woodfolk, 2 Baxt. (Tenn.) 25; Boyd *v.* Gentry, 12 Heisk. (Tenn.) 625; Rumbough *v.* White, 11 Heisk. (Tenn.) 260; Robb *v.* Parker, 4 Heisk. (Tenn.) 58; Sullivan *v.* Fugate, 1 Heisk. (Tenn.) 20; Woodfolk *v.* Whitworth, 5 Coldw. (Tenn.) 561; Smith *v.* Foster, 3 Coldw. (Tenn.) 139.

Virginia.—See Clowser *v.* Hall, 80 Va. 864.

See also Hartford L. Ins. Co. *v.* Bryan, 25 Ind. App. 406, 58 N. E. 262.

Collateral attack.— The omission of an averment that the claim is just is not a ground for impeaching the judgment collaterally. Boyd *v.* Gentry, 12 Heisk. (Tenn.) 625.

Sufficiency.— An affidavit that "the plaintiffs are justly entitled to recover" the sum claimed is sufficient. Gutman *v.* Virginia Iron Co., 5 W. Va. 22. And where actions were consolidated and the parties proceeded on the assumption that the pleadings in one case stood as if filed in both, one answer only being filed, the failure of the affidavit in one action to allege the justice of the claim was cured by that answer denying that the debt was just. Hey *v.* Harding, 21 Ky. L. Rep. 771, 53 S. W. 33, where the sufficiency of the affidavit was not presented or considered below.

17. Evans *v.* Tucker, 59 Tex. 249; Marshall *v.* Alley, 25 Tex. 342; Scram *v.* Duggan, 1 Tex. App. Civ. Cas. § 1269.

Omission of "justly."— The mere statement that defendant is indebted has been

recover[18] will render it insufficient. However, if an implication of the justice of the demand necessarily arises from the language employed,[19] or if the indebtedness of defendant is clearly and positively stated and sworn to,[20] failure to comply strictly with the statute will not vitiate the affidavit, especially where the substance of the necessary allegation appears by the duly verified declaration in the action.[21]

(7) Variance Between Affidavit and Pleading. Immaterial variance between the affidavit and the declaration or complaint in stating the amount of the indebtedness claimed,[22] or a claim in the pleading of an amount greater[23] or even in some cases less[24] than that alleged in the affidavit will not ordinarily vitiate the proceedings, especially where the sum claimed can be ascertained by computation.[25]

(8) Offsets and Counter-Claims — (a) In General. Absolute compliance with statutory provisions requiring the affidavit to show that defendant is indebted to plaintiff in an amount specified, or that the latter is entitled to recover such an amount, over and above all legal payments, set-offs, or counter-claims is necessary to confer jurisdiction to issue the writ,[26] although inability to

held to be sufficient. Livengood *v.* Shaw, 10 Mo. 273; H. B. Claflin Co. *v.* Kamsler, (Tex. Civ. App. 1896) 36 S. W. 1018.

18. Sommers *v.* Allen, 44 W. Va. 120, 28 S. E. 787; Reed *v.* McCloud, 38 W. Va. 701, 18 S. E. 924; Crim *v.* Harmon, 38 W. Va. 596, 18 S. E. 753; Cosner *v.* Smith, 36 W. Va. 788, 15 S. E. 977; Hudkins *v.* Haskins, 22 W. Va. 645.

19. Wilkins *v.* Tourtellott, 28 Kan. 825; Simon *v.* Johnson, 7 Kulp (Pa.) 166; Hart *v.* Dixon, 5 Lea (Tenn.) 336; Alston *v.* Sharp, 2 Lea (Tenn.) 515; Clinch River Mineral Co. *v.* Harrison, 91 Va. 122, 21 S. E. 660. See also Ludlow *v.* Ramsey, 78 U. S. 581, 20 L. ed. 216.

20. Kennedy *v.* Morrison, 31 Tex. 207.

21. McElwee *v.* Steelman, (Tenn. Ch. 1896) 38 S. W. 275; H. B. Claflin Co. *v.* Kamsler, (Tex. Civ. App. 1896) 36 S. W. 1018.

A statement of the amount "due" upon plaintiff's claim is equivalent to a statement of the amount plaintiff "believes he ought to recover." Sleet *v.* Williams, 21 Ohio St. 82.

22. Boone *v.* Savage, 14 La. 169; Grotte *v.* Nagle, 50 Nebr. 363, 69 N. W. 973.

After judgment by default, in an action commenced by attachment, a variance between the affidavit and the complaint as to the amount of the debt claimed is not available on error. Decatur, etc., Imp. Co. *v.* Crass, 97 Ala. 524, 12 So. 41.

23. Heard *v.* Lowry, 5 Ark. 522; O'Conor *v.* Roark, 108 Cal. 173, 41 Pac. 465; Moore *v.* Harlan, 37 Ga. 623; Aultman *v.* Smyth, (Tex. Civ. App. 1897) 43 S. W. 932.

Interest and costs.— The validity of an affidavit which states, in addition to the amount of the debt, the rate of interest thereon and the time that it has been running, is unaffected by a request in an accompanying petition that the writ issue for the amount of the debt, interest, and costs. Piggott *v.* Schram, 64 Tex. 447.

24. Grotte *v.* Nagle, 50 Nebr. 363, 69 N. W. 973.

25. Rogers *v.* East Line Lumber Co., 11 Tex. Civ. App. 108, 33 S. W. 312.

26. Matthews *v.* Densmore, 43 Mich. 461, 5 N. W. 669; Wells *v.* Parker, 26 Mich. 102; Cross *v.* McMaken, 17 Mich. 511, 97 Am. Dec. 203; Wilson *v.* Arnold, 5 Mich. 98; Roelofson *v.* Hatch, 3 Mich. 277; Thorington *v.* Merrick, 101 N. Y. 5, 3 N. E. 794; Ruppert *v.* Haug, 87 N. Y. 141, 1 N. Y. Civ. Proc. 411, 62 How. Pr. (N. Y.) 364; Manufacturers' Nat. Bank *v.* Hall, 60 Hun (N. Y.) 466, 15 N. Y. Suppl. 208, 39 N. Y. St. 463, 21 N. Y. Civ. Proc. 131 [*affirmed* in 129 N. Y. 663, 30 N. E. 65, 42 N. Y. St. 945]; E. W. Bliss Co. *v.* Opera Glass Supply Co., 60 Hun (N. Y.) 438, 15 N. Y. Suppl. 6, 39 N. Y. St. 332, 21 N. Y. Civ. Proc. 136; Marine Nat. Bank *v.* Ward, 35 Hun (N. Y.) 395; Donnell *v.* Williams, 21 Hun (N. Y.) 216, 59 How. Pr. (N. Y.) 68; Lyon *v.* Blakesly, 19 Hun (N. Y.) 299; Kelly *v.* Archer, 48 Barb. (N. Y.) 68; Trow's Printing, etc., Co. *v.* Hart, 9 Daly (N. Y.) 413, 60 How. Pr. (N. Y.) 190; Farrington *v.* Root, 10 Misc. (N. Y.) 347, 31 N. Y. Suppl. 126, 63 N. Y. St. 410; Hart *v.* Bernau, 22 N. Y. Suppl. 296, 51 N. Y. St. 828; McEntee *v.* Aris, 21 N. Y. Suppl. 857, 50 N. Y. St. 541; Norfolk, etc., Hosiery Co. *v.* Arnold, 18 N. Y. Suppl. 910, 46 N. Y. St. 491; Gribbon *v.* Ganss, 18 N. Y. Suppl. 608, 45 N. Y. St. 825; U. S. Net, etc., Co. *v.* Alexander, 18 N. Y. Suppl. 147; Hingston *v.* Miranda, 12 N. Y. Civ. Proc. 439; Taylor *v.* Reed, 54 How. Pr. (N. Y.) 27; Morgan *v.* House, 36 How. Pr. (N. Y. 326 [*following* Bennett *v.* Brown, 4 N. Y. 254]; Whitney *v.* Brunette, 15 Wis. 61.

In Alabama this statement is not required. Harris *v.* Clapp, Minor (Ala.) 328.

Failure to give the date of an admitted credit is fatal. Espey *v.* Heidenheimer, 58 Tex. 662.

Identification of claim.— A statement that there are no counter-claims to the "cause of action" sufficiently refers to the claim on which the action is brought, although no complaint accompanies the application. Maury *v.* American Motor Co., 25 Misc. (N. Y.) 657, 56 N. Y. Suppl. 316. And an affidavit in an action on several distinct claims need not

specify the exact amount of an offset existing in defendant's favor may excuse an uncertain allegation in respect thereto.[27]

(b) KNOWLEDGE. If it is also required to appear that plaintiff is entitled to recover the sum claimed, over and above all counter-claims known to him, the fact of the non-existence of the counter-claims to his knowledge should be so alleged that the court may see that affiant has personal knowledge of the facts, or that his information on the subject is such as to enable him to form a well-grounded belief on the subject.[28] If the affidavit is not made by plaintiff, a statement that the amount is due over and above all counter-claims known to deponent in New York, at least, is wholly insufficient.[29] There is a class of cases, however, which hold that a bare statement by plaintiff that the amount is due over and above all counterclaims is sufficient, without the addition of a statement as to the knowledge of the non-existence of counter-claims,[30] and in some jurisdictions it is sufficient to specify the amount of the indebtedness, over and above all legal set-offs, "as near as may be," either in the language

state the non-existence of counter-claims as to each item. U. S. Net, etc., Co. *v.* Alexander, 18 N. Y. Suppl. 147 [*disapproving* Murray *v.* Hankin, 30 Hun (N. Y.) 37, 3 N. Y. Civ. Proc. 342, 65 How. Pr. (N. Y.) 511].

Necessity of stating facts.— In Farrington *v.* Root, 10 Misc. (N. Y.) 347, 31 N. Y. Suppl. 126, 63 N. Y. St. 410, it was held to be sufficient to show presumptively the absence of counter-claims; but in Livingston *v.* Lakwitz, 25 Misc. (N. Y.) 119, 53 N. Y. Suppl. 1083, it was held that an affidavit in the language of the statute which failed to state the facts from which the conclusion was drawn was insufficient, and that there should have been an allegation as to whether or not there were any counter-claims, and if so for how much. An affidavit stating that defendant has a counter-claim but failing to state that there is any balance due plaintiff or to show the amount that is due is insufficient, although the gross amount of plaintiff's claim is alleged. Morrison *v.* Ream, 1 Pinn. (Wis.) 244.

"Over and above all discounts" is not the equivalent of the statutory requirement of the statement of an indebtedness "over all payments and set-offs." Solinger *v.* Patrick, 7 Daly (N. Y.) 408.

Set-offs "or" counter-claims.—A statement of the amount claimed, over and above all set-off "or" counter-claims, substantially complies with the requirement that plaintiff shall show that the amount claimed is due over and above all set-offs "and" counter-claims. O'Conor *v.* Roark, 108 Cal. 173, 41 Pac. 465.

27. **Ignorance of amount of offsets.**— An affidavit stating that plaintiff is indebted to defendant in some small amount but that he is ignorant of the exact sum was held to be sufficient. Turner *v.* McDaniel, 1 McCord (S. C.) 552. And a statement that the indebtedness to plaintiff may be subject to a set-off for an unascertained sum which on final settlement will be due to defendant from plaintiff was held not to be defective for uncertainty. Holston Mfg. Co. *v.* Lea, 18 Ga. 647.

28. Buhl *v.* Ball, 41 Hun (N. Y.) 61; Cribben *v.* Schillinger, 30 Hun (N. Y.) 248; Lee *v.* U. S. Co-operative L., etc., Assoc., 2 N. Y. Suppl. 864, 19 N. Y. St. 879 [*affirmed* in 113 N. Y. 642, 21 N. E. 414, 22 N. Y. St. 997]; Jordan *v.* Richardson, 7 N. Y. Civ. Proc. 411; Lampkin *v.* Douglass, 10 Abb. N. Cas. (N. Y.) 342, 63 How. Pr. (N. Y.) 47.

Sufficiency.— An affidavit by plaintiff's agent that a certain sum is due plaintiff from defendant "over and above all offsets and counter-claims known to deponent, or to said plaintiff," is sufficient. Mallary *v.* Allen, 7 N. Y. Civ. Proc. 287, 15 Abb. N. Cas. (N. Y.) 338, 1 How. Pr. N. S. (N. Y.) 316, in which case it was said that the words "known to him" need not be used to give jurisdiction but may be omitted as they were doubtless intended to be in relief of the conscience of affiant. An allegation by plaintiff that defendants are justly indebted to him in a stated sum "over all set-offs or counter-claims that the said defendants might have against this plaintiff to his knowledge," is a sufficient compliance with the requirement that plaintiff must show that he is entitled to recover a sum stated over and above all counter-claims known to him. Rickerson *v.* Bunker, 26 Misc. (N. Y.) 383, 56 N. Y. Suppl. 202.

29. Smith *v.* Holt, 37 N. Y. App. Div. 24, 55 N. Y. Suppl. 721; Smith *v.* Arnold, 33 Hun (N. Y.) 484; Murray *v.* Hankin, 30 Hun (N. Y.) 37, 3 N. Y. Civ. Proc. 342, 65 How. Pr. (N. Y.) 511; Mitchell *v.* Anderson, 32 Misc. (N. Y.) 13, 66 N. Y. Suppl. 118.

30. Alford *v.* Cobb, 28 Hun (N. Y.) 22; Lamkin *v.* Douglass, 27 Hun (N. Y.) 517 [*reversing* 10 Abb. N. Cas. (N. Y.) 342, 63 How. Pr. (N. Y.) 47]; Riley *v.* Skidmore, 2 Silv. Supreme (N. Y.) 573, 6 N. Y. Suppl. 107, 24 N. Y. St. 724; Billwiller *v.* Marks, 16 N. Y. Suppl. 541, 21 N. Y. Civ. Proc. 162; Mallary *v.* Allen, 7 N. Y. Civ. Proc. 287, 15 Abb. N. Cas. (N. Y.) 338, 1 How. Pr. N. S. (N. Y.) 316; Ross *v.* Wigg, 6 N. Y. Civ. Proc. 268 note [*affirmed* in 34 Hun (N. Y.) 192, 6 N. Y. Civ. Proc. 263]; Bates *v.* Pinstein, 15 Abb. N. Cas. (N. Y.) 480.

Affidavit by an agent.— An agent need not state that the facts with respect to the counter-claims are known to plaintiff. Billwiller *v.* Marks, 16 N. Y. Suppl. 541, 21 N. Y. Civ. Proc. 162.

of the statute,[31] or by expressions substantially equivalent,[32] unless the statutory language is necessary to the validity of the affidavit.[33]

(c) Affidavit by Assignee of Claim. With respect to assignees of claims who are themselves plaintiffs, it is sufficient for them to state the non-existence of counter-claims as to their knowledge, and it is not necessary to make any statements as to the existence of counter-claims against their assignors.[34]

(d) Affidavit by Attorney or Agent. An affidavit by an attorney or agent must disclose such means of knowledge as will satisfy the court that he is competent to speak upon the subject;[35] and if affiant establishes that he is possessed of sufficient knowledge on the subject, his statement as to the non-existence of counter-claims will be sufficient.[36]

(e) Affidavit on Behalf of Corporation. Statements made by officers of corporations whose official duties presumably afford them adequate means of knowledge, that there are no counter-claims known to plaintiff, or that they know personally that there are no counter-claims in favor of defendant, or like statements, will ordinarily be sufficient.[37]

(f) Affidavit on Behalf of Joint Parties. One joint plaintiff may state that no counter-claims exist to the knowledge of all the plaintiffs,[38] for in such a case it will be presumed that matters positively sworn to were within the personal knowledge of affiant, unless it is apparent that he could not have such knowledge.[39]

31. Estlow *v.* Hanna, 75 Mich. 219, 42 N. W. 812; Grover *v.* Buck, 34 Mich. 519; Cross *v.* McMaken, 17 Mich. 511, 97 Am. Dec. 203; Roelofson *v.* Hatch, 3 Mich. 277; Mairet *v.* Marriner, 34 Wis. 582; Oliver *v.* Town, 28 Wis. 328.

Omission of statutory phrase "as near as may be" is immaterial where the amount of the indebtedness is stated positively. Burns *v.* Kinne, 2 Mich. N. P. 63.

32. Nicolls *v.* Laurence, 30 Mich. 395; Barker *v.* Thorn, 20 Mich. 264.

33. Hawes *v.* Clement, 64 Wis. 152, 25 N. W. 21; Lathrop *v.* Snyder, 16 Wis. 293.

34. Selser Bros. Co. *v.* Potter Produce Co., 80 Hun (N. Y.) 554, 30 N. Y. Suppl. 527, 62 N. Y. St. 408; Crowns *v.* Vail, 51 Hun (N. Y.) 204, 4 N. Y. Suppl. 324, 21 N. Y. St. 208; Dolbeer *v.* Stout, 60 N. Y. Super. Ct. 269, 17 N. Y. Suppl. 184, 42 N. Y. St. 214, 21 N. Y. Civ. Proc. 359; Lewis *v.* Vail, 5 N. Y. Suppl. 946.

35. Manufacturers' Nat. Bank *v.* Hall, 60 Hun (N. Y.) 466, 15 N. Y. Suppl. 208, 39 N. Y. St. 463, 21 N. Y. Civ. Proc. 131 [*affirmed* in 129 N. Y. 663, 30 N. E. 65, 42 N. Y. St. 945]; Kokomo Straw Board Co. *v.* Inman, 53 Hun (N. Y.) 39, 5 N. Y. Suppl. 888, 24 N. Y. St. 663; Hart *v.* Bernau, 22 N. Y. Suppl. 296, 51 N. Y. St. 828; Crowns *v.* Vail, 2 N. Y. Suppl. 218 [*affirmed* in 51 Hun (N. Y.) 204, 4 N. Y. Suppl. 324, 21 N. Y. St. 208].

36. Mann *v.* Carter, 71 Hun (N. Y.) 72, 24 N. Y. Suppl. 591, 54 N. Y. St. 212; Gribbon *v.* Back, 35 Hun (N. Y.) 541; Herzberg *v.* Boiesen, 53 N. Y. Suppl. 256, 5 N. Y. Annot. Cas. 35; Butterworth *v.* Boutilier, 22 N. Y. Suppl. 872, 50 N. Y. St. 828 [*distinguishing* Cribben *v.* Schillinger, 30 Hun (N. Y.) 248]; Billwiller *v.* Marks, 16 N. Y. Suppl. 541, 21 N. Y. Civ. Proc. 162; Marietta First Nat. Bank *v.* Bushwick Chemical Works, 5 N. Y. Suppl. 824 [*affirmed* in 3 Silv. Supreme (N. Y.) 61, 6 N. Y. Suppl. 318, 25 N. Y. St. 830, 17 N. Y. Civ. Proc. 229 [*affirmed* in 119 N. Y. 645, 23 N. E. 1149, 29 N. Y. St. 993)].

Information and belief.— An affidavit by plaintiff's attorney that a specified sum is due "over and above all counter-claims known to deponent, as deponent is informed and verily believes," is fatally defective. Acker *v.* Jackson, 3 How. Pr. N. S. (N. Y.) 160. See *supra*, VII, D, 7, c, (v), (f), (2).

37. Barstow Stove Co. *v.* Darling, 81 Hun (N. Y.) 564, 30 N. Y. Suppl. 1033, 63 N. Y. St. 226; Manufacturers' Nat. Bank *v.* Hall, 60 Hun (N. Y.) 466, 15 N. Y. Suppl. 208, 39 N. Y. St. 463, 21 N. Y. Civ. Proc. 131 [*affirmed* in 129 N. Y. 663, 30 N. E. 65, 42 N. Y. St. 945]; E. W. Bliss Co. *v.* Opera Glass Supply Co., 60 Hun (N. Y.) 438, 15 N. Y. Suppl. 6, 39 N. Y. St. 332, 21 N. Y. Civ. Proc. 136; National Park Bank *v.* Whitmore, 40 Hun (N. Y.) 499; Central Nat. Bank *v.* Ft. Ann Woolen Co., 24 N. Y. Suppl. 640 [*affirmed* in 76 Hun (N. Y.) 610, 27 N. Y. Suppl. 1114, 57 N. Y. St. 316 (*affirmed* in 143 N. Y. 624, 37 N. E. 827, 60 N. Y. St. 873)]; Essex County Nat. Bank *v.* Johnson, 16 N. Y. Suppl. 71, 40 N. Y. St. 949, 21 N. Y. Civ. Proc. 321. But see Geneva Non-Magnetic Watch Co. *v.* Payne, 5 N. Y. Suppl. 68, where an affidavit by the secretary of a corporation, which stated no facts showing knowledge on the part of affiant that the debt was over and above all counter-claims was fatally defective, for the reason that no presumption could arise from affiant's relation to plaintiff. See *supra*, VII, D, 4, d.

38. Doctor *v.* Schnepp, 7 N. Y. Civ. Proc. 144, 2 How. Pr. N. S. (N. Y.) 52; Barton *v.* Saalfield, 1 How. Pr. N. S. (N. Y.) 276.

39. Doctor *v.* Schnepp, 7 N. Y. Civ. Proc. 144, 2 How. Pr. N. S. (N. Y.) 52.

(G) *Maturity of Debt* — (1) DEBT DUE. If the attachment can be issued only where there is a present indebtedness, the affidavit must affirmatively show that the debt upon which the action is brought was actually due at the time the action was commenced, or the affidavit made.[40] This requirement is satisfied by a statement that defendant is indebted,[41] or that the sum claimed is justly due;[42] and it has been held that the statement of a cause of action in the petition showing the right to immediate compensation will control a statement in the affidavit that the debt has not matured.[43] If the debt, although treated as due, has not actually matured it may be shown that it was agreed that it should become due on the happening of a certain contingency, and that the contemplated contingency has occurred.[44]

(2) IMMATURED DEBT. If an attachment is permitted to secure a debt which is not due the affidavit must appropriately show that the demand has not

40. *Georgia.*— Lorillard *v.* Barrett, 77 Ga. 45; Joseph *v.* Stein, 52 Ga. 332. But see Harrill *v.* Humphries, 26 Ga. 514.

Maryland.— Thompson *v.* Towson, 1 Harr. & M. (Md.) 504.

Michigan.— Cross *v.* McMaken, 17 Mich. 511, 97 Am. Dec. 203; Hale *v.* Chandler, 3 Mich. 531.

New York.— Smadbeck *v.* Sisson, 31 Hun (N. Y.) 582, 66 How. Pr. (N. Y.) 225 [*affirming* 4 N. Y. Civ. Proc. 353, 66 How. Pr. (N. Y.) 220]; Reilly *v.* Sisson, 31 Hun (N. Y.) 572, 4 N. Y. Civ. Proc. 361, 66 How. Pr. (N. Y.) 228; Vietor *v.* Henlein, 67 How. Pr. (N. Y.) 486.

Ohio.— Mansfield Sav. Bank *v.* Post, 22 Ohio Cir. Ct. 644.

Texas.—Sydnor *v.* Totham, 6 Tex. 189.

Wisconsin.—Bowen *v.* Slocum, 17 Wis. 181; Whitney *v.* Brunette, 15 Wis. 61.

See 5 Cent. Dig. tit. "Attachment," § 280.

Necessity of positive statement.— That the amount demanded is actually due must be positively stated. Allegations on information and belief are insufficient. Ross *v.* Steen, 20 Fla. 443. But the maturity of the debt need not be stated in express terms, and it will be sufficient if the affidavit state, "the amount at the least, which, the affiant believes, the plaintiff is justly entitled to recover." Ruhl *v.* Rogers, 29 W. Va. 779, 2 S. E. 798.

An allegation that an account was stated between plaintiff and defendant and that upon such statement a specified balance was found to be due from defendant to plaintiff sufficiently shows a breach of contract. Johnston *v.* Ferris, 14 Daly (N. Y.) 302, 12 N. Y. St. 666.

Money loaned — Presumption.— In an action to recover a loan, if no specified period for repayment is stated, the loan will be presumed to have become due at the time the affidavit was sworn to. American Exch. Nat. Bank *v.* Voisin, 44 Hun (N. Y.) 85.

Sufficiency — Contradictory statements.— If facts showing a present indebtedness are stated the affidavit will not be vitiated by an allegation that defendant will be indebted. McCartney *v.* Branch Bank, 3 Ala. 709.

Exceptions to rule.— Unless so prescribed it need not be alleged that the demand is due (Mastin *v.* Kansas City First Nat. Bank, 65 Mo. 16), or when it will become due (Munzenheimer *v.* Manhattan Cloak, etc., Co., 79 Tex. 318, 15 S. W. 389 [*overruling dictum* to the contrary in Cox *v.* Reinhardt, 41 Tex. 591]; Bennett *v.* Rosenthal, 3 Tex. App. Civ. Cas. § 156).

41. Irish *v.* Wright, 8 Rob. (La.) 428; Parmele *v.* Johnston, 15 La. 429; Lum *v.* Steamboat Buckeye, 24 Miss. 564; Winchester *v.* Pierson, 1 Ohio Dec. (Reprint) 169, 3 West. L. J. 131; Trowbridge *v.* Sickler, 42 Wis. 417.

Existence of demand.— Where the statute requires that the affidavit shall state that "the amount of the debt or demand claimed and charged against the opposite party is actually an existing debt or demand," as distinguished from a contingent liability, a statement that defendants are "indebted in the just and full sum," etc., is not sufficient. Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391.

Clerical omission.— An affidavit will not be vitiated for the omission of the word "is," where an intention to allege that defendant is indebted is manifest. Buchanan *v.* Sterling, 63 Ga. 227.

42. Nicolls *v.* Lawrence, 30 Mich. 395.

43. Aultman *v.* Daggs, 50 Mo. App. 280.

44. Merchants' Nat. Bank *v.* Columbia Spinning Co., 21 N. Y. App. Div. 383, 47 N. Y. Suppl. 442, also holding that an affidavit alleging an agreement that in case of defendant's failure, all claims or demands held by plaintiff against it should, at the option of plaintiff, become due and payable, and also alleging defendant's failure, sufficiently shows that the agreement was in existence on or prior to the date of the affidavit and that it was in effect on that date. It was further held in this case that the agreement being set out in substance, there was no necessity for submitting it to the court for inspection.

Necessity of showing right to treat debt as due.— An affidavit is insufficient if it purports to state a cause of action, based on a breach of the conditions of a bond whereby plaintiff elects to treat the bond as due, unless it is shown that the bond gives such right of election. Livingston *v.* Lakwitz, 25 Misc. (N. Y.) 119, 53 N. Y. Suppl. 1083.

matured,[45] as well as the time of its maturity.[46] The affidavit must also set up the existence of the particular ground or grounds upon which an attachment to secure this class of debts may issue,[47] and must set up facts or allege reasons[48] for the immediate issue of the writ sufficient to satisfy the officer to whom application is made of the propriety of allowing it to issue.[49]

(3) Debts Due and Debts Not Due. An affidavit setting forth matured and immatured debts is not defective for that reason,[50] or for the reason that it discloses that a part of the demand is not yet due.[51] If it is sufficient as to one claim and defective as to the other it may be sustained as to the former and disregarded as to the latter,[52] or the insufficient allegations may be regarded as surplusage.[53] It has been held, however, that the affidavit need not show how much of the debt is due and how much not due.[54]

45. Stowe *v.* Sewall, 3 Stew. & P. (Ala.) 67; Lorillard *v.* Barrett, 77 Ga. 45; Yale *v.* McDaniel, 69 Miss. 337, 12 So. 556; Lederer *v.* Rosenthal, 99 Wis. 235, 74 N. W. 971. But in Texas the omission of such a statement will not abate the writ. Gimbel *v.* Gomprecht, 89 Tex. 497, 35 S. W. 470 [*overruling* Avery *v.* Zander, 77 Tex. 207, 13 S. W. 971; Cox *v.* Reinhardt, 41 Tex. 591].

If the instrument sued on is set forth in the affidavit and shows that the debt will mature in the future it will be sufficient. Panhandle Nat. Bank *v.* Still, 84 Tex. 339, 19 S. W. 479.

Admissions in the complaint that the debt is not due may be considered in determining the sufficiency of the affidavit. Lederer *v.* Rosenthal, 99 Wis. 235, 74 N. W. 971.

46. Stowe *v.* Sewall, 3 Stew. & P. (Ala.) 67; Mosher *v.* Bay Cir. Judge, 108 Mich. 503, 66 N. W. 384; Mansfield Sav. Bank *v.* Post, 22 Ohio Cir. Ct. 644; Ruhl *v.* Rogers, 29 W. Va. 779, 2 S. E. 798.

In Texas it will be sufficient if such allegation is made in the petition. Munzenheimer *v.* Manhattan Cloak, etc., Co., 79 Tex. 318, 15 S. W. 389 [*overruling dictum* in Cox *v.* Reinhardt, 41 Tex. 591]; Bennett *v.* Rosenthal, 3 Tex. App. Civ. Cas. § 156. And see Hinzie *v.* Moody, 1 Tex. Civ. App. 26, 20 S. W. 769.

A variance in alleging the time of the maturity of the debt will vitiate the affidavit. Evans *v.* Tucker, 59 Tex. 249.

47. Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068; Wearne *v.* France, 3 Wyo. 273, 21 Pac. 703.

Removal of self or property.— If an attachment to secure such a debt is permissible where the debtor has removed, or is removing, or about to remove himself or his property without the state or other prescribed territory, such removal or contemplated removal must be sufficiently shown (Shockley *v.* Bulloch, 18 Ga. 283; Kleinwort *v.* Klingender, 14 La. Ann. 96; Friedlander *v.* Myers, 2 La. Ann. 920; Crooke *v.* Rutherford, 13 La. 479; Millandon *v.* Foucher, 8 La. 582), and, when so required by statute, it must also be shown that not enough of the debtor's property to satisfy the claim of plaintiff or the claim of other creditors will be left within the state (Hey *v.* Harding, 21 Ky. L. Rep. 771, 53 S. W. 33; Runyan *v.* Morgan, 7 Humphr. (Tenn.) 210). Failure of an affidavit for attachment against partners to state that the individuals have not enough property to satisfy the demand sued on is cured by a judgment sustaining the attachment, where no motion is made during the progress of the action to discharge the attachment on that ground. O'Connor *v.* Sherley, 21 Ky. L. Rep. 735, 52 S. W. 1056.

Where the debt matures pending the action, an affidavit sufficient to authorize an attachment for an immatured debt may be amended by adding a ground which did not exist when the attachment issued. Hey *v.* Harding, 21 Ky. L. Rep. 771, 53 S. W. 33.

48. An affidavit which states mere conclusions and fails to allege facts on which the court may base its judgment is insufficient. Mosher *v.* Bay Cir. Judge, 108 Mich. 503, 66 N. W. 384; Howell *v.* Dickerman, 88 Mich. 361, 50 N. W. 306.

49. Fraud in negotiating immatured notes by the maker and indorser thereof is a sufficient reason for the attachment of their property. Mosher *v.* Bay Cir. Judge, 108 Mich. 503, 66 N. W. 384.

The disposition of property by chattel mortgage and bill of sale which is consistent with an honest purpose to secure just claims will not warrant the issue of an attachment. Pierce *v.* Johnson, 93 Mich. 125, 53 N. W. 16, 18 L. R. A. 486; Ripon Knitting Works *v.* Johnson, 93 Mich. 129, 53 N. W. 17. But an affidavit which sets up the surreptitious transfer from defendant's place of business to a private residence of a portion of a stock of goods purchased from plaintiff on credit, the disposition of other stock to personal friends, financially irresponsible, the mortgaging of the stock to its full value, and false representation to other creditors that plaintiff's claim had been paid, is sufficient to authorize the issue of the writ before the maturity of the debt. Chase *v.* Wayne Cir. Judge, 118 Mich. 358, 76 N. W. 913.

50. Selleck *v.* Twesdall, Dudley (Ga.) 196.

51. Emerson *v.* Detroit Steel, etc., Co., 100 Mich. 127, 58 N. W. 659; Tessier *v.* Englehart, 18 Nebr. 167, 24 N. W. 734. *Contra*, Johnson *v.* Buckel, 65 Hun (N. Y.) 601, 20 N. Y. Suppl. 566, 48 N. Y. St. 924.

52. Danforth *v.* Carter, 1 Iowa 546.

53. Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391.

54. Gimbel *v.* Gomprecht, 89 Tex. 497, 35 S. W. 470; Willis *v.* Mooring, 63 Tex. 340; Tootle *v.* Alexander, 13 Tex. Civ. App.

(H) *Grounds* — (1) In General. To authorize an attachment the affidavit[55] must show by appropriate allegation the existence of some one of the statutory grounds therefor.[56]

(2) Alleging More Than One Ground — (a) In General. Plaintiff may allege as many distinct and separate grounds for the attachment within the terms of the statute as he may deem expedient,[57] but when consistent they should be

615, 35 S. W. 821. *Contra*, Friedlander *v.* Myers, 2 La. Ann. 920; Avery *v.* Zander, 77 Tex. 207, 13 S. W. 971; Sydnor *v.* Totham, 6 Tex. 189.

55. Recital in notary's certificate. — A recital in the certificate of the notary before whom the affidavit is made of the ground on which the application is based is insufficient unless it also appears from the affidavit that such statements were sworn to by affiants. Hudkins *v.* Haskins, 22 W. Va. 645.

56. *Colorado.* — Mentzer *v.* Ellison, 5 Colo. App. 315, 43 Pac. 464.

Georgia. — Moore *v.* Neill, 86 Ga. 186, 12 S. E. 222; Meinhard *v.* Neill, 85 Ga. 265, 11 S. E. 613; Krutina *v.* Culpepper, 75 Ga. 602.

Indiana. — Rodde *v.* Hollweg, 19 Ind. App. 222, 49 N. E. 282.

Kansas. — Doggett *v.* Bell, 32 Kan. 298, 4 Pac. 292; Adams *v.* Lockwood, 30 Kan. 373, 2 Pac. 626; Vundrem *v.* Denn, 25 Kan. 430; Robinson *v.* Burton, 5 Kan. 293.

Kentucky. — Worthington *v.* Cary, 1 Metc. (Ky.) 470.

Louisiana. — Erwin *v.* Commercial, etc., Bank, 3 La. Ann. 186, 48 Am. Dec. 447.

Mississippi. — Wood *v.* Bailey, 77 Miss. 815, 27 So. 1001.

New York. — Jacobs *v.* Hogan, 85 N. Y. 243; Hitner *v.* Boutilier, 67 Hun (N. Y.) 203, 22 N. Y. Suppl. 64, 51 N. Y. St. 518.

North Carolina. — Marsh *v.* Williams, 63 N. C. 371.

North Dakota. — Finch *v.* Armstrong, 9 N. D. 255, 68 N. W. 740.

South Carolina. — Williamson *v.* Eastern Bldg., etc., Assoc., 54 S. C. 582, 32 S. E. 765, 71 Am. St. Rep. 822; Addison *v.* Sujette, (S. C. 1897) 27 S. E. 631; Tabb *v.* Gelzer, 43 S. C. 342, 21 S. E. 261; Munroe *v.* Williams, 37 S. C. 81, 16 S. E. 533, 19 L. R. A. 655; Roddey *v.* Erwin, 31 S. C. 36, 9 S. E. 729.

South Dakota. — Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

Tennessee. — Haynes *v.* Powell, 1 Lea (Tenn.) 347; Baker *v.* Huddleston, 3 Baxt. (Tenn.) 1; Lewis *v.* Woodfolk, 2 Baxt. (Tenn.) 25; Sullivan *v.* Fugate, 1 Heisk. (Tenn.) 20; Fay *v.* Jones, 1 Head (Tenn.) 442; Maples *v.* Tunis, 11 Humphr. (Tenn.) 108, 53 Am. Dec. 779; McElwee *v.* Steelman, (Tenn. Ch. 1896) 38 S. W. 275.

West Virginia. — Crim *v.* Harmon, 38 W. Va. 596, 18 S. E. 753; Hudkins *v.* Haskins, 22 W. Va. 645.

See also *supra*, VII, D, 7, c, (V), (G), (2).

If attachment on more than one ground is permitted it will be sufficient to allege one separate and distinct ground without stating the existence of elements of the other. Thus where an attachment is authorized where the debtor is about to dispose of his property to defraud his creditors, or is about to remove from the state and refuses to provide for the payment of the debt on its maturity, if the application is based on the former ground, a refusal to secure the debt need not be alleged (Danforth *v.* Carter, 1 Iowa 546; Pitkins *v.* Boyd, 4 Greene (Iowa) 255; and if non-residence is sufficiently shown to authorize an attachment, other provisions permitting the issue of the writ, where defendant has departed from the state with the intent to remove his effects therefrom, are inapplicable and need not be stated (Phelps *v.* Young, 1 Ill. 327).

Joint debtors. — If the ground of attachment is insufficiently stated as to one of two joint debtors an attachment against the property of both is unauthorized. Hamilton *v.* Knight, 1 Blackf. (Ind.) 25.

Not confined to ground stated in petition. — Though the petition states facts authorizing an attachment, plaintiff is not confined to the ground stated, but in his affidavit may rely on other statutory grounds. Houston *v.* Woolley, 37 Mo. App. 15, where the petition was to recover for a tort authorizing an attachment, and the affidavit relied on non-residence.

Probative facts requisite to establish the ultimate facts required by the statute need not be stated. Wheeler *v.* Farmer, 38 Cal. 203.

Under a statute permitting an attachment on a debt for "necessaries" furnished, an affidavit stating that the claim was for coal sold and delivered to defendant and further stating that it was for necessaries *prima facie* states a ground for attachment. Collins *v.* Bingham, 22 Ohio Cir. Ct. 533.

57. *Georgia.* — Irvin *v.* Howard, 37 Ga. 18; Kennon *v.* Evans, 36 Ga. 89.

Illinois. — Rosenheim *v.* Fifield, 12 Ill. App. 302.

Indiana. — McCollem *v.* White, 23 Ind. 43.

Nevada. — Pratt *v.* Stone, 25 Nev. 365, 60 Pac. 514.

Oklahoma. — Raymond *v.* Nix, 5 Okla. 656, 49 Pac. 1110.

Tennessee. — Haynes *v.* Powell, 1 Lea (Tenn.) 347.

Contra, Cannon *v.* Logan, 5 Port. (Ala.) 77.

All the specified grounds need not be set out in an affidavit to procure an attachment under the Pennsylvania act of Mar. 17, 1869. Boyd *v.* Lippencott, 2 Pa. Co. Ct. 585, 44 Leg. Int. (Pa.) 46.

Different grounds as to two defendants. — An affidavit alleging that one defendant was a non-resident and that the other was about

set forth cumulatively or conjunctively.[58] Where defendant relies on two or more grounds and some of them are defectively stated, if one ground is properly alleged the affidavit is sufficient to warrant the issue of an attachment.[59]

(b) Inconsistent and Disjunctive Allegations. In stating two or more grounds care must be taken to avoid inconsistency or contradiction which would introduce an element of uncertainty and indefiniteness and render it impossible to determine which ground is relied on.[60] Hence, the statement of two or more grounds disjunctively or in the alternative will as a rule render the affidavit useless for any purpose,[61] even though one of the grounds is insufficiently stated;[62] but two or more phases of the same fact, or different facts of the same nature, which constitute but a single ground for attachment may be stated disjunctively.[63] The incon-

to depart the state will authorize an attachment against both. Moeller *v.* Quarrier, 14 Ill. 280.

58. *Alabama.*— Smith *v.* Baker, 80 Ala. 318 [*explaining* Cannon *v.* Logan, 5 Port. (Ala.) 77].

Nebraska.— Tessier *v.* Englehart, 18 Nebr. 167, 24 N. W. 734.

Pennsylvania.— Simon *v.* Johnson, 7 Kulp (Pa.) 166.

Texas.— Cleveland *v.* Boden, 63 Tex. 103.

West Virginia.— Sandheger *v.* Hosey, 26 W. Va. 221.

59. *Illinois.*— Lawyer *v.* Langhaus, 85 Ill. 138; Rosenheim *v.* Fifield, 12 Ill. App. 302.

Indiana.— McCollem *v.* White, 23 Ind. 43.

Kansas.— Dunlap *v.* McFarland, 25 Kan. 488; Keith *v.* Stetler, 25 Kan. 100.

Mississippi.— Commercial Bank *v.* Ullman, 10 Sm. & M. (Miss.) 411.

Missouri.— Hasler *v.* Schopp, 70 Mo. App. 469; Cole Mfg. Co. *v.* Jenkins, 47 Mo. App. 664.

New York.— Williams *v.* Rightmyer, 88 Hun (N. Y.) 372, 34 N. Y. Suppl. 826, 68 N. Y. St. 764, 2 N. Y. Annot. Cas. 160.

Ohio.— Creasser *v.* Young, 31 Ohio St. 57; Emmitt *v.* Yeigh, 12 Ohio St. 335.

South Dakota.— Lindguist *v.* Johnson, 12 S. D. 486, 81 N. W. 900.

West Virginia.— Delaplaine *v.* Rogers, 29 W. Va. 783, 2 S. E. 800; Ruhl *v.* Rogers, 29 W. Va. 779, 2 S. E. 798.

60. *Colorado.*— McCraw *v.* Welch, 2 Colo. 284.

Minnesota.— Hinds *v.* Fagebank, 9 Minn. 68 [*distinguished* in Nelson *v.* Munch, 23 Minn. 229].

New York.— Johnson *v.* Buckel, 65 Hun (N. Y.) 601, 20 N. Y. Suppl. 566, 48 N. Y. St. 924.

North Dakota.— Birchall *v.* Griggs, 4 N. D. 305, 60 N. W. 842, 50 Am. St. Rep. 654.

Texas.— Pearre *v.* Hawkins, 62 Tex. 434.

West Virginia.— Sandheger *v.* Hosey, 26 W. Va. 221.

61. *Alabama.*— Smith *v.* Baker, 80 Ala. 318; Watson *v.* Auerbach, 57 Ala. 353; Johnson *v.* Hale, 3 Stew. & P. (Ala.) 331.

Georgia.— Brafman *v.* Asher, 78 Ga. 32.

Illinois.— Prins *v.* Hinchliff, 17 Ill. App. 153.

Iowa.— Stacy *v.* Stichton, 9 Iowa 399.

Kansas.— Dickenson *v.* Cowley, 15 Kan. 269.

Kentucky.—Davis *v.* Edwards, Hard. (Ky.) 342; Shipp *v.* Davis, Hard. (Ky.) 65.

Michigan.— Kegel *v.* Schrenkheisen, 37 Mich. 174.

Minnesota.— Guile *v.* McNanny, 14 Minn. 520, 100 Am. Dec. 244.

Mississippi.— Bishop *v.* Fennerty, 46 Miss. 570.

New York.— Cronin *v.* Crooks, 143 N. Y. 352, 38 N. E. 268, 62 N. Y. St. 307 [*affirming* 76 Hun (N. Y.) 120, 27 N. Y. Suppl. 822, 57 N. Y. St. 475]; Dintruff *v.* Tuthill, 62 Hun (N. Y.) 591, 17 N. Y. Suppl. 556, 43 N. Y. St. 704; Arming *v.* Monteverde, 8 N. Y. St. 812.

North Carolina.— Leak *v.* Moorman, 61 N. C. 168.

Ohio.— Rogers *v.* Ellis, 1 Disn. (Ohio) 1, 1 Handy (Ohio) 48, 12 Ohio Dec. (Reprint) 21, 449; Brownell *v.* Heating Co., 9 Ohio Dec. (Reprint) 413, 13 Cinc. L. Bul. 35; Schatzman *v.* Stump, 8 Ohio Dec. (Reprint) 420, 7 Cinc. L. Bul. 334.

Pennsylvania.— Jewel *v.* Howe, 3 Watts (Pa.) 144; Wray *v.* Gilmore, 1 Miles (Pa.) 75; Simon *v.* Johnson, 7 Kulp (Pa.) 166.

South Carolina.— Allen *v.* Fleming, 14 Rich. (S. C.) 196; Hagood *v.* Hunter, 1 McCord (S. C.) 511; Hagard *v.* Smith, 1 McCord (S. C.) 113; Devall *v.* Taylor, Cheves (S. C.) 5.

Texas.— Dunnenbaum *v.* Schram, 59 Tex. 281; Carpenter *v.* Pridgen, 40 Tex. 32; Culbertson *v.* Cabeen, 29 Tex. 247; Garner *v.* Burleson, 26 Tex. 348; Hopkins *v.* Nichols, 22 Tex. 206; Carter *v.* Younger, 2 Tex. Unrep. Cas. 445.

West Virginia.— Roberts *v.* Burns, 48 W. Va. 92, 35 S. E. 922; Sandheger *v.* Hosey, 26 W. Va. 221.

Wisconsin.—Goodyear Rubber Co. *v.* Knapp, 61 Wis. 103, 20 N. W. 651.

See 5 Cent. Dig. tit. "Attachment," § 316.

The justice who granted the attachment is not ousted of jurisdiction by such disjunctive statements, in Michigan at least. Hills *v.* Moore, 40 Mich. 210.

62. Stacy *v.* Stichton, 9 Iowa 399; Monroe *v.* Cutter, 9 Dana (Ky.) 93; Barnard *v.* Sebre, 2 A. K. Marsh. (Ky.) 151.

63. *Alabama.*— Cannon *v.* Logan, 5 Port. (Ala.) 77.

Colorado.— McCraw *v.* Welch, 2 Colo. 284.

Florida.— Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391.

Georgia.— Irvin *v.* Howard, 37 Ga. 18.

sistency is not fatal, however, if one averment does not necessarily negative the other,[64] and an affidavit is not defective because of statements in the disjunctive where it is beyond the power of plaintiff to designate the precise mode, because of doubt as to the purpose or intent of the debtor, or for any other sufficient reason,[65] or where it is evident that defendant could not be surprised or prejudiced by the alternative statement.[66] An objection to the affidavit for a defect of this character should be taken by motion to quash or that plaintiff elect,[67] and it has been held that it cannot be presented for the first time on appeal.[68]

(3) Absence, Absconding, or Concealment — (a) In General. If the ground of the application is the contemplated or actual departure or absconding of the debtor from the state or jurisdiction, or his concealment therein with intent to injure or defraud his creditors or to avoid the service of process, the affidavit must allege such acts or conduct on the part of the debtor as will satisfactorily show the existence of the statutory ground.[69] As a rule, however, no more is

Indiana.— Parsons *v.* Stockbridge, 42 Ind. 121.

Kansas.— Cook *v.* Burnam, 3 Kan. App. 27, 44 Pac. 447.

Kentucky.—Hardy *v.* Trabue, 4 Bush (Ky.) 644.

Michigan.— Jones *v.* Peek, 101 Mich. 389, 59 N. W. 659; Emerson *v.* Detroit Steel, etc., Co., 100 Mich. 127, 58 N. W. 659.

Minnesota.— Brown *v.* Minneapolis Lumber Co., 25 Minn. 461.

Mississippi.— Bosbyshell *v.* Emanuel, 12 Sm. & M. (Miss.) 63; Commercial Bank *v.* Ullman, 10 Sm. & M. (Miss.) 411.

New York.— Garson *v.* Brumberg, 75 Hun (N. Y.) 336, 26 N. Y. Suppl. 1003, 58 N. Y. St. 209 [*distinguishing* Dintruff *v.* Tuthill, 62 Hun (N. Y.) 591, 17 N. Y. Suppl. 556, 43 N. Y. St. 704]; Swezey *v.* Bartlett, 3 Abb. Pr. N. S. (N. Y.) 444. See also F. A. Ringler Co. *v.* Newman, 33 Misc. (N. Y.) 653, 68 N. Y. Suppl. 871.

North Carolina.— Brown *v.* Hawkins, 65 N. C. 645.

Pennsylvania.— Wagonhorst *v.* Dankel, 1 Woodw. (Pa.) 221.

South Dakota.— Dawley *v.* Sherwin, 5 S. D. 594, 59 N. W. 1027.

Texas.— Blum *v.* Davis, 56 Tex. 423; Hopkins *v.* Nichols, 22 Tex. 206.

West Virginia.— Sandheger *v.* Hosey, 26 W. Va. 221.

Wisconsin.— Winner *v.* Kuehn, 97 Wis. 394, 72 N. W. 227; Klenk *v.* Schwalm, 19 Wis. 111.

United States.— Société Foncéire, etc. *v.* Milliken, 135 U. S. 304, 10 S. Ct. 823, 34 L. ed. 208, construing Texas statute.

Different modes of effecting stated purpose. — An affidavit which alleges different modes of effecting a stated purpose or intent is not inconsistent.

Michigan.— Detroit Free Press Co. *v.* Drs. K. & K. U. S. Medical, etc., Assoc., 64 Mich. 605, 31 N. W. 537.

Minnesota.— Nelson *v.* Munch, 23 Minn. 229.

Utah.— Deseret Nat. Bank *v.* Little, 13 Utah 265, 44 Pac. 930.

Washington.— Blackinton *v.* Rumpf, 12 Wash. 279, 40 Pac. 1063.

United States.— Salmon *v.* Mills, 68 Fed. 180, 32 U. S. App. 422, 15 C. C. A. 356, construing Indian Territory statute.

If it follows the language of the statute which states in the alternative the modes by which the wrongful act may be consummated it is not in some states objectionable as vague or uncertain.

Louisiana.— Coleman *v.* Teddlie, 37 La. Ann. 99.

Maryland.— Howard *v.* Oppenheimer, 25 Md. 350.

North Carolina.— Penniman *v.* Daniel, 90 N. C. 154.

Rhode Island.— Stokes *v.* Potter, 10 R. I. 576.

South Dakota.— Dawley *v.* Sherwin, 5 S. D. 594, 59 N. W. 1027.

Tennessee.— Conrad *v.* McGee, 9 Yerg. (Tenn.) 428.

Wisconsin.— Morrison *v.* Fake, 1 Pinn. (Wis.) 133.

64. Holloway *v.* Herryford, 9 Iowa 353, where the averments were that defendant had disposed of all of his property in fraud of creditors, and that he had property subject to execution which he refused to apply in satisfaction of the demand.

65. *Louisiana.*— Coleman *v.* Teddlie, 37 La. Ann. 99.

New York.— Van Alstyne *v.* Erwine, 11 N. Y. 331.

North Carolina.— Penniman *v.* Daniel, 90 N. C. 154.

Tennessee.— Conrad *v.* McGee, 9 Yerg. (Tenn.) 428.

Wisconsin.— Klenk *v.* Schwalm, 19 Wis. 111.

66. Wood *v.* Wells, 2 Bush (Ky.) 197.

67. Holloway *v.* Herryford, 9 Iowa 353.

68. Leser *v.* Glaser, 32 Kan. 546, 4 Pac. 1026.

69. Hagood *v.* Hunter, 1 McCord (S. C.) 511.

It is insufficient to allege that the debtor "has absconded" where the statute requires it to be shown that the debtor "absconds" (Brown *v.* McCluskey, 26 Ga. 577; Levy *v.* Millman, 7 Ga. 167; Selleck *v.* Twesdall, Dudley (Ga.) 196), or that the debtor is "removing or about to remove from the state" (Selleck *v.* Twesdall, Dudley (Ga.)

required than that there shall be a substantial compliance with the requirements of the statute respecting this ground therefor,[70] by the statement of facts from which the court or officer can determine whether the departure, contemplated departure, or concealment, as the case may be, is sufficiently shown to entitle plaintiff to an attachment.[71] An affidavit made in good faith on belief that defendant absconded from his creditors is sufficient to sustain the attachment, although in fact at the time defendant resided within the state.[72]

(b) Citizenship or Residence of Parties. If it is required that the creditor[73] or the absconding or concealed debtor[74] be a citizen or a resident of the state or some prescribed portion thereof, those facts must appear by appropriate allegations.[75]

196), or to allege that the debtor "hath absconded" or "hath removed" where the statute requires it to be shown that the "debtor is removing out of the county privately or absconds or conceals himself" (Kennedy *v.* Dillon, 1 A. K. Marsh. (Ky.) 354; Hopkins *v.* Suttles, Hard. (Ky.) 95 note). An averment that defendant has absconded "from the county" is not equivalent to the required statement that he has absconded "from the place of his usual abode" (Jewel *v.* Howe, 3 Watts (Pa.) 144); and an allegation that defendant is absent so that process cannot be served on him does not show a departure with intent to defraud creditors and to avoid the service of a summons (Love *v.* Young, 69 N. C. 65); nor does an allegation that he has left the state show that he has absconded (Mulherrin *v.* Hill, 5 Heisk. (Tenn.) 58). That the debtor is about to remove to avoid the service of process is insufficient to show that he has actually removed or is removing privately (Wallis *v.* Murphy, 2 Stew. (Ala.) 15), and an allegation that the debtor is about to abscond is not equivalent to stating, as required by statute, that he absconds or conceals himself, or is absconding or concealing himself (Bennett *v.* Avant, 2 Sneed (Tenn.) 151).

Attempt to depart.—A statement that the debtor did attempt to depart permanently from and is about to remove his property out of the state does not satisfy a requirement that the debtor is on the eve of leaving the state permanently. New Orleans *v.* Garland, 11 La. Ann. 438.

70. Ware *v.* Todd, 1 Ala. 199; Sawyer *v.* Arnold, 1 La. Ann. 315; Lee *v.* Peters, 1 Sm. & M. (Miss.) 503; Goss *v.* Gowing, 5 Rich. (S. C.) 477.

Attachment against firm.—An affidavit which, after stating the individual names of copartners, charges them, by the firm-name, with concealing themselves is sufficient. Guckenheimer *v.* Day, 74 Ga. 1.

71. *Minnesota.*— Pierse *v.* Smith, 1 Minn. 82.

New York.— Furman *v.* Walter, 13 How. Pr. (N. Y.) 348; Matter of Faulkner, 4 Hill (N. Y.) 598; *Ex p.* Robinson, 21 Wend. (N. Y.) 672.

South Carolina.— Smith *v.* Walker, 6 Rich. (S. C.) 169.

West Virginia.— Sommers *v.* Allen, 44 W. Va. 120, 28 S. E. 787; Hudkins *v.* Harkins, 22 W. Va. 645.

Wisconsin.— Lorrain *v.* Higgins, 2 Pinn. (Wis.) 454, 2 Chandl. (Wis.) 116.

The facts presented were held sufficient in New York *v.* Genet, 63 N. Y. 646; Stewart *v.* Lyman, 62 N. Y. App. Div. 182, 70 N. Y. Suppl. 936; Lacker *v.* Dreher, 38 N. Y. App. Div. 75, 55 N. Y. Suppl. 979; Stevens *v.* Middleton, 26 Hun (N. Y.) 470; Kissock *v.* Grant, 34 Barb. (N. Y.) 144; Easton *v.* Malavazi, 7 Daly (N. Y.) 147; Patterson *v.* Delaney, 14 N. Y. Suppl. 100, 37 N. Y. St. 585, 20 N. Y. Civ. Proc. 427; Matter of Faulkner, 4 Hill (N. Y.) 598.

72. Walker *v.* Anderson, 18 N. J. L. 217. See *supra*, V, B.

73. Boarman *v.* Patterson, 1 Gill (Md.) 372.

74. Risewick *v.* Davis, 19 Md. 82 (where it appears that under the Maryland act of 1795, c. 56, authorizing an attachment against a non-resident debtor who was not a citizen of the state, or against a resident who had actually absconded or removed from his place of abode, the affidavit was required to state either that defendant was not a citizen or resident of the state, or that being a citizen he was then actually running away, absconding, or removing from his place of abode); Dickinson *v.* Barnes, 3 Gill (Md.) 485; Boarman *v.* Patterson, 1 Gill (Md.) 372.

In Canada plaintiff's affidavit need not show that the debtor was a resident of the province, but that fact may be proved by other persons. Wakefield *v.* Bruce, 5 Ont. Pr. 77.

75. O'Brien *v.* Daniel, 2 Blackf. (Ind.) 290. See also *supra*, VII, D, 7, c, (v), (c), (2), (a), bb; (3), (a), bb.

It is sufficient to state that the debtor has absconded from his usual place of abode, without stating his residence positively. Wagonhorst *v.* Dankel, 1 Woodw. (Pa.) 221.

Removal of property from county.— Under the New York non-imprisonment act it was not necessary to show the removal of property from the county where the debtor last resided, but it was sufficient to show that the debtor removed from the county in which the application was made. Ketchum *v.* Vidvard, 4 Thomps. & C. (N. Y.) 138.

Residence within the state will be implied from statements that defendant conceals himself therein (Matter of Warner, 3 Wend. (N. Y.) 325; Griffith *v.* Robinson, 19 Tex. 219) and consequently that he was indebted within the state where an indebtedness is al-

(c) Period of Absence. When it is required to be shown that defendant absconded within a prescribed time after the injury complained of, such fact must be sufficiently averred or appear by fair inference.[76] It is not necessary, however, to state the period of defendant's absence, or that an attempt has been made to conceal his absence, where the residence of the debtor within the state during such period is a matter of defense.[77]

(d) Intent — aa. *To Avoid Service of Process.* If the creditor relies on the fact or is required to state that the contemplated or actual departure or the concealment is to avoid the service of process, he must allege it in such a manner that the intent can be judicially inferred.[78] If the object of the concealment is alleged to be for the purpose of avoiding the service of summons, an allegation of an intent to defraud creditors is not necessary.[79]

bb. *Intent to Injure or Defraud Creditors.* An affidavit is not sufficient that fails to charge as prescribed by the statute that defendant's action is to the injury of his creditors,[80] or is with intent to defraud creditors.[81]

(4) Fraud. There are decisions to the effect that a general charge of fraud or that the debt sued on was fraudulently contracted will be sufficient;[82] but the

leged (Matter of Warner, 3 Wend. (N. Y.) 325).

76. If the affidavit fails to state that defendant absconded within three months after the injury was done the court is bound to notice it though defendant does not appear. Webb *v.* Bowler, 50 N. C. 362.

77. Frantz *v.* Wendel, 28 Ind. 391.

78. *Iowa.*— State *v.* Morris, 50 Iowa 203.

Kentucky.— Poage *v.* Poage, 3 Dana (Ky.) 579.

Mississippi.—Page *v.* Ford, 2 Sm. & M. (Miss.) 266; Thompson *v.* Raymon, 7 How. (Miss.) 186.

New York.— Castellanos *v.* Jones, 5 N. Y. 164; Thomas *v.* Dickerson, 11 N. Y. Suppl. 436, 33 N. Y. St. 786.

North Dakota.— Birchall *v.* Griggs, 4 N. D. 305, 60 N. W. 842, 50 Am. St. Rep. 654.

South Carolina.— Allen *v.* Fleming, 14 Rich. (S. C.) 196.

Contra, Alabama Bank *v.* Berry, 2 Humphr. (Tenn.) 442.

Process in actions.— The affidavit need not show that the concealment is for the purpose of avoiding the service of a summons in the particular action. Finn *v.* Mehrbach, 65 N. Y. Suppl. 250, 30 N. Y. Civ. Proc. 242.

Efforts to serve.— Proof that plaintiff procured eight alias summonses which he attempted to have served by five different persons and that defendant was aware of such attempts sufficiently shows the existence of an intent to avoid the service of process. Finn *v.* Mehrbach, 65 N. Y. Suppl. 250, 30 N. Y. Civ. Proc. 242. And a statement that defendant "being an adult and a resident of the city of New York, keeps himself concealed therein with the intent to avoid service of the summons, and that, after proper and diligent effort to ascertain the place of the sojourn of the defendant, same cannot be ascertained" is sufficient. Owl Cigar Co. *v.* Lidgerwood, 7 Misc. (N. Y.) 742, 27 N. Y. Suppl. 932, 57 N. Y. St. 648 [*affirmed* in 11 Misc. (N. Y.) 728, 32 N. Y. Suppl. 1148, 65 N. Y. St. 880].

79. Finn *v.* Mehrbach, 65 N. Y. Suppl. 250, 30 N. Y. Civ. Proc. 242.

80. Hewitt *v.* Terry, 56 Mich. 591, 23 N. W. 326.

In Wisconsin such a statement is unnecessary, for the reason that an attachment is authorized regardless of the intention with which the debtor absconded or the effect of his departure upon his creditors. Hawes *v.* Clement, 64 Wis. 152, 25 N. W. 21.

Danger of losing claim.— In Texas plaintiff need not aver danger of losing his claim. Wright *v.* Smith, 19 Tex. 297; Messner *v.* Hutchins, 17 Tex. 597.

81. Castellanos *v.* Jones, 5 N. Y. 164; Taylor *v.* Hull, 56 Hun (N. Y.) 90, 9 N. Y. Suppl. 140, 29 N. Y. St. 635; Kelly *v.* Archer, 48 Barb. (N. Y.) 68; Mott *v.* Lawrence, 9 Abb. Pr. (N. Y.) 196, 17 How. Pr. (N. Y.) 559; Colver *v.* Van Valen, 6 How. Pr. (N. Y.) 102; Birchall *v.* Griggs, 4 N. D. 305, 60 N. W. 842, 50 Am. St. Rep. 654.

82. Nevada Co. *v.* Farnsworth, 89 Fed. 164; Cheshire Provident Inst. *v.* Johnston, 5 Fed. Cas. No. 2,659. See also Biddle *v.* Black, 99 Pa. St. 380; Harrisburg Boot, etc., Co. *v.* Johnson, 3 Pa. Dist. 433.

Fraud in incurring liability as ground of attachment see *supra,* V, G.

An allegation that goods were bought under false and fraudulent representations sufficiently charges that the debt was "fraudulently contracted." Goodman *v.* Sondheim, 3 Kulp (Pa.) 87.

The prothonotary is justified in issuing an attachment on an affidavit charging fraud generally in the terms of the act. Netter *v.* Harding, 6 Pa. Dist. 169, 18 Pa. Co. Ct. 353.

Fraudulently contracted or incurred liability.— The use of the disjunctive "or" in an averment in the affidavit in attachment that defendant "fraudulently contracted a debt or incurred the obligation respecting which the suit is brought" will not invalidate the affidavit. Emerson *v.* Detroit Steel, etc., Co., 100 Mich. 127, 58 N. W. 659.

weight of authority is to the effect that the specific facts relied on to establish the fraud, or from which the court is asked to draw the inference of fraud, must be set out[83] in such a manner as to justify the court or officer in granting the application.[84] If, however, the affidavit charges the fraud in the language of the statute, without setting out the specific fraud complained of, in some states plaintiff will be permitted to take depositions to explain uncertain expressions in the affidavit,[85] to establish the specific acts at the hearing,[86] or to prove the same upon a motion to dissolve.[87] Where it is necessary to show that alleged fraudulent statements were in writing, signed by the debtor or his agent, the statement must be attached to the affidavit or its substance set out.[88]

(5) Fraudulent Disposition, Removal, or Secretion of Property — (a) In General. Although there are exceptions,[89] the general rule is, that an affidavit, based on the disposition, removal, or concealment by a debtor of his property, or his purpose to dispose of or secrete the same, with intent to defraud, hinder, or delay his creditors in the collection of their just claims, should state such specific facts and circumstances as will justify a conclusion as to the commission of the overt acts charged, and the existence of the fraudulent intent.[90] Although it is the better practice to set out this ground according to the terms of

83. Stringfield *v.* Fields, 13 Daly (N. Y.) 171, 7 N. Y. Civ. Proc. 356; National Broadway Bank *v.* Barker, 16 N. Y. Suppl. 75, 40 N. Y. St. 771; Biddle *v.* Black, 99 Pa. St. 380; Netter *v.* Harding, 6 Pa. Dist. 169, 18 Pa. Co. Ct. 353; Harrisburg Boot, etc., Co. *v.* Johnson, 3 Pa. Dist. 433; Chase *v.* Lennox, 2 Wkly. Notes Cas. (Pa.) 487; Bond *v.* Wheeler, 1 Wkly. Notes Cas. (Pa.) 282.

If a charge of specific fraudulent acts is added to the general charge of fraud the addition must be sufficient in itself to show the alleged fraud. Boyd *v.* Bright, 4 Pa. Co. Ct. 518; National Bank of Republic *v.* Tasker, 1 Pa. Co. Ct. 173.

Place of contraction of debt.— It is the better practice to state the place where the debt was contracted, but the omission of such a statement will not vitiate the affidavit. Hall *v.* Kintz, 13 Pa. Co. Ct. 24.

84. Norfolk, etc., Hosiery Co. *v.* Arnold, 18 N. Y. Suppl. 910, 46 N. Y. St. 491; National Broadway Bank *v.* Barker, 16 N. Y. Suppl. 75, 40 N. Y. St. 771; Biddle *v.* Black, 99 Pa. St. 380.

Benefit of doubt.— If the evidence is capable of an interpretation which makes it as consistent with the innocence of the accused as with his guilt, that meaning must be ascribed to it which accords with his innocence rather than that which imputes to him a criminal intent. Stringfield *v.* Fields, 13 Daly (N. Y.) 171, 7 N. Y. Civ. Proc. 356.

85. Harris *v.* Wood, 1 Pa. Dist. 83.

86. Netter *v.* Harding, 6 Pa. Dist. 169, 18 Pa. Co. Ct. 353.

87. Hall *v.* Kintz, 13 Pa. Co. Ct. 24.

Effect of general denial.— If the fraud is merely charged in the words of the act without allegations of specific acts, a general denial by defendant will justify the dissolution of the attachment if no testimony is taken. Netter *v.* Harding, 6 Pa. Dist. 169, 18 Pa. Co. Ct. 353.

88. Fisher *v.* Secrist, 48 Fed. 264.

89. In Pennsylvania, under the act of 1369, specific acts of fraud need not be set out. Sharpless *v.* Ziegler, 92 Pa. St. 467; Holland *v.* Atzerodt, 1 Walk. (Pa.) 237.

The facts indicating the intent need not be stated. Wielar *v.* Garner, 4 App. Cas. (D. C.) 329; Gans *v.* Thompson, 11 Ohio St. 579. And that the alleged fraudulent disposition is to avoid the payment of a debt "due the plaintiff" need not appear. Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391.

90. *District of Columbia.*— Boulter *v.* Behrend, 20 D. C. 567. But see Wielar *v.* Garner, 4 App. Cas. (D. C.) 329.

Iowa.— Torbert *v.* Tracy, 12 Iowa 20.

Louisiana.— New Iberia State Bank *v.* Martin, 52 La. Ann. 1628, 28 So. 130.

Minnesota.— Hinds *v.* Fagebank, 9 Minn. 68.

Nebraska.— Seidentopf *v.* Annabil, 6 Nebr. 524.

New Mexico.— Torlina *v.* Trorlicht, 5 N. M. 148, 21 Pac. 78.

New York.— Sill Stove Works *v.* Scott, 62 N. Y. App. Div. 566, 71 N. Y. Suppl. 181; Proctor *v.* Whitcher, 15 N. Y. App. Div. 227, 44 N. Y. Suppl. 190; American Horse Exch. *v.* Strauss, 75 Hun (N. Y.) 192, 27 N. Y. Suppl. 282, 57 N. Y. St. 791; Hale *v.* Prote, 75 Hun (N. Y.) 13, 26 N. Y. Suppl. 950, 57 N. Y. St. 224; Dintruff *v.* Tuthill, 62 Hun (N. Y.) 591, 17 N. Y. Suppl. 556, 43 N. Y. St. 704; Ladew *v.* Hudson River Boot, etc., Mfg. Co., 61 Hun (N. Y.) 333, 15 N. Y. Suppl. 900, 40 N. Y. St. 725; Mechanics', etc., Bank *v.* Loucheim, 55 Hun (N. Y.) 396, 8 N. Y. Suppl. 520, 29 N. Y. St. 188; Stein *v.* Levy, 55 Hun (N. Y.) 381, 8 N. Y. Suppl. 505, 29 N. Y. St. 94; Kibbe *v.* Herman, 51 Hun (N. Y.) 438, 3 N. Y. Suppl. 852, 21 N. Y. St. 235; Edick *v.* Green, 38 Hun (N. Y.) 202; Horton *v.* Fancher, 14 Hun (N. Y.) 172; Claflin *v.* Silberg, 4 Silv. Supreme (N. Y.) 11, 8 N. Y. Suppl. 557, 29 N. Y. St. 362; Denzer *v.* Mundy, 5 Rob. (N. Y.) 636; Frank *v.* Levie, 5 Rob. (N. Y.) 599; Parrott *v.* Mayer, 31 Misc. (N. Y.) 50, 64 N. Y. Suppl. 649; McLoughlin *v.* Consumers' Brewing Co., 20 Misc. (N. Y.) 144, 45 N. Y. Suppl. 716;

the statute, yet mere informalities or clerical omissions in the statements made are insufficient to defeat the right to the attachment if the requirements are substantially complied with,[91] but the omission of material statements or the failure to state in substance the essential requirements of the statute will render the affidavit insufficient.[92] Allegations not required by the statute need not be made.[93]

Newwitter *v.* Mansell, 14 N. Y. Suppl. 506, 38 N. Y. St. 595; Gersenberger *v.* Herman, 3 N. Y. Suppl. 855; Fleitmann *v.* Sickle, 13 N. Y. St. 399; Achelis *v.* Kalman, 60 How. Pr. (N. Y.) 491; Ellison *v.* Bernstein, 60 How. Pr. (N. Y.) 145; Skiff *v.* Stewart, 39 How. Pr. (N. Y.) 385; Scott *v.* Simmons, 34 How. Pr. (N. Y.) 66.

North Carolina.— Judd *v.* Crawford Gold Min. Co., 120 N. C. 397, 27 S. E. 81.

Ohio.— Coston *v.* Paige, 9 Ohio St. 397; Harrison *v.* King, 9 Ohio St. 388.

South Carolina.— Ferst *v.* Powers, 58 S. C. 398, 36 S. E. 744; Bray Clothing Co. *v.* Shealy, 53 S. C. 12, 30 S. E. 620; Grollman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272; Kerchner *v.* McCormac, 25 S. C. 461; Claussen *v.* Fultz, 13 S. C. 476; Brown *v.* Morris, 10 S. C. 467; Smith *v.* Walker, 6 S. C. 169.

Tennessee.— Brown *v.* Crenshaw, 5 Baxt. (Tenn.) 584; Jackson *v.* Burke, 4 Heisk. (Tenn.) 610.

West Virginia.— Goodman *v.* Henry, 42 W. Va. 526, 26 S. E. 528, 35 L. R. A. 847; Landeman *v.* Wilson, 29 W. Va. 702, 2 S. E. 203; Hale *v.* Donahue, 25 W. Va. 414; Delaplain *v.* Armstrong, 21 W. Va. 211; Capehart *v.* Dowery, 10 W. Va. 130.

Wisconsin.—Pratt *v.* Pratt, 2 Pinn. (Wis.) 395, 2 Chandl. (Wis.) 48; Merrill *v.* Low, 1 Pinn. (Wis.) 221.

Fraudulent transfer and disposition of property as ground of attachment see *supra*, V, H.

Suspicious evidence.— In Frank *v.* Levie, 5 Rob. (N. Y.) 599, testimony of a witness employed by plaintiff's attorney to secure evidence to the effect that he induced defendant to offer to sell the stock in her store to him and that, although they were entire strangers, she entered into a confidential conversation with him, in which she offered to sell to him for less than to any one else, and requested him to keep the matter secret, was held insufficient.

Support of petition.— A petition alleging that the debtor has fraudulently mortgaged all his property is not supported by an affidavit averring that he is fraudulently disposing of his property. Simpson *v.* Holt, 89 Ga. 834, 16 S. E. 87.

Affidavits were held sufficient in the following cases:

Alabama.— Hafley *v.* Patterson, 47 Ala. 271; Free *v.* Hukill, 44 Ala. 197.

District of Columbia.— Cissell *v.* Johnston, 4 App. Cas. (D. C.) 335; Wielar *v.* Garner, 4 App. Cas. (D. C.) 329.

Georgia.— Gray *v.* Neill, 86 Ga. 188, 12 S. E. 362.

Missouri.— Curtis *v.* Settle, 7 Mo. 452.

Nebraska.— Steele *v.* Dodd, 14 Nebr. 496, 16 N. W. 909.

New York.— Van Loon *v.* Lyons, 61 N. Y. 22; Fox *v.* Mays, 46 N. Y. App. Div. 1, 61 N. Y. Suppl. 295; Blakeslee *v.* Cattelain, 86 Hun (N. Y.) 574, 33 N. Y. Suppl. 903, 67 N. Y. St. 632; Anthony *v.* Stype, 19 Hun (N. Y.) 265; Blake *v.* Bernhard, 3 Hun (N. Y.) 397, 6 Thomps. & C. (N. Y.) 74; Anderson *v.* O'Reilly, 54 Barb. (N. Y.) 620; Fulton *v.* Heaton, 1 Barb. (N. Y.) 552; Union Distilling Co. *v.* Ruser, 14 N. Y. Suppl. 908, 39 N. Y. St. 128; Schumann *v.* Davis, 14 N. Y. Suppl. 284; Citizens' Bank *v.* Williams, 12 N. Y. Suppl. 678, 35 N. Y. St. 542; Talcott *v.* Rosenberg, 8 Abb. Pr. N. S. (N. Y.) 287; Keyser *v.* Keyser, 1 N. Y. City Ct. 405; Leiser *v.* Rosman, 10 N. Y. Suppl. 415, 32 N. Y. St. 739.

South Carolina.— Ferst *v.* Powers, 58 S. C. 398, 36 S. E. 744; Guckenheimer *v.* Libbey, 42 S. C. 162, 19 S. E. 999; Roddey *v.* Erwin, 31 S. C. 36, 9 S. E. 729.

Tennessee.— Runyan *v.* Morgan, 7 Humphr. (Tenn.) 210.

Texas.— Smith *v.* Dye, (Tex. Civ. App. 1899) 51 S. W. 858.

91. *Alabama.*— Hafley *v.* Patterson, 47 Ala. 271.

Arkansas.— Mandel *v.* Peet, 18 Ark. 236.

Georgia.— Cox *v.* Felder, 36 Ga. 597.

Indiana.— Cooper *v.* Reeves, 13 Ind. 53.

Iowa.— Drake *v.* Hager, 10 Iowa 556.

Kentucky.— Nutter *v.* Connet, 3 B. Mon. (Ky.) 199; Bell *v.* Mansfield, 12 Ky. L. Rep. 89, 13 S. W. 838.

Louisiana.— Frere *v.* Perret, 25 La. Ann. 500.

Minnesota.—Auerbach *v.* Hitchcock, 28 Minn. 73, 9 N. W. 79.

Mississippi.— Commercial Bank *v.* Ullman, 10 Sm. & M. (Miss.) 411; Lovelady *v.* Harkins, 6 Sm. & M. (Miss.) 412.

Nebraska.— Tessier *v.* Reed, 17 Nebr. 105, 22 N. W. 225.

Tennessee.— Boyd *v.* Buckingham, 10 Humphr. (Tenn.) 433; Alabama Bank *v.* Berry, 2 Humphr. (Tenn.) 442.

Texas.— Steinam *v.* Gahwiler, (Tex. Civ. App. 1895) 30 S. W. 472; Corrigan *v.* Nichols, 6 Tex. Civ. App. 26, 24 S. W. 952; Howard *v.* Caperon, 3 Tex. App. Civ. Cas. § 313; Prince *v.* Turner, 2 Tex. App. Civ. Cas. § 657.

92. *Georgia.*— Simpson *v.* Holt, 89 Ga. 834, 16 S. E. 87.

Illinois.— Clark *v.* Roberts, 1 Ill. 285.

Iowa.— Bundy *v.* McKee, 29 Iowa 253; Mingus *v.* McLeod, 25 Iowa 452; Carothers *v.* Click, Morr. (Iowa) 54.

Missouri.— Updyke *v.* Wheeler, 37 Mo. App. 680.

Pennsylvania.— Waldman *v.* Fisher, 1 Wkly. Notes Cas. (Pa.) 360.

Tennessee.— Craigmiles *v.* Hays, 7 Lea (Tenn.) 720; Jackson *v.* Burke, 4 Heisk. (Tenn.) 610.

93. As that defendant cannot be found within the state (Luttrell *v.* Martin, 112

(b) INTENT. The fraudulent intent is an essential element and must be averred.[94] It need not, however, be stated positively or be conclusively established by the facts; it is enough if a fair inference of the existence of the intent can be deduced.[95]

(c) PROPERTY REMOVED OR DISPOSED OF. In some jurisdictions it is necessary to describe or designate the property which has been or is about to be disposed of,[96] or the quantity of the property removed.[97]

(6) NON-RESIDENCE — (a) IN GENERAL. If an attachment is sought on the ground of non-residence, the affidavit should state facts and circumstances sufficient to authorize an inference that the debtor is within the terms of the statute,[98]

N. C. 593, 17 S. E. 573, stating that the syllabus paragraph in this connection at Sheldon *v.* Kivett, 110 N. C. 408, 14 S. E. 970, is misleading and refers to an order of publication); that ordinary process of law cannot be secured (Shockley *v.* Bulloch, 18 Ga. 283; Wharton *v.* Conger, 9 Sm. & M. (Miss.) 510); that defendant is insolvent or a non-resident (George *v.* Hoskins, 17 Ky. L. Rep. 63, 30 S. W. 406); an intent to defraud creditors (Sherrill *v.* Fay, 14 Iowa 292; State Branch Bank *v.* White, 12 Iowa 141); or that the property disposed of was not a part of the debtor's homestead (Grollman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272).

Such unnecessary averment will not vitiate the affidavit, however. Thus an affidavit which avers that the debtor is concealing his goods will not be vitiated by containing the reason of the creditor's belief of that fact. Spear *v.* King, 6 Sm. & M. (Miss.) 276.

94. Vandevoort *v.* Fanning, 10 Iowa 589; Chittenden *v.* Hobbs, 9 Iowa 417; Pittman *v.* Searcey, 8 Iowa 352; Bowen *v.* Gilkison, 7 Iowa 503; Lockard *v.* Eaton, 3 Greene (Iowa) 543; Chaney *v.* Ostrander, Morr. (Iowa) 493; Denzer *v.* Mundy, 5 Rob. (N. Y.) 636; Marsh *v.* Williams, 63 N. C. 371.

An intent to defraud creditors generally need not be shown. Wakefield *v.* Bruce, 5 Ont. Pr. 77.

An intent to defraud creditors is not charged by a statement that the debtor is about to dispose of his property with intent to prevent plaintiffs and other creditors from collecting their claims. Kerchner *v.* McCormac, 25 S. C. 461.

If the allegations are as consistent with an honest intent on defendant's part as a dishonest one it will not warrant an attachment. Bernhard *v.* Cohen, 56 N. Y. Suppl. 271 [*affirmed* in 27 Misc. (N. Y.) 794, 58 N. Y. Suppl. 363].

95. Kipling *v.* Corbin, 66 How. Pr. (N. Y.) 12; Cooney *v.* Whitfield, 41 How. Pr. (N. Y.) 6.

96. Thomas *v.* Morasco, 5 Pa. Dist. 133.

97. Boulter *v.* Behrend, 20 D. C. 567. But see Weilar *v.* Garner, 4 App. Cas. (D. C.) 329, holding that the affidavit need not state the quantity of goods removed or the place of concealment.

98. McCrea *v.* Russell, 100 Mich. 375, 58 N. W. 1118; James *v.* Signell, 60 N. Y. App. Div. 75, 69 N. Y. Suppl. 680; Anthony *v.* Fox, 53 N. Y. App. Div. 200, 65 N. Y. Suppl. 806; Everitt *v.* Park, 88 Hun (N. Y.) 368, 34 N. Y. Suppl. 827, 2 N. Y. Annot. Cas. 205, 68 N. Y. St. 765; New York *v.* Genet, 4 Hun (N. Y.) 487; Thorn *v.* Alvord, 32 Misc. (N. Y.) 456, 66 N. Y. Suppl. 587 [*affirmed* in 54 N. Y. App. Div. 638, 67 N. Y. Suppl. 1147]; Kelso *v.* Blackburn, 3 Leigh (Va.) 299.

Non-residence as ground of attachment see *supra*, V, L.

Sufficiency of knowledge.— An allegation on personal knowledge that plaintiff knows defendant, that he is a non-resident, and resides in a certain town in an adjoining state, is sufficient to base the inference of satisfactory knowledge of non-residence, although plaintiff was a stranger to the original transaction. Foster *v.* Rogers, 31 Misc. (N. Y.) 14, 64 N. Y. Suppl. 652.

That "the debtor absconds from his creditors and is not at this time within the state, nor within reach of the process of the state" (Croxall *v.* Hutchings, 12 N. J. L. 84) or "has left the state," (Mulherrin *v.* Hill, 5 Heisk. (Tenn.) 58) is not a sufficient allegation of non-residence. Nor does an allegation "that said ——— resides without the limits of this State" set out a ground for attachment. Black *v.* Scanlon, 48 Ga. 12.

Residence unknown.— Under a statute declaring that a writ of attachment may issue if the affidavit states that defendant's residence is unknown and cannot be ascertained, a statement that defendant's residence is unknown and cannot be ascertained is sufficient, although the affidavit states that, at a time prior to the issue of the writ, defendant was a resident of the state. Barth *v.* Burnham, 105 Wis. 548, 81 N. W. 809.

Not residing within the state.— If it is necessary to state that defendant is not a resident of "or residing in, the State," a mere statement that defendant "is not a resident of this State, so that the process of this Court cannot be served upon him" is not sufficient. Lane *v.* Fellows, 1 Mo. 353.

Absence from state.— A charge that defendant was a non-resident does not sufficiently show he was absent from the state. Bentley *v.* Clark, 3 Dana (Ky.) 564.

Residence one month prior to affidavit.— The omission of the word "not" from the statutory averment that defendant is a non-resident, and has not resided in this state for one month next preceding the date of the affidavit, renders the affidavit a nullity. Freer *v.* White, 91 Mich. 74, 51 N. W. 807.

Office within jurisdiction.— Under a stat-

although there are many decisions to the effect that a positive statement as to non-residence will suffice, without detailing the facts on which the statement is based.[99] If there is more than one defendant, the affidavit must show that all of them are non-residents.[1]

(b) PLAINTIFF'S RESIDENCE. Where the ground of the application is that defendant is a non-resident, it is sometimes necessary that plaintiff should show that he is a resident of the state, and if this allegation is necessary its absence will invalidate the affidavit.[2]

ute requiring it to be shown that defendant is a non-resident of the city, and has not an office within the city where he regularly transacts business, an affidavit which merely alleges that defendant is a non-resident of the city of New York, without any allegation as to an office in the city, is insufficient. Niagara Falls Paper Co. *v.* Sterling, 39 N. Y. Suppl. 171, 25 N. Y. Civ. Proc. 251.

Residents and non-residents.— Under a statute providing for attachment against the property of non-residents only, a statement that the proceeding is instituted against a defendant named and others unknown who "are not all residents of the state" is clearly insufficient. Powers *v.* Hurst, 3 Blackf. (Ind.) 229.

Presumption.— Under a statute dispensing with an undertaking where the ground of attachment is non-residence, if no undertaking is mentioned in the affidavit and a summons is returned not found, it will be presumed that the non-residence of defendant was properly alleged. Carper *v.* Richards, 13 Ohio St. 219.

99. *Alabama.*—Graham *v.* Ruff, 8 Ala. 171.

Iowa.— Wiltse *v.* Stearns, 13 Iowa 282.

Kentucky.— Redwine *v.* Underwood, 101 Ky. 190, 19 Ky. L. Rep. 366, 40 S. W. 462; Bently *v.* Clark, 3 Dana (Ky.) 564.

Louisiana.— Farley *v.* Farior, 6 La. Ann. 725; Evans *v.* Saul, 8 Mart. N. S. (La.) 247.

Maryland.— Risewick *v.* Davis, 19 Md. 82.

Michigan.— Burns *v.* Kinne, 2 Mich. N. P. 63.

Nebraska.— Nagel *v.* Loomis, 33 Nebr. 499, 50 N. W. 441.

New York.— Gould *v.* Bryan, 3 Bosw. (N. Y.) 626.

South Carolina.— Smith *v.* Walker, 6 S. C. 169.

West Virginia.— Pendleton *v.* Smith, 1 W. Va. 16.

Under the **Maryland statute** which requires that the creditor shall make affidavit that he "knows or is credibly informed and verily believes that the ——— is not a citizen of the State, and that he doth not reside therein," it is sufficient to aver that the defendant, not being a citizen of the state and not residing therein, is indebted (Gunby *v.* Porter, 80 Md. 402, 31 Atl. 324); but where there are several defendants as to whom it is stated that they are not citizens of the state and do not reside therein, it is unnecessary to add that they "are not citizens, nor is either of them a citizen of Maryland, and do not nor does either of them reside therein" (Franklin *v.* Claflin, 49 Md. 24).

1. Corbit *v.* Corbit, 50 N. J. L. 363, 13 Atl. 178.

Sufficiency.—Where a partnership is spoken of by its partnership name and said to reside or not to reside in a given place, it will be presumed that the members of the firm reside or do not reside at such place. Chambers *v.* Sloan, 19 Ga. 84. So, too, an allegation that both defendants in attachment reside in another state and have not resided within the state for three months will be construed to refer to the defendants, and each of them. Dorr *v.* Clark, 7 Mich. 310.

2. In New York this is necessary in an action against a foreign corporation (Ladenburg *v.* Commercial Bank, 87 Hun (N. Y.) 269, 33 N. Y. Suppl. 321, 67 N. Y. St. 466 [*reversing* 84 Hun (N. Y.) 503, 32 N. Y. Suppl. 873, 66 N. Y. St. 153, 24 N. Y. Civ. Proc. 234]; Talcott *v.* American Credit Indemnity Co., 81 Hun (N. Y.) 577, 30 N. Y. Suppl. 1118, 63 N. Y. St. 256; Smith *v.* Union Milk Co., 70 Hun (N. Y.) 348, 24 N. Y. Suppl. 79, 53 N. Y. St. 891; Cremins *v.* East Lake Woolen Co., 41 N. Y. Suppl. 202, 25 N. Y. Civ. Proc. 336; Adler *v.* Baltimore O. A. F. C., 19 N. Y. Suppl. 885, 22 N. Y. Civ. Proc. 336, 28 Abb. N. Cas. (N. Y.) 233; Oliver *v.* Walter Heywood Chair Mfg. Co., 10 N. Y. Suppl. 771, 32 N. Y. St. 542), but is unnecessary in an action against an individual (Hawkins *v.* Pakas, 39 N. Y. App. Div. 506, 57 N. Y. Suppl. 317. See also Matter of Brown, 21 Wend. (N. Y.) 316).

In Alabama although no one but a resident is entitled to an attachment against a non-resident, it is not necessary that the affidavit should state that plaintiff is a resident. Peters *v.* Bower, Minor (Ala.) 69.

Sufficiency of allegation.— A mere recital of plaintiff's residence following his name in the commencement of the application is insufficient, although the verification is to all matters set forth in the application (Payne *v.* Young, 8 N. Y. 158, Seld. Notes (N. Y.) 74; Staples *v.* Fairchild, 3 N. Y. 41; People *v.* Griffith, Lalor (N. Y.) 447), as is an allegation that plaintiff is engaged in business within the state (Ladenburg *v.* Commercial Bank, 87 Hun (N. Y.) 269, 33 N. Y. Suppl. 821, 67 N. Y. St. 466 [*reversing* 84 Hun (N. Y.) 503, 32 N. Y. Suppl. 873, 66 N. Y. St. 153, 24 N. Y. Civ. Proc. 234, and *affirmed* in 146 N. Y. 406, 42 N. E. 543]). But an application showing that plaintiffs carry on business within the state, and that one or more of them is a resident thereof, is sufficient to authorize the issue of the attachment, although one of the plaintiffs is a non-

(c) Defendant's Residence. If required, defendant's place of residence must be alleged,[3] or the affidavit must state that on diligent inquiry it cannot be ascertained.[4]

(d) Cause of Action Arising on Indebtedness Within State. If the attachment cannot issue unless the cause of action arose within the state, the omission of an allegation to that effect is fatal.[5] Where, to authorize the attachment, it should appear that defendant was indebted within the state, that fact may be shown by alleging that the contract was made within the state or that the creditors were residents thereof.[6]

(e) Inability to Serve Process. Where, because of his non-residence, defendant cannot be served with process, the inability so to serve him must especially appear.[7]

(f) Property Within or Without State. Likewise if it is necessary to show that the non-resident debtor has property within the state subject to attachment,[8] as where both parties are non-residents,[9] or that defendant has not sufficient property within the state of his residence[10] to answer the debt, those facts must

resident. Renard *v.* Hargous, 13 N. Y. 259 [*affirming* 2 Duer (N. Y.) 540].

Remedy of defendant.— If defendant seeks to avail himself of the non-residence of plaintiff, who has alleged residence, he should make his defense by plea. Amos *v.* Allnutt, 2 Sm. & M. (Miss.) 215.

Affidavit by assignee.— An allegation that plaintiff's assignor was duly authorized to transact business within the state is sufficient without alleging the facts showing such authority. Lumley *v.* Anatron Chemical Co., 56 N. Y. App. Div. 174, 67 N. Y. Suppl. 663.

3. Cantrell *v.* Letwinger, 44 Miss. 437.

Ohio — Transference of cause.— In Ohio, where attachment proceedings, commenced before a justice on an affidavit that defendant is not a resident of the county, are transferred to a court in which it is necessary to state that defendant is not a resident of the state, an additional affidavit alleging non-residence within the state is required. Krumm *v.* Krauss, 26 Ohio St. 529.

The debtor's actual residence need not be shown. James *v.* Dowell, 7 Sm. & M. (Miss.) 333.

Voluntary residence.—Where the statutory ground was voluntarily remaining within the Confederate lines, the omission of the word "voluntarily" was held to vitiate the affidavit. Bell *v.* Hall, 2 Duv. (Ky.) 288.

4. Smith *v.* Huntoon, 134 Ill. 24, 24 N. E. 971, 23 Am. St. Rep. 646; Reitz *v.* People, 77 Ill. 518; Prins *v.* Hinchliff, 17 Ill. App. 153.

A statement that defendant's residence was at a stated place two years prior to the application, and that he has departed therefrom, is no evidence that his residence was there at the time the affidavit was made. Baldwin *v.* Ferguson, 35 Ill. App. 393.

Where there are several defendants, the place of residence of each defendant, or that such place cannot be ascertained, should be alleged. Britton *v.* Gregg, 96 Ill. App. 29.

5. Ladenburg *v.* Commercial Bank, 87 Hun (N. Y.) 269, 33 N. Y. Suppl. 821, 67 N. Y. St. 466 [*reversing* 84 Hun (N. Y.) 503, 32 N. Y. Suppl 873, 66 N. Y. St. 153, 24 N. Y. Civ. Proc. 234]; Cremins *v.* East Lake Woolen Co., 41 N. Y. Suppl. 202, 25 N. Y. Civ. Proc. 365; Adler *v.* Baltimore O. A. F. C., 19 N. Y. Suppl. 885, 22 N. Y. Civ. Proc. 336, 28 Abb. N. Cas. (N. Y.) 233.

6. People *v.* St. Nicholas Bank, 44 N. Y. App. Div. 313, 60 N. Y. Suppl. 719; Matter of Fitch, 2 Wend. (N. Y.) 298. See also Matter of Warner, 3 Wend. (N. Y.) 325.

Sufficiency.—A statement that defendant is an inhabitant of another state will not supply the omission. Thompson *v.* Chambers, 12 Sm. & M. (Miss.) 488.

7. Wilson *v.* Outlaw, Minor (Ala.) 196; Thompson *v.* Chambers, 12 Sm. & M. (Miss.) 488; James *v.* Dowell, 7 Sm. & M. (Miss.) 333; Page *v.* Ford, 2 Sm. & M. (Miss.) 266. *Contra*, Conklin *v.* Harris, 5 Ala. 213.

A positive allegation made on personal knowledge that defendant is a non-resident, resides at a stated place in another state, is there engaged in business, and that personal service of the summons cannot be made with due diligence within the state is sufficient. Smith *v.* Mahon, 27 Hun (N. Y.) 40.

Surplusage.— If such an allegation is not required this addition is mere surplusage and not a ground for quashing the attachment. McMahan *v.* Boardman, 29 Tex. 170.

8. Windley *v.* Bradway, 77 N. C. 333.

It will be sufficient to show property in any county within the state. Anderson *v.* Johnson, 32 Gratt. (Va.) 558.

The specific kind of property, or that plaintiff can prove the debtor's ownership, need not be proved. Bates *v.* Robinson, 8 Iowa 318.

Allegation in bill.— It is sufficient if the bill states the existence of a legal or equitable estate belonging to the debtor within the limits of the state. St. Mary's Bank *v.* St. Johns, 25 Ala. 566.

9. Ward *v.* McKenzie, 33 Tex. 297, 7 Am. Rep. 261; Wright *v.* Ragland, 18 Tex. 289; Ward *v.* Lathrop, 11 Tex. 287.

10. Cobb *v.* Miller, 9 Ala. 499; Cobb *v.* Force, 6 Ala. 468, decided under a statute providing that where an attachment issues at the instance of one non-resident against another, it must be shown that the latter has

sufficiently appear. While it has been held that an affidavit for a foreign attachment against the heirs of a judgment debtor must show, where no direct declaration is filed, that there is no personal representative or that there are no personal assets to discharge the debt, it has also been held that in suing out an attachment against the heirs of a non-resident debtor it is not necessary to allege that there are no personal assets within the state.[11]

(g) EXHAUSTION OF LEGAL REMEDIES. Under a statute authorizing the enforcement of a foreign judgment against a non-resident by a bill in equity, where the creditor has exhausted his legal remedies, it must appear that he has resorted to and exhausted such remedies against the debtor in the state of their common residence.[12]

(h) CONCLUSIVENESS. An averment of non-residence is not conclusive between the parties or their privies.[13]

(7) REFUSAL TO PAY OR SECURE DEBT. Under a statute permitting an attachment on the ground that defendant has property which he refuses to give either in payment or security for the debt it is not necessary to state the place where the demand for payment or security was made,[14] or an intent to defraud creditors.[15]

(i) *Negation of Improper Motive.* In some of the states it is required that the affidavit shall contain a statement that the attachment is not sued out for the purpose of injuring, vexing, or harassing defendant, and in those states the absence of such an allegation will vitiate it.[16]

(j) *Danger of Loss of Debt.* Where plaintiff must show that there is a probability of losing his debt that fact should appear by a sufficient allegation.[17]

not sufficient property to answer the debt within the state, of his residence, not only within the knowledge but within the belief of the party making the affidavit.

11. Reed *v.* Kentucky Bank, 5 Blackf. (Ind.) 227; Powers *v.* Hurst, 3 Blackf. (Ind.) 229.

12. **Attempt to collect claim.**— An averment that plaintiff has unsuccessfully attempted to collect his claim does not show that he has reduced the claim to judgment or exhausted his legal remedies within the meaning of such a statute. Brown *v.* Pace, (Tenn. Ch. 1898) 49 S. W. 355.

13. Barr *v.* Perry, 3 Gill (Md.) 313; Brundred *v.* Del Hoyo, 20 N. J. L. 328.

14. Hart *v.* Cummins, 1 Iowa 564, where it is said that it is the refusal which gives the right to the attachment and not the ability or inability of defendant to comply with the request as affected by the place of demand.

15. Bates *v.* Robinson, 8 Iowa 318.

Refusal to pay or secure debt as ground of attachment see *supra*, V, N.

16. Saunders *v.* Cavett, 38 Ala. 51; Burch *v.* Watts, 37 Tex. 135; Wright *v.* Ragland, 18 Tex. 289.

Where there are two defendants an allegation that the attachment is not sued out for the purpose of injuring or harassing the defendant is insufficient. Gunst *v.* Pelham, 74 Tex. 586, 12 S. W. 233; Perrill *v.* Kaufman, 72 Tex. 214, 12 S. W. 125. So, too, is an allegation that the attachment is not brought to injure or harass defendants. The words "or either of them" should be added. Kildare Lumber Co. *v.* Atlanta Bank, 91 Tex. 95, 41 S. W. 64.

Sufficiency.—An allegation that the attachment is not sued out for the purpose of "injuring and harassing" defendant does not comply with the requirement that it must be alleged that the attachment is not sued out for the purpose of "injuring or harassing" defendant. Moody *v.* Levy, 58 Tex. 532.

17. Napper *v.* Noland, 9 Port. (Ala.) 218; Sheffield *v.* Gay, 32 Tex. 225; Wright *v.* Smith, 19 Tex. 297; Messner *v.* Hutchins, 17 Tex. 597.

Several plaintiffs.— An affidavit in attachment by two plaintiffs which alleges that plaintiff will probably lose his debt is insufficient. Sarrazin *v.* Hotman, 16 Tex. Civ. App. 351, 40 S. W. 629.

Unliquidated damages.— Under the Connecticut statute prescribing the form of oath to be indorsed upon the writ and requiring a statement that plaintiff is in danger of losing the debt in this writ, an oath that plaintiff is in danger of losing the debt in this writ is sufficient, although the action is on the case for unliquidated damages. Gillett *v.* Johnson, 30 Conn. 392.

Removal of property.— Such an allegation is unnecessary, where the ground assigned for the attachment is the removal of property. Wright *v.* Smith, 19 Tex. 297.

The reason for the apprehension or danger of losing the debt should be shown by stating the facts upon which the belief of loss is based. Keigher *v.* McCormick, 11 Minn. 545.

Attachment on Sunday — Clerical error.— An affidavit, made under a statute permitting an attachment to issue in certain cases on Sunday, which states that it will be too late to acquire a lien upon said writ to wait until a subsequent day is a substantial com-

(K) *Indebtedness Unsecured.* In some jurisdictions it is required that affiant shall state that the indebtedness for which the action is brought has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property,[18] or if so secured that the security has become valueless.[19] In these jurisdictions compliance with such requirements is necessary.[20] If the ground of attachment is non-residence,[21] or no statutory requirement exists to that effect,[22] or the debt sued on was incurred prior to the passage of the act,[23] such a statement is unnecessary.

(L) *Existence of Attachable Property.* Unless a statute expressly or impliedly requires the affidavit to show that defendant has property within the jurisdiction or within the state,[24] or subject to execution within the jurisdiction of the court,[25] such a showing is unnecessary. There are, however, holdings that an affidavit for a foreign attachment must show that defendant is the owner of the property sought to be attached.[26]

(M) *Description of Property.* If a description of property is necessary to inform the officer as to what property he is authorized to levy upon, there must be an allegation sufficient for that purpose,[27] which must be sworn to positively;[28]

pliance with the statutory requirement that in such cases it must be shown that it will be too late for the purpose of acquiring a lien by said writ, etc. Levy *v.* Elliott, 14 Nev. 435.

18. Scrivener *v.* Dietz, 68 Cal. 1, 8 Pac. 609; Vollmer *v.* Spencer, (Ida. 1897) 51 Pac. 609; Largey *v.* Chapman, 18 Mont. 563, 46 Pac. 808.

Sufficiency.—An affidavit is sufficient although, after stating that the debt is not secured by mortgage or lien upon real or personal property, it fails to add "or any pledge of personal property." Glidden *v.* Whittier, 46 Fed. 437. An affidavit stating that defendant agreed to secure the debt by a claim held by him against a copartnership, and the note of said firm, but instead sent a note signed by the individual partners, which plaintiff refused to accept and returned, does not show that the debt was secured. Simmons Hardware Co. *v.* Alturas Commercial Co., (Ida. 1895) 39 Pac. 550.

Void or voidable.—The failure to comply with this statutory requirement renders the attachment voidable at the instance of the attachment debtor, but not void, so that it may be collaterally attacked by a stranger. Scrivener *v.* Dietz, 68 Cal. 1, 8 Pac. 609.

Aider by petition.—An affidavit defective because failing to show that one of the notes sued upon was not secured is not aided by an amendment of the petition stating that stock held as collateral security was sold in accordance with the pledge, the proceeds credited on the note, and that a balance stated remained due. Fisk *v.* French, 114 Cal. 400, 46 Pac. 161.

19. Sufficiency.—An affidavit showing that the indebtedness was secured by mortgage, but stating generally that "said mortgage, without any act of plaintiff, or the person to whom the security was given, became valueless," will justify the issue of an attachment. Barbieri *v.* Ramelli, 84 Cal. 174, 24 Pac. 113.

Presumption.—If the affidavit fails to state that the security has become valueless without plaintiff's fault, it will be presumed to remain in the hands of plaintiff and to be of value. Consequently the court has no jurisdiction to issue an attachment, and all proceedings had thereon will be void. Murphy *v.* Montandon, 2 Ida. 1048, 29 Pac. 851, 35 Am. St. Rep. 279.

20. Alternative statement.—An allegation that the debt has not been secured, or if originally so secured the security has become valueless is bad, because in the alternative. Winters *v.* Pearson, 72 Cal. 553, 14 Pac. 304; Merced Bank *v.* Morton, 58 Cal. 360; Wilke *v.* Cohn, 54 Cal. 212.

21. In California the affidavit need only show that defendant is a non-resident and that the attachment is not sought for or the action prosecuted to hinder, delay, or defraud any creditor of defendant. Kohler *v.* Agassiz, 99 Cal. 9, 33 Pac. 741.

22. Barbee *v.* Holder, 24 Tex. 225.

23. Williams *v.* Glasgow, 1 Nev. 533.

24. Grebe *v.* Jones, 15 Nebr. 312, 18 N. W. 81; Lawton *v.* Kiel, 51 Barb. (N. Y.) 30, 34 How. Pr. (N. Y.) 465; Fouschee *v.* Owen, 122 N. C. 360, 29 S. E. 770; Parks *v.* Adams, 113 N. C. 473, 18 S. E. 665; Branch *v.* Frank, 81 N. C. 180 [*overruling* Windley *v.* Bradway, 77 N. C. 333].

25. U. S. Capsule Co. *v.* Isaacs, 23 Ind. App. 533, 55 N. E. 832; Bigelow *v.* Chatterton, 51 Fed. 614, 10 U. S. App. 267, 2 C. C. A. 402 [*distinguishing* Blair *v.* Smith, 114 Ind. 114, 15 N. E. 817, 5 Am. St. Rep. 593, which is to the contrary].

26. Blair *v.* Smith, 114 Ind. 114, 15 N. E. 817, 5 Am. St. Rep. 593; Delaware Mut. Ins. Co. *v.* Walker, 1 Phila. (Pa.) 104, 7 Leg. Int. (Pa.) 179.

27. Mayer *v.* Brooks, 74 Ga. 526; Waxlbaum *v.* Paschal, 64 Ga. 275.

28. Bruce *v.* Conyers, 54 Ga. 678.

Sufficiency of description.—A description of the property to be attached, as a stock of goods in a certain store, enumerating the articles composing the stock, is sufficient where the whole stock is sought to be attached, but if the goods have been mingled with others

but under a statute requiring plaintiff to state that defendant has property not exempt from execution which he refuses to give either in security or payment, the affidavit need not describe the exempt property.[29]

(N) *Prayer.* The petition or affidavit should specifically ask that a writ of attachment be granted.[30]

(O) *Signature.* According to the better practice the affidavit should be signed or subscribed by the party by whom it purports to be made;[31] but a slight variance in the spelling of affiant's name[32] or the signature of the affidavit in the name of the person designated as affiant and of another not named[33] is immaterial.

(P) *Verification* — (1) IN GENERAL. The affidavit should show that it was duly sworn to,[34] and this should appear by the jurat or certificate of the officer

in the same store they should be identified. Mayer *v.* Brooks, 74 Ga. 526. But an affidavit stating that defendant was indebted on a bill of particulars thereto annexed in a sum named, and that he was in possession of part or all of aforesaid property does not sufficiently describe the property in defendant's possession. Joseph *v.* Stein, 52 Ga. 332.

29. Hart *v.* Cummins, 1 Iowa 564.

Wages — Negativing exemption. — If the wages of a debtor within a certain amount are exempted the affidavit should contain a statement that the wages of the debtor exceeded the amount which was exempt and that the excess only was sought to be attached. Driscoll *v.* Kelly, 4 Ohio S. & C. Pl. Dec. 124, 5 Ohio N. P. 243.

30. Dawson *v.* Jewett, 4 Greene (Iowa) 157; Queen *v.* Griffith, 4 Greene (Iowa) 113; Kelly *v.* Bently, 9 La. Ann. 586. See also Astor *v.* Winter, 8 Mart. (La.) 171.

The petition in the action need not contain a prayer for an attachment. Harbour-Pitt Shoe Co. *v.* Dixon, 22 Ky. L. Rep. 1169, 60 S. W. 186.

Multifariousness. — A bill seeking an attachment on a single claim is not multifarious because it prays for the issue of the attachment against the property in the hands of various persons and seeks an accounting from such persons for their respective dealings with the debtor. Alexander *v.* Taylor, 62 N. C. 36.

31. *Alabama.* — Lowry *v.* Stowe, 7 Port. (Ala.) 483.

Georgia. — Cohen *v.* Manco, 28 Ga. 27; Birdsong *v.* McLaren, 8 Ga. 521.

Idaho. — Simmons Hardware Co. *v.* Alturas Commercial Co., (Ida. 1895) 39 Pac. 550, holding an omission to sign not fatal, however.

Kentucky. — Gathright *v.* McNeil, 4 Ky. L. Rep. 907, 5 Ky. L. Rep. 165.

Mississippi. — Ebsom *v.* Boyes, (Miss. 1898) 23 So. 586.

Missouri. — Hagardine *v.* Van Horn, 72 Mo. 370; Sedalia Third Nat. Bank *v.* Garton, 40 Mo. App. 113.

Tennessee. — Watt *v.* Carnes, 4 Heisk. (Tenn.) 532.

But see Norton *v.* Hauge, 47 Minn. 405, 50 N. W. 368; West Tennessee Agricultural, etc., Assoc. *v.* Madison, 9 Lea (Tenn.) 407.

See, generally, AFFIDAVITS, 2 Cyc. 26.

Omission of affiant's name from body of affidavit is immaterial if he subscribed it. Rudolf *v.* McDonald, 6 Nebr. 163.

Neglect of clerk. — Where the blanks in a printed form of complaint under which an attachment issued were filled in by the clerk at plaintiff's request, but the name of plaintiff's attorney was not signed by the clerk until the next day and after other attachments had issued, it was held that the irregular action of the clerk did not vitiate the complaint. Dixey *v.* Pollock, 8 Cal. 570.

32. Kahn *v.* Henman, 3 Ga. 266.

33. Fortenheim *v.* Claflin, 47 Ark. 49, 14 S. W. 462.

34. *Kentucky.* — Anderson *v.* Sutton, 2 Duv. (Ky.) 480.

Mississippi. — Ebsom *v.* Boyd, (Miss. 1898) 23 So. 586; Carlisle *v.* Gunn, 68 Miss. 243, 8 So. 743.

Ohio. — Endel *v.* Leibrock, 33 Ohio St. 254.

Texas. — Schrimpf *v.* McArdle, 13 Tex. 368; Caldwell *v.* Haley, 3 Tex. 317.

West Virginia. — Cosner *v.* Smith, 36 W. Va. 788, 15 S. E. 977.

Wisconsin. — Maguire *v.* Bolen, 94 Wis. 48, 68 N. W. 408.

See 5 Cent. Dig. tit. "Attachment," § 233; and, generally, AFFIDAVITS, 2 Cyc. 16.

A bill in equity in which an attachment is sought should be sworn to. Webb *v.* Read, 3 B. Mon. (Ky.) 119. But see Calk *v.* Chiles, 9 Dana (Ky.) 265, holding that where land is subject to attachment by a bill in equity, it is unnecessary that the bill be sworn to and accompanied by an affidavit.

Necessity of showing competency of affiant. — The provision of the Iowa code of 1873, that, to compel the verification of subsequent pleadings, the verification of a pleading must show the competency of affiant, does not apply to a verified petition to obtain an attachment. Sioux Valley State Bank *v.* Kellogg, 81 Iowa 124, 46 N. W. 859.

Signature to oath. — It is not essential for affiant to sign the oath. Bates *v.* Robinson, 8 Iowa 318.

Sufficiency. — An averment that the "facts" set forth in the affidavit are true is a sufficient allegation that the "matters" therein stated are true. Sherrill *v.* Fay, 14 Iowa 292. An affidavit indorsed at length on the application, setting forth and affirming in detail each matter of fact set out in the ap-

by whom the oath is administered, signed by him with his official designation.[35] It appears, however, that the omission of the officer to sign and certify the affidavit is not fatal if the oath was administered in fact.[36]

(2) AUTHENTICATION.[37] Where the affidavit is taken without the jurisdiction, or in another state, the authority of the officer to administer the oath must be authenticated in a mode prescribed by the laws of the state where it is proposed to use the affidavit.[38]

(Q) *Approval.* If necessary that satisfaction with the affidavit should appear

plication, is a sufficient verification. Van Alstyne *v.* Erwine, 11 N. Y. 331.

Surplusage.—If the oath is made according to law the subsequent affirmation of the party is surplusage. Matthews *v.* Dare, 20 Md. 248.

35. *Georgia.*— Loeb *v.* Smith, 78 Ga. 504, 3 S. E. 438; Birdsong *v.* McLaren, 8 Ga. 521.

Michigan.— Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288.

Missouri.— Sedalia Third Nat. Bank *v.* Garton, 40 Mo. App. 113.

South Carolina.— Doty *v.* Boyd, 46 S. C. 39, 24 S. E. 59.

Tennessee.—Watt *v.* Carnes, 4 Heisk. (Tenn.) 532.

Washington.— Tacoma Grocery Co. *v.* Draham, 8 Wash. 263, 36 Pac. 31, 40 Am. St. Rep. 907.

Authority of officer.— A certificate signed and sealed by B stating that the affidavit was sworn to in another state before him, commissioner in said state to take affidavits to be used or recorded in the state where the attachment is sought, is insufficient to show the authority of the officer. Draper *v.* Williams, 8 Blackf. (Ind.) 574. So where the officer designates himself as "mayor," without stating of what city or other place, he fails to show his authority to administer the oath. Edmondson *v.* Carnall, 17 Ark. 284. But, although the officer fail to state his official character, the affidavit will be sufficient if by reference to other papers in the record that character is shown (Singleton *v.* Wofford, 4 Ill. 576) and the court will take judicial knowledge of the signature of its clerk who has failed to sufficiently identify himself (Simon *v.* Stetter, 25 Kan. 155).

Identification of officer.— A jurat reciting that affiant personally appeared and "having been duly sworn by me, subscribed to the foregoing affidavit," etc., sufficiently shows that the affidavit was sworn and subscribed by affiant before the officer who took the affidavit. Steinam *v.* Gahwiler, (Tex. Civ. App. 1895) 30 S. W. 472.

The fact that the complaint was verified by oath need not be certified by the justice and made a part of the record. Kyle *v.* Connelly, 3 Leigh (Va.) 719.

36. *Alabama.*— Hyde *v.* Adams, 80 Ala. 111; McCartney *v.* Branch Bank, 3 Ala. 709.

Illinois.— Kruse *v.* Wilson, 79 Ill. 233.

Iowa.— Cook *v.* Jenkins. 30 Iowa 452.

Louisiana.—English *v.* Wall, 12 Rob. (La.) 132.

Maryland.— Farrow *v.* Hayes, 51 Md. 498.

Tennessee.— Wiley *v.* Bennett, 9 Baxt. (Tenn.) 581.

Supplying omission.—The omission may be cured before the return of the writ (Farrow *v.* Hayes, 51 Md. 498), or the officer may be permitted to sign the jurat *nunc pro tunc* (Simon *v.* Johnson, 7 Kulp (Pa.) 166).

37. **For form** of an authentication of an affidavit taken by a foreign officer see Ross *v.* Wigg, 34 Hun (N. Y.) 192, 6 N. Y. Civ. Proc. 268 note.

38. *Indiana.*— Fellows *v.* Miller, 8 Blackf. (Ind.) 231.

Maryland.— Evesson *v.* Selby, 32 Md. 340; Prentiss *v.* Gray, 4 Harr. & J. (Md.) 192. See Smith *v.* Greenleaf, 4 Harr. & M. (Md.) 291.

Michigan.— Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288.

New York.— Williams *v.* Waddell, 5 N. Y. Civ. Proc. 191.

United States.— Bolton *v.* White, 2 Cranch C. C. (U. S.) 426, 3 Fed. Cas. No. 1,616, construing Maryland statute.

A certificate by the officer who took the affidavit without the state that he is authorized to administer oaths was held to be sufficient. Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124.

Authentication by governor.— A certificate by the governor that the judge's attestation to the certificate is in due form and made by the proper officer, and that full faith and credit are due to all his official acts is sufficient. Washington *v.* Hodgskin, 12 Gill & J. (Md.) 353.

Judge of court of record.— Where the affidavit recites that it was taken before a judge of a designated court, "being a court of record," an authentication that the judge was at the time an associate law judge of said court is insufficient without a further statement that such court was a court of record. Coward *v.* Dillinger, 56 Md. 59.

Justice of the peace.—The official character of the justice of the peace of another state sufficiently appears by a certificate of the clerk of the county court of the county where he resides stating that he was then acting as justice and was duly commissioned; such certificate being accompanied by the certificate of two commissioners of the same court stating that the person signing the certificate is clerk, and that his official acts are entitled to credit. Posey *v.* Buckner, 3 Mo. 604.

Notary within county.— An affidavit taken before a notary in the county in which the action is brought need not be authenticated under his notarial seal. Dyer *v.* Flint, 21 Ill. 80, 74 Am. Dec. 73.

by a certificate indorsed thereon, the affidavit should bear a sufficient indorsement by an officer showing his approval thereof.[39]

8. Presentation and Filing — a. In General. If it is necessary to file the affidavit at the time of the issue of the attachment, or within a prescribed time thereafter,[40] failure so to do will invalidate the proceedings.[41]

b. Delay After Making. Since the ground of attachment must exist at the time the warrant is issued, any delay between the making of the affidavit and its presentation or filing, during which a change in condition may have taken place, will render the affidavit ineffectual;[42] but if it is apparent that no substantial change in condition could have taken place[43] or that the delay was caused by the

39. Slaughter *v.* Bevans, 1 Pinn. (Wis.) 348; Morrison *v.* Fake, 1 Pinn. (Wis.) 133; Mayhew *v.* Dudley, 1 Pinn. (Wis.) 95.

Sufficiency.— An indorsement on an affidavit — "I hereby certify, that I am fully satisfied that the facts and allegations set forth in the above affidavit are true, and that the said affiant is justly entitled to his writ of attachment," sufficiently complies with the statute requiring that an officer shall indorse his satisfaction upon the affidavit. Merrill *v.* Low, 1 Pinn. (Wis.) 221.

Affidavit of belief.— An indorsement that the officer is satisfied that the matters set forth in the affidavit are true is sufficient to authorize the issue of the writ, although the affidavit charges fraud "as the affiant verily believes." Clark *v.* Gilbert, 1 Pinn. (Wis.) 354.

Preliminary examination of plaintiff.— Hurd's Rev. Stat. Ill. c. 11, § 31, providing for the application to and an examination of plaintiff under oath by a judge, respecting the cause of action, and that the judge shall indorse on the application the amount for which the writ shall issue, does not contemplate an examination before a court in session and a record of the proceedings, but where the writ has been ordered it will be presumed that the required examination was had. Jacobs *v.* Marks, 183 Ill. 533, 56 N. E. 154 [*affirming* 83 Ill. App. 156].

40. In Virginia the affidavit to procure an attachment against a non-resident or absent debtor need not be filed before the subpœna issues. Moore *v.* Holt, 10 Gratt. (Va.) 284.

Conflicting requirements.— Where there is an apparent conflict in the statute, one clause thereof requiring the filing of the affidavit at the time of issue of the warrant, and the other requiring the affidavit to be filed within forty-eight hours after such issue, it should be construed to mean that the papers must be filed at the time of issuing the warrant, or within forty-eight hours thereafter. Ferst *v.* Power, 58 S. C. 398, 36 S. E. 744.

Filing with declaration.—In South Carolina it was held that a statute requiring an affidavit to be made at the time of filing the declaration did not require it to be made at the precise time. Creach *v.* Delane, 1 Nott & M. (S. C.) 189.

Filing after sale on execution in suit.— Where by statute it is provided that an affidavit must be filed within ten days after commencement of publication, that if not so filed the attachment shall be dismissed, and permitting the court in its discretion to allow it to be filed at any time before the order of dismissal is actually made, it is an abuse of discretion to refuse to allow the affidavit to be filed after the property has been sold under execution on judgment in the action. Savidge *v.* Padgham, 105 Mich. 257, 63 N. W. 295.

41. Waldo *v.* Beckwith, 1 N. M. 97; State Bank *v.* Hinton, 12 N. C. 397; Townsend *v.* Sparks, 50 S. C. 380, 27 S. E. 801. *Contra*, Brash *v.* Wielarsky, 36 How. Pr. (N. Y.) 253. And see Woodward *v.* Stearns, 10 Abb. Pr. N. S. (N. Y.) 395; Ketchin *v.* Landecker, 32 S. C. 155, 10 S. E. 936; Doty *v.* Boyd, 46 S. E. 39, 24 S. E. 59.

Bona fides.— The filing of a petition for writ of attachment three days after its verification does not indicate bad faith. Deere *v.* Bagley, 80 Iowa 197, 45 N. W. 557.

Filing nunc pro tunc.— In Hughes *v.* Stinnett, 9 Ark. 211, the clerk wrote out the writ on the reverse side of the half sheet on which the affidavit was written and delivered it to the sheriff who kept it until he made his return to the writ. It was held that since plaintiff had complied with the requisites of the statute when he made the affidavit and left it with the clerk it might be filed *nunc pro tunc* on a motion made by him on the trial.

Collateral attack.— The judgment cannot be collaterally attacked, because the record fails to show that an affidavit was filed. Biggs *v.* Blue, 5 McLean (U. S.) 148, 3 Fed. Cas. No. 1,403.

Lost affidavit—Proof of filing.—Where the record shows no finding that the writ was duly issued the court files may be read in evidence to determine whether there was an affidavit or not, and if none appear, parol evidence is admissible to show that some of the files have been lost or destroyed, and on the other hand it may be shown that files alleged to be lost or destroyed never existed. Burnett *v.* McCluey, 78 Mo. 676.

42. Sydnor *v.* Chambers, Dall. (Tex.) 601, holding that an affidavit filed a month after it was taken was insufficient.

43. Adams *v.* Lockwood, 30 Kan. 373, 2 Pac. 626 (where the affidavit was sworn to eighteen days before it was filed, and the ground of attachment was fraudulent contraction of the debts sued on); Hadden *v.* Linville, 86 Md. 210, 38 Atl. 37, 900 (where

fact that affiant resided in a distant jurisdiction,[44] the neglect to promptly present or file the affidavit will not vitiate the proceedings.

c. Laches of Clerk or Officer. If plaintiff has observed the requirements of the statute, the neglect of the clerk or of the officer charged with that duty to place the affidavit on file, as required by law, and to keep it on file, will not affect the validity of the proceedings, where no injury has been caused by such neglect.[45]

9. Objections — a. In General. Mere informalities, defects, or clerical misprisions in affidavits for an attachment which do not prejudice substantial rights may be disregarded;[46] and an insufficient affidavit will not affect the right of recovery in the action in which it was issued,[47] or the rights of other creditors whose proceedings are regular and who have come in under an attachment issued on a defective affidavit.[48] Where, however, the defect is jurisdictional, the attachment and all proceedings subsequent thereto are void.[49] If, by statute, the affidavit is made sufficient evidence of the facts therein stated, its truth cannot be called in question, defendant being confined to his remedy on the bond.[50]

b. Waiver. Defendant may waive an irregularity or defect in the affidavit

the affidavits were filed several months before the action was brought, and it was held that a statutory provision that no attachment should issue without an affidavit, and that such affidavit might be made in any state or foreign country did not require it to be made at or near the time of instituting the suit); Kesler *v.* Lapham, 46 W. Va. 293, 33 S. E. 289 (where the affidavit was made in one county two days before the issue of the attachment in another county). See also Lewis *v.* Stewart, 62 Tex. 352, where it was held that an attachment was not vitiated by the fact that four days elapsed between the making of two affidavits as to the existence of the causes for which the writ was sought.

44. Wright *v.* Ragland, 18 Tex. 289, where the affidavit was not filed until twenty-four days after it had been made by a non-resident of the state.

45. Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288; Augusta Bank *v.* Conrey, 28 Miss. 667. But see Townsend *v.* Sparks, 50 S. C. 380, 27 S. E. 801, where the clerk placed no file-mark on the affidavit but delivered it to the sheriff and did not have it in his custody again until after the expiration of the statutory time prescribed for filing, and it was held that the affidavit was not filed within the time provided for by law.

Presumption.— The issue of an attachment creates a presumption that a proper affidavit was duly filed, and the mere fact that an affidavit received by the clerk does not bear his indorsement, and that instead of keeping it in his custody he attached it to the writ, with which it was afterward returned to him, will not affect the validity of the proceedings. Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288.

46. *Indiana.*— U. S. Capsule Co. *v.* Isaacs, 23 Ind. App. 533, 55 N. E. 832; Fairbanks *v.* Lorig, 4 Ind. App. 451, 29 N. E. 452.

Maryland.— De Bebian *v.* Gola, 64 Md. 262, 21 Atl. 275.

Missouri.— Harvey *v.* Wickham, 23 Mo. 112.

Montana.— Cope *v.* Upper Missouri Min., etc., Co., 1 Mont. 53.

Nebraska.— Whipple *v.* Hill, 36 Nebr. 720, 55 N. W. 227, 38 Am. St. Rep. 742, 20 L. R. A. 313.

New York.— Bascom *v.* Smith, 31 N. Y. 595.

North Carolina.— Skinner *v.* Moore, 19 N. C. 138, 30 Am. Dec. 155.

Surplusage will not render the affidavit defective. Cope *v.* Upper Missouri Min., etc., Co., 1 Mont. 53.

If the evidence on the hearing supplies the defects in the affidavit it will be sufficient where the motion to quash is not made upon plaintiff's papers. Hodson *v.* Tootle, 28 Kan. 317.

Lien created by defective affidavit.—An affidavit defective in not stating the nature of the indebtedness, the residence of defendant, or that his residence could not be found, may create a valid lien. Hogue *v.* Corbit, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232.

47. Elliott *v.* Mitchell, 3 Greene (Iowa) 237.

48. Taylor *v.* Elliott, 51 Ind. 375.

49. *Arkansas.*— Delano *v.* Kennedy, 5 Ark. 457.

California.— Hisler *v.* Carr, 34 Cal. 641.

Maryland.—Halley *v.* Jackson, 48 Md. 254.

Michigan.— Langtry *v.* Wayne Cir. Judges, 68 Mich. 451, 36 N. W. 211, 13 Am. St. Rep. 352; Borland *v.* Kingsbury, 65 Mich. 59, 31 N. W. 620.

Tennessee.— Willey *v.* Riorden, 2 Baxt. (Tenn.) 227; Lillard *v.* Carter, 7 Heisk. (Tenn.) 604; Sullivan *v.* Fugate, 1 Heisk. (Tenn.) 20; Maples *v.* Tunis, 11 Humphr. (Tenn.) 108, 53 Am. Dec. 779. See also McElwee *v.* Steelman, (Tenn. Ch. 1896) 38 S. W. 275.

Texas.— Sydnor *v.* Chambers, Dall. (Tex.) 601.

Wisconsin.— Blackwood *v.* Jones, 27 Wis. 498.

50. Mandel *v.* Peet, 18 Ark. 236; Taylor *v.* Ricards, 9 Ark. 378.

by failing to object;[51] by appearing generally[52] and replevying the attached property,[53] pleading to or defending on the merits,[54] or confessing judgment;[55] by filing a plea in abatement;[56] by taking issue upon the allegations of facts contained in the affidavit,[57] and going to trial on the issues so raised;[58] or by failing to request an adjudication as to the sufficiency of the grounds alleged on motion to discharge the attachment for an insufficient statement thereof.[59]

c. Who May Object. If the defects consist of mere informalities or irregularities the proceedings are regarded as voidable at the instance of a party only and not void.[60] Hence, if the affidavit is sufficient to confer jurisdiction it can only be attacked directly and not collaterally in another proceeding, or by a person who is not a party to the action.[61]

d. Time of Taking. Unless otherwise provided objections for insufficiency

51. O'Connor *v.* Sherley, 21 Ky. L. Rep. 735, 52 S. W. 1056; Clamageran *v.* Bucks, 4 Mart. N. S. (La.) 487, 16 Am. Dec. 185; Isham *v.* Ketchum, 46 Barb. (N. Y.) 43; Matter of Griswold, 13 Barb. (N. Y.) 412.

52. Borland *v.* Kingsbury, 65 Mich. 59, 31 N. W. 620; Blackwood *v.* Jones, 27 Wis. 498.

53. De Leon *v.* Heller, 77 Ga. 740.

54. *Georgia.*— Pool *v.* Perdue, 44 Ga. 454.

Michigan.— Gunn Hardware Co. *v.* Dennison, 83 Mich. 40, 46 N. W. 940.

Missouri.— Schlatter *v.* Hunt, 1 Mo. 651.

Nebraska.— Grotte *v.* Nagle, 50 Nebr. 363, 69 N. W. 973.

North Carolina.— Garmon *v.* Barringer, 19 N. C. 502.

Pennsylvania.— Bollinger *v.* Gallagher, 144 Pa. St. 205, 22 Atl. 815.

South Carolina.— Stoney *v.* McNeill, Harp. (S. C.) 156.

Tennessee.— Johnson *v.* Luckado, 12 Heisk. (Tenn.) 270; Foster *v.* Hall, 4 Humphr. (Tenn.) 345.

See 5 Cent. Dig. tit. "Attachment," § 347.

Want of affidavit.— The invalidity of an attachment because not based on an affidavit is not cured by the appearance of defendant and his interposition of a plea. Tyson *v.* Hamer, 2 How. (Miss.) 669.

55. Hearn *v.* Crutcher, 4 Yerg. (Tenn.) 461.

56. Henderson *v.* Drace, 30 Mo. 358; Williams *v.* Glasgow, 1 Nev. 533.

57. Rice *v.* Morner, 64 Wis. 599, 25 N. W. 668.

Defects consisting of the want of affiant's signature or that of the clerk or seal of the court are not waived by the fact that defendant appeared and pleaded to an amended affidavit subsequently filed after a motion to dismiss the attachment on that ground had been overruled. Sedalia Third Nat. Bank *v.* Garton, 40 Mo. App. 113.

58. De Stafford *v.* Gartley, 15 Colo. 32, 24 Pac. 580; Rice *v.* Hauptman, 2 Colo. App. 565, 31 Pac. 862; Ryon *v.* Bean, 2 Metc. (Ky.) 137.

59. Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743.

60. *Alabama.*— Parmer *v.* Ballard, 3 Stew. (Ala.) 326.

Iowa.— State *v.* Foster, 10 Iowa 435.

Illinois.— Moore *v.* Mauck, 79 Ill. 391.

Kentucky.—Farmers Nat. Bank *v.* National Bank, 4 Ky. L. Rep. 451.

New York.— Carr *v.* Van Hoesen, 26 Hun (N. Y.) 316.

Washington.—Nesqually Mill Co. *v.* Taylor, 1 Wash. Terr. 1.

61. *California.*— Harvey *v.* Foster, 64 Cal. 296, 30 Pac. 849; Fridenberg *v.* Pierson, 18 Cal. 152, 79 Am. Dec. 162.

Illinois.— Moore *v.* Mauck, 79 Ill. 391.

Louisiana.— Clamagran *v.* Bucks, 4 Mart. N. S. (La.) 487, 16 Am. Dec. 185.

Nebraska.— Horkey *v.* Kendall, 53 Nebr. 522, 73 N. W. 953, 68 Am. St. Rep. 623.

New Jersey.— Russell *v.* Work, 35 N. J. L. 316; Weber *v.* Weitling, 18 N. J. Eq. 441.

New York.— Bascom *v.* Smith, 31 N. Y. 595; Brown *v.* Guthrie, 39 Hun (N. Y.) 29; Carr *v.* Van Hoesen, 26 Hun (N. Y.) 316; Isham *v.* Ketchum, 46 Barb. (N. Y.) 43; Matter of Griswold, 13 Barb. (N. Y.) 412; Morgan *v.* Avery, 7 Barb. (N. Y.) 656; McBlane *v.* Speelman, 6 N. Y. Civ. Proc. 401; Miller *v.* Brinkerhoff, 4 Den. (N. Y.) 118, 47 Am. Dec. 242.

North Carolina.— Spillman *v.* Williams, 91 N. C. 483; Skinner *v.* Moore, 19 N. C. 138, 30 Am. Dec. 155.

Pennsylvania.— Billings *v.* Russell, 23 Pa. St. 189, 62 Am. Dec. 330.

Texas.— Barelli *v.* Wagner, 5 Tex. Civ. App. 445, 27 S. W. 17.

West Virginia.—Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791; Hall *v.* Hall, 12 W. Va. 1.

United States.— Matthews *v.* Densmore, 109 U. S. 216, 3 S. Ct. 126, 27 L. ed. 912 [*reversing* 43 Mich. 461, 5 N. W. 669]; Graff *v.* Louis, 71 Fed. 591, construing Nebraska statute.

A jurisdictional defect in an affidavit to procure an attachment is not waived so as to preclude a collateral attack, by the failure of defendant to take an objection to the affidavit on that ground. Murray *v.* Hankin, 30 Hun (N. Y.) 37, 3 N. Y. Civ. Proc. 342, 65 How. Pr. (N. Y.) 511.

Want of affidavit.— A judgment in attachment may be collaterally attacked on the ground that no affidavit was filed. Tacoma Grocery Co. *v.* Draham, 8 Wash. 263, 36 Pac. 31, 40 Am. St. Rep. 907. But see, *contra*, Sloan *v.* Mitchell, 84 Mo. 546.

to confer jurisdiction may be made at any stage of the proceedings;[62] but if the statute requires defendant to appear and plead before he can except to the sufficiency of the affidavit exceptions taken before he pleads are premature.[63] Ordinarily objections to the affidavit for irregularities cannot be raised for the first time on appeal.[64]

e. **Mode of Taking.** There is no rule of general application respecting the mode of objecting. Thus in some jurisdictions objection is taken by plea in abatement;[65] in others by a motion to quash,[66] or to dissolve the attachment,[67] or by an appeal;[68] but alleged defects will not be considered on mandamus,[69] nor can the sufficiency of the facts stated be tested by demurrer to a petition containing similar statements.[70]

10. **AIDER BY PLEADINGS.** An affidavit and complaint in the action may be read together for the purpose of determining whether or not the right to an attachment exists;[71] but if the affidavit must be sufficient of itself it cannot be

62. Bruce *v.* Cook, 6 Gill & J. (Md.) 345.

Laches.— A judgment rendered in an attachment suit founded on an affidavit not warranted by statute may be set aside for irregularity after the lapse of several years. Alexander *v.* Haden, 2 Mo. 228.

63. Heard *v.* Lowry, 5 Ark. 522; Delano *v.* Kennedy, 5 Ark. 457; Hynson *v.* Taylor, 3 Ark. 552.

64. McAbee *v.* Parker, 78 Ala. 573; Roy *v.* Union Mercantile Co., 3 Wyo. 417, 26 Pac. 996.

In Alabama, on appeal from proceedings commenced by attachment before a justice of the peace, objections for irregularities cannot be taken for the first time, though if presented to the justice they might have been fatal. Horton *v.* Miller, 84 Ala. 537, 4 So. 370; Reynolds *v.* Simpkins, 67 Ala. 378; Staggers *v.* Washington, 56 Ala. 225; Perry *v.* Hurt, 54 Ala. 285; Paulhaus *v.* Leber, 54 Ala. 91; Clough *v.* Johnson, 9 Ala. 425.

65. Johnston *v.* Hannah, 66 Ala. 127; Wright *v.* Snedecor, 46 Ala. 92; Kirkman *v.* Patton, 19 Ala. 32; Burt *v.* Parish, 9 Ala. 211; Jones *v.* Pope, 6 Ala. 154; Lowry *v.* Stowe, 7 Port. (Ala.) 483; Worrall *v.* Hare, 1 Colo. 91.

Where an attachment is merely auxiliary to an existent suit, if it is attempted to set it up as an original suit it can be defeated by a plea in abatement. Hounshell *v.* Phares, 1 Ala. 580.

Special affidavit.— Under a statute providing that if an attachment be issued to recover damages for a breach of contract, when the damages are not certain or liquidated, affidavit in writing of the special facts and circumstances must be made so as to enable the judge to determine the amount for which a levy must be made. The special affidavit does not perform the office of any part of the pleadings and is not to be construed by the strict rules applicable to pleadings. Its definiteness and sufficiency rest in the discretion of the judge and cannot be tested by plea in abatement or be a subject of revision on appeal. Bozeman *v.* Rose, 40 Ala. 212.

Only defects specified in the plea will be considered except perhaps those which go to the jurisdiction. Bell *v.* Allen, 76 Ala. 450.

Necessity of craving oyer.—A plea in abatement need not crave oyer of the affidavit, for the reason that it is a part of the record. Eddy *v.* Brady, 16 Ill. 306; Kincaid *v.* Francis, Cooke (Tenn.) 49.

66. Holloway *v.* Herryford, 9 Iowa 353; Hunt *v.* Collins, 4 Iowa 56; Carothers *v.* Click, Morr. (Iowa) 54; Anderson *v.* Johnson, 32 Gratt. (Va.) 558.

67. Bank of Commerce *v.* Latham, 8 Wyo. 316, 57 Pac. 184.

68. **Want of affidavit.**— Where judgment was rendered by default the want of a sufficient affidavit can be taken advantage of on appeal. Adams *v.* Merritt, 10 Ill. App. 275. **If there is enough in the affidavit** to give the court jurisdiction, and it errs in granting an attachment the remedy is by appeal. Allen *v.* Meyer, 7 Daly (N. Y.) 229. So if the affidavit does not state the requisite jurisdictional facts the determination as to its sufficiency will not be such a matter of discretion as to preclude consideration of the question on appeal. Steele *v.* Raphael, 13 N. Y. Suppl. 664, 37 N. Y. St. 623.

The finding of the clerk upon the sufficiency of the proof before issuing a writ of attachment is subject to review on appeal; but if the evidence adduced before him was admissible, and called for the exercise of his judgment on its weight, his decision ordinarily will not be disturbed. Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391.

Allegations regarded as true.— On appeal from an order denying a motion to vacate an attachment made upon the original papers the statements therein will be regarded as true. Ross *v.* Wigg, 34 Hun (N. Y.) 192, 6 N. Y. Civ. Proc. 268 note.

69. **Review of defects on mandamus.**—The defects in an affidavit for an attachment will not be reviewed by the supreme court in a mandamus proceeding to require the allowance of a motion to set aside service of an attachment. Nederlander *v.* Jennison, 55 Mich. 411, 21 N. W. 912.

70. Odom *v.* Shackleford, 44 Ala. 331; Holloway *v.* Herryford, 9 Iowa 353; Hunt *v.* Collins, 4 Iowa 56.

71. U. S. Capsule Co. *v.* Isaacs, 23 Ind. App. 533, 55 N. E. 832; Wirt *v.* Dinan, 44 Mo. App. 583; Hart *v.* Barnes, 24 Nebr. 782, 40 N. W. 322; Edick *v.* Green, 38 Hun

aided by allegations in the pleading,[72] or by process or papers in proceedings subsequently prepared or filed.[73] An affidavit to the effect that the allegations in the petition, which is defective, are true, cannot be aided by a subsequent amendment to the petition;[74] and where the affidavit and complaint are separate papers the complaint cannot be aided by the affidavit.[75]

11. Amendments — a. In General — (i) *Rule Stated.* As a general rule an affidavit which is defective in matters of form merely may be amended;[76] but defects of substance, such as the omission of jurisdictional matters or defective statements thereof, are incurable,[77] except where the right to amend has been

(N. Y.) 202; Dunnenbaum *v.* Schram, 59 Tex. 281; La Force *v.* Wear, etc., Dry Goods Co., 8 Tex. Civ. App. 572, 29 S. W. 75; Whitmore *v.* Wilson, 1 Tex. Unrep. Cas. 213.

72. Fisk *v.* French, 114 Cal. 400, 46 Pac. 161.

Reference to complaint.—If plaintiff's residence is not distinctly averred in the affidavit, or in the complaint in the action, a reference to a bond recited in the latter which states such residence will not supply the omission. Talcott *v.* American Credit Indemnity Co., 81 Hun (N. Y.) 577, 30 N. Y. Suppl. 1118, 63 N. Y. St. 256.

An unsworn statement of claim will not be considered by the court for the purpose of supplying fatal omissions in the affidavit. Hallowell *v.* Tenney Canning Co., 16 Pa. Super. Ct. 60.

Variance between affidavit and pleading.—If the statement of the christian name of one partner in the affidavit is dissimilar from the statement in the petition, there is such a variance as cannot be aided by reference to the petition, because the statements being contradictory it cannot be ascertained which is correct. Focke *v.* Hardeman, 67 Tex. 173, 2 S. W. 363.

73. Burgess *v.* Stitt, 12 How. Pr. (N. Y.) 401.

74. Avery *v.* Zander, 77 Tex. 207, 13 S. W. 971; Marx *v.* Abramson, 53 Tex. 264.

75. Jordan *v.* Frank, 1 N. D. 206, 46 N. W. 171.

76. *Alabama.*— Sloan *v.* Hudson, 119 Ala. 27, 24 So. 458; Richards *v.* Bestor, 90 Ala. 352, 8 So. 30; Flexner *v.* Dickerson, 65 Ala. 129; Paulhaus *v.* Leber, 54 Ala. 91; Sims *v.* Jacobson, 51 Ala. 186; Pearsoll *v.* Middlebrook, 2 Stew. & P. (Ala.) 406.

Arkansas.— Landfair *v.* Lowman, 50 Ark. 446, 9 S. W. 188; Sannoner *v.* Jacobson, 47 Ark. 31, 14 S. W. 458.

Colorado.— De Stafford *v.* Gartley, 15 Colo. 32, 24 Pac. 580.

Georgia.— Brumby *v.* Rickoff, 94 Ga. 429, 21 S. E. 232.

Illinois.— Roberts *v.* Dunn, 71 Ill. 46.

Kansas.— Moline Plow Co. *v.* Updyke, 48 Kan. 410, 29 Pac. 575; Burton *v.* Robinson, 5 Kan. 287.

Missouri.— Owens *v.* Johns, 59 Mo. 89.

Montana.— Muth *v.* Erwin, 14 Mont. 227, 36 Pac. 43.

New Jersey.— Corbit *v.* Corbit, 50 N. J. L. 363, 13 Atl. 178.

New York.— Buhl *v.* Ball, 41 Hun (N. Y.) 61; Richter *v.* Wise, 3 Hun (N. Y.) 398, 6 Thomps. & C. (N. Y.) 70; Furman *v.* Walter, 13 How. Pr. (N. Y.) 348.

North Carolina.— Palmer *v.* Bosher, 71 N. C. 291; Clark *v.* Clark, 64 N. C. 150.

Tennessee.— Lillard *v.* Carter, 7 Heisk. (Tenn.) 604.

Washington.— Nesqually Mill Co. *v.* Taylor, 1 Wash. Terr. 1.

West Virginia.— Goodman *v.* Henry, 42 W. Va. 526, 26 S. E. 528, 35 L. R. A. 847.

Bohn *v.* Zeigler, 44 W. Va. 402, 29 S. E. 983.

See 5 Cent. Dig. tit. "Attachment," § 323.

Amendments to affidavits, generally, see Affidavits, 2 Cyc. 33.

Application at chambers.— The application to amend may be made at chambers. Quinlan *v.* Danford, 28 Kan. 507; Wells *v.* Danford, 28 Kan. 487.

On appeal.— An insufficient affidavit made before a justice of the peace may be amended in the circuit court. Hackney *v.* Williams, 3 Mo. 455.

Who may make supplemental affidavit.— While a supplemental affidavit for an order of attachment should be filed by the party who makes the original affidavit such affidavit may be made by a third party who is a credible person. Lewis *v.* Bragg, 47 W. Va. 707, 35 S. E. 943.

77. *Alabama.*— Sloan *v.* Hudson, 119 Ala. 27, 24 So. 458; Knowles *v.* Steed, 79 Ala. 427; Flexner *v.* Dickerson, 65 Ala. 129; Shield *v.* Dothard, 59 Ala. 595; Sims *v.* Jacobson, 51 Ala. 186; Hall *v.* Brazleton, 46 Ala. 359; Hall *v.* Brazleton, 40 Ala. 406; Saunders *v.* Cavett, 38 Ala. 51; Johnson *v.* Hale, 3 Stew. & P. (Ala.) 331.

Colorado.— Skinner *v.* Beshoar, 2 Colo. 383.

Georgia.— Moore *v.* Neill, 86 Ga. 186, 12 S. E. 222.

Illinois.— Clark *v.* Roberts, 1 Ill. 285.

Maryland.— Blair *v.* Winston, 84 Md. 356, 35 Atl. 1101; Halley *v.* Jackson, 48 Md. 254.

Michigan.— Freer *v.* White, 91 Mich. 74, 51 N. W. 807.

Mississippi.— Cantrell *v.* Letwinger, 44 Miss. 437.

Missouri.— Owens *v.* Johns, 59 Mo. 89.

New Jersey.— Corbit *v.* Corbit, 50 N. J. L. 363, 13 Atl. 178.

New York.— Buhl *v.* Ball, 41 Hun (N. Y.) 61; Richter *v.* Wise, 3 Hun (N. Y.) 398, 6 Thomps. & C. (N. Y.) 70; Furman *v.* Walter, 13 How. Pr. (N. Y.) 348.

North Carolina.— Palmer *v.* Bosher, 71 N. C. 291.

Pennsylvania.— See Miller *v.* Smith, 2 Pearson (Pa.) 265, 34 Leg. Int. (Pa.) 68

extended by statute to matters of substance,[78] or where it has been held that statutory provisions permitting amendments generally in furtherance of justice extend the right in this respect.[79] In attachment proceedings the federal courts may grant amendments in cases where the state practice does not allow them and the decisions of the state courts respecting amendments are not binding on them when sitting in the same jurisdiction.[80]

(II) *Applications of Rule*—(A) *Formal Requisites.* In accordance with these general rules it has been decided that the omission of the venue may be supplied,[81] or a defect in the title of the cause remedied,[82] and the names of omitted parties plaintiff,[83] or of the individual members of a copartnership which institutes proceedings in its firm-name[84] inserted. Likewise where no question of identity arises the improper description of a defendant may be rectified by substituting his true name;[85] and while it has been held that a new defendant may be added[86] it has also been held that one of several defendants cannot be stricken out.[87] Errors in the date may be corrected[88] or an affidavit newly dated substituted for one erroneously post-dated,[89] and the omission of affiant to affix his signature[90] or

[*disapproving* Ferris *v.* Carlton, 8 Phila. (Pa.) 549].

South Carolina.—Addison *v.* Sujette, (S. C. 1897) 27 S. E. 631.

Tennessee.—Lillard *v.* Carter, 7 Heisk. (Tenn.) 604; McReynolds *v.* Neal, 8 Humphr. (Tenn.) 12.

Texas.—Marx *v.* Abramson, 53 Tex. 264.

West Virginia.—Bohn *v.* Zeigler, 44 W. Va. 402, 29 S. E. 983.

Wisconsin.—Slaughter *v.* Bevans, 1 Pinn. (Wis.) 348.

Wyoming.—Blyth, etc., Co. *v.* Swensen, 7 Wyo. 303, 51 Pac. 873.

See 5 Cent. Dig. tit. "Attachment," § 323.

In California under Cal. Code Civ. Proc. § 558, providing that a writ of attachment improperly or irregularly issued must be discharged, on motion of defendant, the affidavit on which such writ was issued is not amendable. Winters *v.* Pearson, 72 Cal. 553, 14 Pac. 304.

If the affidavit is required to be sufficient in itself and to authorize on its face the issue of an attachment it cannot be amended nor can defective statements therein be cured by additional proofs or affidavits. Marx *v.* Abramson, 53 Tex. 264; U. S. Baking Co. *v.* Bachman, 38 W. Va. 84, 18 S. E. 382.

78. Richards *v.* Bestor, 90 Ala. 352, 8 So. 30; Robinson *v.* Holt, 85 Ala. 596, 5 So. 350; Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695; Campbell *v.* Whetstone, 4 Ill. 361; Langworthy *v.* Waters, 11 Iowa 432; Bunn *v.* Pritchard, 6 Iowa 56; Graves *v.* Cole, 1 Greene (Iowa) 405.

If the right is confined to actions instituted after the passage of the act affidavits made in actions commenced prior to the enactment cannot be amended in this respect. Robinson *v.* Holt, 85 Ala. 596, 5 So. 350. See also Rosenthal *v.* Wehe, 58 Wis. 621, 17 N. W. 318, holding that the Wisconsin statute applied to actions pending at the time of its enactment.

79. Ladenburg *v.* Commercial Bank, 87 Hun (N. Y.) 269, 33 N. Y. Suppl. 821, 67 N. Y. St. 466; Furman *v.* Walter, 13 How. Pr. (N. Y.) 348; Penniman *v.* Daniel, 93 N. C. 332. But see Freer *v.* White, 91 Mich. 74, 51 N. W. 807.

80. Erstein *v.* Rothschild, 22 Fed. 61.

81. Avery *v.* Good, 114 Mo. 290, 21 S. W. 815; Rudolf *v.* McDonald, 6 Nebr. 163.

82. S. C. Herbst Importing Co. *v.* Hogan, 16 Mont. 384, 41 Pac. 135.

83. Shaw *v.* Brown, 42 Miss. 309.

A new plaintiff cannot be introduced into the cause in the stead of the one who originally instituted the action and proceedings. Fargo *v.* Cutshaw, 12 Ind. App. 392, 39 N. E. 532.

84. Sims *v.* Jacobson, 51 Ala. 186; Emerson *v.* Detroit Steel, etc., Co., 100 Mich. 127, 58 N. W. 659 [*explaining* Freer *v.* White, 91 Mich. 74, 51 N. W. 807]; Barber *v.* Smith, 41 Mich. 138, 1 N. W. 992.

Substitution of corporation for firm.—Proceedings commenced by plaintiffs as copartners cannot be amended by substituting a corporation as plaintiff, although the new plaintiff be composed exclusively of the original plaintiffs. Fargo *v.* Cutshaw, 12 Ind. App. 392, 39 N. E. 532.

85. *Ex p.* Nicrosi, 103 Ala. 104, 15 So. 507; Hall *v.* Thorburn, 61 N. C. 158; Swezey *v.* Brown, 10 Wkly. Notes Cas. (Pa.) 207. See also Sims *v.* Jacobson, 51 Ala. 186.

86. McKissack *v.* Witz, 120 Ala. 412, 25 So. 21.

A bill for an attachment, defective in omitting a necessary party, may be amended to cure the defect. Alston *v.* Sharp, 2 Lea (Tenn.) 515.

87. Blair *v.* Winston, 84 Md. 356, 35 Atl. 1101; Halley *v.* Jackson, 48 Md. 254.

88. Anderson *v.* Kanawha Coal Co., 12 W. Va. 526.

89. Drew *v.* Dequindre, 2 Dougl. (Mich.) 93.

90. Savage *v.* Atkins, 124 Ala. 378, 27 So. 514; Watts *v.* Womack, 44 Ala. 605; Stout *v.* Folger, 34 Iowa 71, 11 Am. Rep. 138; West Tennessee Agricultural, etc., Assoc. *v.* Madison, 9 Lea (Tenn.) 407; Watt *v.* Carnes, 4 Heisk. (Tenn.) 532; Scott *v.* White, Thomps. Cas. (Tenn.) 38. See also Ruthe *v.* Green Bay, etc., R. Co., 37 Wis. 344. *Contra,* Cohen

a defective verification[91] may be amended. If the contents of the affidavit be duly sworn to, but the officer who administered the oath neglects to add his certificate or signature he may be permitted to do so *nunc pro tunc*;[92] and an insufficient or defective authentication of the certificate of an officer acting without the jurisdiction may be likewise amended,[93] as may an affidavit improperly sworn to before the attorney of record;[94] but an affidavit taken before a person having no authority to administer the oath is an absolute nullity and cannot be validated.[95]

(B) *Capacity of Plaintiff.* A receiver may amend by adding an allegation respecting his authority to sue,[96] and a corporation may aver its corporate character which it failed to do originally.[97]

(C) *Capacity of Affiant.* An affidavit by an agent or attorney which fails to disclose his relation to plaintiff may be so amended as to show that fact.[98]

(D) *Cause or Nature of Action.* There are a number of decisions which accord the right to amend by supplying omitted statements as to the cause of action or the nature of the claim,[99] but it seems that amendment by way of substitution of one cause of action for another is not permissible.[1]

(E) *Claim or Indebtedness* — (1) EXISTENCE — RIGHT OF RECOVERY. An affidavit defective because not alleging an existing debt or demand due to plaintiff which he is entitled to recover is not the subject of amendment;[2] but an

v. Manco, 28 Ga. 27; Sedalia Third Nat. Bank *v.* Garton, 40 Mo. App. 113.

91. Lowenstein *v.* Monroe, 52 Iowa 231, 3 N. W. 51; Shaffer *v.* Sundwall, 33 Iowa 579.

92. *Alabama.*— Hyde *v.* Adams, 80 Ala. 111.

Arkansas.— Fortenheim *v.* Claflin, 47 Ark. 49, 14 S. W. 462.

Colorado.— Skinner *v.* Beshoar, 2 Colo. 383.

Iowa.— Stout *v.* Folger, 34 Iowa 71, 11 Am. Rep. 138.

Louisiana.— State *v.* Downing, 48 La. Ann. 1420, 20 So. 907.

Maryland.— Farrow *v.* Hayes, 51 Md. 498.

Mississippi.— Boisseau *v.* Kahn, 62 Miss. 757.

Pennsylvania.— Simon *v.* Johnson, 7 Kulp (Pa.) 166; Hart *v.* Jones, 6 Kulp (Pa.) 326.

Contra, Birdsong *v.* McLaren, 8 Ga. 521; Sedalia Third Nat. Bank *v.* Garton, 40 Mo. App. 113.

See 5 Cent. Dig. tit. "Attachment," § 328.

Administration of oath not apparent.— A certificate of the clerk, intended as an affidavit, which does not state that plaintiff was sworn and contains no jurat, cannot be cured by a subsequent order in which it appears that the clerk, having been sworn, states that plaintiff did in fact make oath to the matters stated in the certificate. Cosner *v.* Smith, 36 W. Va. 788, 15 S. E. 977.

The affidavit cannot be amended as against subsequent attachment creditors, although it will not vitiate the proceedings as between the debtor and creditor. Garriott *v.* Tiller, 13 Ky. L. Rep. 96.

A jurat post-dated by mistake may be corrected. Arkansas City Lumber Co. *v.* Scott, 5 Kan. App. 636, 47 Pac. 545.

An indorsement of satisfaction could not be made *nunc pro tunc* under the territorial laws. Slaughter *v.* Bevans, 1 Pinn. (Wis.) 348.

93. Lawton *v.* Kiel, 51 Barb. (N. Y.) 30, 34 How. Pr. (N. Y.) 465.

94. Yoakam *v.* Howser, 37 Kan. 130, 14 Pac. 438; Swearingen *v.* Howser, 37 Kan. 126, 14 Pac. 436; Dobry *v.* Western Mfg. Co., 57 Nebr. 228, 77 N. W. 656; Horkey *v.* Kendall, 53 Nebr. 522, 73 N. W. 953, 68 Am. St. Rep. 623.

95. Greenvault *v.* Farmers', etc., Bank, 2 Dougl. (Mich.) 498.

96. Muth *v.* Erwin, 14 Mont. 227, 36 Pac. 43.

97. Rosenberg *v.* Claflin Co., 95 Ala. 249, 10 So. 521.

98. Tracy *v.* Gunn, 29 Kan. 508; Cassidy *v.* Fleak, 20 Kan. 54; Kirksville Sav. Bank *v.* Spangler, 59 Mo. App. 172.

Affiant described as plaintiff.—A clerical error in naming plaintiff as affiant in the body of the affidavit, which was signed by his attorney, may be amended. Dunn *v.* Drummond, 4 Okla. 461, 51 Pac. 656.

99. *Illinois.*— Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695.

Montana.— S. C. Herbst Importing Co. *v.* Hogan, 16 Mont. 384, 41 Pac. 135.

New York.— Ladenburg *v.* Commercial Bank, 87 Hun (N. Y.) 269, 33 N. Y. Suppl. 821, 67 N. Y. St. 466.

North Carolina.—Cook *v.* New York Corundum Co., 114 N. C. 617, 19 S. E. 664.

West Virginia.— Chapman *v.* Pittsburg, etc., R. Co., 26 W. Va. 299.

Contra, Staggers *v.* Washington, 56 Ala. 225; Zerega *v.* Benoist, 7 Rob. (N. Y.) 199, 33 How. Pr. (N. Y.) 129.

1. Boarman *v.* Patterson, 1 Gill (Md.) 372; Jaffray *v.* Wolf, 1 Okla. 312, 33 Pac. 945; Sage *v.* Rudderow, 1 Pa. Co. Ct. 373.

2. Mentzer *v.* Ellison, 7 Colo. App. 315, 43 Pac. 464; Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391.

Ownership of claims.— If plaintiff at the date of the issue of the attachment does not

affidavit ambiguous because stating a present or a future indebtedness may be amended by striking out the allegation respecting the maturity of the debt in the future;[3] and such appropriate amendments may be made to an affidavit based on a debt actually due as will authorize an attachment to secure a debt not yet matured[4] or show that the debt is due in part only[5] or that the indebtedness has become absolute pending the action.[6]

(2) Amount of Claim. When inadvertently omitted the amount of the indebtedness claimed may be shown by a subsequent amendment or new affidavit,[7] or the affidavit may be amended where the allegations relative thereto are uncertain and indefinite or contain erroneous statements made through mistake or inadvertence.[8]

(F) *Grounds* — (1) In General. An affidavit which fails to assign any statutory cause for an attachment cannot be amended in that respect,[9] but an amendment which merely makes the cause of action alleged in the petition more specific,[10] or the filing of a supplemental affidavit as to additional facts which were not known at the time of filing the original affidavit,[11] is permissible to show the ground of attachment. An affidavit which is uncertain and ambiguous because stating separate grounds in the disjunctive is amendable.[12]

(2) Addition of New Grounds. The preponderance of authority seems to hold that a new ground for attachment may be substituted or added by way of amendment.[13] Even where otherwise permissible, however, it has been held that

own the claim, he cannot afterward, by purchasing such claim, assert it by amendment or otherwise, against the property seized. John V. Farwell Co. *v.* Wright, 38 Nebr. 445, 56 N. W. 984. Where an action is brought by the equitable owner of the chose in action sued on, and the declaration is amended by making the legal owner plaintiff, the affidavit stating the indebtedness to be to the equitable owner need not be changed. Tully *v.* Herrin, 44 Miss. 626.

3. Tommey *v.* Gamble, 66 Ala. 469.

4. Wadsworth *v.* Cheeney, 13 Iowa 576; Baker Wire Co. *v.* Kingman, 44 Kan. 270, 24 Pac. 476.

5. Dalsheimer *v.* McDaniel, 69 Miss. 339, 12 So. 338.

6. Pride *v.* Wormwood, 27 Iowa 257.

7. Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695; Burnett *v.* McCluey, 92 Mo. 230, 4 S. W. 694 [*overruling* Burnett *v.* McCluey, 78 Mo. 676; Bray *v.* McClury, 55 Mo. 128].

8. *Alabama.*— Dittman Boot, etc., Co. *v.* Mixon, 120 Ala. 206, 24 So. 847.

Colorado.— Leppel *v.* Beck, 2 Colo. App. 390, 31 Pac. 185.

Montana.— Newell *v.* Whitwell, 16 Mont. 243, 40 Pac. 866.

New York.— Sulzbacher *v.* Cawthra, 14 Misc. (N. Y.) 545, 36 N. Y. Suppl. 8, 70 N. Y. St. 766.

Pennsylvania.— Long *v.* Goodwin, 5 Pa. Dist. 335, 26 Pittsb. Leg. J. N. S. (Pa.) 449.

Wisconsin.— Maguire *v.* Bolen, 94 Wis. 48, 68 N. W. 408.

See 5 Cent. Dig. tit. "Attachment," § 333.

Indebtedness arising during pendency of action.— The attachment law of Wisconsin permits amendments only to state facts existing at the time of making the affidavit and does not permit an omnibus affidavit to cover any indebtedness that may come into existence between the parties during the pendency of the litigation. Oconto Co. *v.* Esson, (Wis. 1901) 87 N. W. 855.

9. Mentzer *v.* Ellison, 7 Colo. App. 315, 43 Pac. 464. But see Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695.

10. Gourley *v.* Carmody, 23 Iowa 212.

11. Sommers *v.* Allen, 44 W. Va. 120, 28 S. E. 787; Goodman *v.* Henry, 42 W. Va. 526, 26 S. E. 528, 35 L. R. A. 847.

Necessity of stating time of knowledge.— The supplemental affidavit need not expressly state that the additional facts came to affiant's knowledge since the first affidavit. Miller *v.* Zeigler, 44 W. Va. 484, 29 S. E. 981, 67 Am. St. Rep. 777.

12. Bishop *v.* Fennerty, 46 Miss. 570; Salmon *v.* Mills, 49 Fed. 333, 4 U. S. App. 101, 1 C. C. A. 278 (construing Arkansas statute).

13. *Illinois.*— Bryant *v.* Simoneau, 51 Ill. 324.

Iowa.— Emerson *v.* Converse, 106 Iowa 330, 76 N. W. 705; Citizens' Nat. Bank *v.* Converse, 105 Iowa 669, 75 N. W. 506.

Kentucky.— Allen *v.* Brown, 4 Metc. (Ky.) 342 [*overruling* Pool *v.* Webster, 3 Metc. (Ky.) 278].

New York.— Thames, etc., Mar. Ins. Co. *v.* Dimick, 22 N. Y. Suppl. 1096, 51 N. Y. St. 41.

Oklahoma.— Jaffray *v.* Wolf, 4 Okla. 303, 47 Pac. 496.

West Virginia.—Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

United States.— Fitzpatrick *v.* Flannagan, 106 U. S. 648, 1 S. Ct. 369, 27 L. ed. 211 (construing Mississippi statute); Spreen *v.* Delsignore, 94 Fed. 71 (construing Kentucky statute).

Contra, Brookmire *v.* Rosa, 34 Nebr. 227, 51 N. W. 840. And see Sherrill *v.* Bench, 37 Ark. 560.

an amendment of this character which may be prejudicial to defendant or to others will not be permitted.[14]

(3) Fraudulent Disposition or Removal of Property. An affidavit charging a belief that defendant is about to remove his property may be amended by further charging a fraudulent intent,[15] or by supplying clerical omissions to state a fraudulent intention to dispose of the property and that the property belonged to the debtor;[16] and an affidavit in the language of the statute alleging fraudulent intent in disposing of property may be amended by setting forth the facts relied on.[17] An amended petition must show the present existence of this ground for attachment.[18]

(4) Removal From Jurisdiction. An affidavit which does not substantially comply with the statutory provisions respecting the removal of defendant from the state or other prescribed place is defective in substance and cannot be amended,[19] although an allegation that the debtor is about to remove from the state may be amended by stating in addition, or other political division within the state.[20]

(5) Non-Residence. While it has been held that an affidavit which insufficiently states the non-residence of defendant cannot be amended,[21] amendments have been permitted to an affidavit alleging non-residence on information and belief [22] and it seems that insufficiency in this respect may be cured by an affidavit read on behalf of defendant on a motion to vacate the attachment;[23] and where plaintiff is required to ascertain the place of defendant's residence if possible an amendment stating the place of residence may be properly made.[24]

(G) *Negation of Improper Motive.* Failure to state that the attachment is not sued out for the purpose of vexing or harassing defendant is a substantial defect which cannot be supplied by amendment [25]

(H) *Justice of Claim.* When such an averment is required the omission

When not deemed amended on appeal.— An affidavit will not be considered on appeal as amended to conform to proof of a new ground of attachment not existing at the time the original attachment was sued out, where there was no offer to amend at the trial and the affidavit was not treated as amended. Blass *v.* Lee, 55 Ark. 329, 18 S. W. 186.

14. **Amendment at trial.**— Refusal to permit an amendment by alleging an additional ground of attachment, to stand as a pleading, where not filed until after the jury was impaneled, is not an abuse of sound discretion. Emerson *v.* Converse, 106 Iowa 330, 76 N. W. 705.

Necessity of new bond.— A motion to file an additional affidavit in attachment, setting up grounds other than those contained in the original affidavit, is properly refused in default of an offer to file a new bond conditioned for prosecuting with effect the additional causes set forth. Page *v.* Dillon, 61 Ill. App. 282.

Insufficiency of original affidavit.— Where the attached property was purchased by plaintiff on a sale under an attachment procured on grounds which had no existence in fact, it was held proper to refuse to allow him to set up as an additional ground that defendant then had no property subject to execution. Carter *v.* James, 15 Ky. L. Rep. 127.

15. Musgrove *v.* Mott, 90 Mo. 107 2 S. W. 214.

16. Stewart *v.* Cabanne, 16 Mo. App. 517.

17. Josephi *v.* Mady Clothing Co., 13 Mont. 195, 33 Pac. 1.

18. Bundy *v.* McKee, 29 Iowa 253; Wadsworth *v.* Cheeny, 10 Iowa 257.

19. Brown *v.* McCluskey, 26 Ga. 577; Lillard *v.* Carter, 7 Heisk. (Tenn.) 604.

20. Brumby *v.* Rickoff, 94 Ga. 429, 21 S. E. 232.

21. Freer *v.* White, 91 Mich. 74, 51 N. W. 807.

In Pennsylvania an affidavit for the issue of a foreign attachment is analogous to an affidavit to hold to bail and cannot be aided by a supplemental or amended affidavit. Jacobs *v.* Tichenor, 27 Wkly. Notes Cas. (Pa.) 35; Mylert *v.* White, 1 Wkly. Notes Cas. (Pa.) 626.

Continuing non-residence.—An attachment issued at the commencement of an action is not sustained by an amended petition filed some time afterward, and only showing defendant to be a non-resident at the time of the filing. Crouch *v.* Crouch, 9 Iowa 269.

22. Booth *v.* Rees, 26 Ill. 45; Clarke Banking Co. *v.* Wright, 37 Nebr. 382, 55 N. W. 1060.

23. Herman *v.* Bailey, 20 Misc. (N. Y.) 94, 45 N. Y. Suppl. 88.

24. Hogue *v.* Corbit, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232.

25. Hall *v.* Brazleton, 46 Ala. 359; Hall *v.* Brazleton, 40 Ala. 406; Saunders *v.* Cavett, 38 Ala. 51.

or the insufficiency of an averment that the claim is just may be supplied or remedied.[26]

(I) *Danger of Loss of Debt.* A failure to aver that plaintiff is in danger of losing his claim unless an attachment issue, or an allegation faulty in that respect is amendable.[27]

(J) *Possession of Attachable Goods.* A clerical error in stating the possession by the debtor of goods exempt from execution is amendable.[28]

b. Time of Application. In some states the application to amend may be made after a motion to dissolve or quash the attachment,[29] and before the affidavit is adjudged defective,[30] but an amendment will not be permitted after a plea in abatement is sustained.[31] Where on motion to dissolve an attachment for insufficiency of the affidavit the court is required to give plaintiff an opportunity to remedy the defects, it may order the dissolution of the attachment unless a proper affidavit is filed within a designated time,[32] which should be reasonable.[33]

c. Necessity of New Verification. Where an affidavit or petition is amended in a material respect it should be sworn to anew[34] or new affidavits should be filed,[35] but if the amendment is no more than a new statement of the same cause of action the petition need not be resworn to.[36]

d. Effect of Amendment. The general rule deducible from the authorities is that as between the creditor and the debtor the amendment of the affidavit will not affect the lien obtained under the affidavit originally made and filed;[37] but as to subsequent attaching creditors or lienors, if the amendment is one of substance or prejudice will result, liens obtained by them intermediate the original levy and the amendment will be entitled to priority,[38] although where the effect is not jurisdictional it has been held that the amendment will relate back even as to

26. Moore *v.* Harrod, 101 Ky. 248, 19 Ky. L. Rep. 406, 40 S. W. 675; Bailey *v.* Beadles, 7 Bush (Ky.) 383; Allen *v.* Brown, 4 Metc. (Ky.) 342 [*overruling* Pool *v.* Webster, 3 Metc. (Ky.) 278]; Burnett *v.* McCluey, 92 Mo. 230, 4 S. W. 694 [*overruling* Burnett *v.* McCluey, 78 Mo. 676; Bray *v.* McClury, 55 Mo. 128].

In West Virginia the omission from the clause of the words "justly" or "justly entitled to recover" is fatal and cannot be cured by amendment. Sommers *v.* Allen, 44 W. Va. 120, 28 S. E. 787.

27. Norton *v.* Flake, 36 Mo. App. 698.

28. Bunn *v.* Pritchard, 6 Iowa 56.

29. Beecher *v.* James, 3 Ill. 462; Moline, etc., Co. *v.* Curtis, 38 Nebr. 520, 57 N. W. 161; Clarke Banking Co. *v.* Wright, 37 Nebr. 382, 55 N. W. 1060; Struthers *v.* McDowell, 5 Nebr. 491. *Contra*, Kelly *v.* Bently, 9 La. Ann. 586.

When a plea in abatement alleging formal defects is filed an amendment may be permitted before consideration of the plea. Simpson *v.* East, 124 Ala. 293, 27 So. 436.

30. Under Mo. Rev. Stat. § 445, providing that when an affidavit is adjudged insufficient plaintiff may amend, plaintiff need not wait until the affidavit is held defective but may amend in advance. Musgrove *v.* Mott, 90 Mo. 107, 2 S. W. 214. See Winter *v.* Kirby, 68 Ark. 471, 60 S. W. 34, where the amendment was made nearly two years after the issue of the attachment.

31. Sydnor *v.* Chambers, Dall. (Tex.) 601.

32. Wells *v.* Danford, 28 Kan. 487; Henderson *v.* Drace, 30 Mo. 358; Claflin *v.* Hoover, 20 Mo. App. 314.

33. Claflin *v.* Hoover, 20 Mo. App. 314.

34. Queen *v.* Griffith, 4 Greene (Iowa) 113; Atlantic Bank *v.* Frankford, 61 N. C. 199.

35. Inman *v.* Allport, 65 Ill. 540.

36. Hamill *v.* Phenicie, 9 Iowa 525.

37. Bamberger *v.* Moayon, 91 Ky. 517, 13 Ky. L. Rep. 102, 16 S. W. 276; Bell *v.* Hall, 2 Duv. (Ky.) 288; Moses *v.* Rountree, 11 Ky. L. Rep. 438; Cook *v.* New York Corundum Co., 114 N. C. 617, 19 S. E. 664. To same effect see Breene *v.* Merchants, etc., Bank, 11 Colo. 97, 17 Pac. 280.

The amendment of the complaint by the addition of a new ground will not affect the lien of the attachment. *Ex p.* Chase, (S. C. 1901) 38 S. E. 718.

38. Covington First Nat. Bank *v.* D. Kiefer Milling Co., 95 Ky. 97, 15 Ky. L. Rep. 457, 23 S. W. 675; Bell *v.* Hall, 2 Duv. (Ky.) 288; Harbour-Pitt Shoe Co. *v.* Dixon, 22 Ky. L. Rep. 1169, 60 S. W. 186; Meyer *v.* Ruff, 13 Ky. L. Rep. 254, 16 S. W. 84; Gathright *v.* McNeil, 4 Ky. L. Rep. 907, 5 Ky. L. Rep. 165; Greenvault *v.* Farmers,' etc., Bank, 2 Dougl. (Mich.) 498; Kendrick *v.* Mason, (Tenn. Ch. 1901) 62 S. W. 359; Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791. And see Goodman *v.* Henry, 42 W. Va. 526, 26 S. E. 528, 35 L. R. A. 847, where the court divided on this question.

An amendment increasing amount of plaintiff's claim made after the levy will not affect the rights of another creditor who levied on the same property prior to the amendment. Maguire *v.* Bolen, 94 Wis. 48, 68 N. W. 408.

subsequent attachment creditors.[39] However, if the original affidavit was sufficient an unnecessary amendment is without prejudice.[40]

E. Bond to Procure Attachment — 1. Necessity of — a. In General. The statutes authorizing attachment usually require, as a condition to the issue of the writ, that a bond shall be given to protect defendant from the injury of a wrongful attachment.[41] When so required it is jurisdictional and cannot be dispensed with,[42] and it must precede the issue of the writ, because jurisdiction does not attach until the bond is given.[43] The requirement may, however, be merely

39. Coyle Mercantile Co. *v.* Nix, 7 Okla. 267, 54 Pac. 469; Symms Grocer Co. *v.* Burnham, 6 Okla. 618, 52 Pac. 918 (where the amendment consisted in adding the name of a copartner who had been omitted from the original attachment).

40. Fremd *v.* Ireland, 17 Ky. L. Rep. 1140, 33 S. W. 89; Ask *v.* Armstrong, 9 S. D. 265, 68 N. W. 743.

There need not be a new writ where an omission to state that the claim is not due is supplied. Wadsworth *v.* Cheeney, 13 Iowa 576.

41. Smith *v.* Mulhern, 57 Miss. 591; Fox *v.* Mackenzie, 1 N. D. 298, 47 N. W. 386; Rothermel *v.* Marr, 98 Pa. St. 285; Cosner *v.* Smith, 36 W. Va. 788, 15 S. E. 977.

Indemnity of officer.— The attachment bond is for indemnity of the officer as well as defendant under Tenn. Code, § 3605, which authorizes the officer, against whom a judgment for levying under a wrongful attachment has been rendered, to take judgment by motion against plaintiff on his attachment bond. Shaw *v.* Holmes, 4 Heisk. (Tenn.) 692.

Attachment bonds are assignable, as also are claims arising under them. State *v.* Heckart, 49 Mo. App. 280.

42. *Alabama.*— Smith *v.* Moore, 35 Ala. 76; *Ex p.* Robbins, 29 Ala. 71; McGown *v.* Sprague, 23 Ala. 524.

Arkansas.—Delano *v.* Kennedy, 5 Ark. 457.

Connecticut.— Starr *v.* Lyon, 5 Conn. 538.

Georgia.— Heard *v.* Illinois Nat. Bank, (Ga. 1901) 40 S. E. 266; English *v.* Reed, 97 Ga. 477, 25 S. E. 325; Rogers *v.* E. M. Birdsall Co., 72 Ga. 133; Dobbs *v.* Justices Murray County Inferior Ct., 17 Ga. 624; Birdsong *v.* McLaren, 8 Ga. 521; Levy *v.* Millman, 7 Ga. 167; Kahn *v.* Herman, 3 Ga. 266.

Indiana.— Cousins *v.* Brashier, 1 Blackf. (Ind.) 85; Louisville, etc., R. Co. *v.* Lake, 5 Ind. App. 450, 32 N. E. 590.

Iowa.— Eads *v.* Pitkin, 3 Greene (Iowa) 77.

Kansas.— Ballinger *v.* Lantier, 15 Kan. 608.

Kentucky.— Kleine *v.* Nie, 88 Ky. 542, 11 Ky. L. Rep. 583, 11 S. W. 590; Anderson *v.* Sutton, 2 Duv. (Ky.) 480; Kerr *v.* Smith, 5 B. Mon. (Ky.) 552; Worthington *v.* Damarin, 5 Ky. L. Rep. 684.

Louisiana.— U. S. *v.* Murdock, 18 La. Ann. 305, 89 Am. Dec. 651; Roquest *v.* Steamer B. E. Clarke, 12 La. Ann. 300.

Mississippi.— Ford *v.* Hurd, 4 Sm. & M. (Miss.) 683; Ford *v.* Woodward, 2 Sm. & M. (Miss.) 260; Cornell *v.* Rulon, 3 How. (Miss.) 54.

Minnesota.— Blake *v.* Sherman, 12 Minn. 420.

New York.— Bennett *v.* Brown, 4 N. Y. 254; Kelly *v.* Archer, 48 Barb. (N. Y.) 68; Campbell *v.* Conner, 41 N. Y. Super. Ct. 459; Homan *v.* Brinckerhoff, 1 Den. (N. Y.) 184.

North Carolina.—State Bank *v.* Hinton, 12 N. C. 397.

South Carolina.— National Exch. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028; Ford *v.* Rogers, 12 Rich. (S. C.) 385; Dillon *v.* Watkins, 2 Speers (S. C.) 445.

Tennessee.— Alabama Bank *v.* Fitzpatrick, 4 Humphr. (Tenn.) 311; Smith *v.* Story, 4 Humphr. (Tenn.) 168.

Texas.— Briggs *v.* Smith, 13 Tex. 269.

Wisconsin.— Lederer *v.* Rosenthal, 99 Wis. 235, 74 N. W. 971; Gowan *v.* Hanson, 55 Wis. 341, 13 N. W. 238.

See 5 Cent. Dig. tit. "Attachment," § 351.

Giving of bond presumed.— Although no bond could be found in the clerk's office, a magistrate, having issued an attachment, was presumed to have done his duty in requiring a bond as a condition thereof, so as to uphold the lien of the attachment as against judgments subsequently confessed. Kincaid *v.* Neall, 3 McCord (S. C.) 201. And on review, if the record does not show that a bond was not given, the giving of a bond may be presumed. Wight *v.* Warner, 1 Dougl. (Mich.) 384. See also Gribble *v.* Ford, (Tenn. Ch. 1898) 52 S. W. 1007.

New party — New bond.— The addition by amendment of a new party defendant to a foreign attachment necessitates the giving of a new bond. Baldwin *v.* Ferguson, 35 Ill. App. 393; Stein *v.* Bowers, 2 Wkly. Notes Cas. (Pa.) 542.

A second writ requires a new bond where the terms of the bond relate only to the first writ, for the surety is bound only for damages resulting from the first writ. Erwin *v.* Commercial, etc., Bank, 12 Rob. (La.) 227. But an alias writ after death of plaintiff and revivor in the name of his executor does not require a new bond. Rheubottom *v.* Sadler, 19 Ark. 491.

Depositing a sum of money equal to the amount of the required bond was held not to be a compliance with the statute. Bate *v.* McDowell, 48 N. Y. Super. Ct. 219.

43. *Arkansas.*— Kellogg *v.* Miller, 6 Ark. 468; Didier *v.* Galloway, 3 Ark. 501.

California.— Benedict *v.* Bray, 2 Cal. 251, 56 Am. Dec. 332.

directory, in which case a failure of compliance will not avoid the levy,[44] and failure to give an attachment bond has been held a mere irregularity of which defendant alone could take advantage, the attachment being otherwise valid.[45]

b. When Not Required. No bond need be given where none is required, or where it is expressly dispensed with[46] — as in case of a branch writ issued to another county,[47] the substitution of a pauper's oath,[48] a non-resident foreign corporation defendant,[49] an attachment by the state,[50] and in Maryland in case of a claim for liquidated damages.[51]

2. Requisites — a. The Form[52] — (I) *Following Statute* — (A) *In General.*

Georgia.—Bailey *v.* Clay, 79 Ga. 600, 7 S. C. 258; Enneking *v.* Clay, 79 Ga. 598, 7 S. E. 257; Clay *v.* Tapp, 79 Ga. 596, 7 S. E. 256; Rogers *v.* E. M. Birdsall Co., 72 Ga. 133; Levy *v.* Millman, 7 Ga. 167.

Indiana.— Root *v.* Monroe, 5 Blackf. (Ind.) 594.

Kentucky.— Hucheson *v.* Ross, 2 A. K. Marsh. (Ky.) 349; Lynn *v.* Stark, 6 Ky. L. Rep. 586.

Missouri.— Jasper County *v.* Chenault, 38 Mo. 357; Stevenson *v.* Robbins, 5 Mo. 18.

South Carolina.— Perminter *v.* McDaniel, 1 Hill (S. C.) 267, 26 Am. Dec. 179.

Texas.— Osborn *v.* Schiffer, 37 Tex. 434.

West Virginia.—Cosner *v.* Smith, 36 W. Va. 788, 15 S. E. 977.

Wisconsin.— Gowan *v.* Hanson, 55 Wis. 341, 13 N. W. 238.

United States.— Bradley *v.* Kroft, 19 Fed. 295, construing Wisconsin statute.

See also *infra*, VIII, B, 1, a; and 5 Cent. Dig. tit. "Attachment," § 360.

Under the Wisconsin statute, the giving of a bond is not essential to a valid issue of the writ, but is essential to its execution. Hubbard *v.* Haley, 96 Wis. 578, 71 N. W. 1036.

The writ and bond being of the same date, in the absence of evidence to the contrary, it will be presumed that the bond preceded the writ (Reed *v.* Kentucky Bank, 5 Blackf. (Ind.) 227; McKenzie *v.* Buchan, 1 Nott & M. (S. C.) 205); and this presumption is not overcome by a recital in the bond that the plaintiffs "have this day sued out an attachment" (Wright *v.* Ragland, 18 Tex. 289. *Contra*, Summers *v.* Glancey, 3 Blackf. (Ind.) 361, holding that in case of such recital parol evidence is not admissible to prove that the bond preceded the writ. Hucheson *v.* Ross, 2 A. K. Marsh. (Ky.) 349).

Omission to file bond before issue of writ, when no injury results, is no ground for dissolving the attachment. Augusta Bank *v.* Conrey, 28 Miss. 667; Wheeler *v.* Slavens, 3 Sm. & M. (Miss.) 623; Millbank *v.* Broadway Bank, 3 Abb. Pr. N. S. (N. Y.) 223.

44. Jones *v.* Ealer, 1 Ohio Dec. (Reprint) 385, 8 West. L. J. 500, which holds that an attachment without security for costs is good, and that the officer serving the writ may be liable.

45. Austin *v.* Goodbar Shoe Co., 60 Ark. 444, 30 S. W. 888; O'Farrell *v.* Stockman, 19 Ohio St. 296; Wigfall *v.* Byne, 1 Rich. (S. C.) 412; Shaw *v.* Holmes, 4 Heisk. (Tenn.) 692.

As to waiver by defendant see *infra*, VII, E, 2, f.

46. Kenefick *v.* Caulfield, 88 Va. 122, 13 S. E. 348.

47. Simpson *v.* East, 124 Ala. 293, 27 So. 436.

48. Wiley *v.* Bennett, 9 Baxt. (Tenn.) 581; Barber *v.* Denning, 4 Sneed (Tenn.) 266.

A pauper's oath taken before a justice of the peace has been held proper in a suit instituted in the circuit court. Phipps *v.* Burnett, 96 Tenn. 175, 33 S. W. 925 [*overruling* Graham *v.* Caldwell, 8 Baxt. (Tenn.) 69].

49. Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911; Simon *v.* Stetter, 25 Kan. 155; Kerr *v.* Smith, 5 B. Mon. (Ky.) 552; Baird *v.* Georgia Pac. R. Co., (Miss. 1893) 12 So. 547; Grehe *v.* Jones, 15 Nebr. 312, 18 N. W. 81.

A discrimination against non-residents is constitutional.— A statute dispensing with a bond for attachment against non-residents and requiring it in case of attachment against residents is not open to the objection that it deprives the non-resident of his property without due process of law, that it denies him the equal protection of the laws, or that it denies equal privileges and immunities to citizens of other states. Olmstead *v.* Rivers, 9 Nebr. 234, 2 N. W. 366; Marsh *v.* Steele, 9 Nebr. 96, 1 N. W. 869, 31 Am. Rep. 406; Cook *v.* Scott, 8 Ohio S. & C. Pl. Dec. 586; Central L. & T. Co. *v.* Campbell Commission Co., 173 U. S. 84, 43 L. ed. 623.

Some of defendants residents.— If all of the defendants against whom the attachment issues are non-residents, a bond is not necessary, although some of the other defendants are residents. Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911.

50. Renkert *v.* Elliott, 11 Lea (Tenn.) 235.

Exemption of the state is constitutional.— Such a provision does not violate the requirement of "due process of law," or any provision of the state or federal constitution. *Ex p.* Macdonald, 76 Ala. 603.

The United States, when plaintiff in a civil action, need not give the usual attachment bond. U. S. *v.* Ottman, 3 MacArthur (D. C.) 73.

The city and county of San Francisco, exempted by Cal. Code Civ. Proc. § 1058, from the necessity of giving security in a civil action, need not give a bond to have an attachment in an action where it is plaintiff. Morgan *v.* Menzies, 60 Cal. 341.

51. Dirickson *v.* Showell, 79 Md. 49, 28 Atl. 896.

52. For forms of attachment bonds in whole, in part, or in substance see the following cases:

The statute requiring an attachment bond necessarily describes the kind of bond required in many of its particulars. It should be consulted and closely followed,[53] and a failure to comply with such requirements is fatal to the attachment,[54] unless the omission be only as to requirements which are not jurisdictional or mandatory and therefore constitute mere irregularities that may be cured or waived.[55]

(B) *Substantial Compliance.* A substantial compliance is, however, sufficient, although the exact words of the statute be not followed,[56] and no condition which

California.— Cahen *v.* Mahoney, (Cal. 1886) 12 Pac. 300; Smith *v.* Fargo, 57 Cal. 157; Frankel *v.* Stern, 44 Cal. 168.

Illinois.— Love *v.* Fairfield, 10 Ill. 303.

Indiana.— Cunningham *v.* Jacobs, 120 Ind. 306, 22 N. E. 335.

Kansas.— Gerson *v.* Hanson, 34 Kan. 590, 9 Pac. 230.

Maryland.— Gable *v.* Brooks, 48 Md. 108.

Mississippi.—Atkinson *v.* Foxworth, 53 Miss. 741; Grand Gulf R., etc., Co. *v.* Conger, 9 Sm. & M. (Miss.) 505.

Nebraska.— Jansen *v.* Mundt, 20 Nebr. 320, 30 N. W. 53; Raymond *v.* Green, 12 Nebr. 215, 10 N. W. 709, 41 Am. Rep. 763.

New York.— Tischler *v.* Fishman, 34 Misc. (N. Y.) 172, 68 N. Y. Suppl. 787; Coleman *v.* Bean, 14 Abb. Pr. (N. Y.) 38.

Ohio.— McLain *v.* Simington, 37 Ohio St. 484.

South Carolina.— Sullivan *v.* Williams, 43 S. C. 489, 21 S. E. 642.

53. Following new statute not promulgated.— A statute which by its terms takes effect from and after its passage may be followed as to the form of an attachment bond, although such law has not been promulgated in the official journal and such bond does not conform to the old law. Thomas *v.* Scott, 23 La. Ann. 689.

54. *Arkansas.*— Edwards *v.* Cooper, 28 Ark. 466; Delano *v.* Kennedy, 5 Ark. 457.

California.— Hisler *v.* Carr, 34 Cal. 641.

Indiana.— Louisville, etc., R. Co. *v.* Lake, 5 Ind. App. 450, 32 N. E. 590.

Kansas.— Ballinger *v.* Lantier, 15 Kan. 608.

Minnesota.— Blake *v.* Sherman, 12 Minn. 420.

Mississippi.— McIntyre *v.* White, 5 How. (Miss.) 298.

New York.— Tiffany *v.* Lord, 65 N. Y. 310; Van Loon *v.* Lyons, 61 N. Y. 22; Kelly *v.* Archer, 48 Barb. (N. Y.) 68; Bliss *v.* Molter, 8 Abb. N. Cas. (N. Y.) 241, 58 How. Pr. (N. Y.) 112; Homan *v.* Brinckerhoff, 1 Den. (N. Y.) 184.

Pennsylvania.— Harrisburg Boot, etc., Co. *v.* Johnson, 3 Pa. Dist. 433; Starbird *v.* Koonse, 10 Pa. Co. Ct. 449; Elliott *v.* Plukart, 6 Pa. Co. Ct. 151.

Tennessee.— Alabama Bank *v.* Fitzpatrick, 4 Humphr. (Tenn.) 311.

Texas.— Caldwell *v.* Lamkin, 12 Tex. Civ. App. 29, 33 S. W. 316; Winn *v.* Sloan, 1 Tex. App. Civ. Cas. § 1103; Johnson *v.* Brunson, 1 Tex. App. Civ. Cas. § 842; Whitley *v.* Jackson, 1 Tex. App. Civ. Cas. § 574.

Rule in this respect stricter than in action on bond.— When the question is as to the sufficiency of an attachment by reason of a failure to comply with statutory requirements, the more liberal rule in favor of the sufficiency of the bond to establish liability thereupon after the benefits of the attachment have been received does not apply. Lehman *v.* Broussard, 45 La. Ann. 346, 12 So. 504.

As to actions on bonds see *infra*, VII, E, 2, a, (III).

55. *Ex p.* Nicrosi, 103 Ala. 104, 15 So. 507; Jones *v.* Leadville Bank, 10 Colo. 464, 17 Pac. 272; Schweigel *v.* L. A. Shakman Co., 78 Minn. 142, 80 N. W. 871, 81 N. W. 529; Gallatin First Nat. Bank *v.* Wallace, (Tex. Civ. App. 1901) 65 S. W. 392.

The test of a mere irregularity is that which determines that defendant in attachment could waive the defect. Reinmiller *v.* Skidmore, 7 Lans. (N. Y.) 161.

As to amendments of attachment bonds see *infra*, VII, E, 2, e.

As to waiver of irregularities see *infra*, VII, E, 2, f.

56. *Alabama.*— Saltmarsh *v.* Evans, 1 Stew. (Ala.) 132.

California.— Wigmore *v.* Buell, 122 Cal. 144, 54 Pac. 600.

Georgia.— Kahn *v.* Herman, 3 Ga. 266.

Illinois.— Miere *v.* Brush, 4 Ill. 21.

Maryland.— Howard *v.* Oppenheimer, 25 Md. 350.

Minnesota.— Schweigel *v.* L. A. Shakman Co., 78 Minn. 142, 80 N. W. 871, 81 N. W. 529.

Mississippi.—Amos *v.* Allnutt, 2 Sm. & M. (Miss.) 215.

Missouri.— Hays *v.* Bouthalier, 1 Mo. 346.

Montana.—Langstaff *v.* Miles, 5 Mont. 554, 6 Pac. 356; Pierse *v.* Miles, 5 Mont. 549, 6 Pac. 347.

Nebraska.— Tessier *v.* Crowley, 17 Nebr. 207, 22 N. W. 422.

Ohio.— Driscoll *v.* Kelly, 4 Ohio S. & C. Pl. Dec. 124, 5 Ohio N. P. 243.

Pennsylvania.— Simon *v.* Johnson, 7 Kulp (Pa.) 166.

South Carolina.— Leach *v.* Thomas, 2 Nott & M. (S. C.) 110.

Texas.— Gallatin First Nat. Bank *v.* Wallace, (Tex. Civ. App. 1901) 65 S. W. 392; La Force *v.* Wear, etc., Dry Goods Co., 8 Tex. Civ. App. 572, 29 S. W. 75.

West Virginia.— Lively *v.* Southern Bldg., etc., Assoc., 46 W. Va. 180, 33 S. E. 93.

Mere clerical errors are not fatal. They may be disregarded or corrected where it is apparent that the purpose of the statute has been substantially fulfilled.

Arkansas.— Mandel *v.* Peet, 18 Ark. 236.

is not plainly required need be inserted,[57] although a condition beyond the statutory requirement may not be objectionable.[58]

(II) *Irrespective of Statute*— (A) *In General.* Aside from the statutory requirements no particular form of bond need be followed. It is sufficient if the intention to become bound in the manner and to the extent required be adequately expressed.[59] Thus the following have been held not sufficient grounds of objection: interlineations and erasures;[60] writing the condition below the signatures of the obligors;[61] misrecitals of matters of inducement;[62] omitting the date[63] or the place of execution;[64] omitting from body of bond the name of a surety[65] or of the principal[66] or of one of them;[67] omitting to describe the proceedings[68] or the court where they are had;[69] and omitting to describe the property attached.[70]

(B) *Fatal Defects.* It is otherwise, however, if the terms of the bond be such as not to show an intention to become bound according to the statute and on account of the issue and levy of the particular attachment — as in case of the description of a writ other than the one in question,[71] description of a court other than the one where the proceedings are had,[72] or the description of parties not of the suit pending.[73]

(III) *In Action on Bond.* In the case of an action on a bond to procure an attachment, it may be upheld as a voluntary common-law obligation, although the statute has not been complied with, and it will be enforced upon condition broken according to its terms, if it be not contrary to an express statute or to public policy or morality, has not been exacted without authority of law, and is not otherwise of such a character or form as to be utterly void.[74] This rule

California.— Frankel *v.* Stern, 44 Cal. 168.

Idaho.— Simmons Hardware Co. *v.* Alturas Commercial Co., (Ida. 1895) 39 Pac. 550.

Mississippi.— McClanahan *v.* Brack, 46 Miss. 246.

New York.— Tischler *v.* Fishman, 34 Misc. (N. Y.) 172, 68 N. Y. Suppl. 787; Reinmiller *v.* Skidmore, 7 Lans. (N. Y.) 161.

Texas.— Laning *v.* Iron City Nat. Bank, (Tex. Civ. App. 1896) 36 S. W. 481; Beckham *v.* Hargadine-McKitrick Dry-Goods Co., (Tex. Civ. App. 1895) 33 S. W. 578; La Force *v.* Wear, etc., Dry Goods Co., 8 Tex. Civ. App. 572, 29 S. W. 75; Weis *v.* Chipman, 3 Tex. Civ. App. 106, 22 S. W. 225.

57. It is sufficient if the statutory form be followed.—Harris *v.* Clapp, Minor (Ala.) 328; Love *v.* Fairfield, 10 Ill. 303; Boshyshell *v.* Emanuel, 12 Sm. & M. (Miss.) 63; Proskey *v.* West, 8 Sm. & M. (Miss.) 711; Lucky *v.* Miller, 8 Yerg. (Tenn.) 90.

58. Kahn *v.* Herman, 3 Ga. 266.

59. An undertaking in the form of a penal bond which contains all the required conditions is not objectionable if no other precise form is prescribed. Conklin *v.* Dutcher, 5 How. Pr. (N. Y.) 386, Code Rep. N. S. (N. Y.) 49.

60. Interlineations and erasures, although objectionable in an attachment bond, are not necessarily fatal to the attachment. Simon *v.* Johnson, 7 Kulp (Pa.) 166.

61. Melvin *v.* General Shields, 15 Ark. 207.

62. Adler *v.* Potter, 57 Ala. 571; Houston *v.* Belcher, 12 Sm. & M. (Miss.) 514.

63. Plumpton *v.* Cook, 2 A. K. Marsh. (Ky.) 450; Conner *v.* Clarke, 10 Ky. L. Rep. 358; Claflin *v.* Hoover, 20 Mo. App. 314.

64. Aultman *v.* Smyth, (Tex. Civ. App. 1897) 43 S. W. 932.

65. Williams *v.* Barnaman, 19 Abb. Pr. (N. Y.) 69; McLain *v.* Simington, 37 Ohio St. 484.

66. Walbridge *v.* Spalding, 1 Dougl. (Mich.) 451.

Omitting a part of the principal's name, so as not plainly to be a wrong description, is not fatal. Laning *v.* Iron City Nat. Bank, (Tex. Civ. App. 1896) 36 S. W. 481.

67. Munzenheimer *v.* Manhattan Cloak, etc., Co., 79 Tex. 318, 15 S. W. 389.

68. West *v.* Woolfolk, 21 Fla. 189; Lawver *v.* Langhans, 85 Ill. 138; Steamboat General Worth *v.* Hopkins, 30 Miss. 703.

If the bond could not be mistaken for one given in another suit there is no necessity for any further particularity. Gray *v.* Steedman, 63 Tex. 95; Eilers *v.* Forbes, (Tex. Civ. App. 1895) 32 S. W. 709.

69. Singleton *v.* Wofford, 4 Ill. 576; Standard Cotton Seed Oil Co. *v.* Mathison, 47 La. Ann. 710, 17 So. 251; Huffman *v.* Hardeman, (Tex. 1886) 1 S. W. 575. *Contra,* Lawrence *v.* Yeatman, 3 Ill. 15.

70. Lawver *v.* Langhans, 85 Ill. 138.

71. The use of the singular number by joint plaintiffs — as that "he" will pay all such damages and costs as shall be adjudged against "him" if the attachment sued out "by him" shall be wrongful — will not support a joint attachment. Solinskey *v.* Young, (Tex. App. 1891) 17 S. W. 1083; Winn *v.* Sloan, 1 Tex. App. Civ. Cas. § 1103; Jones *v.* Anderson, 7 Leigh (Va.) 308.

72. Bonner *v.* Brown, 10 La. Ann. 334.

73. Schrimpf *v.* McArdle, 13 Tex. 368.

74. State *v.* Thompson, 49 Mo. 188; Barnes *v.* Webster, 16 Mo. 258, 57 Am. Dec. 232;

applies to afford security to the extent of the injury done, although the attachment has been discharged because of the defect in the bond.[75]

b. The Amount — (i) *Fixed by Statute.* An attachment cannot be supported by a bond in a less sum than that designated in the statute requiring it,[76] as for instance a requirement of the statute that the bond shall be for the payment of all damages suffered by defendant;[77] or in an amount equal to the sum claimed by plaintiff,[78] exceeding by one half the sum claimed by plaintiff,[79] or

State *v.* Berry, 12 Mo. 376; State *v.* Finke, 66 Mo. App. 238; Eckman *v.* Hammond, 27 Nebr. 611, 43 N. W. 397.

A bond against public policy cannot be enforced — as in case of one given by the "City and County of San Francisco," a subdivision of the state. Morgan *v.* Menzies, 60 Cal. 341.

An action cannot be maintained on a void bond — as where the seal was omitted (State *v.* Thompson, 49 Mo. 188); the penalty left blank (Copeland *v.* Cunningham, 63 Ala. 394); the bond taken after dismissal of the attachment (Benedict *v.* Bray, 2 Cal. 251, 56 Am. Dec. 332); the bond signed in blank and afterward filled up by the officer (Perminter *v.* McDaniel, 1 Hill (S. C.) 267, 26 Am. Dec. 179); or the bond required by a justice having no jurisdiction of the action (Benedict *v.* Bray, 2 Cal. 251, 56 Am. Dec. 332).

75. McLuckie *v.* Williams, 68 Md. 262, 12 Atl. 1; Corbit *v.* Nicoll, 12 N. Y. Civ. Proc. 235.

76. Leaving the amount blank is fatal to the bond.— Louisville, etc., R. Co. *v.* Lake, 5 Ind. App. 450, 32 N. E. 590; Lehman *v.* Broussard, 45 La. Ann. 346, 12 So. 504; Boyd *v.* Boyd, 2 Nott & M. (S. C.) 125.

A portion of the debt not due must be included in fixing the amount of the bond with reference to the amount claimed, where the entire amount is claimed. Allen *v.* Champlin, 32 La. Ann. 511.

Attorneys' fees included in the amount claimed cannot be omitted in determining the amount of the bond, under a requirement that the amount of the bond shall be fixed with reference to the amount claimed. Panhandle Nat. Bank *v.* Still, 84 Tex. 339, 19 S. W. 479. *Aliter*, in case of attorneys' fees which could not be lawfully included and without which the bond would be sufficient. Aultman *v.* Smyth, (Tex. Civ. App. 1897) 43 S. W. 932.

Interest on the amount claimed need not be provided for in the bond, in compliance with a requirement for security in an amount to be ascertained by reference to the amount claimed by plaintiff (Saulter *v.* Butler, 10 Ga. 510; Planters' Bank *v.* Byrne, 3 La. Ann. 687; Pope *v.* Hunter, 13 La. 306; Driscoll *v.* Kelly, 4 Ohio Dec. 124, 5 Ohio N. P. 243; Smith *v.* Pearce, Gilmer (Va.) 34; Smith *v.* Pearce, 6 Munf. (Va.) 585); but the attachment will be upheld only as to such amount of property as will be sufficient to cover the amount claimed (McDaniel *v.* Sappington, Hard. (Ky.) 94; Fellows *v.* Dickens, 5 La. Ann. 131); and where interest is included in the amount claimed, the fact that the bond would be sufficient if measured by the principal without the interest has been held not a compliance with the statute (Gallagher *v.* Cogswell, 11 Fla. 127; Graham *v.* Burckhalter, 2 La. Ann. 415; Erwin *v.* Vicksburg Commercial, etc., Bank, 12 Rob. (La.) 227).

Converting claim ex contractu into claim ex delicto, so as to make the amount due and thus to evade the statute requiring a bond in a larger amount when the debt claimed is not due, will not be permitted. Lederer *v.* Rosenthal, 99 Wis. 235, 74 N. W. 971.

The bond need not recite the amount claimed, so as to show that it is given in a sufficient amount with reference to the sum claimed according to the statute (Strong *v.* Lake Weir Chautauqua, etc., Assoc., 25 Fla. 765, 6 So. 882), and a misrecital of the amount will not invalidate the bond, if the true amount, as alleged in the affidavit, shows the bond to be in the proper amount (Lawrence *v.* Featherston, 10 Sm. & M. (Miss.) 345).

Amendment.—Where a bond does not comply with the requirement as to amount and the defect is not amendable, the attachment falls, and where amendments are permitted, such amendment must be made by filing a new and sufficient bond. Irvin *v.* Howard, 37 Ga. 18; Griffith *v.* Milwaukee Harvester Co., 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573; Gourley *v.* Carmody, 23 Iowa 212; Elliott *v.* Stevens, 10 Iowa 418; Van Winkle *v.* Stevens, 9 Iowa 264; Churchill *v.* Fulliam, 8 Iowa 45; Kissam *v.* Marshall, 10 Abb. Pr. (N. Y.) 424; Bradley *v.* Kroft, 19 Fed. 295 (construing Wisconsin statute).

A subsequent claim of a larger amount will not invalidate the attachment because of insufficiency of the bond given with reference to the original claim. Pope *v.* Hunter, 13 La. 306.

The rule de minimis non curat lex cannot be invoked to support a bond which is less than the amount required by fifty-seven dollars (Yale *v.* Cole, 31 La. Ann. 687) or by four dollars (Marnine *v.* Murphy, 8 Ind. 272). *Aliter*, where the deficiency was less than one dollar. Bodet *v.* Nihourel, 25 La. Ann. 499. See also Aldrich *v.* Columbia Southern R. Co., (Oreg. 1901) 64 Pac. 455.

77. Limiting the amount of damages secured by the bond will render it insufficient where the requirement is for a bond securing payment of all damages. Hisler *v.* Carr, 34 Cal. 641.

78. Frankel *v.* Stern, 44 Cal. 168; Gapen *v.* Stephenson, 18 Kan. 140; Samuel *v.* Brite, 3 A. K. Marsh. (Ky.) 317; Smith *v.* Pearce, Gilmer (Va.) 34.

79. Lehman *v.* Broussard, 45 La. Ann. 346, 12 So. 504; Yale *v.* Cole, 31 La. Ann. 687; Miller *v.* Chandler, 29 La. Ann. 88; Bodet *v.*

double [80] or treble [81] such sum; or double the value of the property attached.[82] An amount greater than that required is unobjectionable.[83]

(II) *Fixed by Court*—(A) *Upon Issue of Writ.* In case the amount is fixed by statute the court has no power to allow the writ upon a bond for a less sum.[84] In some instances, however, the amount of the bond has been left to the discretion of the court [85] or of the clerk of the court.[86]

(B) *As Additional Security.* In some jurisdictions the courts are invested with the power to require additional security in their discretion upon proof of the inadequacy of that first given,[87] while in others this power is not conferred.[88] Upon failure to furnish such additional security where the court has exercised its discretion to demand the same, the attachment may be discharged [89] or the

Nibourel, 25 La. Ann. 499; Planters' Bank *v.* Byrne, 3 La. Ann. 687; Graham *v.* Burckhalter, 2 La. Ann. 415; Erwin *v.* Commercial, etc., Bank, 12 Rob. (La.) 227; Jackson *v.* Warwick, 17 La. 436; Pope *v.* Hunter, 13 La. 306; Williams *v.* Borrow, 3 La. 57; Fleitas *v.* Cockrem, 101 U. S. 301, 25 L. ed. 954.

80. *Florida.*— Strong *v.* Lake Weir Chautauqua, etc., Assoc., 25 Fla. 765, 6 So. 882.

Georgia.— Lockett *v.* De Neufville, 55 Ga. 454; Shockley *v.* Davis, 17 Ga. 175; Saulter *v.* Butler, 10 Ga. 510.

Illinois.— American Cent. Ins. Co. *v.* Hettler, 46 Ill. App. 416.

Indiana.— Marnine *v.* Murphy, 8 Ind. 272; Louisville, etc., R. Co. *v.* Lake, 5 Ind. App. 450, 32 N. E. 590.

Kentucky.— Martin *v.* Thompson, 3 Bibb (Ky.) 252.

South Carolina.— Brown *v.* Whiteford, 4 Rich. (S. C.) 327; Camberford *v.* Hall, 3 McCord (S. C.) 345; Boyd *v.* Boyd, 2 Nott & M. (S. C.) 125; Leach *v.* Thomas, 2 Nott & M. (S. C.) 110.

Texas.— Panhandle Nat. Bank *v.* Still, 84 Tex. 339, 19 S. W. 479; East Texas, etc., Lumber Co. *v.* Warren, 78 Tex. 318, 14 S. W. 783.

See 5 Cent. Dig. tit. "Attachment," § 364.

81. Hamble *v.* Owen, 20 Iowa 70; Lederer *v.* Rosenthal, 99 Wis. 235, 74 N. W. 971; Gowan *v.* Hanson, 55 Wis. 341, 13 N. W. 238; Bradley *v.* Kroft, 19 Fed. 295.

82. Hamill *v.* Phenicie, 9 Iowa 525; Van Winkle *v.* Stevens, 9 Iowa 264; Churchill *v.* Fulliam, 8 Iowa 45.

Double value same as treble amount claimed. —In Iowa, under the statute requiring an attachment bond to be in double the value of the property attached and authorizing the attachment of property exceeding in value the amount claimed by one half, a bond in treble the amount claimed is sufficient and necessary. Griffith *v.* Milwaukee Harvester Co., 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573; Hamble *v.* Owen, 20 Iowa 70.

When the interest of a partner in partnership property is attached, under a statute requiring the bond to be in double the value of the property attached, the amount of the bond need only be double the value of the interest of the debtor partner. Stewart *v.* Hunter, 1 Handy (Ohio) 22, 12 Ohio Dec. (Reprint) 6.

83. *California.*— Wigmore *v.* Buell, 122 Cal. 144, 54 Pac. 600.

Georgia.— Shockley *v.* Davis, 17 Ga. 175.

Indiana.— Fellows *v.* Miller, 8 Blackf. (Ind.) 231.

Kentucky.— Bourne *v.* Hocker, 11 B. Mon. (Ky.) 23.

Pennsylvania.— Hibbs *v.* Blair, 14 Pa. St. 413.

Failure to fix maximum liability by leaving the amount blank, so that the undertaking binds the obligors in an unlimited amount, was held not to render the bond insufficient. Tischler *v.* Fishman, 34 Misc. (N. Y.) 172, 68 N. Y. Suppl. 787.

84. Griffith *v.* Milwaukee Harvester Co., 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573; Fleitas *v.* Cockrem, 101 U. S. 301, 25 L. ed. 954.

85. Bamberger *v.* Duden, 9 N. Y. St. 686; Riggs *v.* Cleveland R. Co., 21 N. Y. Wkly. Dig. 45.

86. Willman *v.* Freidman, (Ida. 1893) 35 Pac. 37; Bowers *v.* London Bank of Utah, 3 Utah 417, 4 Pac. 225.

87. *Alabama.*— *Ex p.* Damon, 103 Ala. 477, 15 So. 852.

Georgia.— Gregory *v.* Clark, 73 Ga. 542.

Kansas.— Gapen *v.* Stephenson, 18 Kan. 140.

Louisiana.— See Durham *v.* Lisso, 32 La. Ann. 415.

Mississippi.— House *v.* Bierne, 5 Sm. & M. (Miss.) 622.

New York.—Fuerstenberg *v.* American Soda Fountain Co., 21 N. Y. App. Div. 501, 48 N. Y. Suppl. 508; Mauda *v.* Etienne, 13 N. Y. App. Div. 237, 43 N. Y. Suppl. 194, 4 N. Y. Annot. Cas. 65; Miller *v.* Ferry, 50 Hun (N. Y.) 256, 2 N. Y. Suppl. 863, 19 N. Y. St. 387; Whitney *v.* Deniston, 2 Thomps. & C. (N. Y.) 471; Ives *v.* Ellis, 35 Misc. (N. Y.) 333, 71 N. Y. Suppl. 971; Lawlor *v.* Magnolia Metal Co., 60 N. Y. Suppl. 391; Bamberger *v.* Duden, 9 N. Y. St. 686.

Tennessee.— Renkert *v.* Elliott, 11 Lea (Tenn.) 235.

88. Proskey *v.* West, 8 Sm. & M. (Miss.) 711.

89. *Alabama.*— Lowry *v.* Stowe, 7 Port. (Ala.) 483. See also Scott *v.* Macy, 3 Ala. 250; Alford *v.* Johnson, 9 Port. (Ala.) 320.

Georgia.— English *v.* Reed, 97 Ga. 477, 25 S. E. 325; Gregory *v.* Clark, 73 Ga. 542.

Indiana.— See Blaney *v.* Findley, 2 Blackf. (Ind.) 338.

Missouri.— Springfield Engine, etc., Co. *v.* Glazier, 65 Mo. App. 616.

New York.— Corbit *v.* Nicoll, 12 N. Y. Civ. Proc. 235.

levy may be reduced so as to bring the amount attached fairly within the penalty of the bond.[90]

c. The Obligee. Ordinarily the bond should be made payable to the person whose property is sought to be attached, that is, the defendant, and this is usually required by the statute.[91] It may, however, be required to be given to the clerk of the court[92] or to the state for the use of the owners.[93]

d. The Execution — (i) *In General* — (A) *By Plaintiff* — (1) GENERALLY. The attachment plaintiff need not himself execute the bond when this is not required by the statute. It is sufficient if executed by proper sureties.[94] When, however, a bond executed by plaintiff is required, execution by any other person will not suffice,[95] unless by one duly authorized to bind him by signing his name as attorney in fact.[96]

Tennessee.— Pflaum *v.* Grinberg, 5 Heisk. (Tenn.) 215.

90. Renkert *v.* Elliott, 11 Lea (Tenn.) 235.

91. Hann *v.* Ruse, 35 La. Ann. 725; Renkert *v.* Elliott, 11 Lea (Tenn.) 235.

An omission to describe obligees as defendants has been held fatal to the bond, the bond being payable to the named obligees on condition that plaintiffs would "pay to defendants" damages, etc. Rohrbough *v.* Leopold, 68 Tex. 254, 4 S. W. 460.

A bond to the state is not objectionable because defendant can sue upon it. Taaffe *v.* Rosenthal, 7 Cal. 514.

In an attachment against a firm the bond should be given to all the members, not merely to one (De Caussey *v.* Baily, 57 Tex. 665); but not in the firm-name (Gray *v.* Steedman, 63 Tex. 95 [*disapproving* Birdsong *v.* McLaren, 8 Ga. 521]).

The bond may be given to one of several defendants, where the attachment is against that one alone. Patterson *v.* Stiles, 6 Iowa 54; Branshaw *v.* Tinsley, 4 Tex. Civ. App. 131, 23 S. W. 184.

The bond may be given to all the defendants, who are jointly interested, although the property of one only is attached. Hadley *v.* Bryors, 58 Ala. 139; Voorheis *v.* Eiting, 15 Ky. L. Rep. 161, 22 S. W. 80; Sloo *v.* Powell, Dall. (Tex.) 467. *Contra*, Courrier *v.* Cleghorn, 3 Greene (Iowa) 523.

An attachment on fraudulently conveyed property does not call for a bond payable to the fraudulent grantee, who is one of the defendants, but only for one payable to defendant debtor. Archenhold *v.* Evans, 11 Tex. Civ. App. 138, 32 S. W. 795.

92. Scooler *v.* Alstrom, 38 La. Ann. 907.

93. A bond in the name of the state need not recite the names of the parties for whose benefit it is given or say that it is for the use of the parties interested. Steam Boat Napoleon *v.* Etter, 6 Ark. 103; Simon *v.* Johnson, 7 Kulp (Pa.) 166; Hall *v.* Kintz, 13 Pa. Co. Ct. 24.

94. *Alabama.*— Jackson *v.* Stanley, 2 Ala. 326.

Arkansas.— Mandel *v.* Peet, 18 Ark. 236.

Minnesota.— Howard *v.* Manderfield, 31 Minn. 337, 17 N. W. 946.

Montana.—Langstaff *v.* Miles, 5 Mont. 554, 6 Pac. 356; Pierse *v.* Miles, 5 Mont. 549, 6 Pac. 347.

Nebraska.— Storz *v.* Finklestein, 48 Nebr. 27, 50 Nebr. 177, 66 N. W. 1020, 30 L. R. A. 644, 69 N. W. 856; Eckman *v.* Hammond, 27 Nebr. 611, 43 N. W. 397.

New York.—Leffingwell *v.* Chave, 19 How. Pr. (N. Y.) 54.

Pennsylvania.— Meyers *v.* Rauch, 4 Pa. Dist. 333.

South Dakota.— Black Hills Mercantile Co. *v.* Gardiner, 5 S. D. 246, 58 N. W. 557.

A bond on the part of plaintiff is a requirement which has been held to render execution of the bond by plaintiff or his duly authorized agent necessary (Wagener *v.* Booker, 31 S. C. 375, 9 S. E. 1055; National Exch. Bank *v.* Stelling, 31 S. C. 360, 9 S. E. 1028), although the contrary is the usual interpretation (Stewart *v.* Katz, 30 Md. 334; Black Hills Mercantile Co. *v.* Gardiner, 5 S. D. 246, 58 N. W. 557; Shakman *v.* Koch, 93 Wis. 595, 67 N. W. 925; and cases cited *supra* in this note).

That plaintiff's name was signed without authority is immaterial where execution by him is not essential, the bond being signed by and therefore binding on the sureties. Taylor *v.* Ricards, 9 Ark. 378; Pitkins *v.* Boyd, 4 Greene (Iowa) 255.

In an action on such a bond plaintiff cannot be held liable, nor is he a proper party to the action. He is liable to defendant for the injury occasioned by the attachment but not on the bond. State *v.* Fortinberry, 54 Miss. 316; Storz *v.* Finklestein, 50 Nebr. 177, 69 N. W. 856.

95. Lewis *v.* Butler, 2 Ky. Dec. 246; Ford *v.* Hurd, 4 Sm. & M. (Miss.) 683; Booker *v.* Smith, 38 S. C. 228, 16 S. E. 774; Myers *v.* Lewis, 1 McMull. (S. C.) 54.

One beneficially interested in the subject-matter of the action with plaintiff has been held competent to give a bond in compliance with the requirement that it be given by plaintiff — such as the equitable owner of the chose in action sued on (Tully *v.* Herrin, 44 Miss. 626); one for whose use the attachment in the name of another is sued out (Grand Gulf R., etc., Co. *v.* Conger, 9 Sm. & M. (Miss.) 505); or one of the trustees of a town in whose behalf the attachment is issued (Clanton *v.* Laird, 12 Sm. & M. (Miss.) 568).

96. The agent's authority need not be under seal. Therefore he may bind plaintiff by

(2) By Agent or Attorney. Some statutes permit the attachment bond to be given in behalf of plaintiff by his agent or attorney. In such case execution by plaintiff is dispensed with and that of the agent or attorney as principal obligor is substituted,[97] but execution by another than plaintiff or his agent will not be a compliance,[98] and authority from plaintiff to act as his agent is necessary when execution by agent is required.[99] Plaintiff may, however, accept and ratify the

signing the latter's name to an attachment bond upon the authority of a telegram (Ferst *v.* Powers, 58 S. C. 398, 36 S. E. 744); or a telephone message (Long *v.* Goodwin, 5 Pa. Dist. 335). *Contra*, Forbes *v.* Porter, 25 Fla. 362, 6 So. 62, holding as a proposition of general law, that authority under seal is necessary to bind the principal.

The issuing officer may demand the agent's authority, and where there is a power of attorney in writing he may file it with the undertaking, but his failure to do this will not invalidate the attachment. Grollman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272.

One partner has authority by virtue of the partnership relation to sign the firm-name and bind the partnership to a bond for attachment in an action by the firm (Dow *v.* Smith, 8 Ga. 551; Churchill *v.* Fulliam, 8 Iowa 45; Danforth *v.* Carter, 1 Iowa 546; Claflin *v.* Hoover, 20 Mo. App. 314; Hall *v.* Kintz, 13 Pa. Co. Ct. 24; Munzesheimer *v.* Heinze, 74 Tex. 254, 11 S. W. 1094; Gray *v.* Steedman, 63 Tex. 95. See also Sims *v.* Jacobson, 51 Ala. 186; Brooks *v.* Hartman, 1 Heisk. (Tenn.) 36), and authority from the other partners to bind them may be given by parol (Jeffreys *v.* Coleman, 20 Fla. 536). A partnership may also make a bond by its several members to procure an attachment sued out by one member for the firm benefit. This is neither an irregularity nor a variance (McCluny *v.* Jackson, 6 Gratt. (Va.) 96), and a bond signed simply by the individual members of a firm in whose behalf the attachment is issued sufficiently shows execution in the name of plaintiff (Hampton *v.* Bogan, 55 S. C. 547, 33 S. E. 581).

An attorney at law has no authority as such to bind his client by signing the name of the latter to an attachment bond. He must have special or statutory authority for such purpose the same as any other person. Beardslee *v.* Morgan, 29 Mo. 471; Harrisburg Boot, etc., Co. *v.* Johnson, 3 Pa. Dist. 433; Mantz *v.* Hendley, 2 Hen. & M. (Va.) 308. *Compare* Anthanissen *v.* Brunswick, etc., Steam Towing, etc., Co., 92 Ga. 409, 17 S. E. 951; Craig *v.* Herring, 80 Ga. 709, 6 S. E. 283; Fulton *v.* Brown, 10 La. Ann. 350. See *infra*, VII, E, 2, d, (I), (A), (2); and, generally, Attorney and Client.

Want of authority to bind the principal has been held to be cured by ratification, so that the act, at the time merely that of the agent, subsequently became that of plaintiff in compliance with the statute requiring execution by plaintiff. State *v.* Fortinberry, 54 Miss. 316; Augusta Bank *v.* Conrey, 28 Miss. 667. *Compare* Kellogg *v.* Miller, 6 Ark. 468, which holds that such ratification may occur before but not after the issue of the writ.

97. **Authority to sue out the attachment** impliedly authorizes the agent or attorney to do whatever else is necessary to perfect the process, including execution of the bond. Guckenheimer *v.* Day, 74 Ga. 1; Alexander *v.* Burns, 6 La. Ann. 704; Dillon *v.* Watkins, 2 Speers (S. C.) 445. See also *supra*, VII, E, 2, d, (I), (A), (1).

The principal need not be bound.— A bond binding the agent or attorney personally as such is a sufficient compliance with the statute requiring such bond from plaintiff, his agent, or attorney. Bryan *v.* Knight, 12 Fla. 165; Simpson *v.* Knight, 12 Fla. 144; Conklin *v.* Goldsmith, 5 Fla. 280; Walbridge *v.* Spalding, 1 Dougl. (Mich.) 451; Page *v.* Ford, 2 Sm. & M. (Miss.) 266; Byne *v.* Byne, 1 Rich. (S. C.) 438.

A rule of court against an attorney becoming surety is not affected by a statute permitting him to make an attachment bond for his client, as this contemplates his execution as principal and the rule only forbids him to become surety. Simpson *v.* Knight, 12 Fla. 144.

Form of signature by plaintiff's attorney. — Where plaintiff's name is signed to an attachment bond by his attorney, it should be followed by the words "by his attorney at law," to which should be added the attorney's name. Long *v.* Hood, 46 Ga. 225. *Compare* Fulton *v.* Brown, 10 La. Ann. 350.

98. **A bond which does not appear to have been executed by agent** cannot be upheld as an agent's bond by evidence that such was the intention, even though such person be described as agent in the attachment affidavit. Work *v.* Titus, 12 Fla. 628.

99. **Assuming to act as agent or attorney** is not sufficient if the authority does not in fact exist. Elliott *v.* Plukart, 6 Pa. Co. Ct. 151.

Authority as agent may be presumed where it has been assumed by one in the execution of an attachment bond and has not been denied or questioned by a proper plea to that effect. Alford *v.* Johnson, 9 Port. (Ala.) 320; Messner *v.* Lewis, 20 Tex. 221; Messner *v.* Hutchins, 17 Tex. 597. See also McDonald *v.* Fist, 53 Mo. 343.

The agent's authority need not accompany the bond. The officer taking the bond will be presumed to have performed his duty by requiring legal authority. Lindner *v.* Aaron, 5 How. (Miss.) 581. See also Grollman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272.

One partner is agent for the partnership, so that he may make a bond in his own name to procure an attachment in behalf of the

bond of an unauthorized agent or other person whenever such bond is not jurisdictional.[1] If execution by neither plaintiff nor his agent be required, an attempted execution on behalf of plaintiff which binds only the obligor in his personal capacity with the sureties is sufficient.[2]

(B) *By Sureties* — (1) WHO MAY BE — (a) NATURAL PERSONS. Any person may be surety on an attachment bond who possesses the capacity to contract and who is not otherwise disqualified from becoming such surety by statute or rule of court[3] or by the fact that he is already bound as principal.[4]

(b) CORPORATIONS AND PARTNERSHIPS. A corporation or partnership cannot become bound as surety through an execution in its name by an agent authorized only to bind it in the ordinary course of business,[5] unless acting as surety is the business of such corporation or partnership.[6] However, the unauthorized agent who attempts to bind the corporation or partnership outside its legitimate business becomes personally bound[7] and the principal may, by ratification or acquiescence, be estopped to plead *ultra vires*.[8]

(2) SUFFICIENCY OF SURETIES. In order to support an attachment statutory requirements respecting the number and qualifications of sureties on the bond should be complied with[9] — such as a certain number of persons[10] resident within

partnership, although the other partners be not bound. Iroquois Furnace Co. *v.* Wilkin Mfg. Co., 181 Ill. 582, 54 N. E. 987 [*reversing* 77 Ill. App. 59]; Wallis *v.* Wallace, 6 How. (Miss.) 254; Sloo *v.* Powell, Dall. (Tex.) 467; Kyle *v.* Connelly, 3 Leigh (Va.) 719. See also *supra*, note 96.

1. *Arkansas.*— Mandel *v.* Peet, 18 Ark. 236.
Florida.— Pollock *v.* Murray, 38 Fla. 105, 20 So. 815; Jeffreys *v.* Coleman, 20 Fla. 536.
Georgia.— Craig *v.* Herring, 80 Ga. 709, 6 S. E. 283.
Michigan.— Palmer *v.* Seligman, 77 Mich. 305, 43 N. W. 974.
Pennsylvania.— Netter *v.* Harding, 6 Pa. Dist. 169, 18 Pa. Co. Ct. 353.

2. **One acting as agent without authority may make a good bond** where the statute does not require a bond by plaintiff or his agent. Plaintiff's name signed without authority may, in such case, be treated as mere surplusage and disregarded. Gable *v.* Brooks, 48 Md. 108; Stewart *v.* Katz, 30 Md. 334; State *v.* Fortinberry, 54 Miss. 316; Simmons *v.* Missouri Pac. R. Co., 19 Mo. App. 542. See also Anthanissen *v.* Brunswick, etc., Steam Towing, etc., Co., 92 Ga. 409, 17 S. E. 951.

3. **Attorneys at law may be sureties unless expressly prohibited.**— The office of attorney at law is of itself no reason for disqualification. Therefore, although a rule of court prohibits attorneys from becoming sureties on cost and appeal-bonds, there is nothing to prevent their becoming sureties on attachment bonds. Abbott *v.* Zeigler, 9 Ind. 511; Danforth *v.* Carter, 1 Iowa 546; Lewis *v.* Higgins, 52 Md. 614. See, generally, ATTORNEY AND CLIENT.

A prohibition against attorneys does not avoid the attachment, when an attorney is permitted to become surety and the bond is accepted and approved. Tessier *v.* Crowley, 17 Nebr. 207, 22 N. W. 422; Rogers *v.* Burbridge, 5 Tex. Civ. App. 67, 24 S. W. 300.

4. **An agent personally bound as principal cannot be a surety,** as this would be permitting one to be both principal and surety. Marshall *v.* Ravisies, 22 Fla. 583; Wanamaker *v.* Bowes, 36 Md. 42.

A partner cannot be surety for the partnership, for as a member of the firm he is individually bound as principal, and one cannot be both principal and surety on the same bond. Bayne *v.* Cusimano, 50 La. Ann. 361, 23 So. 361.

A stockholder may be surety for a corporation on a bond to procure an attachment in behalf of the corporation. His relation to the corporation is no ground of objection, as he does not become subject to any liability by the fact that the corporation is principal. City Nat. Bank *v.* Cupp, 59 Tex. 268. The fact that such stockholder is an officer or director makes no difference. Laning *v.* Iron City Nat. Bank, (Tex. Civ. App. 1896) 36 S. W. 481.

5. Thatcher *v.* Goff, 13 La. 360.

6. Thatcher *v.* Goff, 13 La. 360; Steppacher *v.* McClure, 75 Mo. App. 135; Aldrich *v.* Columbia Southern R. Co., (Oreg. 1901) 64 Pac. 455.

7. Thatcher *v.* Goff, 13 La. 360.

8. Churchill *v.* Fulliam, 8 Iowa 45; Danforth *v.* Carter, 1 Iowa 546; Donnelly *v.* Elser, 69 Tex. 282, 6 S. W. 563; Eikel *v.* Hanscom, 3 Tex. App. Civ. Cas. § 473.

9. **A bond without surety cannot support an attachment** under a statute requiring a bond with surety. Ford *v.* Rogers, 12 Rich. (S. C.) 385.

In the federal courts the requirements of the statute of the state where the court sits concerning attachment bonds must be followed. Singer Mfg. Co. *v.* Mason, 5 Dill. (U. S.) 488, 22 Fed. Cas. No. 12,903.

10. **Less than the statutory number** will not support the attachment however responsible those executing may be. Roulhac *v.* Rigby, 7 Fla. 336; Ward *v.* Whitney, 3 Sandf. (N. Y.) 399; Spettigue *v.* Hutton, 9 Pa. Co. Ct. 156.

If no number of sureties is specified a single surety whose solvency and material

the state[11] and possessed of available assets in a sufficient amount to the satisfaction of the statute[12] or of a designated officer.[13]

(II) *Sealing.* In some states the old common-law rule requiring specialties to be under seal has been dispensed with by statute or judicial construction, and in such states an attachment bond need not be sealed.[14] In others, the old common-law rule is adhered to, and there attachment bonds must be sealed[15] except

possessions are satisfactory is sufficient. Church *v.* Drummond, 7 Ind. 17; Williams *v.* Barnaman, 19 Abb. Pr. (N. Y.) 69.

Statutory construction.— The word "sureties," as employed in the Iowa statute concerning attachment bonds, has been construed to mean either singular or plural, thus upholding a bond with only one surety as sufficient. Elliott *v.* Stevens, 10 Iowa 418.

The bond need not be both joint and several. A joint bond executed by the requisite number is sufficient in the absence of a specific requirement that it shall be also several. Baars *v.* Gordon, 21 Fla. 25.

Approval cannot cure deficiency in number of sureties, although the sufficiency of the bond is committed to the approving officer and approval is required. Goldmark *v.* Magnolia Metal Co., 28 N. Y. App. Div. 264, 51 N. Y. Suppl. 68.

11. The object of the requirement as to residence of sureties is that the attachment bond may be enforced by the courts of the state. Therefore the property qualifications of a non-resident surety, however good, are immaterial and cannot fulfil the statute.

Alabama.— Mobile Mut. Ins. Co. *v.* Cleveland, 76 Ala. 321; Jackson *v.* Stanley, 2 Ala. 326.

Georgia.— Thompson *v.* Arthur, Dudley (Ga.) 253.

Louisiana.— McCook *v.* Willis, 28 La. Ann. 448.

Texas.— Caldwell *v.* Lamkin, 12 Tex. Civ. App. 29, 33 S. W. 316.

United States.— Singer Mfg. Co. *v.* Mason, 5 Dill. (U. S.) 488, 22 Fed. Cas. No. 12,903, construing Kansas statute.

Canada.— Bradbury *v.* Lowry, 3 U. C. Q. B. O. S. 439.

The bond need not show the fact of residence although it be essential to its validity. If such is not the fact the proceedings may be abated. Jackson *v.* Stanley, 2 Ala. 326.

A surety need not reside in the county where the attachment is issued when not so required by the statute. Mobile Mut. Ins. Co. *v.* Cleveland, 76 Ala. 321.

12. Lockett *v.* De Neufville, 55 Ga. 454.

A surety need not own real estate, if he be otherwise competent, unless such qualification be required by statute. Austin *v.* Latham, 19 La. 88.

The actual means of the surety, under the Louisiana statute, not the amount for which, from the nature of the case, he may be ultimately liable, must be considered in ascertaining his sufficiency. Thus, he must be worth the full amount of the attachment bond, notwithstanding he may be fully able to answer for the property actually attached.

Lard *v.* Strother, 4 Rob. (La.) 95; Jackson *v.* Warwick, 17 La. 436.

Evidence of insufficiency.—Evidence that a surety returned no property for taxation does not necessarily require an inference that he is without sufficient available property to satisfy the statute. Reid *v.* Armour Packing Co., 93 Ga. 696, 21 S. E. 131. A failure to show one of the sureties to be insolvent, together with evidence showing that the other is worth many times more than the amount claimed in the suit where the attachment was issued does not show that the sureties are not "good and sufficient." C. B. Cones, etc., Mfg. Co. *v.* Rosenbaum, (Tex. Civ. App. 1898) 45 S. W. 333.

Each surety need not be good for the entire amount of the bond, unless this is specifically required. The bond will be sufficient if both together, where two are required, are responsible for the required amount. May *v.* Gamble, 14 Fla. 467.

As to justification of sureties see *infra*, VII, E, 2, d, (IV).

13. The solvency of sureties is primarily for the approving officer, whose determination is conclusive until properly questioned by defendant before pleading to the merits; but when properly questioned approval is but *prima facie* evidence of sufficiency. Reid *v.* Armour Packing Co., 93 Ga. 696, 21 S. E. 131; Gregory *v.* Clark, 73 Ga. 542; Perry *v.* Mulligan, 58 Ga. 479; Lockett *v.* De Neufville, 55 Ga. 454; Blaney *v.* Findley, 2 Blackf. (Ind.) 338; Gable *v.* Brooks, 48 Md. 108; Stewart *v.* Katz, 30 Md. 334.

As to the necessity and sufficiency of approval of attachment bonds see *infra*, VII, E, 2, d, (V).

14. Ferst *v.* Powers, 58 S. C. 398, 36 S. E. 744; Grollman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272; Brooks *v.* Hartman, 1 Heisk. (Tenn.) 36; Gasquet *v.* Collins, 57 Tex. 340; Bernhard *v.* De Forrest, 36 Tex. 518; Hart *v.* Kanady, 33 Tex. 720; Read *v.* Levy, 30 Tex. 738.

A bond executed by a corporation stands upon different ground, for a corporation properly acts through its corporate seal, and although a seal be not required of natural persons this exemption does not affect corporations. Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391.

15. Lea *v.* Vail, 3 Ill. 473; Hunter *v.* Ladd, 2 Ill. 551; State *v.* Eldridge, 65 Mo. 584; State *v.* Chamberlin, 54 Mo. 338; State *v.* Thompson, 49 Mo. 188; Tiffany *v.* Lord, 65 N. Y. 310.

A sealed power of attorney is necessary to authorize an agent to execute a bond for his principal where the bond itself is required to

they be of such a nature as not to come within the definition of a specialty.[16] However, the usual liberality respecting the character of the seal is applicable to attachment bonds. Thus, a mere scroll has been held sufficient,[17] as has the word "[seal]" printed on the bond[18] and the use of one seal or scrawl by two persons.[19]

(III) *ATTESTATION.* An attachment bond need not be attested unless required by the statute,[20] and, although attestation by a magistrate be required, this need not be by the one issuing the writ.[21]

(IV) *JUSTIFICATION.* When the sureties are required by statute to justify a failure to comply will be a ground for avoidance of the attachment. In some states justification is required as an element of jurisdiction, in which case a failure to comply cannot be cured;[22] but often the requirement is not mandatory, and a failure to comply is regarded as a mere irregularity which may subsequently be cured.[23]

(V) *APPROVAL.* The officer issuing the writ is generally required first to approve and accept the bond.[24] The writ may be avoided for failure so to approve,[25] but the bond need not bear the evidence of approval. Existence of the fact is sufficient, and this is evinced by receiving and filing the bond and issuing the writ;[26] and where the statute requires indorsement of the approval

be sealed (Forbes *v.* Porter, 25 Fla. 362, 6 So. 62); and in such case ratification of an unauthorized bond should likewise be under seal (Pollock *v.* Murray, 38 Fla. 105, 20 So. 815).

Different rules in different courts.—In Missouri, in ordinary attachments before a justice of the peace, the statutory form omits a seal, and in those courts a seal is not necessary. This does not, however, dispense with a seal where the suit is in the circuit court. State *v.* Chamberlin, 54 Mo. 338.

16. A simple undertaking, although often called a bond, is not a specialty requiring a seal. McLain *v.* Simington, 37 Ohio St. 484.

17. State *v.* Eldridge, 65 Mo. 584.

18. Underwood *v.* Dollins, 47 Mo. 259.

19. Baars *v.* Gordon, 21 Fla. 25.

20. Conner *v.* Clarke, 10 Ky. L. Rep. 358; O'Neal *v.* Owens, 2 N. C. 419.

Attestation cannot be required by rule of court.— A rule of court requiring attestation to attachment bonds has been held to conflict with a statute providing for a bond without making this requirement, and not to be upheld as a simple regulation of practice. Grollman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272.

21. Dobbs *v.* Justices Murray County Inferior Ct., 17 Ga. 624; Brown *v.* Clayton, 12 Ga. 564.

22. Tibbet *v.* Sue, 122 Cal. 206, 54 Pac. 741; Taaffe *v.* Rosenthal, 7 Cal. 514; Bliss *v.* Molter, 8 Abb. N. Cas. (N. Y.) 241, 58 How. Pr. (N. Y.) 112.

23. Jones *v.* Leadville Bank, 10 Colo. 464, 17 Pac. 272; Bell *v.* Moran, 25 N. Y. App. Div. 461, 50 N. Y. Suppl. 982; McCord, etc., Mercantile Co. *v.* Glenn, 6 Utah 139, 21 Pac. 500; Baxter *v.* Smith, 2 Wash. Terr. 97, 4 Pac. 35.

24. The officer acts as defendant's agent in order to approve and accept delivery of the bond. Perminter *v.* McDaniel, 1 Hill (S. C.) 267, 26 Am. Dec. 179.

A deputy clerk of court may act for the clerk in approving an attachment bond under a statute imposing this duty on the clerk. Finn *v.* Rose, 12 Iowa 565; Anderson *v.* Kanawha Coal Co., 12 W. Va. 526.

In Georgia an attachment bond need not be approved by the magistrate who issues the attachment writ, or in his presence. Smith *v.* Joiner, 27 Ga. 65. See Cox *v.* Felder, 36 Ga. 597.

An attorney who is a magistrate has no power to approve and accept an attachment bond for his client in a case in which he appears as attorney, under Ga. Rev. Code, § 193, which prohibits a judge or other judicial officer from sitting in any cause in which he is pecuniarily interested or has been of counsel. Wilkowski *v.* Halle, 37 Ga. 678, 95 Am. Dec. 374.

Mandamus to compel approval.— Mandamus will lie to compel an officer, required by law to approve an attachment bond, to perform his duty, that is, to pass upon the sufficiency of the bond, but not to control his discretion or require him to approve unless the reason for his refusal is insufficient in law and admits the sufficiency of the bond. Mobile Mut. Ins. Co. *v.* Cleveland, 76 Ala. 321.

25. Jones *v.* Leadville Bank, 10 Colo. 464, 17 Pac. 272; Conklin *v.* Dutcher, 5 How. Pr. (N. Y.) 386, Code Rep. N. S. (N. Y.) 49; Harrisburg Boot, etc., Co. *v.* Johnson, 3 Pa. Dist. 433; Elliott *v.* Plukart, 6 Pa. Co. Ct. 151.

26. *Alabama.*— Hyde *v.* Adams, 80 Ala. 111; Dothard *v.* Shield, 69 Ala. 135; Good *v.* Jones, 56 Ala. 538; Pearson *v.* Gayle, 11 Ala. 278.

Arkansas.— Mandel *v.* Peet, 18 Ark. 236.

Florida.— West *v.* Woolfolk, 21 Fla. 189.

Indiana.— Levi *v.* Darling, 28 Ind. 497; Simpson *v.* Minor, 1 Blackf. (Ind.) 229.

Maryland.— Dean *v.* Oppenheimer, 25 Md. 368; Howard *v.* Oppenheimer, 25 Md. 350.

Missouri.— State *v.* Hesselmeyer, 34 Mo. 76; Whitman Agricultural Assoc. *v.* National R., etc., Industrial Assoc., 45 Mo. App. 90.

New York.— Bascom *v.* Smith, 31 N. Y. 595.

the court may, upon determining the fact, direct the indorsement to be made *nunc pro tunc*.[27]

e. Amendment of Insufficient Bond — (I) *Right to Amend.* An attachment bond cannot be amended for the purpose of curing any substantial defect without express statutory permission. In such case a sufficient bond is a condition precedent to the attachment,[28] and statutory amendments may properly relate only to such defects as are not jurisdictional and which do not render the bond void;[29] but amendments of any defects may be permitted by statute, and if the permission include jurisdictional defects, they cease to be so when made amendable.[30] Therefore, it is sometimes said that a void bond may be amended under authority of the statute.[31] A void bond, however, is no bond at all, and wherever a bond is requisite to an amendment, a void bond cannot be amended.[32]

(II) *Exercise of Right.* The method of amendment may be either by correcting some formal irregularity, mistake, or omission[33] or by substituting a new and sufficient bond for a defective one.[34] Where permissible, amendments

Texas.— Griffith *v.* Robinson, 19 Tex. 219.
West Virginia.— Anderson *v.* Kanawha Coal Co., 12 W. Va. 526.

27. Mandel *v.* Peet, 18 Ark. 236; West *v.* Woolfolk, 21 Fla. 189; Anderson *v.* Kanawha Coal Co., 12 W. Va. 526.

28. *California.*— Tibbet *v.* Sue, 122 Cal. 206, 54 Pac. 741.
Florida.— Work *v.* Titus, 12 Fla. 628; Roulhac *v.* Rigby, 7 Fla. 336.
Kentucky.— Horne *v.* Mitchell, 7 Bush (Ky.) 131.
Louisiana.— Graham *v.* Burckhalter, 2 La. Ann. 415.
Michigan.— Anonymous, 2 Mich. N. P. 118.
Mississippi.— Houston *v.* Belcher, 12 Sm. & M. (Miss.) 514.
Pennsylvania.— Spettigue *v.* Hutton, 9 Pa. Co. Ct. 156; Elliott *v.* Plukart, 6 Pa. Co. Ct. 151.
Texas.— East Texas, etc., Lumber Co. *v.* Warren, 78 Tex. 318, 14 S. W. 783; Caldwell *v.* Lamkin, 12 Tex. Civ. App. 29, 33 S. W. 316; Winn *v.* Sloan, 1 Tex. App. Civ. Cas. § 1103; Whitley *v.* Jackson, 1 Tex. App. Civ. Cas. § 574.

29. Sims *v.* Jacobson, 51 Ala. 186; Guckenheimer *v.* Day, 74 Ga. 1; Lockett *v.* De Neufville, 55 Ga. 454; Blake *v.* Camp, 45 Ga. 298; Kent *v.* Downing, 44 Ga. 116; Oliver *v.* Wilson, 29 Ga. 642; Cohen *v.* Manco, 28 Ga. 27; Smith *v.* Joiner, 27 Ga. 65; Brown *v.* McCluskey, 26 Ga. 577.

30. *Colorado.*— Jones *v.* Leadville Bank, 10 Colo. 464, 17 Pac. 272.
Georgia.—Anthanissen *v.* Brunswick, etc., Steam Towing, etc., Co., 92 Ga. 409, 17 S. E. 951.
Illinois.— Schmitt *v.* Devine, 63 Ill. App. 289.
Iowa.— Elliott *v.* Stevens, 10 Iowa 418.
Michigan.— Adams *v.* Kellogg, 63 Mich. 105, 29 N. W. 679.
Missouri.— Van Arsdale *v.* Krum, 9 Mo. 397.
Tennessee.— Hart *v.* Dixon, 5 Lea (Tenn.) 336.

31. Jackson *v.* Stanley, 2 Ala. 326; Finn *v.* Mehrbach, 65 N. Y. Suppl. 250; Lillard *v.* Carter, 7 Heisk. (Tenn.) 604.

32. Owens *v.* Johns, 59 Mo. 89; Boyd *v.* Boyd, 2 Nott & M. (S. C.) 125.

33. *Alabama.*— McKissack *v.* Witz, 120 Ala. 412, 25 So. 21; *Ex p.* Nicrosi, 103 Ala. 104, 15 So. 507; Alford *v.* Johnson, 9 Port. (Ala.) 320.
Arkansas.— Mandel *v.* Peet, 18 Ark. 236.
Georgia.— Sutherlin *v.* Underwriters' Agency, 53 Ga. 442.
Illinois.— Lea *v.* Vail, 3 Ill. 473.
Minnesota.— Blake *v.* Sherman, 12 Minn. 420.
Mississippi.— Boisseau *v.* Kahn, 62 Miss. 757.
New York.— Bell *v.* Moran, 25 N. Y. App. Div. 461, 50 N. Y. Suppl. 982; Conklin *v.* Dutcher, 5 How. Pr. (N. Y.) 386, Code Rep. N. S. (N. Y.) 49.
Utah.— McCord, etc., Mercantile Co. *v.* Glenn, 6 Utah 139, 21 Pac. 500.
West Virginia.—Anderson *v.* Kanawha Coal Co., 12 W. Va. 526.

34. *Alabama.*—Good *v.* Jones, 56 Ala. 538; Jackson *v.* Stanley, 2 Ala. 326; Lowry *v.* Stowe, 7 Port. (Ala.) 483.
Georgia.— Irvin *v.* Howard, 37 Ga. 18.
Iowa.— Griffith *v.* Milwaukee Harvester Co., 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573; Gourley *v.* Carmody, 23 Iowa 212; State Branch Bank *v.* Morris, 13 Iowa 136; Holmes *v.* Budd, 11 Iowa 186; Elliott *v.* Stevens, 10 Iowa 418; Van Winkle *v.* Stevens, 9 Iowa 264; Cheever *v.* Lane, 9 Iowa 193; Churchill *v.* Fulliam, 8 Iowa 45.
Kentucky.— Nutter *v.* Connet, 3 B. Mon. (Ky.) 199.
Michigan.— Adams *v.* Kellogg, 63 Mich. 105, 29 N. W. 679; Kidd *v.* Dougherty, 59 Mich. 240, 26 N. W. 510; Torrent *v.* Muskegon Booming Co., 21 Mich. 159.
Missouri.— Beardslee *v.* Morgan, 29 Mo. 471; Wood *v.* Squires, 28 Mo. 528.
Montana.—Langstaff *v.* Miles, 5 Mont. 554, 6 Pac. 356; Pierse *v.* Miles, 5 Mont. 549, 6 Pac. 347.
New York.— Kissam *v.* Marshall, 10 Abb. Pr. (N. Y.) 424; Corbit *v.* Nicoll, 12 N. Y. Civ. Proc. 235.
Tennessee.— Brooks *v.* Hartman, 1 Heisk. (Tenn.) 36; Arledge *v.* White, 1 Head (Tenn.)

may be made before discharge of the attachment[35] and an opportunity to amend should be allowed before discharging the attachment on account of an insufficient bond.[36]

(iii) *Effect of Amendment.* Permitting the correction of an original bond or the substitution of a new one supposes the existence of a bond not defective in a jurisdictional respect or else dispenses with the jurisdictional element as a condition precedent. In any case therefore the effect of a duly authorized amendment is to validate the proceeding from its inception.[37]

f. Waiver of Insufficient Bond. Since an attachment bond is required for the protection of defendant, the want of a sufficient bond may be waived by him,[38] unless the giving of a bond is an element of jurisdiction and the defect is such as to render the writ void.[39] A waiver may be express, as by stipulation,[40] but usually it results from a failure to object until after entry of a general appearance,[41] plea to the merits,[42] judgment,[43] or appeal.[44]

241; Alexander *v.* Lisby, 2 Swan (Tenn.) 107.

United States.— Singer Mfg. Co. *v.* Mason, 5 Dill. (U. S.) 488, 22 Fed. Cas. No. 12,903, construing Kansas statute.

A bond insufficient in amount can, it seems, be amended in no other way. See *supra*, VII, E, 2, b, (I), note 76.

35. Sloo *v.* Powell, Dall. (Tex.) 467.

36. *Alabama.*— Hyde *v.* Adams, 80 Ala. 111; Lowe *v.* Derrick, 9 Port. (Ala.) 415; Lowry *v.* Stowe, 7 Port. (Ala.) 483.

Georgia.— Lockett *v.* De Neufville, 55 Ga. 454; Long *v.* Hood, 46 Ga. 225; Irvin *v.* Howard, 37 Ga. 18.

Iowa.— Churchill *v.* Fulliam, 8 Iowa 45; Bretney *v.* Jones, 1 Greene (Iowa) 366.

Missouri.— Jasper County *v.* Chenault, 38 Mo. 357; Beardslee *v.* Morgan, 29 Mo. 471; Tevis *v.* Hughes, 10 Mo. 380; Claflin *v.* Hoover, 20 Mo. App. 314; Cummings *v.* Denny, 6 Mo. App. 602.

United States.— Bumberger *v.* Gerson, 24 Fed. 257, construing Louisiana statute.

An amendable defect is not a ground of abatement of the writ as for a want of jurisdiction. Anthanissen *v.* Brunswick, etc., Steam Towing, etc., Co., 92 Ga. 409, 17 S. E. 951; Adams *v.* Kellogg, 63 Mich. 105, 29 N. W. 679.

In the appellate court a defective attachment bond cannot be amended. Alabama Bank *v.* Fitzpatrick, 4 Humphr. (Tenn.) 311. But it has been held that where a cause is reversed because of an insufficient attachment bond it may be remanded with leave to amend. Hamble *v.* Owen, 20 Iowa 70.

37. *Arkansas.*—Bergman *v.* Sells, 39 Ark. 97.

Colorado.— McCraw *v.* Welch, 2 Colo. 284.

Iowa.— State Branch Bank *v.* Morris, 13 Iowa 136.

Minnesota.— Blake *v.* Sherman, 12 Minn. 420.

Montana.—Langstaff *v.* Miles, 5 Mont. 554, 6 Pac. 356; Pierse *v.* Miles, 5 Mont. 549, 6 Pac. 347.

New York.— Riley *v.* Skidmore, 2 Silv. Supreme (N. Y.) 573, 6 N. Y. Suppl. 107, 24 N. Y. St. 724.

Tennessee.— Brooks *v.* Hartman, 1 Heisk. (Tenn.) 36.

38. Amendable defects may be waived (Steers *v.* Morgan, 66 Ga. 552); but if defendant does not object a stranger to the proceeding cannot (Reinmiller *v.* Skidmore, 7 Lans. (N. Y.) 161; Camberford *v.* Hall, 3 McCord (S. C.) 345; Baxter *v.* Smith, 2 Wash. Terr. 97, 4 Pac. 35).

39. Houston *v.* Belcher, 12 Sm. & M. (Miss.) 514; Tyson *v.* Hamer, 2 How. (Miss.) 669.

40. Moynihan *v.* Drobaz, 124 Cal. 212, 56 Pac. 1026, 71 Am. St. Rep. 46.

41. General appearance without objection waives defects.— Hammond *v.* Starr, 79 Cal. 556, 21 Pac. 971.

A special appearance, entered for the sole purpose of moving to set aside the attachment, is not a waiver of insufficiency of the bond upon which the attachment is issued. Tiffany *v.* Lord, 65 N. Y. 310.

Effect of appearance, generally, see *infra*, XVI, B, 3.

42. Pleading to the merits a waiver of defects.— Reagan *v.* Irvin, 25 Ark. 86; Perry *v.* Mulligan, 58 Ga. 479; Bryant *v.* Hendee, 40 Mich. 543. *Contra*, Drake *v.* Brander, 8 Tex. 351.

A failure to plead defect in abatement of the writ waives the defect. Jones *v.* Pope, 6 Ala. 154; Bickerstaff *v.* Dellinger, 1 N. C. 388; Powell *v.* Hampton, 1 N. C. 218.

43. After judgment is too late to object to defective bond.— Carothers *v.* Click, Morr. (Iowa) 54; Englehart-Davidson Mercantile Co. *v.* Burrell, 66 Mo. App. 117.

44. Objection to defective bond cannot be first raised in appellate court.— *Alabama.*— Burt *v.* Parish, 9 Ala. 211; Fleming *v.* Burge, 6 Ala. 373; Conklin *v.* Harris, 5 Ala. 213.

Arkansas.— Fletcher *v.* Menken, 37 Ark. 206.

Illinois.— Iroquois Furnace Co. *v.* Wilkin Mfg. Co., 181 Ill. 582, 54 N. E. 987 [*reversing* 77 Ill. App. 59]; Morris *v.* School Trustees, 15 Ill. 266.

Kansas.— Myers *v.* Cole, 32 Kan. 138, 4 Pac. 169.

Louisiana.— Durham *v.* Lisso, 32 La. Ann. 415.

Mississippi.— Barrow *v.* Burbridge, 41 Miss. 622.

g. Substitution of Sufficient Bond. In order to render a surety competent to testify on behalf of plaintiff, a new bond with a different surety may be substituted therefor and the original canceled prior to the accrual of liability thereupon.[45]

VIII. THE WRIT.

A. Nature and Necessity. The writ of attachment is the process issued at the institution or during the progress of an action commanding the sheriff or other proper officer to attach the property, rights, credits, or effects of defendant to satisfy the demands of plaintiff.[46] The ancillary writ is not a pleading which permits of an answer. It constitutes no part of, and is not embraced in, the pleadings in the action.[47] An attachment without the writ is void, that being the leading and essential process in the proceeding.[48]

B. Issues When — 1. In General — a. Rule Stated. Where the statute fixes a time within which the writ may issue, it must be issued within such prescribed time.[49] In the case of ancillary attachment, the pendency of an action is a prerequisite to the right to the writ, and a writ issued before an action is commenced is void and can give no lien;[50] but the writ may be issued contemporaneously with the commencement of suit[51] or at any time thereafter before final judgment.[52] It can never be issued, however, before the filing of the required affi-

45. Tyson *v.* Lansing, 10 La. 444; Garmon *v.* Barringer, 19 N. C. 502; Shaw *v.* Trunsler, 30 Tex. 390; Drake *v.* Brander, 8 Tex. 351.

46. Bouvier L. Dict. In Delaplain *v.* Armstrong, 21 W. Va. 211, 213, the writ is thus defined: "An order of attachment is an execution by anticipation."

Under the code practice a defendant who interposes a counter-claim may enforce the same by attachment. See for example N. Y. Code Civ. Proc. § 720; State *v.* Hobson, 6 Ohio S. & C. Pl. Dec. 338.

47. Boston *v.* Wright, 3 Kan. 220; Beck *v.* Irby, 36 Miss. 188.

Where the suit is commenced by a writ of attachment, it serves as both process and count, and no declaration is necessary. Where this is the case, the above statement does not apply. Moore *v.* Hawkins, 6 Dana (Ky.) 289; Osgood *v.* Holyoke, 48 Me. 410; Saco *v.* Hopkinton, 29 Me. 268; Fairbanks *v.* Stanley, 18 Me. 296; Brigham *v.* Este, 2 Pick. (Mass.) 420. See also Monroe *v.* Castleman, 3 A. K. Marsh. (Ky.) 399; Kincaid *v.* Francis, Cooke (Tenn.) 49.

48. Sawyers *v.* Smith, 41 Miss. 554.

49. Thus, under a statute, providing that a writ against a defendant who has absconded or concealed himself should issue within three months after the injury done, an attachment issued more than three months after such injury has been held to be void. Webb *v.* Bowler, 50 N. C. 362.

In Pennsylvania an early statute requiring the creditor to wait six days before suing out an attachment against an absconding debtor has been abolished. Jewel *v.* Howe, 3 Watts (Pa.) 144; Wray *v.* Gilmore, 1 Miles (Pa.) 75.

50. *Alabama.*— Morgan *v.* Lamar, 9 Ala. 231.

California.— Wheeler *v.* Farmer, 38 Cal. 203; Low *v.* Henry, 9 Cal. 538.

Iowa.— Nuckols *v.* Mitchell, 4 Greene (Iowa) 432.

Kansas.— Bannister *v.* Carroll, 43 Kan. 64, 22 Pac. 1012; Dunlap *v.* McFarland, 25 Kan. 488.

Kentucky.— Redwine *v.* Underwood, 101 Ky. 190, 19 Ky. L. Rep. 366, 40 S. W. 462; Kellar *v.* Stanley, 86 Ky. 240, 9 Ky. L. Rep. 388, 5 S. W. 477.

Montana.— Sharman *v.* Huot, 20 Mont. 555, 52 Pac. 558, 63 Am. St. Rep. 645.

Nevada.— Levy *v.* Elliott, 14 Nev. 435.

New York.— Houghton *v.* Ault, 16 How. Pr. (N. Y.) 77.

North Carolina.— Marsh *v.* Williams, 63 N. C. 371.

Ohio.— Seibert *v.* Switzer, 35 Ohio St. 661; Central Sav. Bank Co. *v.* Langenbach, 1 Ohio S. & C. Pl. Dec. 182, 1 Ohio N. P. 124.

Oklahoma.— Raymond *v.* Nix, 5 Okla. 656, 49 Pac. 1110.

Oregon.— White *v.* Johnson, 27 Oreg. 282, 40 Pac. 511, 50 Am. St. Rep. 726.

Tennessee.— Barber *v.* Denning, 4 Sneed (Tenn.) 266; Thompson *v.* Carper, 11 Humphr. (Tenn.) 542.

Texas.— King *v.* Robinson, 2 Tex. App. Civ. Cas. § 554. But see Bowers *v.* Chaney, 21 Tex. 363, holding that a writ issued before the filing of the petition is voidable but not void when attacked collaterally.

West Virginia.— Steele *v.* Harkness, 9 W. Va. 13, holding that after a suit has abated the writ cannot issue.

Wisconsin.— Jarvis *v.* Barrett, 14 Wis. 591.

United States.— Spreen *v.* Delsignore, 94 Fed. 71, construing Kentucky statute.

This rule has been strictly construed, and a writ issued on the same day that the action was commenced, but prior thereto, held void. Seibert *v.* Switzer, 35 Ohio St. 661.

51. Hubbardston Lumber Co. *v.* Covert, 35 Mich. 254; Houghton *v.* Ault, 16 How. Pr. (N. Y.) 77.

52. *Indiana.*— Will *v.* Whitney, 15 Ind. 194.

Kentucky.— Kellar *v.* Stanley, 86 Ky. 240, 9 Ky. L. Rep. 388, 5 S. W. 477; Hall *v.* Gro-

davit and bond.[53] Where the attachment can be issued only on the order of the court it should be issued as of the term at which it is awarded.[54]

b. When Action Deemed Commenced — (I) *On Filing Affidavit.* In some states the time of filing the affidavit for attachment is made, by statute, for all legal purposes the date of the commencement of the suit, and a *præcipe* is not required.[55]

(II) *On Filing Complaint, Declaration, or Petition.* In other states the action is deemed to be commenced when the complaint, declaration, or petition is filed,[56] although in some it is also necessary that a summons be issued thereon with a *bona fide* intent that it shall be served.[57]

gan, 78 Ky. 11; Fremd *v.* Ireland, 17 Ky. L. Rep. 1140, 33 S. W. 89; Kendall *v.* Kennedy, 8 Ky. L. Rep. 532.

Nebraska.— Hoagland *v.* Wilcox, 42 Nebr. 138, 60 N. W. 376; Strickler *v.* Hargis, 34 Nebr. 468, 51 N. W. 1039; Coffman *v.* Brandhoeffer, 33 Nebr. 279, 50 N. W. 6.

New York.—Houghton *v.* Ault, 16 How. Pr. (N. Y.) 77.

United States.— Spreen *v.* Delsignore, 94 Fed. 71, construing West Virginia statute.

Attachment after verdict.— It has been held in Kansas that attachment may be allowed in a civil action for the recovery of money after the return of the verdict and before the final judgment thereon is rendered and recorded. Davis *v.* Jenkins, 46 Kan. 19, 26 Pac. 459.

53. *Alabama.*— Kirkman *v.* Patton, 19 Ala. 32.

Arkansas.— McDonald *v.* Smith, 24 Ark. 614.

California.— Wheeler *v.* Farmer, 38 Cal. 203.

Colorado.—Nachtrieb *v.* Stoner, 1 Colo. 423.

Florida.— Simpson *v.* Knight, 12 Fla. 144.

Michigan.— Howell *v.* Dickerman, 88 Mich. 361, 50 N. W. 306; Hubbardston Lumber Co. *v.* Covert, 35 Mich. 254; Buckley *v.* Lowry, 2 Mich. 418; Wight *v.* Warner, 1 Dougl. (Mich.) 384.

Nebraska.— Tessier *v.* Crowley, 16 Nebr. 369, 20 N. W. 264.

Ohio.— Endel *v.* Leibrock, 33 Ohio St. 254.

Texas.— Griffith *v.* Robinson, 19 Tex. 219; Wright *v.* Ragland, 18 Tex. 289.

United States.— People's Sav. Bank, etc., Co. *v.* Batchelder Egg Case Co., 51 Fed. 130, 4 U. S. App. 603, 2 C. C. A. 126, construing Arkansas statute.

See *supra*, VII, E, 1, a; and 5 Cent. Dig. tit. "Attachment," § 396.

Affidavit and writ dated same day.—Where the affidavit was made the same day the writ issued and purports to be annexed thereto it will be presumed that the writ did not pass from the clerk's hands until the affidavit was made, and it is of no consequence whether the writ was filled out before the making of the affidavit. Hubbardston Lumber Co. *v.* Covert. 35 Mich. 254.

54. Barney *v.* Patterson, 6 Harr. & J. (Md.) 182, holding, however, that the intervention of a term before the issue of the attachment is an irregularity which renders the writ voidable and not void.

55. Simpson *v.* Knight, 12 Fla. 144; Pullian *v.* Nelson, 28 Ill. 112; Eddy *v.* Prady, 16 Ill. 306; Buck *v.* Coy, 73 Ill. App. 160.

56. *Arkansas.*— McDonald *v.* Smith, 24 Ark. 614. See also Rheubottom *v.* Sadler, 19 Ark. 491.

Georgia.— Graves *v.* Strozier, 37 Ga. 32.

Iowa.— Reed *v.* Chubb, 9 Iowa 178; Hargan *v.* Burch, 8 Iowa 309.

Texas.— Cordova *v.* Priestly, 4 Tex. 250; Wooster *v.* McGee, 1 Tex. 17; Fowler *v.* Poor, Dall. (Tex.) 401. But while it is irregular and erroneous to issue a writ of attachment before the filing of the petition, yet this would only render the writ voidable and not void, and therefore it would not be subject to collateral attack. Bowers *v.* Chaney, 21 Tex. 363, distinguishing the foregoing cases on the ground that in them there was a direct attack and the judgments would have been reversed on appeal.

Washington.— Schwabacher *v.* Abrahams Grocery Co., 14 Wash. 225, 44 Pac. 257; Cosh-Murray Co. *v.* Tuttich, 10 Wash. 449, 38 Pac. 1134, which hold that the Washington code of civil procedure providing that civil actions shall be commenced by the filing of a complaint is not, so far as it applies to suits in which attachments are issued, repealed by Wash. Laws (1893), p. 407, which declares that civil actions shall be commenced by service of summons, but that for the purpose of issuing writs of attachments the filing of complaint is still to be taken as commencement of an action upon which the clerk is authorized to act.

United States.— People's Sav. Bank, etc., Co. *v.* Batchelder Egg Case Co., 51 Fed. 130, 4 U. S. App. 602, 2 C. C. A. 126, construing Arkansas statute.

See 5 Cent. Dig. tit. "Attachment," § 397.

Presumption as to time of issue.— Where the record showed that a petition was filed and the writ of attachment issued on the same day it was presumed that the writ was issued after the filing of the petition. Nuckols *v.* Mitchell, 4 Greene (Iowa) 432; Pitkins *v.* Boyd, 4 Greene (Iowa) 255.

57. *California.*— Low *v.* Henry, 9 Cal. 538; *Ex p.* Cohen, 6 Cal. 318.

Kansas.— Dunlap *v.* McFarland, 25 Kan. 488.

Kentucky.— Kellar *v.* Stanley, 86 Ky. 240, 9 Ky. L. Rep. 388, 5 S. W. 477; Hall *v.* Grogan, 78 Ky. 11; Fremd *v.* Ireland, 17 Ky. L Rep. 1140, 33 S. W. 89.

(III) *On Issue of Summons*—(A) *Rule Stated.* The action, in some states, is deemed to be commenced when the summons is issued,[58] but the suit will be deemed pending for the purposes of the issue of the writ, if the summons and writ issue simultaneously.[59]

(B) *What Constitutes Issue of Summons.* Summons will be deemed issued when it is made out and placed in the hands of an officer authorized to serve it with a *bona fide* intent to have it served.[60] It is not necessary, however, that the summons should be actually served by the officer before the issue of the writ of attachment,[61] although in some states it is provided that a personal service of such summons shall be made, or publication thereof commenced, within a specified time after the issue of the same, and if publication has been or is thereafter commenced, that the service must be made complete by the continuance thereof.[62]

Nebraska.— Darnell *v.* Mack, 46 Nebr. 740, 65 N. W. 805; Hoagland *v.* Wilcox, 42 Nebr. 138, 60 N. W. 376; Coffman *v.* Brandhoeffer, 33 Nebr. 279, 50 N. W. 6.

Ohio.— Seibert *v.* Switzer, 35 Ohio St. 661; Central Sav. Bank Co. *v.* Langenbach, 1 Ohio S. & C. Pl. Dec. 182, 1 Ohio N. P. 124.

Oklahoma.— Raymond *v.* Nix, 5 Okla. 656, 49 Pac. 1110.

United States.— Spreen *v.* Delsignore, 94 Fed. 71, construing Ky. Civ. Code, § 194.

Summons by order of publication.— Where the action is deemed to be commenced upon filing of the petition and causing summons to be issued thereupon, it has been held that when the petition is filed and a summons served or the first publication is made within sixty days, such service or first publication relates back to the time of filing of petition, *præcipe*, and other necessary papers, and by such relation the suit is to be deemed to have been commenced at the date of their filing. Bannister *v.* Carroll, 43 Kan. 64, 22 Pac. 1012; Raymond *v.* Nix, 5 Okla. 656, 49 Pac. 1110.

58. *Montana.*— Sharman *v.* Huot, 20 Mont. 555, 52 Pac. 558, 63 Am. St. Rep. 645.

New York.— Allen *v.* Meyer, 73 N. Y. 1.

Oregon.— White *v.* Johnson, 27 Oreg. 282, 40 Pac. 511, 50 Am. St. Rep. 726.

Texas.— King *v.* Robinson, 2 Tex. App. Civ. Cas. § 554.

Wisconsin.— Bell *v.* Olmsted, 18 Wis. 69; Jarvis *v.* Barrett, 14 Wis. 591.

United States.— Henrietta Min., etc., Co. *v.* Gardner, 173 U. S. 123, 19 S. Ct. 327, 43 L. ed. 637, construing Arizona statute.

Warning order in lieu of summons.— In Kentucky where a warning order addressed to defendant is issued by the clerk, failure to issue a summons is not deemed to be erroneous. Anderson *v.* Sutton, 2 Duv. (Ky.) 480.

59. *Colorado.*— Schuster *v.* Rader, 13 Colo. 329, 22 Pac. 505.

Iowa.— Nuckols *v.* Mitchell, 4 Greene (Iowa) 432.

Kentucky.— Harbour-Pitt Shoe Co. *v.* Dixon, 22 Ky. L. Rep. 1169, 60 S. W. 186.

Minnesota.— Blackman *v.* Wheaton, 13 Minn. 326.

New York.— Webb *v.* Baily, 54 N. Y. 164; Finn *v.* Mehrbach, 65 N. Y. Suppl. 250, 30 N. Y. Civ. Proc. 242; Gould *v.* Bryan, 3 Bosw. (N. Y.) 626; Cushman *v.* Fischer, 16 Abb. Pr. (N. Y.) 246 note; Mills *v.* Corbett, 8 How. Pr. (N. Y.) 500.

Tennessee.— Walker *v.* Cottrell, 6 Baxt. (Tenn.) 257; Thompson *v.* Carper, 11 Humphr. (Tenn.) 542.

Wisconsin.— Barth *v.* Burnham, 105 Wis. 548, 81 N. W. 809; Bell *v.* Olmsted, 18 Wis. 69.

Presumption as to summons.— Where in a court of superior jurisdiction an attachment has been issued, it will be presumed *prima facie* that the summons was issued prior to or contemporaneous with such writ in accordance with statutory requirement. Blackman *v.* Wheaton, 13 Minn. 326.

60. Morgan *v.* Lamar, 9 Ala. 231; Mills *v.* Corbett, 8 How. Pr. (N. Y.) 500; White *v.* Johnson, 27 Oreg. 282, 40 Pac. 511, 50 Am. St. Rep. 726; Barth *v.* Burnham, 105 Wis. 548, 81 N. W. 809.

Actual or constructive delivery to officer necessary.— The mere making out of the writ, without actual or constructive delivery to the officer for service, is the same as if no summons has issued. Hancock *v.* Ritchie, 11 Ind. 48.

61. *Alabama.*— Morgan *v.* Lamar, 9 Ala. 231.

Colorado.—Schuster *v.* Rader, 13 Colo. 329, 22 Pac. 505.

Minnesota.— Blackman *v.* Wheaton, 13 Minn. 326.

New York.— Wallace *v.* Castle, 68 N. Y. 370. But under the old New York code an attachment against a non-resident debtor, if made before the actual service of the summons, was utterly void (Kerr *v.* Mount, 28 N. Y. 659; Zerega *v.* Benoist, 7 Rob. (N. Y.) 199, 33 How. Pr. (N. Y.) 129; Fisher *v.* Curtis, 2 Sandf. (N. Y.) 660. *Compare* Webb *v.* Bailey, 54 N. Y. 164); and an attachment rendered void by failure to serve a summons was not revived and validated by the appearance of defendant (Blossom *v.* Estes, 84 N. Y. 614 [*affirming* 22 Hun (N. Y.) 472]; Cossitt *v.* Winchell, 39 Hun (N. Y.) 439).

Wisconsin.— Maguire *v.* Bolen, 94 Wis. 48, 68 N. W. 408; Cox *v.* North Wisconsin Lumber Co., 82 Wis. 141, 51 N. W. 1130; Evans *v.* Virgin, 69 Wis. 148, 33 N. W. 585; Cummings *v.* Tabor, 61 Wis. 185, 21 N. W. 72; Bell *v.* Olmsted, 18 Wis. 69.

62. *Michigan.*—Millar *v.* Babcock, 29 Mich. 526; King *v.* Harrington, 14 Mich. 532.

c. Interval Allowed Between Filing Papers and Issue of Writ. Reasonable time should be allowed within which to transmit the affidavit to the place where it is to be used;[63] but such a delay between the making of the affidavit and the issue of the writ as to cast a suspicion on the verity of the affidavit, or to lead to the suspicion that the grounds stated in the affidavit for asking that the attachment issue had ceased to exist, will warrant the quashing of the attachment.[64]

Nebraska.— Wescott *v.* Archer, 12 Nebr. 345, 11 N. W. 491, 577.

New York.— Mojarietta *v.* Saenz, 80 N. Y. 547, 58 How. Pr. (N. Y.) 505; Allen *v.* Meyer, 73 N. Y. 1; Wallace *v.* Castle, 68 N. Y. 370; Kerr *v.* Mount, 28 N. Y. 659; American Exch. Nat. Bank *v.* Voisin, 44 Hun (N. Y.) 85; Cossitt *v.* Winchell, 39 Hun (N. Y.) 439; Simpson *v.* Burch, 4 Hun (N. Y.) 315, 6 Thomps. & C. (N. Y.) 560; Taddiken *v.* Cantrell, 1 Hun (N. Y.) 710, 4 Thomps. & C. (N. Y.) 222; Waffle *v.* Goble, 53 Barb. (N. Y.) 517; Lawton *v.* Kiel, 51 Barb. (N. Y.) 30, 34 How. Pr. (N. Y.) 465; Corson *v.* Ball, 47 Barb. (N. Y.) 452; Fisher *v.* Curtis, 2 Sandf. (N. Y.) 660; Tyler *v.* Williams, 9 Daly (N. Y.) 451; Towle *v.* Covert, 15 Abb. Pr. N. S. (N. Y.) 193; Woodward *v.* Stearns, 10 Abb. Pr. N. S. (N. Y.) 395; Cushman *v.* Fischer, 16 Abb. Pr. (N. Y.) 246 note; Orvis *v.* Goldschmidt, 64 How. Pr. (N. Y.) 71; Blossom *v.* Estes, 59 How. Pr. (N. Y.) 381; Houghton *v.* Ault, 16 How. Pr. (N. Y.) 77; Furman *v.* Walter, 13 How. Pr. (N. Y.) 348; Mills *v.* Corbett, 8 How. Pr. (N. Y.) 500; Burkhardt *v.* Sanford, 7 How. Pr. (N. Y.) 329; Hulbert *v.* Hope Mut. Ins. Co., 4 How. Pr. (N. Y.) 275, 2 Code Rep. (N. Y.) 148.

North Dakota.— Rhode Island Hospital Trust Co. *v.* Keeney, 1 N. D. 411, 48 N. W. 341.

South Dakota.— Iowa State Sav. Bank *v.* Jacobson, 8 S. D. 292, 66 N. W. 453.

Wisconsin.— Cummings *v.* Tabor, 61 Wis. 185, 21 N. W. 72; Anderson *v.* Coburn, 27 Wis. 558.

Appearance of defendant.— Where defendant within thirty days from the time of issuing the attachment appears in person, or by his attorney, who serves a formal notice of appearance in his behalf, it is not necessary to serve the summons upon him either personally or by publication. Tuller *v.* Beck, 108 N. Y. 355, 15 N. E. 396; Catlin *v.* Ricketts, 91 N. Y. 668; Pomeroy *v.* Ricketts, 27 Hun (N. Y.) 242.

Collateral attack.— Omission to serve a summons within thirty days of the allowance of the attachment entitles defendant to avoid all proceedings after the issue thereof, yet it does not render such proceedings void as against third persons. Defendant may waive the effect of such omissions. This is the test of whether the defect shown is a nullity or a mere irregularity. Simpson *v.* Burch, 4 Hun (N. Y.) 315, 6 Thomps. & C. (N. Y.) 560; Gere *v.* Gundlach, 57 Barb. (N. Y.) 13.

Death of defendant.— Where a summons issued, attachment was issued upon the summons, and the original defendant died within thirty days after the issue of the summons and attachment, but before service of the summons upon him, the attachment was void, since the service of the summons was a condition necessary to the life of the action. Kelly *v.* Countryman, 15 Hun (N. Y.) 97. But see More *v.* Thayer, 10 Barb. (N. Y.) 258.

Publication in two newspapers.— Under N. Y. Code Civ. Proc. § 638, in order to sustain the attachment a publication of the summons must be commenced in both newspapers directed by the order within thirty days after the granting of the attachment, or the attachment falls. Peetsch *v.* Sommers, 31 N. Y. App. Div. 255, 53 N. Y. Suppl. 438. See also Taylor *v.* Troncoso, 76 N. Y. 599.

Service on one defendant.— Where an action was brought against a firm consisting of two members, an attachment was issued, and one of the partners personally served with the summons, but the other was not, nor were proceedings to serve him by publication commenced within the thirty days required by statute, it was held that the attachment ceased to be a lien upon the firm property. Donnell *v.* Williams, 21 Hun (N. Y.) 216, 59 How. Pr. (N. Y.) 68. But see Orvis *v.* Goldschmidt, 64 How. Pr. (N. Y.) 71, where it was held that the service of summons upon one of two defendants within thirty days was a sufficient compliance with the provision of the code in that regard.

Substituted service.— It has been held that the requirements of the code as to service of summons are not complied with by an order of substituted service and service thereunder. Bogart *v.* Swezey, 26 Hun (N. Y.) 463.

63. Foster *v.* Illinski, 3 Ill. App. 345; Graham *v.* Bradbury, 7 Mo. 281; Creach *v.* Delane, 1 Nott & M. (S. C.) 189.

What is a reasonable time is to be judged of by the situation of the parties and the character of the grounds for attachment, whether presumably continuing or transitory. Adams *v.* Lockwood, 30 Kan. 373, 2 Pac. 626; Avery *v.* Good, 114 Mo. 290, 21 S. W. 815; O'Neil *v.* New York, etc., Min. Co., 3 Nev. 141. Thus, where affiant resides in the county in which the suit is brought less time would be considered reasonable than where he resided in a different county, and in the latter case less than where he resided in a different state. Foster *v.* Illinski, 3 Ill. App. 345. So where the affidavit was made in New York on June 9, for use in Texas, and was not filed and the writ did not issue until July 3 following, such lapse of time was not sufficient ground to warrant quashing the attachment. Wright *v.* Ragland, 18 Tex. 289.

64. *Illinois.*— Foster *v.* Illinski, 3 Ill. App. 345.

2. In Vacation. In the absence of statutory prohibition the writ may issue in a pending action in vacation as well as during a term of court.[65]

3. On Sundays or Holidays. Unless authorized by statute[66] the writ cannot issue on a Sunday or holiday where its issue is a judicial act,[67] although it is otherwise when the issue is a ministerial act.[68]

C. Form and Requisites[69] **—1. In General — a. Style of Writ.** The writ should run in the name of the state or people;[70] but while, in some jurisdictions

Missouri.— Avery *v.* Good, 114 Mo. 290, 21 S. W. 815; Graham *v.* Bradbury, 7 Mo. 281.

Nevada.— O'Neil *v.* New York, etc., Min. Co., 3 Nev. 141.

South Carolina.— Creach *v.* Delane, 1 Nott & M. (S. C.) 189.

Texas.— Lewis *v.* Stewart, 62 Tex. 352; Wright *v.* Ragland, 18 Tex. 289; Campbell *v.* Wilson, 6 Tex. 379; Sydnor *v.* Chambers, Dall. (Tex.) 601; Wilson *v.* Galbraith, 2 Tex. Unrep. Cas. 391.

Compare McClanahan *v.* Brack, 46 Miss. 246, holding that the fact that the affidavit and bond for attachment were dated Nov. 24, 1866, and the writ dated Dec. 12, 1866, did not *ipso facto* constitute ground for quashing the attachment, and that the propriety of the proceedings ought to be tested by plea in abatement, on the trial of which the question would be whether the attachment was wrongfully sued out at the time of its issue.

In Michigan, under How. Anno. Stat. Mich. § 7887, the intervention of a day between the date of the jurat and the issue of the writ is permitted. Horton *v.* Monroe, 98 Mich. 195, 57 N. W. 109, holding that such day does not begin to run until the expiration of the day upon which the affidavit is executed, and that the writ may be issued after the expiration of the intervening day. Formerly the writ against a non-resident debtor was required to issue on the day on which the affidavit supporting it was sworn to, and a writ issued subsequent to the date of the affidavit was voidable (Fessenden *v.* Hill, 6 Mich. 242; Wilson *v.* Arnold, 5 Mich. 98), the reason being that otherwise defendant might become a resident of the state between the time the affidavit was sworn to and the issue of the writ (Drew *v.* Dequindre, 2 Dougl. (Mich.) 93).

65. Dutcher *v.* Crowell, 10 Ill. 445; Beecher *v.* James, 3 Ill. 462; Byers *v.* Brannon, (Tex. 1892) 19 S. W. 1091.

66. Thus under Nev. Comp. Laws, § 955, subs. 50, a writ of attachment may issue and be served on a non-judicial day (for instance Sunday) whenever plaintiff or some person in his behalf will make the necessary affidavit required by such section. Levy *v.* Elliott, 14 Nev. 435.

67. Matthews *v.* Ansley, 31 Ala. 20; Merchants Nat. Bank *v.* Jaffray, 36 Nebr. 218, 54 N. W. 258, 19 L. R. A. 316; Corning *v.* Dreyfus, 20 Fed. 426 (construing Louisiana statute). See also Johnson *v.* Day, 17 Pick. (Mass.) 106, and, generally, Sunday.

Defect not apparent on face of writ.— The issue of a writ on Sunday is, at common law, an irregularity, which, if apparent on the face of the writ, will justify the quashing of it, but if not so apparent the validity of the writ will not be affected, and in such cases the court cannot order the clerk to alter the date of the writ to make it show that it was issued on Sunday and then quash it. Matthews *v.* Ansley, 31 Ala. 20.

68. Whipple *v.* Hill, 36 Nebr. 720, 55 N. W. 227, 38 Am. St. Rep. 742, 20 L. R. A. 313.

69. For forms of writs of attachment see the following cases:

Alabama.— Bruner *v.* Kinsel, 42 Ala. 493.

Arkansas.— Rice *v.* Dale, 45 Ark. 34; Ellis *v.* Cossitt, 14 Ark. 222.

Florida.— West *v.* Woolfolk, 21 Fla. 189.

Maine.— Jordan *v.* Keen, 54 Me. 417.

Maryland.— Boarman *v.* Patterson, 1 Gill (Md.) 372; Dawson *v.* Brown, 12 Gill & J. (Md.) 53; Smith *v.* Greenleaf, 4 Harr. & M. (Md.) 291.

New Hampshire.— Laighton *v.* Lord, 29 N. H. 237; Rand *v.* Sherman, 6 N. H. 29.

New York.— Castellanos *v.* Jones, 5 N. Y. 164; Genin *v.* Tompkins, 12 Barb. (N. Y.) 265, Code Rep. N. S. (N. Y.) 12.

Vermont.— Brewer *v.* Story, 2 Vt. 281.

Canada.— Meighan *v.* Pinder, 2 U. C. Q. B. O. S. 292.

70. *Arkansas.*— Kahn *v.* Kuhn, 44 Ark. 404.

Colorado.—Archibald *v.* Thompson, 2 Colo. 388.

Kentucky.— Yeager *v.* Groves, 78 Ky. 278; McDaniel *v.* Sappington, Hard. (Ky.) 94; Settles *v.* Davis, 14 Ky. L. Rep. 718.

Missouri.— Davis *v.* Wood, 7 Mo. 162.

Nebraska.— Livingston *v.* Coe, 4 Nebr. 379.

New York.— Camman *v.* Tompkins, 12 Barb. (N. Y.) 265, Code Rep. N. S. (N. Y.) 12.

Tennessee.— Harper *v.* Turner, 101 Tenn. 686, 50 S. W. 755; McLendon *v.* State, 92 Tenn. 520, 22 S. W. 200, 21 L. R. A. 738; Wiley *v.* Bennett, 9 Baxt. (Tenn.) 581; Nashville *v.* Pearl, 11 Humphr. (Tenn.) 249.

Texas.— King *v.* Robinson, 2 Tex. App. Civ. Cas. § 554.

West Virginia.— Sims *v.* Charleston Bank, 3 W. Va. 415. *Contra,* King *v.* Board, 7 W. Va. 701; Gutman *v.* Virginia Iron Co., 5 W. Va. 22.

See 5 Cent. Dig. tit. "Attachment," § 404.

Attachment indorsed on back of summons. — Where on the back of a summons, issued in the name of the commonwealth and signed by the clerk, was an order of attachment, also signed by the clerk, but which when read by itself did not run in the name of the commonwealth, it was held that the summons and indorsement should be read together as forming one writ, and the attachment thus regarded

a defect in this respect has been held to be fatal, the writ being regarded as void *ab initio*,[71] in others, an amendment is allowed.[72]

b. To Whom Directed. The writ should be directed to a particular officer or class of officers authorized by law to levy the same,[73] but an error in this respect has been held to be curable by amendment.[74]

c. Description of Parties. The writ should give the names of the parties to the suit;[75] but amendments supplying the names of parties inadvertently omitted

as issuing in the name of the commonwealth, especially as the practice of thus indorsing orders for attachment had for a long time prevailed in many of the courts. Northern Bank *v.* Hunt, 93 Ky. 67, 14 Ky. L. Rep. 1, 19 S. W. 3. See also Rice *v.* Dale, 45 Ark. 34.

Surplusage.—While the writ of attachment should run in the name of the state, it has been held to be no objection thereto that the name of the county was added just below that of the state. McMahan *v.* Boardman, 29 Tex. 170.

71. Harper *v.* Turner, 101 Tenn. 686, 50 S. W. 755; Sims *v.* Charleston Bank, 3 W. Va. 415.

72. Kahn *v.* Kuhn, 44 Ark. 404; Livingston *v.* Coe, 4 Nebr. 379; Camman *v.* Tompkins, 12 Barb. (N. Y.) 265, Code Rep. N. S. (N. Y.) 12.

73. *Alabama.*— The proper direction of an attachment returnable to the circuit court is "To any sheriff of the State of Alabama." Herring *v.* Kelly, 96 Ala. 559, 11 So. 600; Drewry *v.* Leinkauff, 94 Ala. 486, 10 So. 352; Peebles *v.* Weir, 60 Ala. 413. But where the writ is addressed to the sheriff of a particular county the defect is fatal only where the attachment is sought to be levied in another county (Blair *v.* Miller, 42 Ala. 308), and where the writ is directed to any lawful officer such defect is immaterial if the process was in fact executed by a proper officer (Ware *v.* Todd, 1 Ala. 199). Where, in addition to the proper direction, the writ is directed to the constable of a particular beat, such additional direction will be regarded as an indorsement under Ala. Code, § 2956. Drewry *v.* Leinkauff, 94 Ala. 486, 10 So. 352.

Colorado.— The writ must be addressed to the sheriff or constable. Archibald *v.* Thompson, 2 Colo. 388.

Georgia.— Attachments returnable to the superior courts are directed to all and singular the sheriffs and constables of this state (Rogers *v.* Moore, 40 Ga. 386) and the addition of the words "of said county" has been held to render the writ void (Thomas *v.* Lavender, 15 Ga. 267).

Iowa.— The writ must be directed to the sheriff, and though the word "sheriff" is extended by statute to include constables, a writ directed to a constable is void. Freeman *v.* Lind, 112 Iowa 39, 83 N. W. 800.

Nevada.— The writ must be directed to the sheriff of the county where defendant's property is situated. Sadler *v.* Tatti, 17 Nev. 429, 30 Pac. 1082.

North Carolina.— The writ should be addressed to any sheriff, but where it was in fact issued to the sheriff and duly executed by him, this cures an informality in the direction of the writ "to any constable or other lawful officer." Askew *v.* Stevenson, 61 N. C. 288.

West Virginia.— Sims *v.* Charleston Bank, 3 W. Va. 415.

When directed to one specially authorized the conditions and circumstances giving special jurisdiction and authority for such direction should affirmatively appear. Brooks *v.* Farr, 51 Vt. 396; Dolbear *v.* Hancock, 19 Vt. 388.

74. Herring *v.* Kelly, 96 Ala. 559, 11 So. 600; Blair *v.* Miller, 42 Ala. 308; Warren *v.* Purtell, 63 Ga. 428; Buchanan *v.* Sterling, 63 Ga. 227.

75. Barber *v.* Swan, 4 Greene (Iowa) 352, 61 Am. Dec. 124; Barber *v.* Smith, 41 Mich. 138, 1 N. W. 992; Clay *v.* Neilson, 5 Rand. (Va.) 596.

Defect cured by reference to affidavit and bond.— Where the identity of defendant can be ascertained by reference to the affidavit and bond, the writ will not be dismissed because it does not name him. Moore *v.* Brewer, 94 Ga. 260, 21 S. E. 460.

Describing plaintiff by copartnership name is not sufficient (Barber *v.* Smith, 41 Mich. 138, 1 N. W. 992), but failure to state the names of the individuals composing the firm will not authorize the dismissal of a levy thereunder or the rejection of the attachment when offered in evidence on trial of a claim growing out of such levy (Gazan *v.* Royce, 78 Ga. 512, 3 S. E. 753); and the irregularity is unimportant where the full names appear in the declaration and defendant appears (Clayburg *v.* Ford, 3 Ill. App. 542).

Omission of some of plaintiffs.— An attachment is not absolutely void as against subsequently attaching creditors because the names of some of the parties, who should have been joined as plaintiffs, were omitted. This would be matter of defense and might be waived. Paine *v.* Tilden, 20 Vt. 554.

Fictitious names for defendants.— It has been held that neither the district courts of the city of New York nor the New York marine court had authority to grant attachments against persons by fictitious names, and that warrants of attachment so issued were absolutely void. Patrick *v.* Solinger, 9 Daly (N. Y.) 149 (holding this to be the rule even though the evidence showed that the party against whom it was intended to proceed was the owner of the property attached); McCabe *v.* Doe, 2 E. D. Smith (N. Y.) 64; Davenport *v.* Deady, 3 Abb. Pr. (N. Y.) 409.

or correcting the names of parties have been liberally allowed by the courts, particularly where the substantial rights of the parties to the suit have not been thereby affected,[76] although where the name of neither party is specified the writ is fatally defective.[77] The writ need not state that plaintiff is a resident of the state[78] or that defendant is an adult.[79]

d. Recital of Proceedings to Procure. In the absence of statutory requirement it is not necessary to recite the filing of the affidavit required by law,[80] the order for the issue of the writ,[81] or the execution or filing of a bond.[82]

e. Recitals as to Cause of Action. The writ must refer to, describe, and identify the suit in aid of which it issues, so as to show unmistakably upon its face that it forms an adjunct to that particular proceeding.[83] It should recite that a suit has been commenced[84] by plaintiff against defendant,[85] the nature thereof,[86]

76. *Alabama.*— *Ex p.* Nicrosi, 103 Ala. 104, 15 So. 507; Sims *v.* Jacobson, 51 Ala. 186; Alford *v.* Johnson, 9 Port. (Ala.) 320.
Connecticut.— Johnson *v.* Huntington, 13 Conn. 47.
Georgia.— Moore *v.* Brewer, 94 Ga. 260, 21 S. E. 460.
Illinois.— Johnson *v.* Buell, 26 Ill. 66.
Massachusetts.— Diettrich *v.* Wolffsohn, 136 Mass. 335; Wright *v.* Herrick, 125 Mass. 154; Wight *v.* Hale, 2 Cush. (Mass.) 486, 48 Am. Dec. 677.
Michigan.— Emerson *v.* Detroit Steel, etc., Co., 100 Mich. 127, 58 N. W. 659; Barber *v.* Smith, 41 Mich. 138, 1 N. W. 992.
Mississippi.— Shaw *v.* Brown, 42 Miss. 309.
Missouri.— Whitehill *v.* Keen, 79 Mo. App. 125, 2 Mo. App. Rep. 384.
New Hampshire.— Hazen *v.* Quimby, 61 N. H. 76.
North Carolina.— Hall *v.* Thorburn, 61 N. C. 158.
Texas.— Martin-Brown Co. *v.* Milburn, 2 Tex. App. Civ. Cas. § 214.
United States.— Birch *v.* Butler, 1 Cranch C. C. (U. S.) 319, 3 Fed. Cas. No. 1,425 (construing Maryland statute); Harrington *v.* Philadelphia Fire Assoc., 11 Fed. Cas. No. 6,106, 4 Wkly. Notes Cas. (Pa.) 432 (construing Pennsylvania statute).
See 5 Cent. Dig. tit. "Attachment," § 440.

77. Barber *v.* Swan, 4 Greene (Iowa) 352, 61 Am. Dec. 124; Clay *v.* Neilson, 5 Rand. (Va.) 596.

78. Maury *v.* American Motor Co., 25 Misc. (N. Y.) 657, 56 N. Y. Suppl. 316; Bloomfield *v.* Hancock, 1 Yerg. (Tenn.) 100.

79. Hall *v.* Anderson, 17 Misc. (N. Y.) 270. 40 N. Y. Suppl. 354.

80. Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391; Tessier *v.* Crowley, 16 Nebr. 369, 20 N. W. 264; King *v.* Board, 7 W. Va. 701. It seems, however, that in South Carolina the oath taken before the granting of an attachment by a magistrate should be recited in the writ, on the ground that it must appear on the face of the process of all limited jurisdictions that the case is within its bounds. Hagood *v.* Hunter, 1 McCord (S. C.) 511.

Unnecessary to annex affidavit to writ.— It was held in Burnside *v.* Davis, 65 Mich. 74, 31 N. W. 619, that How. Anno. Stat. Mich. § 6839, did not contemplate that the affidavit should be annexed to the writ or a copy served with it.

81. Armstrong *v.* Lynch, 29 Nebr. 87, 45 N. W. 274.

What officer allowed the writ need not appear upon the face thereof. Shaubhut *v.* Hilton, 7 Minn. 506.

82. Tanner, etc., Engine Co. *v.* Hall, 22 Fla. 391; Ellsworth *v.* Moore, 5 Iowa 486; Hays *v.* Gorby, 3 Iowa 203; Tessier *v.* Crowley, 16 Nebr. 369, 20 N. W. 264; Ela *v.* Shepard, 32 N. H. 277.

In Indiana, however, the statute requires a recital in the writ that the bond has been approved and filed. Levi *v.* Darling, 28 Ind. 497; Marnine *v.* Murphy, 8 Ind. 272. But it has been held under this statute that a recital in the writ that the bond has been filed is equivalent to a statement of its approval. Marnine *v.* Murphy, 8 Ind. 272.

83. Lewis *v.* Woodfolk, 2 Baxt. (Tenn.) 25; Gibson *v.* Carroll, 1 Heisk. (Tenn.) 23.

84. Peak *v.* Buck, 3 Baxt. (Tenn.) 71; Woodfolk *v.* Whitworth, 5 Coldw. (Tenn.) 561; Smith *v.* Foster, 3 Coldw. (Tenn.) 139; Morris *v.* Davis, 4 Sneed (Tenn.) 452; Thompson *v.* Carper, 11 Humphr. (Tenn.) 542.

That action is pending should be stated in the writ (Barber *v.* Swan, 4 Greene (Iowa) 352, 61 Am. Dec. 124), but failure to state that it was issued in a pending action does not render the warrant void (Lawton *v.* Kiel, 51 Barb. (N. Y.) 30, 34 How. Pr. (N. Y.) 465. See also Hounshell *v.* Phares, 1 Ala. 580).

85. Peak *v.* Buck, 3 Baxt. (Tenn.) 71; Woodfolk *v.* Whitworth, 5 Coldw. (Tenn.) 561; Smith *v.* Foster, 3 Coldw. (Tenn.) 139; Morris *v.* Davis, 4 Sneed (Tenn.) 452; Thompson *v.* Carper, 11 Humphr. (Tenn.) 542.

86. Brown *v.* Hoy, 16 N. J. L. 157; Peak *v.* Buck, 3 Baxt. (Tenn.) 71; Ogg *v.* Lcinart, 1 Heisk. (Tenn.) 40; Woodfolk *v.* Whitworth, 5 Coldw. (Tenn.) 561; Smith *v.* Foster, 3 Coldw. (Tenn.) 139; Morris *v.* Davis, 4 Sneed (Tenn.) 452; Thompson *v.* Carper, 11 Humphr. (Tenn.) 542. *Compare* Pitkins *v.* Boyd, 4 Greene (Iowa) 255; Tessier *v.* Englehart, 18 Nebr. 167, 24 N. W. 734.

Maine — Attachment of real estate.— In

the tribunal in which it is pending,[87] the amount of damages laid,[88] and where required by statute that the cause of action is just.[89] When the amount claimed

Maine since Me. Stat. (1838), c. 344 (Smith *v.* Keen, 26 Me. 411), no attachment of real estate on mesne process creates any lien thereon, unless the nature and amount of the creditor's demand is set forth in proper counts or a specification thereof is annexed to the writ (Everett *v.* Carleton, 85 Me. 397, 27 Atl. 265; Briggs *v.* Hodgdon, 78 Me. 514, 7 Atl. 387; Bartlett *v.* Ware, 74 Me. 292; Belfast Sav. Bank *v.* Kennebec Land, etc., Co., 73 Me. 404; French *v.* Lord, 69 Me. 537; Shaw *v.* Nickerson, 60 Me. 249; Poor *v.* Larrabee, 58 Me. 543; Phillips *v.* Pearson, 55 Me. 570; Drew *v.* Alfred Bank, 55 Me. 450; Jordan *v.* Keen, 54 Me. 417; Forbes *v.* Hall, 51 Me. 568; Hanson *v.* Dow, 51 Me. 165; Neally *v.* Judkins, 48 Me. 566; Osgood *v.* Holyoke, 48 Me. 410; Saco *v.* Hopkinton, 29 Me. 268; Fairbanks *v.* Stanley, 18 Me. 296), and an attachment of real estate, if invalid when made, cannot be rendered valid by any subsequent amendment of the writ (Drew *v.* Alfred Bank, 55 Me. 450).

The technical name of the action need not be given where the writ upon its face advises defendant, not only of the nature of the complaint, but also of the precise amount sworn to by plaintiff. Ellis *v.* Cossitt, 14 Ark. 222 [*distinguishing* Renner *v.* Reed, 3 Ark. 339]. See also McCluny *v.* Jackson, 6 Gratt. (Va.) 96, holding that an attachment is not defective because it does not describe the character of the debt, whether due by bond, note, or account, and that the statute does not require the warrant to describe the claim with the precision of a declaration.

Profert not necessary in writ.— While an attachment should state the demand for which it is brought so explicitly as to make it a good bar in a future action for the same cause, yet, where the action is founded on a note, it is not necessary to make in the writ profert of the note. Monroe *v.* Castleman, 3 A. K. Marsh. (Ky.) 399.

Amendment.—Where an amendment in the principal action makes it proper or necessary, the auxiliary writ of attachment may be amended so as to conform to the principal action. Jackson *v.* Fletcher, Morr. (Iowa) 230, in which case, by clerical error, the writ of summons was issued in assumpsit although the action was in debt.

Indorsement of cause of action in writ.— It has been held that the Alabama act of 1807 which provides that the cause of action shall be indorsed on the writ applies only to initiatory process issued from the courts in which clerks are necessary officers, and does not extend to attachments issued by a judicial officer. Planters', etc., Bank *v.* Andrews, 8 Port. (Ala.) 404; Lowry *v.* Stowe, 7 Port. (Ala.) 483.

87. Peak *v.* Buck, 3 Baxt. (Tenn.) 71; Lowenheim *v.* Ireland, 2 Baxt. (Tenn.) 214; Woodfolk *v.* Whitworth, 5 Coldw. (Tenn.) 561; Smith *v.* Foster, 3 Coldw. (Tenn.) 139; Morris *v.* Davis, 4 Sneed (Tenn.) 452; Thompson *v.* Carper, 11 Humphr. (Tenn.) 542.

88. *California.*— Kennedy *v.* California Sav. Bank, 97 Cal. 93, 31 Pac. 846, 33 Am. St. Rep. 163.

Tennessee.— Peak *v.* Buck, 3 Baxt. (Tenn.) 71; Woodfolk *v.* Whitworth, 5 Coldw. (Tenn.) 561; Smith *v.* Foster, 3 Coldw. (Tenn.) 139; Morris *v.* Davis, 4 Sneed (Tenn.) 452; Thompson *v.* Carper, 11 Humphr. (Tenn.) 542.

Texas.— Munzenheimer *v.* Manhattan Cloak, etc., Co., 79 Tex. 318, 15 S. W. 389; Espey *v.* Heidenheimer, 58 Tex. 662.

Utah.— Bowers *v.* London Bank of Utah, 3 Utah 417, 4 Pac. 225.

Virginia.— McCluny *v.* Jackson, 6 Gratt. (Va.) 96; Clay *v.* Neilson, 5 Rand. (Va.) 596.

West Virginia.— Ballard *v.* Great Western Min., etc., Co., 39 W. Va. 394, 19 S. E. 510.

Addition of the words "or thereabouts" after the amount of the demand in a writ does not render the proceeding void, on a collateral attack, under Cal. Code Civ. Proc. § 540, requiring writs of attachment to state the amount of plaintiff's demand. Davis *v.* Baker, 88 Cal. 106, 25 Pac. 1108.

Statement of aggregate sum.— A writ containing the amount of each of separate causes of action pleaded, based on an affidavit not stating a cause of attachment as to all, was not invalidated because it alleged the amount demanded as the aggregate of all the claims. Wilson *v.* Barbour, 21 Mont. 176, 53 Pac. 315.

Variance.— A slight discrepancy between the amount stated in the warrant and that contained in the complaint will not affect, in a collateral proceeding, the validity of a lien secured under the attachment (Shaubhut *v.* Hilton, 7 Minn. 506), and where the amount stated in the writ is less than that demanded in the complaint or summons it affords no ground for setting the attachment aside, for defendant will not be prejudiced thereby (Tibbet *v.* Sue, 122 Cal. 206, 54 Pac. 741; De Leonis *v.* Etchepare, 120 Cal. 407, 52 Pac. 718; Reed *v.* Kentucky Bank, 5 Blackf. (Ind.) 227; Tessier *v.* Crowley, 16 Nebr. 369, 20 N. W. 264; American Exch. Nat. Bank *v.* Voisin, 44 Hun (N. Y.) 85; Dwyer *v.* Testard, 65 Tex. 432. See also Dawson *v.* Brown, 12 Gill & J. (Md.) 53). So, too, where the writ and complaint corresponded although the amount named in the affidavit was smaller, a motion to quash the writ was properly denied where plaintiff amended his bond to correspond to the larger amount. De Stafford *v.* Gartley, 15 Colo. 32, 24 Pac. 580.

89. Peak *v.* Buck, 3 Baxt. (Tenn.) 71; Woodfolk *v.* Whitworth, 5 Coldw. (Tenn.) 561; Smith *v.* Foster, 3 Coldw. (Tenn.) 139; Morris *v.* Davis, 4 Sneed (Tenn.) 452; Thompson *v.* Carper, 11 Humphr. (Tenn.) 542.

is omitted or erroneously stated the writ is ordinarily amendable in that respect.[90]

f. Grounds of Attachment. The writ should state one or more of the statutory grounds upon which it is granted,[91] but in the absence of statutory inhibition the court has inherent power to permit the amendment of an inadvertent error in the statement of the grounds,[92] and a defective statement in the writ may be aided by reference to the affidavit.[93]

g. Commands to Officer — (i) *As to Attaching.* The writ should contain a command to the officer to attach the property or estate of defendant,[94] designating

90. *Iowa.*— Atkins *v.* Womeldorf, 53 Iowa 150, 4 N. W. 905; Gourley *v.* Carmody, 23 Iowa 212.

Kansas.— Emerson *v.* Thatcher, 6 Kan. App. 325, 51 Pac. 50.

Kentucky.— Lee *v.* Smyser, 96 Ky. 369, 16 Ky. L. Rep. 497, 29 S. W. 27; Louisville Banking Co. *v.* Etheridge Mfg. Co., 19 Ky. L. Rep. 908, 43 S. W. 169.

New York.— Peiffer *v.* Wheeler, 76 Hun (N. Y.) 280, 27 N. Y. Suppl. 771, 59 N. Y. St. 106.

Texas.— Munzenheimer *v.* Manhattan Cloak, etc., Co., 79 Tex. 318, 15 S. W. 389.

91. Nachtrieb *v.* Stoner, 1 Colo. 423; Cline *v.* Patterson, 191 Ill. 246, 61 N. E. 126 [*reversing* on other grounds 88 Ill. App. 360]; Castellanos *v.* Jones, 5 N. Y. 164; Fox *v.* Mays, 46 N. Y. App. Div. 1, 61 N. Y. Suppl. 295; Stone *v.* Pratt, 90 Hun (N. Y.) 39, 35 N. Y. Suppl. 519, 70 N. Y. St. 731; Garson *v.* Brumberg, 75 Hun (N. Y.) 336, 26 N. Y. Suppl. 1003, 58 N. Y. St. 209; Galligan *v.* Groten, 18 Misc. (N. Y.) 428, 42 N. Y. Suppl. 22; MacDonald *v.* Kieferdorf, 18 N. Y. Suppl. 763, 22 N. Y. Civ. Proc. 105; Conrad *v.* McGee, 9 Yerg. (Tenn.) 428; McCulloch *v.* Foster, 4 Yerg. (Tenn.) 162. *Contra*, Wadsworth *v.* Cheeney, 13 Iowa 576.

Alternative statements.— The grounds of attachment must not be stated in the alternative (Garson *v.* Brumberg, 75 Hun (N. Y.) 336, 26 N. Y. Suppl. 1003, 58 N. Y. St. 209; Johnson *v.* Buckel, 65 Hun (N. Y.) 601, 20 N. Y. Suppl. 566, 48 N. Y. St. 924; Dintruff *v.* Tuthill, 62 Hun (N. Y.) 591, 17 N. Y. Suppl. 556, 43 N. Y. St. 704; Gregg *v.* York, Dall. (Tex.) 528), but separate grounds of one class may be stated in the alternative as the same facts presented by affidavits may be applicable to and permit inferences in support of each of the causes so recited (Smith *v.* Wilson, 76 Hun (N. Y.) 565, 28 N. Y. Suppl. 212, 58 N. Y. St. 245; Sturz *v.* Fischer, 15 Misc. (N. Y.) 410, 36 N. Y. Suppl. 893, 72 N. Y. St. 252; Herzberg *v.* Boiesen, 53 N. Y. Suppl. 256, 5 N. Y. Annot. Cas. 35). See also Stewart *v.* Lyman, 62 N. Y. App. Div. 182, 70 N. Y. Suppl. 936.

Presumption as to grounds.—Where the attachment itself does not appear in the record it will be presumed that it was granted on all the grounds sufficiently established. Dinan *v.* Allen, 16 Hun (N. Y.) 407.

Surplusage.— Where the writ sufficiently states the ground on which it was granted the fact that it states in addition matters which are not made grounds for its issue does not vitiate or invalidate the writ, but such matters will be treated as mere surplusage. Fox *v.* Mays, 46 N. Y. App. Div. 1, 61 N. Y. Suppl. 295; Ross *v.* Wigg, 6 N. Y. Civ. Proc. 268 note [*affirmed* in 34 Hun (N. Y.) 192, 6 N. Y. Civ. Proc. 263]. But see Conrad *v.* McGee, 9 Yerg. (Tenn.) 428.

Use of non-statutable words.—The ground is sufficiently stated where words are employed which are substantially synonymous with those of the statute. Jurgens *v.* Tum Suden, 32 N. Y. App. Div. 1, 52 N. Y. Suppl. 662.

Waiver of irregularity.— An irregularity in an attachment in reciting that defendant had disposed of its property with intent to defraud its creditors instead of reciting, as the fact was, that it was about to dispose of its property by means of a fraudulent judgment, is not available to defendant, where no reference is made to such irregularity in the notice of motion to vacate the attachment, as required by the rules of practice. Marietta First Nat. Bank *v.* Brunswick Chemical Works, 3 Silv. Supreme (N. Y.) 61, 6 N. Y. Suppl. 318, 25 N. Y. St. 830, 17 N. Y. Civ. Proc. 229 [*affirmed* in 119 N. Y. 645, 23 N. E. 1149, 29 N. Y. St. 993].

92. Cline *v.* Patterson, 191 Ill. 246, 61 N. E. 126 [*reversing*, on other grounds, 88 Ill. App. 360]; King *v.* King, 68 N. Y. App. Div. 189, 74 N. Y. Suppl. 119; Stone *v.* Pratt, 90 Hun (N. Y.) 39, 35 N. Y. Suppl. 519, 70 N. Y. St. 131; Hallock *v.* Van Camp, 55 Hun (N. Y.) 1, 8 N. Y. Suppl. 588, 28 N. Y. St. 337; Kibbe *v.* Wetmore, 31 Hun (N. Y.) 424; Herzberg *v.* Boiesen, 53 N. Y. Suppl. 256, 5 N. Y. Annot. Cas. 35; Thames, etc., Mar. Ins. Co. *v.* Dimmick, 22 N. Y. Suppl. 1096, 51 N. Y. St. 41; Rothschild *v.* Mooney, 13 N. Y. Suppl. 125, 36 N. Y. St. 565; Furman *v.* Walter, 13 How. Pr. (N. Y.) 348. But see MacDonald *v.* Kieferdorf, 18 N. Y. Suppl. 763, 22 N. Y. Civ. Proc. 105.

93. Van Camp *v.* Searle, 79 Hun (N. Y.) 134, 29 N. Y. Suppl. 757, 61 N. Y. St. 349.

94. Archer *v.* Strachan, (Mich. 1901) 88 N. W. 465; King *v.* Hubbell, 42 Mich. 597, 4 N. W. 440; Paddock *v.* Matthews, 3 Mich. 18; Hughes *v.* Tennison, 3 Tenn. Ch. 641; Munzenheimer *v.* Manhattan Cloak, etc., Co., 79 Tex. 318, 15 S. W. 389.

Maine — Special attachment.— Although the precept in every writ of attachment is to attach to the amount therein prescribed, yet where a special attachment is not ordered in writing the return of a nominal attachment has been received as a sufficient service, and

the amount or value of the property to be attached,[95] but should not designate the particular property to be taken.[96]

(II) *As to Summoning Defendant.* Where the statute so requires[97] the writ should contain a direction to the officer to summon defendant,[98] and an omission of this direction has been held fatal.[99]

(III) *As to Return.* The writ should contain proper directions to the officer as to the return of the writ and where required should specify the return-day [1] and

by virtue of the statutes, and the settled practice under them, the officer is under no legal obligation to make a special attachment without written directions to this effect from plaintiff, his agent, or attorney. Betts *v.* Norris, 15 Me. 468. Where the direction on the back of a writ was, "Mr. officer attach suff." it was held sufficient to indicate to the officer the wish of plaintiff that an attachment should be made, and that the officer would be responsible for omitting to attach, if in his power, when so directed (Kimball *v.* Davis, 19 Me. 310) even though such direction was not signed (Abbott *v.* Jacobs, 49 Me. 319).

Defective direction.— A warrant of attachment, in an action against an unincorporated association in the name of its president, is defective where it commands the sheriff only to take the property of defendant, as it does not reach the "property belonging to the association, or owned jointly or in common by all the members thereof," which, under Code Civ. Proc. § 1921, is the only property subject to execution in such action. Mertz *v.* Fenouillet, 13 N. Y. App. Div. 222, 42 N. Y. Suppl. 217.

95. Fairfield *v.* Baldwin, 12 Pick. (Mass.) 388.

Where the damages are unliquidated the amount for which the attachment will issue is in the discretion of the court. Rouge *v.* Rouge, 14 Misc. (N. Y.) 421, 35 N. Y. Suppl. 836, 70 N. Y. St. 256 [*affirmed* in 15 Misc. (N. Y.) 36, 36 N. Y. Suppl. 436, 71 N. Y. St. 487]. In such case the writ may be amended, upon application of plaintiff, by reducing the amount stated in the original attachment. Sulzbacher *v.* Cawthra, 14 Misc. (N. Y.) 545, 36 N. Y. Suppl. 8, 70 N. Y. St. 766 [*affirmed* in 148 N. Y. 755, 43 N. E. 990].

Direction of amount permissive and not peremptory.— It has been held that a direction to attach property to the value of nine hundred dollars could not be deemed to have restricted the operation of attachment to that amount, making it invalid for the excess, and that the direction should be regarded as permissive and not peremptory. Aldrich *v.* Arnold, 13 R. I. 655.

96. Hines *v.* Chambers, 29 Minn. 7, 11 N. W. 129; Vance *v.* Cooper, 2 Coldw. (Tenn.) 497; Pulliam *v.* Aler, 15 Gratt. (Va.) 54. See also King *v.* Board, 7 W. Va. 701.

Excepting articles exempt.—It is not necessary for the writ to except from the command articles exempt from attachment by statute, as the officer who serves the precept must be presumed to know the law in such cases. Cooke *v.* Gibbs, 3 Mass. 193.

Where issued against devisees the writ should be limited to the land of the devisor held by such devisees. Connelly *v.* Lerche, 56 N. J. L. 95, 28 Atl. 430.

An unauthorized command in this respect in a writ otherwise sufficient would not affect its validity. Hines *v.* Chambers, 29 Minn. 7, 11 N. W. 129. See also Raymond *v.* Nixon, 5 Okla. 656, 49 Pac. 1110, holding that an order of attachment issued from a probate court directing the sheriff to levy on the lands and tenements of defendant and to seize his personal property was not void, even though the lands of defendant might not be attached in an action in the probate court, and that such direction as to lands and tenements would be treated as surplusage.

97. In Arkansas, before the adoption of the civil code, the writ was required to contain a summons clause (Gould's Dig. Ark. c. 17, § 6), but there is no express provision in the present code. It has been held, however, that a summons and an order of attachment may be joined in the same writ. Rice *v.* Dale, 45 Ark. 34; Weil *v.* Kittay, 40 Ark. 528.

98. State Bank *v.* Matson, 26 Mo. 243, 72 Am. Dec. 208.

99. Whitney *v.* Brunette, 15 Wis. 61.

1. Archibald *v.* Thompson, 2 Colo. 388; Backalan *v.* Littlefield, 64 N. C. 233.

No return-day need be specified in the writ (Blair *v.* Miller, 42 Ala. 308; Westphal *v.* Sherwood, 69 Iowa 364, 28 N. W. 640; Hiatt *v.* Simpson, 35 N. C. 72; Raymond *v.* Nix, 5 Okla. 656, 49 Pac. 1110; Chase *v.* Hill, 13 Wis. 222), and although it is usual for the writ to direct the sheriff to make a return by the first day of the next term of the court such direction may be regarded as mere surplusage (Westphal *v.* Sherwood, 69 Iowa 364, 28 N. W. 640). *Compare* Brooks *v.* Godwin, 8 Ala. 296, holding that where an attachment is issued in one county, returnable to a court in another county, the objection may be taken on error, although it was not made in the court below, if it has not been waived by appearing and pleading to the merits.

If the return-day named is the proper day, to wit, the first return-day after the issue of the writ, the writ will not be quashed because it is not made returnable "on the first return-day." Hall *v.* Kintz, 12 Pa. Co. Ct. 90.

Omission of the year.— Where a writ of attachment was attested and issued on Feb. 7, 1867, and made returnable on Tuesday, April 2, without expressing the year, it was held that this must be understood as referring to April of the then current year, and such omission did not invalidate the writ. Nash *v.* Mallory, 17 Mich. 232 [*followed* in Vinton *v.* Mead, 17 Mich. 388].

the place of return.[2] An error in naming the return-day has been held to render the writ void;[3] but as a rule it is considered as rendering it only voidable,[4] so that an error in this respect,[5] or in making the writ returnable to the wrong court,[6] may be cured by amendment. An attachment against a foreign corporation must be made returnable in the same manner as process against individuals.[7]

h. Date. While the writ should bear the date upon which it issues this need not appear in any particular place[8] and an error[9] or an omission[10] in this respect may be cured by amendment.

i. Teste. The writ should be tested as required by law,[11] but if not properly tested may be amended.[12]

j. Signature. The writ should be signed by the clerk[13] or by the judge grant-

The fact that the præcipe did not mention the return-day of the writ is immaterial. It is the duty of the prothonotary, in the absence of specific directions, to make the writ returnable according to law. Simon *v.* Johnson, 7 Kulp (Pa.) 166.

2. Backalan *v.* Littlefield, 64 N. C. 233.

Returnable to clerk instead of court.— Where the direction in an attachment was that it should be returned to the clerk of the circuit court instead of to the circuit court itself, it was held to be but a formal error, which could not vitiate the process. Bourne *v.* Hocker, 11 B. Mon. (Ky.) 23.

The omission of the word "circuit" before the word "court" is immaterial where the attachment in all other particulars is regular. Byrd *v.* Hopkins, 8 Sm. & M. (Miss.) 441. See also Wharton *v.* Conger, 9 Sm. & M. (Miss.) 510.

3. Casey *v.* Wiley, 5 Ga. 333; Webber *v.* Gay, 24 Wend. (N. Y.) 485; Williamson *v.* McCormick, 126 Pa. St. 274, 17 Atl. 591; Parks *v.* Watts, 112 Pa. St. 4, 6 Atl. 106. But in a county where, in accordance with the Pennsylvania act of May 24, 1878, a rule has been adopted concerning return-days the writ will not be set aside because not made returnable on the first return-day after the issue. Slingluff *v.* Sisler, 193 Pa. St. 264, 44 Atl. 423; Starbird *v.* Koonse, 10 Pa. Co. Ct. 449; Curtis *v.* Koshland, 41 Wkly. Notes Cas. (Pa.) 374. See also Sowers *v.* Leihy, 4 Pa. Co. Ct. 223; McAllister *v.* Guggenheimer, 91 Va. 317, 21 S. E. 475.

Day and term passed.—Where a writ by its terms was made returnable on a day and to a term of the court then passed, it was held that such writ was void upon its face, and a proceeding thereunder void also. Dame *v.* Fales, 3 N. H. 70; Holzman *v.* Martinez, 2 N. M. 271.

4. *Arkansas.*— Thompson *v.* McHenry, 18 Ark. 537; Jones *v.* Austin, 16 Ark. 336.

Florida.— Post *v.* Bird, 28 Fla. 1, 9 So. 888.

Illinois.— Wheat *v.* Bower, 42 Ill. App. 600.

Indiana.—Brose *v.* Doe, 2 Ind. 666; Ziegenhager *v.* Doe, 1 Ind. 296, Smith (Ind.) 174.

Kansas.— Smith *v.* Payton, 13 Kan. 362.

Mississippi.— Dandridge *v.* Stevens, 12 Sm. & M. (Miss.) 723.

Missouri.— State Bank *v.* Matson, 26 Mo. 243, 72 Am. Dec. 208.

North Carolina.— Backalan *v.* Littlefield, 64 N. C. 233.

Texas.— Panhandle Nat. Bank *v.* Still, 84 Tex. 339, 19 S. W. 479.

5. *Alabama.*— Scott *v.* Macy, 3 Ala. 250.

Colorado.— Talpey *v.* Doane, 3 Colo. 22; Archibald *v.* Thompson, 2 Colo. 388.

Georgia.— Kent *v.* Downing, 44 Ga. 116.

Iowa.— Graves *v.* Cole, 2 Greene (Iowa) 467.

Mississippi.— McClanahan *v.* Brack, 46 Miss. 246.

6. Carter *v.* O'Bryan, 105 Ala. 305, 16 So. 894; Mohr *v.* Chaffe, 75 Ala. 387; Blake *v.* Camp, 45 Ga. 298; Rock Island Plow Co. *v.* Breese, 83 Iowa 553, 49 N. W. 1026.

7. Bennett *v.* Hartford F. Ins. Co., 19 Wend. (N. Y.) 46.

8. **Indorsement on back of writ.**— It has been held that Tenn. Code, § 3474, is directory, and that the date of an attachment not appearing at the foot of the writ, as is proper, but being indorsed on the back thereof is sufficient. Swan *v.* Roberts, 2 Coldw. (Tenn.) 153.

Where the chancellor's fiat on the bill shows that an attachment has been granted and issued, the date of issue, and when returnable and the sheriff's indorsement shows the day it was received and the date of the levy, omission of the date of issue in the writ of attachment itself is immaterial, especially where no question is raised as to the exact date of its issue. Lyle *v.* Longley, 6 Baxt. (Tenn.) 286.

9. McCoy *v.* Boyle, 10 Md. 391; Shakman *v.* Schwartz, 89 Wis. 72, 61 N. W. 309.

10. State *v.* Moran, 43 N. J. L. 49; Brack *v.* McMahan, 61 Tex. 1.

11. Norton *v.* Dow, 10 Ill. 459 (holding that the attachment should be tested in the name of the clerk of the circuit court, and not in the name of the judge of that court); Reynolds *v.* Damrell, 19 N. H. 394 (holding that by the constitution and statutes of New Hampshire all writs are required to bear the teste of the chief, first, or senior justice of the courts from which they issue); Lyle *v.* Longley, 6 Baxt. (Tenn.) 286.

12. Skinner *v.* Beshoar, 2 Colo. 383; Norton *v.* Dow, 10 Ill. 459; Reynolds *v.* Damrell, 19 N. H. 394.

13. *Colorado.*— Archibald *v.* Thompson, 2 Colo. 388.

ing the same,[14] and, when required by statute, it should be signed by plaintiff's attorney.[15]

k. Seal. The seal of the court from which the writ of attachment issues or a private seal where no court seal exists should be affixed thereto.[16] Where,

Minnesota.— O'Farrell *v.* Heard, 22 Minn. 189; Wheaton *v.* Thompson, 20 Minn. 196.

Missouri.— Smith *v.* Hackley, 44 Mo. App. 614.

New Hampshire.— Reynolds *v.* Damrell, 19 N. H. 394.

Tennessee.— Wiley *v.* Bennett, 9 Baxt. (Tenn.) 581; Lyle *v.* Longley, 6 Baxt. (Tenn.) 286.

West Virginia.— Miller *v.* Zeigler, 44 W. Va. 484, 29 S. E. 981, 67 Am. St. Rep. 777, holding that a defect in this respect may be amended.

The clerk need not sign with his own proper hand. It is sufficient if the writ is signed by his name by another under his direction and in his presence. Clark *v.* Latham, 25 Ark. 16. Where a deputy clerk issued the writ, signing the clerk's name thereto, his failure to sign his own name as deputy does not render the writ void, it being a mere irregularity and amendable under the statute. Wimberly *v.* Boland, 72 Miss. 241, 16 So. 905. But see Pendleton *v.* Smith, 1 W. Va. 16, where it was held that the writ was fatally defective, because signed by the deputy as deputy clerk, instead of being signed by the clerk himself, or by the deputy in the clerk's name.

Presumption as to regularity.— A writ of attachment issued out of the circuit court will be intended to have been signed and sealed by the clerk, until the contrary appears. Morrel *v.* Buckley, 20 N. J. L. 667.

Waiver of objection.—"The objection to the writ, that the signature of the clerk has been taken from a blank summons, cannot be taken advantage of at this stage of the proceedings. Had it been made in season, by a motion to quash the writ, we should have granted it. But it is too late for that motion, after plea, issue, trial and verdict. The defendant has admitted it to be a regular writ, by pleading to the merits." Lovell *v.* Sabin, 15 N. H. 29, 37.

14. Fox *v.* Mays, 46 N. Y. App. Div. 1, 61 N. Y. Suppl. 295; MacDonald *v.* Kieferdorf, 18 N. Y. Suppl. 763, 22 N. Y. Civ. Proc. 105; Worthington *v.* Dorsett, 6 N. Y. St. 861; Osterstock *v.* Lent, 3 Abb. Pr. (N. Y.) 141; Greenleaf *v.* Mumford, 30 How. Pr. (N. Y.) 30.

Signature by name of justice only.—An attachment issued by one of the justices of the peace of the county has been held good, although signed by his name merely, without the words "Justice of the Peace" or the initials "J. P." Henderson *v.* Pitman, 20 Ga. 735, 65 Am. Dec. 649. See also Dickson *v.* Thurmond, 57 Ga. 153, holding that where a justice of the peace in issuing an attachment neglects to add to his signature words or letters denoting his office they may be added on motion, after proving that such officer was duly authorized to issue attachments, that he had signed in his official capacity, and had omitted the words of office accidentally.

Omission in copy.— It has been held in New York where the signature of the judge who grants the warrant is indispensable to the validity of the warrant of attachment that the omission of the signature from the copy of the warrant served is immaterial. Greenleaf *v.* Mumford, 30 How. Pr. (N. Y.) 30.

15. Fox *v.* Mays, 46 N. Y. App. Div. 1, 61 N. Y. Suppl. 295; Camman *v.* Tompkins, 12 Barb. (N. Y.) 265, Code Rep. N. S. (N. Y.) 12; MacDonald *v.* Kieferdorf, 18 N. Y. Suppl. 763, 22 N. Y. Civ. Proc. 105, the last case holding that the provision of N. Y. Code Civ. Proc. § 641, in this respect is mandatory. *Compare* Kissam *v.* Marshall, 10 Abb. Pr. (N. Y.) 424, holding that omission of the attorney's signature may be remedied by amendment.

There is no presumption, from the absence of an attorney's signature to a writ on which attachment was made, that it was issued in violation of R. I. Gen. Laws, c. 228, § 25, declaring that no justice or clerk of a district court shall sell any blank writ by him officially signed to any person except an attorney, or deliver to any person other than an attorney any such writ with permission to fill up the same, or cause it to be filled; there being three other ways by which a person not an attorney may lawfully obtain and use a writ. Remington *v.* Benoit, 19 R. I. 698, 36 Atl. 718.

16. *Colorado.*—Archibald *v.* Thompson, 2 Colo. 388.

Illinois.— Williams *v.* Vanmetre, 19 Ill. 293, holding an unsealed writ void.

Minnesota.— O'Farrell *v.* Heard, 22 Minn. 189; Wheaton *v.* Thompson, 20 Minn. 196.

Missouri.— Jump *v.* McClurg, 35 Mo. 193, 86 Am. Dec. 146.

New Hampshire.— Reynolds *v.* Damrell, 19 N. H. 394; Lovell *v.* Sabin, 15 N. H. 29.

Tennessee.— McCulloch *v.* Foster, 4 Yerg. (Tenn.) 162; Walker *v.* Wynne, 3 Yerg. (Tenn.) 61. See also Hearn *v.* Crutcher, 4 Yerg. (Tenn.) 461.

Locus of seal.— A seal immediately after the signature of the justice is sufficient. Lowry *v.* Stowe, 7 Port. (Ala.) 483.

Private seal where no court seal exists.— Where the writ was without the court's seal as the law required, and the clerk affixed a private seal or scroll with the statement that no court seal had yet been secured (the county having only been organized within a year, and the courts not having yet been fully organized) it was held that the writ was not void. Wehrman *v.* Conklin, 155 U. S. 314, 15 S. Ct. 129, 39 L. ed. 167.

Lost writ — Presumption of regularity.—

however, the seal was not properly affixed it has been held that the error or omission was amendable.[17]

2. VARIANCE BETWEEN WRIT AND OTHER PAPERS. A material variance between the writ, affidavit, and pleadings, either as to grounds,[18] cause of action,[19] or description of parties[20] is fatal, if the objection is properly raised;[21] but an immaterial variance due to clerical oversight will not invalidate the writ.[22]

3. AMENDMENTS. Some states expressly provide by statute for amendment of the writ, where legal grounds for the attachment existed at the time of its issue; and even in the absence of statutes expressly authorizing defects in form to be corrected the courts have been very liberal in granting applications to amend mere clerical errors and omissions.[23] In many jurisdictions, however, amendment

There is a legal presumption in favor of the due execution of the papers emanating from a public office, so that the sufficiency, as to form and seal, of an attachment writ which has been lost, in the absence of any proof impeaching it, will be presumed. French *v.* Reel, 61 Iowa 143, 12 N. W. 573, 16 N. W. 55.

An order for an attachment granted and signed by the clerk needs no seal. Seeligson *v.* Rigmaiden, 37 La. Ann. 722. *Compare* Winchell *v.* McKinzie, 35 Nebr. 813, 53 N. W. 975, where the county judge, having made an order granting an attachment in an action to be brought in a district court, failed to attach the seal of the county court to such order, which was filed with the clerk of the district court to issue an attachment thereupon, it was held that the omission of the seal of the county court did not make the order void, but that it was an irregularity available to defendant in attachment only.

17. *Iowa.*— Murdough *v.* McPherrin, 49 Iowa 479 [*distinguishing* Shaffer *v.* Sundwall, 33 Iowa 579; Foss *v.* Isett, 4 Greene (Iowa) 76, 61 Am. Dec. 117, which were decided under earlier statutes].

Missouri.— Jump *v.* McClurg, 35 Mo. 193, 86 Am. Dec. 146.

New York.— Talcott *v.* Rosenberg, 8 Abb. Pr. N. S. (N. Y.) 287.

Texas.—Whittenberg *v.* Lloyd, 49 Tex. 633.

United States.— Wolf *v.* Cook, 40 Fed. 432, construing Wisconsin statute.

18. Woodley *v.* Shirley, Minor (Ala.) 14; Gregg *v.* York, Dall. (Tex.) 528.

19. Wright *v.* Snedecor, 46 Ala. 92; Browning *v.* Pasquay, 35 Md. 294; Moore *v.* Kaufman First Nat. Bank, 82 Tex. 537, 18 S. W. 657; Joiner *v.* Perkins, 59 Tex. 300; Moore *v.* Corley, (Tex. App. 1890) 16 S. W. 787; Ballard *v.* Great Western Min., etc., Co., 39 W. Va. 394, 19 S. E. 510.

20. *Iowa.*— Musgrave *v.* Brady, Morr. (Iowa) 456.

Mississippi.—Ligon *v.* Bishop, 43 Miss. 527.

New Mexico.— Bennett *v.* Zabriski, 2 N. M. 176 [*affirming* 2 N. M. 7].

South Carolina.—Lamar *v.* Reid, 2 McMull. (S. C.) 346.

Texas.— Focke *v.* Hardeman, 67 Tex. 173, 2 S. W. 363.

21. **Objection — How raised.**— It has been held in Alabama that a variance between the writ, bond, and affidavit, if available at all to defendant, can only be taken advantage of by plea in abatement. Goldsticker *v.* Stetson, 21 Ala. 404. A variance between the attachment and complaint in the amount claimed is not available on error after judgment by *nil dicit*. Hutchison *v.* Powell, 92 Ala. 619, 9 So. 170.

22. *Arkansas.*— Mandel *v.* Peet, 18 Ark. 236; Whitlock *v.* Kirkwood, 16 Ark. 488.

California.— Wigmore *v.* Buell, 122 Cal. 144, 54 Pac. 600.

Georgia.— Johnston *v.* Smith, 83 Ga. 779, 10 S. E. 354. See also Cooper *v.* Lockett, 65 Ga. 702.

Minnesota.— Shaubhut *v.* Hilton, 7 Minn. 506.

Mississippi.— McClanahan *v.* Brack, 46 Miss. 246; Lovelady *v.* Harkins, 6 Sm. & M. (Miss.) 412. See also Peck *v.* Critchlow, 7 How. (Miss.) 243, holding that a variance between the bond and the writ, when the recital in the bond is unnecessary, cannot be pleaded in abatement.

New York.— Fox *v.* Mays, 46 N. Y. App. Div. 1, 61 N. Y. Suppl. 295.

South Carolina.— Smith *v.* Walker, 6 S. C. 169.

Texas.— Stewart *v.* Heidenheimer, 55 Tex. 644.

Wisconsin.— Spitz *v.* Mohr, 86 Wis. 387, 57 N. W. 41.

23. *Alabama.*—*Ex p.* Nicrosi, 103 Ala. 104, 15 So. 507; Sims *v.* Jacobson, 51 Ala. 186; Blair *v.* Miller, 42 Ala. 308.

Arkansas.—Thompson *v.* McHenry, 18 Ark. 537.

Colorado.— Archibald *v.* Thompson, 2 Colo. 388.

Georgia.— Gnckenheimer *v.* Day, 74 Ga. 1.

Iowa.— Rock Island Plow Co. *v.* Breese, 83 Iowa 553, 49 N. W. 1026; Atkins *v.* Womeldorf, 53 Iowa 150, 4 N. W. 905.

Massachusetts.—Diettrich *v.* Wolffsohn, 136 Mass. 335.

New York.— Furman *v.* Walter, 13 How. Pr. (N. Y.) 348.

United States.— Tilton *v.* Cofield, 93 U. S. 163, 23 L. ed. 858 (construing Colorado statute); Helena Bank *v.* Batchelder Egg Case Co., 51 Fed. 137, 4 U. S. App. 614, 2 C. C. A. 141; People's Sav. Bank, etc., Co. *v.* Batchelder Egg Case Co., 51 Fed. 130, 4 U. S. App. 603, 2 C. C. A. 126 (the last two cases construing the Arkansas statute).

Void writ.—Statutes allowing amendments to writs of attachment relate only to such

of the writ is not permitted to cut off intermediate rights acquired by third parties,[24] while in others it has been held that the same right exists to amend against creditors attaching after the issue of a defective writ as against the original debtor.[25]

D. Simultaneous Writs. When defendant has property in several counties separate writs may be issued simultaneously to each county.[26]

E. Successive Writs. In some jurisdictions where the first writ fails through some defect, or where an insufficient amount of property is attached thereunder successive writs may issue to the same or different counties[27] without

defects as would not render the process absolutely void. Where the writ is void, it is a nullity, and to amend in such a case would be to create a new writ, giving it a retroactive effect. Clawson *v.* Sutton Gold Min. Co., 3 S. C. 419; Whitney *v.* Brunette, 15 Wis. 61.

As to specific amendments see *supra*, VIII, C, 1, a–VIII, C, 1, k.

24. *Massachusetts.*— Putnam *v.* Hall, 3 Pick. (Mass.) 445; Brigham *v.* Este, 2 Pick. (Mass.) 420; Willis *v.* Crooker, 1 Pick. (Mass.) 204; Danielson *v.* Andrews, 1 Pick. (Mass.) 156.

Michigan.— Greenvault *v.* Farmers', etc., Bank, 2 Dougl. (Mich.) 498.

New Hampshire.— Garvin *v.* Legery, 61 N. H. 153.

Ohio.— Dobell *v.* Loker, 1 Handy (Ohio) 574, 12 Ohio Dec. (Reprint) 297.

Texas.—Munzenheimer *v.* Manhattan Cloak, etc., Co., 79 Tex. 318, 15 S. W. 389.

Wisconsin.—Whitney *v.* Brunette, 15 Wis. 61.

25. Johnson *v.* Huntington, 13 Conn. 47; Diettrich *v.* Wolffsohn, 136 Mass. 335; King *v.* King, 68 N. Y. App. Div. 189, 74 N. Y. Suppl. 119. See also Rock Island Plow Co. *v.* Breese, 83 Iowa 553, 49 N. W. 1026.

26. Read *v.* Kirkwood, 19 Ark. 332; Morris *v.* School Trustees, 15 Ill. 266; Carter *v.* Arhuthnot, 62 Mo. 582; Huxley *v.* Harrold, 62 Mo. 516.

Indorsements on duplicate writs.— It has been held in Mississippi, that it is not necessary that duplicate writs of attachment should have indorsed thereupon that they are such duplicates, where they are in the name of the same plaintiff, against the same defendant, and returnable to the same court and term. Saunders *v.* Columbus L., etc., Ins. Co., 43 Miss. 583.

Defect in one writ renders both void.— It has been held under the Georgia act of 1836 where one writ of attachment directed to one county was void on account of misdirection to the sheriff that a simultaneous writ directed to another county was likewise void, although the direction to the sheriff in the latter writ was in the language required by the statute. This decision was put upon the ground that, as in cases of this kind the first is manifestly the foundation of the second, if the first is void the second is void too. Thomas *v.* Lavender, 15 Ga. 267.

27. *Alabama.*— Brown *v.* Isbell, 11 Ala. 1009.

Indiana.— Runner *v.* Scott, 150 Ind. 441, 50 N. E. 479.

Iowa.— Elliott *v.* Stevens, 10 Iowa 418; Hamill *v.* Phenicie, 9 Iowa 525.

Kentucky.—Harbour-Pitt Shoe Co. *v.* Dixon, 22 Ky. L. Rep. 1169, 60 S. W. 186.

Mississippi.— Barnett *v.* Ring, 55 Miss. 97.

New York.— Mojarrieta *v.* Saenz, 80 N. Y. 547, 58 How. Pr. (N. Y.) 505; Ladenburg *v.* Commercial Bank, 5 N. Y. App. Div. 219, 39 N. Y. Suppl. 119; Acker *v.* Jackson, 3 How. Pr. N. S. (N. Y.) 160.

Ohio.— Brooks *v.* Todd, 1 Handy (Ohio) 169, 12 Ohio Dec. (Reprint) 84.

Texas.— Panhandle Nat. Bank *v.* Still, 84 Tex. 339, 19 S. W. 479; Baines *v.* Ullmann, 71 Tex. 529, 9 S. W. 543; Billingsley *v.* Hewett, (Tex. Civ. App. 1897) 39 S. W. 953; H. B. Claflin Co. *v.* Kamsler, (Tex. Civ. App. 1896) 36 S. W. 1018; Branshaw *v.* Tinsley, 4 Tex. Civ. App. 131, 23 S. W. 184.

West Virginia.— Ballard *v.* Great Western Min., etc., Co., 39 W. Va. 394, 19 S. E. 510.

United States.— Spreen *v.* Delsignore, 94 Fed. 71, construing Kentucky statute.

Contra, Pack *v.* American Trust, etc., Bank, 172 Ill. 192, 50 N. E. 326; Carr *v.* Keeley Brewing Co., 94 Ill. App. 225; American Hydraulic Dredging Co. *v.* Richardson Fueling Co., 90 Ill. App. 376; Buck *v.* Coy, 73 Ill. App. 160; Dennison *v.* Blumenthal, 37 Ill. App. 385; State *v.* Noblett, (N. J. 1900) 47 Atl. 438. See also Wilson *v.* Stricker, 66 Ga. 575.

See 5 Cent. Dig. tit. "Attachment," § 52.

In Pennsylvania where a writ of attachment has been issued an alias writ issued for the same cause of action without showing the failure to serve or execute the first writ or without having first entered a discontinuance of the original proceeding will be quashed at the cost of plaintiff. Elliott *v.* Plukart, 6 Pa. Co. Ct. 151.

Effect of dissolution of first writ.— Where a writ of attachment has been dissolved by the court after a hearing on the merits of the application, an alias writ, based on substantially the same state of facts, whether applied for to the same or another court, will not be granted (Schlemmer *v.* Myerstein, 19 How. Pr. (N. Y.) 412; Merritt *v.* Quigley, 1 Pa. Dist. 505; National Bank of Republic *v.* Tasker, 1 Pa. Co. Ct. 173. See also Jackson *v.* Thomson, 9 Montg. Co. Rep. (Pa.) 28. *Compare* Brooks *v.* Todd, 1 Handy (Ohio) 169, 12 Ohio Dec. (Reprint) 84), but an alias writ will not be dissolved where the first writ was quashed for a mere irregularity (Acker *v.* Jackson, 3 How. Pr. N. S. (N. Y.) 160; Ballard *v.* Great Western Min., etc., Co., 39 W. Va. 394, 19 S. E. 510. See

filing a new affidavit or bond, provided the affidavit and bond supporting the first writ are not defective.[28]

IX. PROPERTY SUBJECT TO ATTACHMENT.

A. In General — 1. Rule Stated. To render the property[29] of a debtor liable to seizure upon attachment he must not only have some right or title, either legal or equitable therein,[30] but as a general rule it is held that the prop-

also Randle *v.* Mellen, 67 Md. 181, 8 Atl. 573).

Form of alias writ.— The alias writ should refer to the preceding writ, showing its issue and the amount levied under it. Hamill *v.* Phenicie, 9 Iowa 525.

Leave of court not necessary.—A court out of which a warrant of attachment is issued has the power to vacate the same, and a second attachment can be obtained upon a proper statement of sufficient new facts; no leave to make application therefor is necessary. Selser Bros. Co. *v.* Potter Produce Co., 80 Hun (N. Y.) 554, 30 N. Y. Suppl. 527, 62 N. Y. St. 408. *Compare* Graham *v.* Canton, etc., R. Co., 26 Wkly. Notes Cas. (Pa.) 203.

Separate attachments based on different grounds.— It has been held that there may be in the same suit more than one affidavit and attachment based on different grounds and the lien of the subsequent attachment does not relate back to the first attachment (Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791), and that a second attachment at the suit of other plaintiffs and for another cause of action may issue pending the first (Duffin *v.* Wolf, 21 N. J. L. 475; Brown *v.* Bissett, 21 N. J. L. 46. *Contra,* Brundred *v.* Del Hoyo, 20 N. J. L. 328; Cummins *v.* Blair, 18 N. J. L. 151; Harris *v.* Linnard, 9 N. J. L. 58).

Where attached property is lost.— Where a creditor caused property of his debtor to be attached sufficient in value to discharge the debt and, pending litigation, the property was lost through the insolvency of the officer in whose custody it was left and his sureties, it was held that the creditor could not afterward enforce his demand by another attachment against the property of the debtor; and that after sequestering a sufficient amount of the assets to pay his debt the estate of such debtor was discharged. Kenrick *v.* Huff, 71 Mo. 570.

Where sufficient property attached.— It would perhaps be competent to dismiss alias writs or quash the levy thereof where the estate of defendant levied on under the first attachment was unquestionably ample to satisfy the demand sought to be recovered. Brown *v.* Isbell, 11 Ala. 1009.

28. *Iowa.*—Elliott *v.* Stevens, 10 Iowa 418; Hamill *v.* Phenicie, 9 Iowa 525.

Kentucky.—Harbour-Pitt Shoe Co. *v.* Dixon, 22 Ky. L. Rep. 1169, 60 S. W. 186.

New York.— Mojarrieta *v.* Saenz, 80 N. Y. 547, 58 How. Pr. (N. Y.) 505; Acker *v.* Jackson, 3 How. Pr. N. S. (N. Y.) 160.

Texas.— Billingsley *v.* Hewett, (Tex. Civ. App. 1897) 39 S. W. 953; Branshaw *v.* Tinsley, 4 Tex. Civ. App. 131, 23 S. W. 184.

West Virginia.— Ballard *v.* Great Western Min., etc., Co., 39 W. Va. 394, 19 S. E. 510.

See also *supra,* VII, D, 2 b; VII, E, 1, b.

In Louisiana one who has obtained an attachment against a debtor and subsequently applies for a second attachment on the ground of insufficiency of property originally attached must show under oath a continued existence of the debt, and the necessity for the further process asked for or the application will be properly rejected. Favrot *v.* Delle Piane, 4 La. Ann. 584.

In Mississippi a new bond is necessary where the writ, although purporting on its face to be an alias, was not issued upon any of the causes specified in the statute and was an original proceeding founded on a different action. Jeffries *v.* Dancey, 44 Miss. 693.

Where affidavit is insufficient.— Where the affidavit was discovered to be insufficient after it had been filed and an order for attachment issued thereon and placed in the sheriff's hands, it was held to be valid on the filing of a supplemental affidavit by plaintiff for the clerk to reissue the same order of attachment, after erasing the indorsement thereupon of the time at which it came into the sheriff's hands. Dean *v.* Garnett, 1 Duv. (Ky.) 408.

Where bond is insufficient.— Where the attachment is set aside for insufficiency of bond, it is not necessary for plaintiff to file a new petition or affidavit, but an alias writ may issue on the filing of a sufficient bond. Harrison *v.* Poole, 4 Rob. (La.) 193; Panhandle Nat. Bank *v.* Still, 84 Tex. 339, 19 S. W. 479.

29. What constitutes property.— Bonds of a corporation deposited with their agent to be delivered to such persons as should be willing to loan money to the company and take them as security for its repayment are in no sense property while in the hands of the agent before delivery, and are therefore not attachable. Coddington *v.* Gilbert, 17 N. Y. 489. Likewise bonds simply issued and delivered to a bank on condition that it will take them in satisfaction of a debt are not, upon the non-acceptance of this condition, property within the meaning of the attachment law. Alabama Marble, etc., Co. *v.* Chattanooga Marble, etc., Co., (Tenn. Ch. 1896) 37 S. W. 1004.

30. *California.*— Ward *v.* Waterman, 85 Cal. 488, 24 Pac. 930.

Colorado.— Finding *v.* Hartman, 14 Colo. 596, 23 Pac. 1004, construing contract of sale of ore.

Maine.— Emerson *v.* Hewins, 64 Me. 297, construing a will, holding that, under its pro-

erty, whether personal or real, must in addition be liable to be taken and sold on execution.[31]

2. PERSONALTY — a. In General. Subject to the above qualification it may be stated as a general rule that all the goods and chattels of a defendant are subject to attachment for his debts.[32]

b. Commingled Goods. If the goods of a debtor are so intermingled with

visions, the title to the property therein mentioned was entirely in the executor, and that the mere fact that another party held possession under the executor would not make it liable to attachment, as the property of the party holding possession.

Massachusetts.— Jones *v.* Mitchell, 158 Mass. 385, 33 N. E. 609 (where the debtor having no record title to real estate, and the contingency having happened on which he was to reconvey it, it was held that he had no attachable interest in the land); Spring *v.* Baker, 8 Allen (Mass.) 267; Stevens *v.* Briggs, 5 Pick. (Mass.) 177.

Michigan.— Winner *v.* Williams, 62 Mich. 363, 28 N. W. 904.

Rhode Island.— Beckwith *v.* Burrough, 13 R. I. 294, where it was held that in the absence of a showing of fraudulent intent on the part of the debtor, he had, under the facts of the case, parted with both his legal and equitable interest in certain corporate shares.

Tennessee.— Williams *v.* Whoples, 1 Head (Tenn.) 401.

Vermont.— Chase *v.* Snow, 52 Vt. 525; Gallup *v.* Josselyn, 7 Vt. 334, the latter case construing a building contract, and holding that under its conditions growing timber which was on the land of B, for whom a barn was to be built, remained the property of B, and could not be attached for the contractor's debts.

Virginia.— Culbertson *v.* Stevens, 82 Vt. 406, 4 S. E. 607, where it was held that a debtor, having parted with his legal title and equity of redemption, had no attachable interest.

See 5 Cent. Dig. tit. "Attachment," § 167.

Right to convey or dispose of, as a test.— Whether or not property which can be conveyed by the owner will be subject to attachment would seem to depend upon the statute of each state. In a recent Rhode Island case (Wood *v.* Watson, 20 R. I. 223, 37 Atl. 1030) it is said that if an interest can be disposed of by will, contract, or other conveyance under the statute, there would seem to be no valid objection to its attachment. Similar language is found in Fessler *v.* Haas, 19 Kan. 216, where it was held that one who builds on and occupies lots in a town, the town site of which was public land of the United States, has sufficient interest in the lots to support an attachment, although the probate judge of the county has not proved up on the town site in trust for the occupants thereof since, under the statutes, such party's contract or conveyance of the property would be good. *Compare,* however, Young *v.* Young, 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642, where it was held that although a contingent remainder could be assigned or conveyed yet, under the statutes, it was not a subject of attachment.

31. *Arkansas.*— Jennings *v.* McIlroy, 42 Ark. 236, 48 Am. Rep. 61.

Connecticut.— Smith *v.* Gilbert, 71 Conn. 149, 41 Atl. 284, 71 Am. St. Rep. 163.

Illinois.— Newhall *v.* Buckingham, 14 Ill. 405.

Massachusetts.— Russia Cement Co. *v.* Le Page Co., 174 Mass. 349, 55 N. E. 70; Pierce *v.* Jackson, 6 Mass. 242; Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202. Therefore private papers are not liable to attachment. Oystead *v.* Shed, 12 Mass. 505.

North Carolina.—Davis *v.* Garrett, 25 N. C. 459.

New York.— McCullough *v.* Carragan, 24 Hun (N. Y.) 157; North American Trust Co. *v.* Aymar, 33 Misc. (N. Y.) 576, 68 N. Y. Suppl. 870; Handy *v.* Dobbin, 12 Johns. (N. Y.) 220.

Tennessee.— Lane *v.* Marshall, 1 Heisk. (Tenn.) 30; Hervey *v.* Champion, 11 Humphr. (Tenn.) 568; Nashville Bank *v.* Ragsdale, Peck (Tenn.) 296.

Texas.— Chase *v.* York Sav. Bank, 89 Tex. 316, 36 S. W. 406, 59 Am. St. Rep. 48, 32 L. R. A. 785.

Vermont.— Lovejoy *v.* Lee, 35 Vt. 430.

Compare Thomson *v.* Baltimore, etc., Steam Co., 33 Md. 312, where it was held that although under 8 Anne, c. 14, the goods and chattels of a lessee of land could not be seized under execution and removed from the land unless plaintiff in execution should tender to the landlord the arrears of rent due him, yet such property could be attached by an officer without complying with this condition, an attachment not being an execution, and therefore not falling within the statute. The landlord is, however, entitled to his rent out of the proceeds of the attachment sale of such property by the sheriff.

32. *Arkansas.*— State *v.* Lawson, 7 Ark. 391, 46 Am. Dec. 293, holding that it was the obvious intention of the legislature to subject every species of property to the payment of the debtor's obligation and that treasury notes were subject to levy and seizure by attachment.

Connecticut.— Cole *v.* Wooster, 2 Conn. 203.

Georgia.— Haley *v.* Reid, 16 Ga. 437.

Louisiana.— Oliver *v.* Gwin, 17 La. 28.

Maryland.— Campbell *v.* Morris, 3 Harr. & M. (Md.) 535.

Massachusetts.— Gay *v.* Southworth, 113 Mass. 333; Wallace *v.* Bartlett, 108 Mass. 52; Gibson *v.* Jenney, 15 Mass. 205; Danforth *v.* Woodward, 10 Pick. (Mass.) 423, 20 Am. Dec. 531.

Tennessee.— Lane *v.* Marshall, 1 Heisk.

those of another that they cannot be distinguished or identified,[33] the whole may be taken by attachment in an action against the debtor. The officer may, however, retain possession of the goods other than the debtor's only until they are identified or pointed out to him.[34]

e. Growing Crops. Annual growing crops which are the product of industry and care have been held to be properly attachable as the personal property of the owner,[35] but in some jurisdictions it would seem that to be attachable such crops should be fit for harvest.[36]

(Tenn.) 30; Lockwood *v.* Nye, 2 Swan (Tenn.) 515, 58 Am. Dec. 73.

See 5 Cent. Dig. tit. "Attachment," § 122.

Property right, and not mere possession, determines liability to attachment.—It seems to have been argued in some of the earlier cases that property, to be subject to attachment, must be in the actual possession of the debtor, but this view was never taken by the courts; and the mere fact that the property is in the possession of a third party does not exempt it from attachment (Hutcheson *v.* Ross, 3 A. K. Marsh. (Ky.) 490; Skillman *v.* Bethany, 2 Mart. N. S. (La.) 104; Walton *v.* Deignan, 2 Nott & M. (S. C.) 248), although in some jurisdictions where the property is in the hands of another there must be a specific direction to the officer to attach it, and not a mere direction to attach the "goods and the estate of" the debtor (Deering *v.* Lord, 45 Me. 293).

The following species of personalty have been held attachable: Bank notes (Ringo *v.* Biscoe, 13 Ark. 563; Spencer *v.* Blaisdell, 4 N. H. 198, 17 Am. Dec. 412; Lovejoy *v.* Lee, 35 Vt. 430. And see Knowlton *v.* Bartlett, 1 Pick. (Mass.) 271, where their liability to attachment is neither expressly affirmed nor denied); hay in a barn (Campbell *v.* Johnson, 11 Mass. 184; Barrett *v.* White, 3 N. H. 210, 14 Am. Dec. 352. *Compare dictum* in Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28); merchandise kept in a store for sale (Batchelder *v.* Frank, 49 Vt. 90); money (Handy *v.* Dobbin, 12 Johns. (N. Y.) 220; Williams *v.* Rogers, 5 Johns. (N. Y.) 163); a wooden boot hung up at the door of a shoemaker's shop as a sign of his trade (Wallace *v.* Barker, 8 Vt. 440).

Fixtures which a tenant may remove are subject to attachment. Morey *v.* Hoyt, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611. It must be clear, however, that the fixtures are those that the tenant has in fact a right to remove, because the right to attach supposes of course the right to carry out the attachment, which means the right to remove such structures from the soil when the attachment becomes fixed by judgment. Mayhew *v.* Hathaway, 5 R. I. 283.

Letters and correspondence are not, in the absence of express statutory authority, attachable. Hergman *v.* Dettlebach, 11 How. Pr. (N. Y.) 46.

Goods in transit.—The mere fact that the goods of an absconding or non-resident debtor were in transit, passing through the state when attached, is no ground for their exemption from this process. Morrel *v.* Buckley, 20 N. J. L. 667.

Trade-mark.—Whether or not property in a trade-mark is subject to attachment, *quære.* Milliken *v.* Dart, 26 Hun (N. Y.) 24; Hegeman *v.* Hegeman, 8 Daly (N. Y.) 1.

Trunk containing articles exempted from attachment is subject to attachment and may properly be taken by the officer, opportunity being given to the debtor to remove from the trunk the exempted articles. Towns *v.* Pratt, 33 N. H. 345, 66 Am. Dec. 726.

Attachment of debts due defendant see GARNISHMENT.

33. Necessity of goods being indistinguishable by the officer.—It is essential that the goods shall be so intermingled that they could not upon due inquiry be distinguished by the officer who makes the attachment, and it would also seem that he should request the aid of the owner of the goods in their identification. Walcott *v.* Keith, 22 N. H. 196. The fact that a part of the goods had been fraudulently obtained will not change the rule if the intermingling was not such that the identity of the goods was lost. Capron *v.* Porter, 43 Conn. 383.

34. Yates *v.* Wormell, 60 Me. 495; Shumway *v.* Rutter, 8 Pick. (Mass.) 443, 19 Am. Dec. 340; Taylor *v.* Jones, 42 N. H. 25; Wilson *v.* Lane, 33 N. H. 466; Albee *v.* Webster, 16 N. H. 362; Lewis *v.* Whittemore, 5 N. H. 364, 22 Am. Dec. 466.

35. Raventas *v.* Green, 57 Cal. 254; Polley *v.* Johnson, 52 Kan. 478, 35 Pac. 8, 23 L. R. A. 258; Farmers' Alliance Ins. Co. *v.* Nichols, 6 Kan. App. 923, 50 Pac. 940; Farmers' Bank *v.* Morris, 79 Ky. 157 (holding also that after an execution at law had been returned "no property" a growing crop was liable to seizure by attachment at once, notwithstanding the statute prohibiting a levy of execution thereon until after the first day of October); Sims *v.* Jones, 54 Nebr. 769, 75 N. W. 150, 69 Am. St. Rep. 749.

Standing grass is, however, considered as realty by the New Hampshire court, and therefore not subject to attachment as personal property. Rogers *v.* Elliott, 59 N. H. 201, 47 Am. Rep. 192 [*distinguishing* Norris *v.* Watson, 22 N. H. 364, 55 Am. Dec. 160, and holding that while this latter case decided that a growing crop of grass was not attachable, it could not be inferred from it that the grass would have been attachable had it been ripe].

36. Heard *v.* Fairbank, 5 Metc. (Mass.) 111, 38 Am. Dec. 394 [*approving* the analogous case of Penhallow *v.* Dwight, 7 Mass. 34, 5 Am. Dec. 21].

This is an exception to the old rule which forbids the attachment of property that can-

d. Perishable Property. The mere fact that chattels are perishable will not in itself exempt them from attachment. Not only is this true under statutes providing for a sale of such property,[37] but also, it would seem, in jurisdictions where no provision is made for their sale.[38]

e. Rolling Stock of Corporations. The engines or the freight and passenger cars of a railroad corporation are liable to attachment when not in use the same as other personal property.[39]

f. Watercraft. As a general rule[40] there is no discrimination between vessels or steamboats and other species of personal property, when the kind of property subject to attachment is considered.[41]

g. Interests in Personalty — (I) *Interest of Mortgagor* — (A) *In General.* At common law the mortgagor of personalty had not such an interest therein that the chattel could be taken by attachment in an action against him;[42] but the liability of such interest to attachment has in many states been affirmed, either by the recognition of a legal, as well as an equitable, right of property in the mort-

not be returned in the same plight, the reason of the rule being held not applicable as applied to mature crops. Cheshire Nat. Bank *v.* Jewett, 119 Mass. 241.

Tobacco stored in barns or hanging on poles in process of curing, although in such condition that it cannot be moved without damage, is attachable within the rule that all annual products when ripe and fit for harvest are subject to attachment. Cheshire Nat. Bank *v.* Jewett, 119 Mass. 241.

37. Batchelder *v.* Frank, 49 Vt. 90.

38. Cilley *v.* Jenness, 2 N. H. 87, 91, where, although there was no statute providing for the sale of such property, the court, resting their opinion partly upon the analogy between the officer's situation and the situation of other bailees, but more particularly between his condition and the practice under like circumstances in courts of admiralty, held that they would not be "wandering into the province of legislation" by holding the officer liable for permitting the debtor to retain and consume such property; his duty being to expose it to public sale and account for the net proceeds. *Compare* Crocker *v.* Baker, 18 Pick. (Mass.) 407, where it is said that in the absence of such statute perishable goods would not be attachable. Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28, is cited by the court as authority for this proposition, but this was decided wholly on the ground that certain goods which could not be distrained at common law were not attachable, and it would seem from a *dictum* in the case that perishable articles were attachable; at least if their destruction was not hastened or they were not injured by the mere attaching and removing of them.

39. Boston, etc., R. Co. *v.* Gilmore, 37 N. H. 410, 72 Am. Dec. 336. See also Buffalo Coal Co. *v.* Rochester, etc., R. Co., 8 Wkly. Notes Cas. (Pa.) 126, where the rolling stock of a railroad being expressly made liable to attachment by statute, it was held that the mere fact that the corporation was not a resident of the state could not exempt its property from this process.

40. An exception to this rule arises where a creditor seeks to attach the vessel under a statute providing for an attachment when the debtor is about to remove his property out of the state before the debt becomes due. It is very clear that when the obligation is created the creditor must know that, from the very nature of the property, it would be perhaps useless if it were not taken ouside of the state occasionally in the course of commerce, and therefore he is held to contract with that understanding. Russell *v.* Wilson, 18 La. 367.

41. Nimick *v.* Louisiana Tehuantepec Co., 16 La. Ann. 46; Hogan *v.* Carras, 12 La Ann. 49; Haeberle *v.* Barringer, 20 La. 410; Russell *v.* Wilson, 18 La. 367; Com. *v.* Fry, 4 W. Va. 721. And see Sibley *v.* Fernie, 22 La. Ann. 163.

Appurtenances of a vessel.— It is said that to take a boat, or a cable and anchor from a vessel, when they are actually in use and necessary to the safety of the vessel, would expose the party to damages; but if the vessel were at the wharf and such appurtenances were not in use they may be properly taken under a writ of attachment, like a harness to a carriage. Briggs *v.* Strange, 17 Mass. 405.

42. *Arkansas.*— Jennings *v.* McIlroy, 42 Ark. 236, 48 Am. Rep. 61.

Maine.— Holbrook *v.* Baker, 5 Me. 309, 17 Am. Dec. 236.

Massachusetts.— Prout *v.* Root, 116 Mass. 410; Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202.

New Hampshire.— Haven *v.* Low, 2 N. H. 13, 9 Am. Dec. 25.

United States.— Simonds *v.* Pearce, 31 Fed. 137, construing South Carolina statute.

See also Scott *v.* Scholey, 8 East 467, 9 Rev. Rep. 487, which, although the case involved an execution and not an attachment, is cited by nearly all of the opinions in this country where the question was determined for the first time.

The reason being that an equitable interest could not be taken and sold on execution; for it was said where there was no legal right there was no legal remedy. Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202.

gagor,[43] or by express statutory provisions.[44] The courts are not, however, uniform in determining just what interest the mortgagor must have in the property before it is attachable. While it is usually held liable so long as the mortgagor's interest is coupled with the legal right to possession,[45] in some jurisdictions, possession or a possessory right to the chattel is expressly adjudged to be essential,[46] and the right does not exist after condition broken.[47] In other jurisdictions the statutes seem to authorize the attachment of mere equities of redemption,[48] and the mortgagor's interest would, it has been held, be attachable after condition broken.[49]

43. Pollock *v.* Douglas, 56 Mo. App. 487; Dahoney *v.* Allison, 1 Tex. Unrep. Cas. 112 [*following* Wright *v.* Henderson, 12 Tex. 43]; Jones Chattel Mortg. (4th ed.) § 556.

44. Weil *v.* Raymond, 142 Mass. 206, 7 N. E. 860; Brackett *v.* Bullard, 12 Metc. (Mass.) 308, the latter holding that Mass. Rev. Stat. (1847), c. 90, did not apply to executions, but to attachments only.

Extension of statute by implication.— Under the Michigan statute of 1880, providing that mortgaged chattels might be levied on and sold under execution against the mortgagor, and a subsequent section providing that an attachment should command the officer to take so much of defendant's chattels, etc., "not exempt from execution," it was held that mortgaged chattels might be taken under an attachment against a mortgagor and sold subject to the mortgage, although the latter statute did not, in express terms, refer to attachments. King *v.* Hubbell, 42 Mich. 597, 4 N. W. 440.

Conflict with federal law.— If the right by virtue of the state statute would conflict with the right of the mortgagee under a United States statute it cannot be exercised. Thus, a vessel upon which the mortgagees have a claim by virtue of a mortgage duly recorded under the shipping laws of the United States cannot be taken by attachment by virtue of the state statute, although it would be clearly within the provision of the latter statute were it not for the existence of the federal law. Howe *v.* Tefft, 15 R. I. 477, 8 Atl. 707 [*citing* and *approving* Aldrich *v.* Ætna Co., 8 Wall. (U. S.) 491, 19 L. ed. 473].

45. *Alabama.*— Thompson *v.* Thornton, 21 Ala. 808; Fontaine *v.* Beers, 19 Ala. 722.

Maine.—See Perry *v.* Somerby, 57 Me. 552.

Nebraska.— Locke *v.* Shreck, 54 Nebr. 472, 74 N. W. 970.

New Jersey.— Blauvelt *v.* Fechtman, 48 N. J. L. 430, 8 Atl. 728; Fox *v.* Cronan, 47 N. J. L. 493, 2 Atl. 444, 4 Atl. 314, 54 Am. Rep. 190.

Ohio.— Curd *v.* Wunder, 5 Ohio St. 92.

Rhode Island.— Good *v.* Rogers, 19 R. I. 1, 31 Atl. 264, applying the same rule where property was covered by a bill of sale intended to operate as a mortgage.

See 5 Cent. Dig. tit. "Attachment," § 140.

Chattels subject to deed of trust are subject to attachment, especially when such trust is in favor of plaintiff. The mere fact that plaintiff elected to choose his statutory, and not his conventional, remedy cannot be objected to by defendant. The Richmond *v.* Cake, 1 App. Cas. (D. C.) 447.

46. Wells *v.* Sabelowitz, 68 Iowa 238, 26 N. W. 127 (interest not attachable where mortgagee has right to take possession); Pollock *v.* Douglas, 56 Mo. App. 487; Merchants' Nat. Bank *v.* Abernathy, 32 Mo. App. 211; Sams *v.* Armstrong, 8 Mo. App. 573 (possession during the pleasure of the mortgagee is not sufficient).

Application of principle to increase of animals.— Inasmuch as the right to possession of colts until weaned follows the dams (see ANIMALS, 2 Cyc. 309, note 30), such colts will not, before that time, be liable to attachment at the suit of a creditor of the mortgagor of the dams; the right of possession in the dams being in the mortgagee (Rogers *v.* Highland, 69 Iowa 504, 29 N. W. 429, 58 Am. Rep. 230).

47. *Alabama.*— Thompson *v.* Thornton, 21 Ala. 808.

Illinois.— Martin *v.* Duncan, 156 Ill. 274, 41 N. E. 43 [*reversing* 47 Ill. App. 84, which seems to hold that after condition broken the attachment would not lie].

Michigan.— Tannahill *v.* Tuttle, 3 Mich. 104, 61 Am. Dec. 480.

Missouri.— Fahy *v.* Gordon, 133 Mo. 414, 34 S. W. 881; Pollock *v.* Douglas, 56 Mo. App. 487.

Rhode Island.— If the mortgagor has by statute sixty days after condition broken within which to redeem the chattels he would have no attachable interest therein after the expiration of that time. Earle *v.* Anthony, 1 R. I. 307.

Vermont.— Norris *v.* Sowles, 57 Vt. 360.

See 5 Cent. Dig. tit. "Attachment," § 140.

Rule applicable in deed of trust.— The above rule is applicable where the grantor in a deed of trust as security for the payment of a debt, after default made, remains in possession of personal property conveyed by it, at least where the deed gives the trustee power to sell enough of the property to pay the demand then due. This is true although only a portion of the demand secured is due and unpaid at the time of the levy of the attachment, and the property conveyed greatly exceeds in value the sum due. Thompson *v.* Thornton, 21 Ala. 808.

48. Sawyer *v.* Mason, 19 Me. 49; Hall *v.* Samson, 23 How. Pr. (N. Y.) 84.

49. Burnham *v.* Doolittle, 14 Nebr. 214, 15 N. W. 606 [*modifying* Peckinbaugh *v.* Quillin, 12 Nebr. 586, 12 N. W. 104, which held that it was only when the mortgagor had a right of possession for a definite period of time that he had an attachable interest]; Carty *v.* Fenstemaker, 14 Ohio St. 457.

(B) *When in Possession of Mortgagee.* If by virtue of the mortgage the mortgagee is in rightful possession of the property, it cannot as a rule be taken in an attachment against the mortgagor,[50] although in some jurisdictions it seems that if the property has not been applied to the satisfaction of the claim it would be attachable when in the possession of the mortgagee.[51]

(II) *Interest of Mortgagee.* Personal property, while the possession or right of redemption remains in the mortgagor, is not only not liable to attachment in a suit against the mortgagee,[52] but, it would seem, cannot be thus taken, although the mortgagee has possession, and after condition broken, if it has not in fact been applied to the satisfaction of the debt by foreclosure or otherwise.[53]

3. Realty[54] — a. In General — (I) *Rule Stated.* Inasmuch as the lands of a debtor are now, as a rule, liable to be taken on execution for his debts,[55] it follows that they are usually liable to attachment,[56] unless by the terms of the statute the intention is clearly otherwise.[57] It is essential, however, that the debtor have some beneficial interest in the land. The bare legal title,[58] or instantaneous seizin

50. Moore *v.* Murdock, 26 Cal. 514; Giffert *v.* Wilson, 18 Ill. App. 214; Bacon *v.* Kimmel, 14 Mich. 201 (especially after the time for the payment has expired, and the mortgage has, by its terms, become absolute); Stiles *v.* Hill, 62 Tex. 429 (holding that under the statutes of that state such property could not be taken from the possession of the mortgagee unless the debt for which it was held was first paid).

51. Prout *v.* Root, 116 Mass. 410, which seems to say that under the statutes of that state the property would pass into the custody of the officer, and if the amount due the mortgagee be paid his title is ended, and the possession of the attaching officer cannot be interfered with.

52. Meadow *v.* Wise, 41 Ark. 285; Morton *v.* Hodgdon, 32 Me. 127; Adoue *v.* Jemison, 65 Tex. 680.

53. Prout *v.* Root, 116 Mass. 410; Voorhies *v.* Hennessy, 7 Wash. 243, 34 Pac. 931 (where it is said that the mere possession of the mortgagee after the maturity of the debt does not amount to a forfeiture so that the legal title vests in him). *Compare* Lyon *v.* Johnson, 3 Dana (Ky.) 544.

If the mortgagee was in possession under a bill of sale the mere fact that the officer did not know that the bill of sale was intended as a mortgage does not render the levy effective. Voorhies *v.* Hennessy, 7 Wash. 243, 34 Pac. 931.

The interest of mortgagee and mortgagor is not joint, and hence a plaintiff cannot by joining them in a suit upon a joint debt enlarge the statute of attachment and thus make the interest of the mortgagee attachable. Murphy *v.* Galloupe, 143 Mass. 123, 8 N. E. 894.

54. What constitutes realty under attachment laws.— In determining what shall constitute real estate in the sense of the attachment law the Rhode Island court say: "We hold that to be real estate in the sense of our attachment law, which our law with regard to the conveyance of real estate treats as such, and requires to be conveyed with the solemnities and public notice with which real estate is, according to its policy, to be conveyed; and regard the notice, required in attachments of real estate to be left at the town clerk's office, as congruous with, and suggestive of, this test of discrimination. All estates in lands and tenements of a longer duration than one year, are, according to this standard, real estate, and should be attached as such." Mayhew *v.* Hathaway, 5 R. I. 283, 285. Manure made upon a farm in the ordinary course of husbandry (Sawyer *v.* Twiss, 26 N. H. 345), or an iron pier (Harriman *v.* Rockaway Beach Pier Co., 5 Fed. 461), is realty and not attachable as goods or chattels separate from the land.

55. See Executions.

Prior to 5 Geo. II, c. 7, lands were not liable to be taken on execution, and it was therefore held that they were not attachable under the Maryland act of 1715. Since that statute they have uniformly been held to be subject to attachment in Maryland. Barney *v.* Patterson, 6 Harr. & J. (Md.) 182; Davidson *v.* Beatty, 3 Harr. & M. (Md.) 594.

56. See *supra*, IX, A, 1.

57. Thus it has been held that real estate was not liable to attachment within the meaning of the domestic attachment acts of South Carolina and Pennsylvania (Continental Nat. Bank *v.* Draper, 89 Pa. St. 446; *In re* Miners' Bank, 13 Wkly. Notes Cas. (Pa.) 370; Boyce *v.* Owens, 2 McCord (S. C.) 208, 13 Am. Dec. 711; Jamieson *v.* Brodrick, 1 Brev. (S. C.) 396), although the rule is otherwise as to foreign attachments in Pennsylvania (Graighle *v.* Notnagle, Pet. C. C. (U. S.) 245, 10 Fed. Cas. No. 5,679); and under an early statute of Kentucky land was not attachable upon a return of the capias "not found" (Murray *v.* Hamilton, Hard. (Ky.) 5; Rees *v.* Bishop, Hard. (Ky.) 95 note).

The mere fact that the real estate is mortgaged can make no difference if under the statute the officer is commanded to attach real estate. So held under the Connecticut attachment act of 1882, which provided for the institution of insolvency proceedings if the attaching officer could not find sufficient property to satisfy the claimant's demand. Hawes' Appeal, 50 Conn. 317.

58. Riddell *v.* Park, 18 Ky. L. Rep. 907, 38 S. W. 688; Houston *v.* Nowland, 7 Gill

would be insufficient,[59] at least as against the equitable owners, where the attaching party has, or is bound by law to take, notice of the paramount outstanding equitable title.[60]

(II) *As Dependent Upon Seizure of Personalty.* In the absence of any positive statutory limitations exempting real estate from attachment until the debtor's personalty is exhausted such lands would be liable to attachment regardless of the amount of personalty the debtor may possess.[61]

b. Interests in Realty — (I) *Equitable Interests Generally.* While in the absence of statute, equitable interests in realty are not liable to attachment,[62] in most states such interests are attachable.[63] In a few jurisdictions, however, it

& J. (Md.) 480; Hart *v.* Farmers', etc., Bank, 33 Vt. 252.

59. Woodward *v.* Sartwell, 129 Mass. 210; Webster *v.* Campbell, 1 Allen (Mass.) 313; Haynes *v.* Jones, 5 Metc. (Mass.) 292; Chickering *v.* Lovejoy, 13 Mass. 51. See also Hazleton *v.* Lesure, 9 Allen (Mass.) 24, holding that where a debtor's interest in mortgaged land, subject to a life-estate, is attached, and the life-tenant conveys to him, to enable him to raise money to pay off the mortgage, which he does, giving a new mortgage to secure the money loaned and then reconveys the life-estate to its former holder, such acts being in effect but one transaction, the attachment will not cover the instantaneous fee acquired by the debtor, but will apply only to his interest at the time of the levy.

60. Tucker *v.* Vandermark, 21 Kan. 263.

A party knowing the seizin to be instantaneous can therefore acquire no right or interest by an attempted attachment. Spear *v.* Hubbard, 4 Pick. (Mass.) 143; Jorgenson *v.* Minneapolis Threshing Mach. Co., 54 Minn. 489, 67 N. W. 364; Buswell *v.* Davis, 10 N. H. 413.

61. Isham *v.* Downer, 8 Conn. 282 (where, although the statute provided for the attachment of the debtor's "goods and chattels, and in want of goods and chattels, the lands of the defendant," yet, the legislature put a construction on this statute in prescribing the forms of writs which read "attach the goods or estate of N. B.," and it was held thereby gave to plaintiff the choice of attaching personalty or real estate); Boggess *v.* Gamble, 3 Coldw. (Tenn.) 148. And see Samuels *v.* Revier, 92 Fed. 199, 63 U. S. App. 752, 34 C. C. A. 294, holding that under the procedure in Texas a prior levy on personalty was not a prerequisite to the right to attach realty.

62. Lowry *v.* Wright, 15 Ill. 95; Trask *v.* Green, 9 Mich. 358; Kendall *v.* Gibbs, 5 R. I. 525. See also Garlick *v.* Robinson, 12 Ga. 340.

The reason being that the common-law courts did not recognize equitable estates which could not therefore be sold upon execution. It was incumbent upon the creditors to file a bill in chancery to subject such estates to their claims. Atwater *v.* Manchester Sav. Bank, 45 Minn. 341, 48 N. W. 187, 12 L. R. A. 741.

63. *California.*— Fish *v.* Fowlie, 58 Cal. 373.

Connecticut.—Davenport *v.* Lacon, 17 Conn. 278, holding that the statute subjecting lands to attachment was not confined to estates where the debtor had a legal interest, but also includes any equitable interest therein which he might have.

Illinois.— Laclede Bank *v.* Keeler, 103 Ill. 425; West *v.* Schnebly, 54 Ill. 523; Wallace *v.* Monroe, 22 Ill. App. 602.

Kansas.— Shanks *v.* Simon, 57 Kan. 385, 46 Pac. 774; Travis *v.* Topeka Supply Co., 42 Kan. 625, 22 Pac. 991; Bullene *v.* Hiatt, 12 Kan. 98.

Kentucky.— Louisville Bank *v.* Barrick, 1 Duv. (Ky.) 51.

Maine.— Moore *v.* Richardson, 37 Me. 438.

Maryland.— Cecil Bank *v.* Snively, 23 Md. 253 (holding that where property is purchased for a third party who furnishes the purchase-money paid at the sale, and also pays subsequent instalments on the property, such third party will have an attachable interest to the extent of the payments made by him); Campbell *v.* Morris, 3 Harr. & M. (Md.) 535 [*approved* in Ford *v.* Philpot, 5 Harr. & J. (Md.) 312].

Michigan.— But the statute providing for such attachments must be adhered to, and the interest attached as an equity and not as corporeal real estate. Grover *v.* Fox, 36 Mich. 453.

Minnesota.— Atwater *v.* Manchester Sav. Bank, 45 Minn. 341, 48 N. W. 187, 12 L. R. A. 741, residuary interest.

Missouri.— Huxley *v.* Harrold, 62 Mo. 516.

North Carolina.— Henderson *v.* Hoke, 21 N. C. 119.

Ohio.— Coggshall *v.* Marine Bank. Co., 63 Ohio St. 88, 57 N. E. 1086; Wright *v.* Franklin Bank, 59 Ohio St. 80, 51 N. E. 876. And see Kentucky Northern Bank *v.* Nash, 1 Handy (Ohio) 153, 12 Ohio Dec. (Reprint) 75, where the court strongly inclined to the opinion that an equitable interest in real estate was subject to attachment under the code of that date, but as the actual decision of such point was unnecessary it was not specifically affirmed.

Vermont.— Bailey *v.* Warner, 28 Vt. 87, equitable right to a conveyance.

What constitutes attachable interests under the statute.—Under the statutes of Texas the right to attach equitable interests in real estate cannot be denied, but the court, in the case of Chase *v.* York County Sav. Bank, 89 Tex. 316, 36 S. W. 406, 59 Am. St. Rep. 48, 32 L. R. A. 785, say that it does not follow that every equitable interest is attachable and

is still necessary to resort to a court of equity to subject such interests to payment of a debt.[64]

(II) *Interest of Mortgagee.* The interest of the mortgagee in land, while the mortgage is open and subsisting, is not of such nature as to be liable to attachment.[65] Some of the cases, however, seem to be limited to the particular facts before the court, and do not expressly affirm the non-liability of his interests to attachment after entry but before foreclosure;[66] but inasmuch as the inconveniences and difficulties which would result from the attachment before entry would still prevail after entry and before foreclosure,[67] the distinction, if ever made, does not rest upon sound legal principles, and does not, it is believed, now exist.[68]

(III) *Mortgagor's Right to Redeem.* While, in most states, the mortgagor's equity of redemption was not liable to attachment at common law,[69] the rule is changed by statute.[70]

it was held that where the absolute title to land, the purchase-price for which had been paid by several persons, was conveyed to one person, to be resold by him, and the proceeds divided among those furnishing the purchase-price, the equitable interest of such persons was not attachable. This interest was a mere right in equity to demand an accounting of the proceeds of the sale of the land, and was held not to come within the operation of the statute. But see Maloney *v.* Bewley, 10 Heisk. (Tenn.) 642, holding that interest in the enhanced value of land by reason of improvements placed thereon, and because of a small financial outlay expended as interest on the purchase-price constitutes an attachable interest in the land.

64. Shoemaker *v.* Harvey, 43 Nebr. 75, 61 N. W. 109 [*approved* and *distinguished* in Westervelt *v.* Hagge, 61 Nebr. 647, 85 N. W. 852]; Dworak *v.* Moore, 25 Nebr. 735, 41 N. W. 778; Macauley *v.* Smith, 10 N. Y. Suppl. 578, 32 N. Y. St. 745 [*reversed* on other grounds in 132 N. Y. 524, 30 N. E. 997, 44 N. Y. St. 847]. *Compare* Lee *v.* Hunter, 1 Paige (N. Y.) 519.

In Tennessee an attachment against such interest, although provided for by statute, must be issued from a court of equity (Lane *v.* Marshall, 1 Heisk. (Tenn.) 30); and it is necessary to show that it is intended to be attached as an equity, and the holder of the legal title must be made a party (Blackburn *v.* Clarke, 85 Tenn. 506, 3 S. W. 505; Hillman *v.* Werner, 9 Heisk. (Tenn.) 586; Lane *v.* Marshall, 1 Heisk. (Tenn.) 30). If issued by a court of law it could not be levied upon equitable interests. Blackburn *v.* Clarke, 85 Tenn. 506, 3 S. W. 505; Hillman *v.* Werner, 9 Heisk. (Tenn.) 586; Lane *v.* Marshall, 1 Heisk. (Tenn.) 30.

Attachment of right of redemption from a tax sale.— Whether or not the right to remove land which has been sold for taxes is attachable is of course dependent directly upon the statute. In Massachusetts (Adams *v.* Mills, 126 Mass. 278) it is held that this interest is not, under the statute, attachable; but in Tennessee (Herndon *v.* Pickard, 5 Lea (Tenn.) 702, it was held that it might be reached by an attachment in chancery.

65. *Alabama.*— Morris *v.* Barker, 82 Ala. 272, 2 So. 335.

California.— McGurren *v.* Garrity, 68 Cal. 566, 9 Pac. 839.

Iowa.— Courtney *v.* Carr, 6 Iowa 238.

Maine.— Brown *v.* Bates, 55 Me. 520, 92 Am. Dec. 613; Thornton *v.* Wood, 42 Me. 282; McLaughlin *v.* Shepherd, 32 Me. 143, 52 Am. Dec. 646. And therefore an assignee of the mortgagee would not have an interest which is attachable. Bullard *v.* Hinckley, 5 Me. 272.

Massachusetts.— Portland Bank *v.* Hall, 13 Mass. 207; Marsh *v.* Austin, 1 Allen (Mass.) 235.

Michigan.— Columbia Bank *v.* Jacobs, 10 Mich. 349, 81 Am. Dec. 792.

Vermont.— Barrett *v.* Sargeant, 18 Vt. 365.

See 5 Cent. Dig. tit. "Attachment," § 144.

The purchaser of an equity of redemption sold upon execution is held, upon this principle, to have no attachable interest in the premises during the time allowed the debtor to redeem from the purchaser. Rogers *v.* Wingate, 46 Me. 436; Thornton *v.* Wood, 42 Me. 282.

The interest acquired by a judgment creditor in his levy on land is not attachable during the time allowed by law for its redemption. Kidder *v.* Orcutt, 40 Me. 589.

66. Morris *v.* Barker, 82 Ala. 272, 2 So. 335; Eaton *v.* Whiting, 3 Pick. (Mass.) 484. *Compare* Symes *v.* Hill, Quincy (Mass.) 318, from which it would seem that under the law at that time the title became absolute in the mortgagee upon breach of the condition.

67. Smith *v.* People's Bank, 24 Me. 185; Eaton *v.* Whiting, 3 Pick. (Mass.) 484.

68. Brown *v.* Bates, 55 Me. 520, 92 Am. Dec. 613; Lincoln *v.* White, 30 Me. 291; Smith *v.* People's Bank, 24 Me. 185 (where the court say that it does not appear that this question had at that time ever been distinctly presented for adjudication).

69. Piatt *v.* Oliver, 2 McLean (U. S.) 267, 19 Fed. Cas. No. 11,115.

70. *Alabama.*— British, etc., Mortg. Co. *v.* Norton, 125 Ala. 522, 28 So. 31; Norton *v.* British American Mortg. Co., 113 Ala. 110, 20 So. 968; Central Min., etc., Co. *v.* Stoven, 45 Ala. 594, the last case holding that the

(IV) *ESTATE BY CURTESY.* In the absence of a statute rendering it exempt the estate of a tenant by curtesy initiate[71] is, like all other certain and vested legal estates, subject to attachment.[72]

(V) *UNASSIGNED DOWER.* The liability to attachment at law of a widow's interest in dower which has not been assigned or admeasured to her is dependent entirely upon statute.[73] Under a statute providing for the attachment of any interest in realty, which is capable of being aliened by defendant, whether vested or not vested, it is held that such interest is attachable.[74]

B. Property Fraudulently Conveyed. Inasmuch as a conveyance of property with intent to defraud one's creditors may be treated as a nullity by them,[75] it follows that property which has been thus conveyed may be attached as the property of the grantor by his creditors the same as if no conveyance had been made.[76] To sustain his attachment, however, the creditor must show fraud upon

statutory right of redemption of land was not, however, subject to a levy of an attachment.

California.— Godfrey *v.* Monroe, 101 Cal. 224, 35 Pac. 761.

Maine.— Kidder *v.* Orcutt, 40 Me. 589.

Maryland.— Ford *v.* Philpot, 5 Harr. & J. (Md.) 312.

Massachusetts.— Wiggin *v.* Heywood, 118 Mass. 514. And such levy may be made by the mortgagee for a debt not secured by the mortgage. Cushing *v.* Hurd, 4 Pick. (Mass.) 253, 16 Am. Dec. 335.

New Hampshire.— Bryant *v.* Morrison, 44 N. H. 288; Kittredge *v.* Bellows, 4 N. H. 424.

Vermont.— Moore *v.* Quint, 44 Vt. 97.

United States.— Pratt *v.* Law, 9 Cranch (U. S.) 456, 3 L. ed. 791, construing Maryland statute.

See 5 Cent. Dig. tit. "Attachment," § 145.

A right to redeem a mortgage of an equitable interest in real estate has also been held to be attachable. Thus where a mortgagor, after a sale on execution of his equity of redemption, executes a second mortgage on the land, his equity of redemption under the second mortgage is attachable. Reed *v.* Bigelow, 5 Pick. (Mass.) 281.

71. As for instance, in Rhode Island where, under R. I. Rev. Stat. (1875), c. 136, all the real estate which is the property of any woman before marriage, or which may become her property after marriage, is so far secured to her sole and separate use that the same, and the rents, profits, and income thereof is not liable to be attached or in any way taken for the debt of her husband either before or after her death. Greenwich Nat. Bank *v.* Hall, 11 R. I. 124. See also Sill *v.* White, 62 Conn. 430, 26 Atl. 396, 20 L. R. A. 321, holding that an estate by the curtesy was exempt from attachment during the life of any of the children except for certain classes of debts.

72. Day *v.* Cochran, 24 Miss. 261.

73. Rausch *v.* Moore, 48 Iowa 611, 30 Am. Rep. 412 (holding that where the common-law dower of a life-estate is in force the great weight of authority is to the effect that, until it is assigned or set apart to the dowress, it is not liable to attachment or execution in a suit at law by the creditor of the widow, and that this rule was not changed by Iowa Laws (1862), c. 151, § 1); McMahon *v.* Gray, 150 Mass. 289, 22 N. E. 923, 15 Am. St. Rep. 202, 5 L. R. A. 748 (holding that under the statute the creditor must resort to a bill in equity to subject such interest to his claim).

74. Latourette *v.* Latourette, 52 N. Y. App. Div. 192, 65 N. Y. Suppl. 8.

75. See, generally, FRAUDULENT CONVEYANCES.

For attachment by garnishee or trustee process of notes, judgments, or other property fraudulently conveyed see GARNISHMENT.

76. *Arkansas.*— Blass *v.* Anderson, 57 Ark. 483, 23 S. W. 94, affirming the proposition that a creditor of a fraudulent vendor could attach conveyed property, but holding that the mere fact that the sale is illegal, because against the prohibition of the statute, does not prove that it is fraudulent as to creditors.

Connecticut.— Bishop *v.* Warner, 19 Conn. 460.

Florida.— McClellan *v.* Solomon, 23 Fla. 437, 2 So. 825, 11 Am. St. Rep. 381.

Georgia.— Haralson *v.* Newton, 63 Ga. 163.

Illinois.— Bostwick *v.* Blake, 145 Ill. 85, 34 N. E. 38; McKinney *v.* Farmers' Nat. Bank, 104 Ill. 180; Getzler *v.* Saroni, 18 Ill. 511.

Indiana.— Quarl *v.* Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662.

Iowa.— While in Iowa the right to attach fraudulently conveyed property is not denied, it seems to be necessary to the completion of the lien that the levy be followed by a supplemental proceeding to set aside the transfer. Ware *v.* Delahaye, 95 Iowa 667, 64 N. W. 640; Boggs *v.* Dougless, 89 Iowa 150, 56 N. W. 412.

Kentucky.— Carter *v.* Carpenter, 7 Bush (Ky.) 257; Dishman *v.* Davidson, 19 Ky. L. Rep. 139, 39 S. W. 515; Goldnamer *v.* Robinson, 11 Ky. L. Rep. 630.

Louisiana.— Meeker *v.* Hays, 18 La. 19.

Maine.— Wise *v.* Tripp, 13 Me. 9.

Massachusetts.— Sheldon *v.* Root, 16 Pick. (Mass.) 567, 28 Am. Dec. 266. And a general attachment of all of a debtor's interest in any real estate in the county will hold the real estate fraudulently conveyed by the debtor. Pratt *v.* Wheeler, 6 Gray (Mass.) 520.

the part of the transferee,[77] or that the deed to him was without consideration and wholly voluntary.[78] In some jurisdictions it has been held that the liability to attachment is confined to the specific property conveyed, and that, if the fraudulent assignee converts it into money or otherwise changes its identity, the proceeds held by him would not be attachable,[79] nor can the property be attached if conveyed by the fraudulent assignee to an innocent third party for a valuable consideration.[80]

Michigan.— Archer *v.* Strachan, (Mich. 1901) 88 N. W. 465.

Minnesota.— Arper *v.* Baze, 9 Minn. 108.

Missouri.— Kurtz *v.* Lewis Voight, etc., Co., 86 Mo. App. 649, holding this to be true irrespective of the fact that the purchaser paid full value for the goods, provided he knew the transaction to be in fraud of creditors, and that the fact that the vendor had assigned the note which he received for the price of the goods to a holder of a valid demand against him did not preclude an attachment at the instance of other creditors.

Nebraska.— Westervelt *v.* Hagge, 61 Nebr. 647, 85 N. W. 852; Columbus First Nat. Bank *v.* Hollerin, 31 Nebr. 558, 48 N. W. 392; Keene *v.* Sallenbach, 15 Nebr. 200, 18 N. W. 75.

New Hampshire.— Putnam *v.* Osgood, 51 N. H. 192; Angier *v.* Ash, 26 N. H. 99.

New Jersey.— Williams *v.* Michenor, 11 N. J. Eq. 520.

New York.— Hess *v.* Hess, 117 N. Y. 306, 22 N. E. 956, 27 N. Y. St. 346; Rinchey *v.* Stryker, 28 N. Y. 45, 26 How. Pr. (N. Y.) 75, 84 Am. Dec. 324; Hall *v.* Stryker, 27 N. Y. 596; Sterrett *v.* Buffalo Third Nat. Bank, 46 Hun (N. Y.) 22, 10 N. Y. St. 818, 27 N. Y. Wkly. Dig. 516; Bates *v.* Plonsky, 28 Hun (N. Y.) 112, 2 N. Y. Civ. Proc. 389, 64 How. Pr. (N. Y.) 232; Campbell *v.* Erie R. Co., 46 Barb. (N. Y.) 540.

North Carolina.— Spence *v.* Yellowly, 4 N. C. 551.

Texas.— McCamant *v.* Batsell, 59 Tex. 363.

United States.— Thompson *v.* Baker, 141 U. S. 648, 12 S. Ct. 89, 35 L. ed. 889, holding that inasmuch as the laws of Texas declared conveyances in fraud of creditors absolutely void the right of a creditor of a fraudulent transferrer to attach is plain, and a purchaser of the land *pendente lite* will take it subject to the attachment lien.

See 5 Cent. Dig. tit. "Attachment," § 179.

Attempted conveyance.— Since a verbal contract for the sale of land is not enforceable, such land may still be levied on as that of the vendor, he being in possession. Kendall *v.* Kennedy, 8 Ky. L. Rep. 532.

Fraudulent conveyance may be shown by officer.— The sheriff may justify his attachment of the property of the defendant named in his precept, which has been conveyed to a third party, by showing that such conveyance was fraudulent against creditors. Hall *v.* Stryker, 27 N. Y. 596. It has been held essential, however, that the officer take the property into his actual possession, and that therefore if the debtor has at the time only an equity in the property which cannot be reached by the attachment, the sheriff cannot assail the transfer as fraudulent. Anthony *v.* Wood, 96 N. Y. 180, 67 How. Pr. 424 [*reversing* 29 Hun (N. Y.) 239].

77. Johnston *v.* Field, 62 Ind. 377; Mansfield *v.* Dyer, 131 Mass. 200.

78. Mansfield *v.* Dyer, 131 Mass. 200. And see Neil *v.* Tenney, 42 Me. 322, where, although it was agreed that there was no actual fraud on the part of the grantee, it seems that the transfer was made without proper consideration, and it was held that the property was subject to attachment by the creditor.

79. Such proceeds can be reached only by a creditor's suit. Lawrence *v.* Bank of Republic, 35 N. Y. 320, 31 How. Pr. (N. Y.) 502; Lanning *v.* Streeter, 57 Barb. (N. Y.) 33; Campbell *v.* Erie R. Co., 46 Barb. (N. Y.) 540; Matter of Foley, 10 Daly (N. Y.) 4; Matter of True, 4 Abb. N. Cas. (N. Y.) 90; Matter of Freel, 55 How. Pr. (N. Y.) 386. *Compare* Flake *v.* Day, 22 Ala. 132, holding that such proceeds may be reached by an attachment in chancery, which is in effect, however, a proceeding by garnishment.

When provision of insolvent law is violated.— It has been said that an attaching creditor cannot avoid a sale and delivery of property simply on the ground that it is made with the intent to prefer another creditor, in violation of a provision of the insolvency law, and that the provisions of the insolvent law for the avoidance of sales, transfers, and attachments which may operate as a preference are designed exclusively for the benefit of those who come in under the assignee to obtain an equal share of the property of the insolvent in the mode provided by law, and cannot be invoked in aid of a person who stands only in the position of a creditor endeavoring to secure his whole debt by means of an attachment. Gardner *v.* Lane, 9 Allen (Mass.) 492, 85 Am. Dec. 779.

80. Evidence of fraud in purchaser.— The mere fact that a purchaser from a fraudulent vendee takes his title by quitclaim deed is not conclusive evidence that he is not a purchaser in good faith and without notice of the fraud. Mansfield *v.* Dyer, 131 Mass. 200.

What constitutes notice to purchaser.— In an attachment of land held by a fraudulent grantee, it would seem to be necessary, if the attachment is to operate as a notice to any purchaser of the assignee, that the premises in the attachment return be particularly described, or described to such an extent and in such a way that an inspection of the return would show an intention to attach the particular premises. Therefore a general attachment of all a debtor's interest in a town does not hold land fraudulently conveyed by the debtor by a deed recorded before the attach-

C. Pledged Property. A chattel, pledged upon sufficient consideration,[81] is not liable to attachment in an action against a pledgor[82] without discharging the debt for which the property is held as security.[83] Whether in the absence of statutory authorization,[84] a creditor would have this right upon discharging the debt for which the property is held is a matter of some doubt. In one decision the existence of this right has been intimated,[85] while in another state it was intimated that the statutory authorization was necessary.[86]

D. Property Held by Trustee. Where a defendant holds the title to property merely as a trustee it is not subject to attachment for his debts,[87] notwithstanding the fact that the attaching creditor had no notice of the trust prior to his attachment.[88]

E. Property or Interest Held Under Contract — 1. In General. In determining whether or not a contractual interest relative to property is of such nature as to be attachable each case must be governed by its own facts. It would seem, however, that when a debtor's pecuniary interest in property is dependent upon a mere contingency[89] it is not attachable, and this is apparently

ment, and conveyed by a fraudulent grantee after the attachment to an innocent purchaser for value. Ashland Sav. Bank *v.* Mead, 63 N. H. 435.

What constitutes sufficient consideration. — Where a party had conveyed property in fraud of his creditors and plaintiff had bought it of the assignee, and verbally agreed to pay for it at certain rates in his notes on time, it was held that, before making any payment or giving the notes, the verbal promise to pay was not sufficient to protect the title of the purchaser against the attachment. Dixon *v.* Hill, 5 Mich. 404.

81. **A pledge of personal property to a receiptor** to secure him for the liability which he has incurred in procuring the discharge of other property of the debtor which has been attached is sufficient consideration. Thompson *v.* Stevens, 10 Me. 27.

82. Sabel *v.* Planters' Nat. Bank, 22 Ky. L. Rep. 1755, 61 S. W. 367.

The reason being that since the attaching creditor can acquire no greater right in the attached property than the defendant had at the time of the attachment (see *infra*, XII, B, 1, a), he cannot take possession of the chattel without at least paying the debt for which it was held as security.

The fact that the pledgor would have some interest in the surplus after the payment of the amount secured is immaterial. Leinkauf Banking Co. *v.* Grell, 62 N. Y. App. Div. 275, 70 N. Y. Suppl. 1083; Neill *v.* Rogers Bros. Produce Co., 41 W. Va. 37, 23 S. E. 702.

83. Memphis First Nat. Bank *v.* Pettit, 9 Heisk. (Tenn.) 447. And see Blake *v.* Hatch, 25 Vt. 555; Hervey *v.* Dimond, 67 N. H. 342, 39 Atl. 331, 68 Am. St. Rep. 673.

84. **The procedure is expressly authorized** by statute in some jurisdictions. Sargent *v.* Carr, 12 Me. 396; Pomeroy *v.* Smith, 17 Pick. (Mass.) 85 [*distinguishing* Boyden *v.* Moore, 11 Pick. (Mass.) 362].

85. Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202.

86. Sargent *v.* Carr, 12 Me. 396, 397, where it is said: "It seems to have been generally regarded as too doubtful and uncertain, to attempt its enforcement at law. The sense of the community rather seems to have been, that to make property of this description accessible to creditors, some interposition was necessary on the part of the legislature."

For attachment of pledgor's interest after satisfaction of debt see GARNISHMENT.

87. Rodgers *v.* Hendsley, 2 La. 597; Davis *v.* Taylor, 4 Mart. N. S. (La.) 134; Dow *v.* Sayward, 14 N. H. 9. *Compare* Carney *v.* Emmons, 9 Wis. 114, in which case it is not clear whether the trustee had more than the bare legal estate or not, but where the court held that this interest, whatever it was, was taken by the creditor, and that it could not be affected by a suit by the beneficiary against such trustee filed after the execution sale, where neither the attaching creditor nor the purchaser were made parties.

88. And equity will enjoin an attachment in such case (Houghton *v.* Davenport, 74 Me. 590), or, where the trustee was in equity bound to convey the property to the *cestui que trust*, will decree a conveyance to the latter from the levying creditor (Hart *v.* Farmers', etc., Bank, 33 Vt. 252). *Compare* Porter *v.* Rutland Bank, 19 Vt. 410, from which it seems that if the attaching creditors are *bona fide* and without notice of the trust, the attachment will hold. And whether notice subsequent to the attachment but before levy would affect the creditors who had attached without notice, *quære*. This latter point was also suggested by Bennett, J., in Pinney *v.* Fellows, 15 Vt. 525, but left undecided, as under the facts in that case the attaching creditor was held to have notice.

For attachment of interest of cestui que trust held by trustee see GARNISHMENT.

89. As for instance where an agent is to have as his commission all the property sells for above specified prices (Vose *v.* Stickney, 8 Minn. 75), where his compensation is to be a certain per cent of the profits of the business (Blanchard *v.* Coolidge, 22 Pick. (Mass.) 151), or where one agrees that he shall deliver wood by a certain day, and then be paid, or have a lien upon it until payment, and fails to make such delivery (Hilger *v.* Ed-

true even though the debtor be entitled to defend his possession against a wrong-doer or intruder.[90]

2. For Conveyance of Land. In some jurisdictions the right and interest which a person has obtained by virtue of a contract[91] for the conveyance of real estate upon the performance of a condition by him is subject to attachment.[92] The position of the obligee must be such, however, that upon performance of the condition a conveyance could be enforced. Therefore if he has forfeited his right by the non-performance of a condition precedent,[93] or if the contract is conditioned in the alternative, either to convey to, or to purchase property of, the obligee,[94] the interest would not be attachable.

3. Lease. Whether or not property or an interest therein held under a lease is attachable in an action against the lessee is dependent not only upon the statute but upon the terms of the lease as well.[95] Under a statute making only such property attachable as is subject to execution it is held that a leasehold estate is

wards, 5 Nev. 84). And see Dickerman *v.* Ray, 55 Vt. 65.

Interest under building contract.— A contractor who erects a building on the land of another under an agreement that payments shall be made as the work progresses and, after the work has been partly completed and some of the payments made, abandons his work, has no interest in the building attachable at the instance of his creditors who furnished the materials therefor. Sleeper *v.* Emery, 59 N. H. 374.

90. Vose *v.* Stickney, 8 Minn. 75. See also Howe *v.* Keeler, 27 Conn. 538, holding that under the provisions of a contract whereby a party was to take possession of and run a corporation's factory, at the latter's risk and expense until a debt was paid, the possession of the party was coupled with such an interest that the factory was not attachable by a creditor of the corporation, except upon a payment of the claims for the payment of which the factory was being operated.

An assignee of a bill of lading with draft attached takes the contract of the shipper and stands in his shoes with the same rights. Therefore if a party has a cause of action against a shipper, in which an attachment would lie, it may be levied on the property taken by the assignee of the bill of lading and draft. Finch *v.* Gregg, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679.

91. Neil *v.* Tenney, 42 Me. 322.

Under parol contract.— The interest of one under a parol contract of conveyance is attachable if the circumstances are such that the contract could be enforced in equity. Johnson *v.* Bell, 58 N. H. 395.

Contract may be in name of another.—The mere fact that a debtor procures the contract or bond for the conveyance to be executed to a third person, there being no interest in the person except to hold the title for the debtor, will not preclude an attachment of the debtor's interest. Woods *v.* Scott, 14 Vt. 518.

92. Houston *v.* Jordan, 35 Me. 520; Whitmore *v.* Woodward, 28 Me. 392; Whittier *v.* Vaughan, 27 Me. 301; Wise *v.* Tripp, 13 Me. 9.

In New York, under N. Y. Code Civ. Proc. § 645, which provides that "the real property, which may be levied upon by virtue of a warrant of attachment, includes any interest in real property, either vested or not vested which is capable of being aliened by the defendant," the interest of a party in possession of land under a contract of purchase on which he has made partial payments, and under which he is entitled to a conveyance on completing his payment, may be levied upon in attachment, notwithstanding section 1253 provides that "the interest of a person, holding a contract for the purchase of real property, is not bound by the docketing of a judgment; and cannot be levied upon or sold, by virtue of an execution, issued upon a judgment." Higgins *v.* McConnell, 130 N. Y. 482, 29 N. E. 978, 42 N. Y. St. 363 [*reversing* 56 Hun (N. Y.) 277, 9 N. Y. Suppl. 588, 30 N. Y. St. 958, 18 N. Y. Civ. Proc. 322].

93. Brett *v.* Thompson, 46 Me. 480; French *v.* Sturdivant, 8 Me. 246.

94. Dodge *v.* Beattie, 61 N. H. 101, 105, where the contract with the owner of the land was that the debtor should cut and manufacture the timber on the land at a sawmill erected by the debtor for that purpose, and that the owner of the land should buy the mill, or sell him the land, at his election, after the timber was cut and manufactured. The court, in discussing this contract, say: "Whatever right he had under the contract was not one of the nature of a present interest in real estate. There was no vested interest. It depended upon a double contingency — contingency upon a contingency. It was only a right to acquire the right to compel the owners of the land to make the alternative election to buy his mill or sell to him their land."

95. Tuohy *v.* Wingfield, 52 Cal. 319; Potter *v.* Cunningham, 34 Me. 192.

Not attachable.—Thus where, by the terms of the lease of a farm, it was stipulated that "all the hay and straw should be used on said farm," the hay raised thereon by the lessee would be subject to this condition and not liable to attachment or execution by his creditors. Coe *v.* Wilson, 46 Me. 314.

If the lease is absolutely void, so that the tenant acquires no right under it, the increase of the leased property, if attached as his, may

not attachable where it does not give the lessee general power to sub-let.[96] If by the terms of the lease the property or produce is to be held for the rent at the disposal of the lessor, who may enter and take it in case of a default, it would seem that such an agreement, not being accompanied by a delivery of possession, would not hold against the lessee's creditors who could, before such entry, maintain an attachment upon the term demised.[97] On the other hand, if the agreement is such that the property or produce is to remain in the lessor until the payment of the rent, and no entry is required to vest it in him,[98] or if the right of the lessee to the property does not become perfected until a certain part of the contract is performed[99] it would not be attachable as the tenant's.

F. Property Held Jointly[1] — **1. In General.** The interest of a party in property held jointly with others is liable to attachment in an action against him, and an officer may take possession of the whole.[2] In New York,[3] if the enforcement of a joint liability is sought the joint property of the debtors may be attached and sold, although summons is served on one of the debtors only.[4]

2. As Tenants in Common. The interest of a tenant in common of property may be attached in an action against him[5] and the property removed, notwith-

be taken in trover from the attaching creditor by parties having the legal title thereto. Foster *v.* Gorton, 5 Pick. (Mass.) 185.

96. Boone *v.* Waxahacie First Nat. Bank, 17 Tex. Civ. App. 365, 43 S. W. 594. See Shelton *v.* Codman, 3 Cush. (Mass.) 318; Wheeler *v.* Train, 3 Pick. (Mass.) 255.

Effect of landlord's waiver of condition as to sub-letting.— A written waiver by the landlord of the conditions of the lease and of the benefit of the statute prohibiting subletting without his consent, delivered to the tenant's creditor prior to the issue of the attachment, renders the leasehold subject to attachment, although the tenant had no knowledge of the landlord's waiver until after the levy. Copeland *v.* Cooper Grocery Co., (Tex. Civ. App. 1901) 63 S. W. 886.

Attachment of right to cut timber or grass on state land.—Prior to the Maine act of July 1, 1857, the right to cut and carry away timber or grass from lands sold by the states of Maine and Massachusetts, when the soil thereof was not conveyed, was not subject to attachment. Phillips *v.* Pearson, 55 Me. 570.

97. Munsell *v.* Carew, 2 Cush. (Mass.) 50 [*distinguishing* Lewis *v.* Lyman, 22 Pick. (Mass.) 437]; Butterfield *v.* Baker, 5 Pick. (Mass.) 522.

98. Kelley *v.* Weston, 20 Me. 232 [*distinguishing* Bailey *v.* Tillebrown, 9 Me. 12, 23 Am. Dec. 529; Dockham *v.* Parker, 9 Me. 137, 23 Am. Dec. 547, in which the provisions that the produce should be security for the rent showed that the property was in the tenant and not in the landlord]; Whitcomb *v.* Tower, 12 Metc. (Mass.) 487; Lewis *v.* Lyman, 22 Pick. (Mass.) 439.

99. Chandler *v.* Thurston, 10 Pick. (Mass.) 205; Smith *v.* Meech, 26 Vt. 233; Paris *v.* Vail, 18 Vt. 277.

1. Attachment of partnership property, generally, see Partnership.

2. Marion *v.* Faxon, 20 Conn. 486; Buddington *v.* Stewart, 14 Conn. 404; Whitney *v.* Ladd, 10 Vt. 165; Northwest Bank *v.* Taylor, 16 Wis. 609.

Shares of each set apart.—If, although the ownership and possession of a farm be joint, the shares of the crops of each have been set apart to them and are in the custody of each, the share of one cannot be taken by a creditor of the other joint owner. Hawkins *v.* Hewitt, 56 Vt. 430.

3. N. Y. Code Civ. Proc. §§ 1932–1935 apply in the case of an attachment. Yerkes *v.* McFadden, 141 N. Y. 136, 36 N. E. 7, 56 N. Y. St. 672 [*reversing* 22 N. Y. Suppl. 1119].

4. Yerkes *v.* McFadden, 141 N. Y. 136, 36 N. E. 7, 56 N. Y. St. 272. *Compare* Talbot *v.* Pierce, 14 B. Mon. (Ky.) 158.

Necessity of serving such notice on at least one of the debtors.— In Stoutenburgh *v.* Vandenburgh, 7 How. Pr. (N. Y.) 229, it is held that this proceeding is only applicable where an action has been commenced, and that it is essential that process be served upon one or more of the joint debtors before such a judgment can be entered. If the judgment is entered by confession without action it can only be against the parties who signed the confession.

5. *Connecticut.*— Buddington *v.* Stewart, 14 Conn. 404, where it was contended that this general rule did not apply in case the property attached was a ship, because it was said that as a majority of the owners of the ship could send her upon a voyage contrary to the will of the minority, an officer who had attached only the interest of the minority could not detain her from the others. But the court held that if the majority in a case like this wished to send the vessel to sea the officer could compel them to give security for the lien acquired by the attachment, and that it would be a breach of his official duty to part with his possession of the ship without such security.

Georgia.— Walter *v.* Kierstead, 74 Ga. 18.

North Carolina.— Boylston Ins. Co. *v.* Davis, 68 N. C. 17, 12 Am. Rep. 624, construing a contract by which a wrecker was to move goods from a wrecked vessel for a

standing the stipulations between the parties be thereby impaired,[6] the purchaser thereof becoming a tenant in common with the others in his stead.[7] The officer must, however, sell only the share of the debtor in the property,[8] and the sale of all the property would, it has been held, constitute him a trespasser *ab initio*.[9]

G. Property Exempt From Attachment[10]— **1. On Ground of Public Policy or of Conflict in Laws — a. Books of Account.** Although books of account are often evidences of debt they are not so intimately connected with the demands charged therein as to make their attachment equivalent to the attachment of the debt, or, in the absence of statute,[11] to create any lien thereon.[12] It has also been held that inasmuch as a seizure and sale of such books would be productive of great injury to the debtor, without a corresponding benefit to the creditor, the books themselves would not be attachable.[13]

b. Interest of Preëmptioner of Land. Inasmuch as the interest of a preëmp-

certain per cent of the property saved, as constituting the parties tenants in common of the property taken from the vessel and landed on the beach by the wrecker.

Oregon.— Beezley *v.* Crossen, 14 Oreg. 473, 13 Pac. 306, construing a contract whereby a party was to take care of sheep for a term, and holding that it created a tenancy in common in the wool.

Vermont.— Frost *v.* Kellogg, 23 Vt. 308, construing an agreement by which a tenant was to work a farm for a year in consideration of half of the crop, half of the natural increase of certain sheep, and a part of the wool produced to constitute the landlord and tenant tenants in common of the wool.

See 5 Cent. Dig. tit. "Attachment," § 190.

Application of rule to crops grown on shares.— Where crops are raised under a contract providing for the payment of rent by a share of the crops it would seem that in the absence of an expressed definite intention in the contract the parties should be treated as tenants in common of the crop (Sims *v.* Jones, 54 Nebr. 769, 75 N. W. 150, 69 Am. St. Rep. 749), and the landlord would thus have an attachable interest in them before their apportionment (Sims *v.* Jones, 54 Nebr. 769, 75 N. W. 150, 69 Am. St. Rep. 749; Rentfrow *v.* Lancaster, 10 Tex. Civ. App. 321, 31 S. W. 229). The rule has been held otherwise, however (Howard County *v.* Kyte, 69 Iowa 307, 28 N. W. 609), although not to the extent of allowing an attachment against the tenant, before the crops are apportioned, to defeat the interest of the landlord (Atkins *v.* Womeldorf, 53 Iowa 150, 4 N. W. 905).

6. Remmington *v.* Cady, 10 Conn. 44.

7. Veach *v.* Adams, 51 Cal. 609; Mersereau *v.* Norton, 15 Johns. (N. Y.) 179; Curry *v.* Hale, 15 W. Va. 867.

Property severable in nature.— If property owned by several tenants in common is of such a nature that each tenant may sever and appropriate his share, if it can be determined by measurement or weight, without the consent of the others, and if he can sell or destroy it, without being liable to them in an action for the conversion of the common property, it follows that an attaching creditor of a tenant in common of such property may lawfully seize and sever his debtor's share. Newton *v.* Howe, 29 Wis. 531, 9 Am. Rep. 616 [*citing* Tripp *v.* Riley, 15 Barb. (N. Y.) 333].

Effect of partition after attachment.— If a creditor who has two demands against the tenants in common attaches upon one of these demands all of his debtor's undivided interest in the land, after which a partition of the land is made, he may upon the other demand attach the debtor's separate share without waiving his attachment of the undivided interest. McMechan *v.* Griffing, 9 Pick. (Mass.) 537.

8. Ladd *v.* Hill, 4 Vt. 164.

9. Melville *v.* Brown, 15 Mass. 82.

Effect of attachment upon the right to partition.— An attachment of a debtor's interest in property held in common with others does not prevent the other part owners from procuring a partition of the property. Argyle *v.* Dwinel, 29 Me. 29. It is necessary, however, that the party who has attached be served with notice of the proceedings for partition or they will not be binding upon him. Munroe *v.* Luke, 19 Pick. (Mass.) 39.

10. **Exemptions by statute** see Exemptions; Homesteads.

11. **Statutory exceptions.**—While the general rule is otherwise, yet under Nebr. Code Civ. Proc. § 214, the attachment of such books must be considered as constituting a lien upon the debt. Sloan *v.* Thomas Mfg. Co., 58 Nebr. 713, 79 N. W. 728. See also Ohors *v.* Hill, 3 McCord (S. C.) 338 [*followed* in Reily *v.* Middleton, Dudley (S. C.) 21], where it seems that under the South Carolina attachment law of that time there was a provision for the attachment of credits in this manner in the foreign attachment law, but no such provision in the domestic attachment law, and it was therefore held that in a domestic attachment no lien could be created on the debts by a levy on the books of account.

12. Goodbar *v.* Lindsley, 51 Ark. 380, 11 S. W. 577, 14 Am. St. Rep. 54; Rosenthal *v.* Dickerman, 98 Mich. 208, 57 N. W. 112, 39 Am. St. Rep. 535, 22 L. R. A. 693.

13. Bradford *v.* Gillaspie, 8 Dana (Ky.) 67. See also Rosenthal *v.* Dickerman, 98 Mich. 208, 57 N. W. 112, 39 Am. St. Rep. 535, 22 L. R. A. 693.

tioner of land is unassignable before the issue of the patent, such interest is not liable to attachment during that time.[14]

c. Intoxicating Liquors. Since an attachment can be made fully effective only by sale, and since such sale would defeat the right of forfeiture which is often provided for, as well as violate the statute itself, it follows that in those jurisdictions where the sale of intoxicating liquors is prohibited, they are not subject to attachment.[15] In some jurisdictions, however, the attachment has been upheld notwithstanding the statute, apparently upon the ground that such goods do not lose their character of property by being illegally kept for sale.[16]

d. Property in State of Manufacture. When property is in such a state of manufacture that if taken it could not be returned to defendant in the same condition should plaintiff's claim fail,[17] or when it would be rendered nearly or entirely valueless by the arrest of the manufacturing process, and care or skill is required in its completion,[18] it has been held not liable to attachment [19]

e. When Carried or Worn by Person. Property which is being carried or worn by a person in such position or manner that it cannot be taken without an assault or violating his personal security is not liable to attachment.[20]

f. When Held For Payment of Duty. Imported goods, while they are in the custody of the United States custom-house officials and before the duty thereon

14. McMillen *v.* Gerstle, 19 Colo. 98, 100, 34 Pac. 681, where the court said: "It would seem manifest, therefore, that if a voluntary transfer or assignment by the preemptor would be void, a third party could not, in contravention of the policy and against the expressed letter of the statute, procure a transfer of the right by an adverse legal proceeding against him, and that any step towards the accomplishment of such a result would be wholly ineffective."

15. Nichols *v.* Valentine, 36 Me. 322; Kiff *v.* Old Colony, etc., R. Co., 117 Mass. 591, 19 Am. Rep. 429; Ingalls *v.* Baker, 13 Allen (Mass.) 449; Barron *v.* Arnold, 16 R. I. 22, 11 Atl. 298; Lanahan *v.* Bailey, 53 S. C. 489, 31 S. E. 332, 66 Am. St. Rep. 884, 42 L. R. A. 297. *Aliter* if the party is claiming to hold the liquor for a lawful purpose. Nutt *v.* Wheeler, 30 Vt. 436, 73 Am. Dec. 316.

16. Tucker *v.* Adams, 63 N. H. 361; Howe *v.* Stewart, 40 Vt. 145.

17. Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28.

18. Wilds *v.* Blanchard, 7 Vt. 138, where the question was whether a log coal-pit was attachable while on fire and partly burned, and the court in their decision cite as other illustrations of the principle baker's dough, the materials in the crucibles in the process of fusion in a glass factory, the burning ware in a potter's oven, a burning brick-kiln, or a burning pit of charcoal.

19. Rule not absolute.— While the court expressly states in Wilds *v.* Blanchard, 7 Vt. 138, that such property is not subject to attachment, the real gist of the case is that the officer cannot be compelled to attach and take the risk of the property becoming valueless, nor is he required to turn artist and carry forward the process of manufacture. But it is conceived that should the officer be willing to assume this risk he may attach. In the analogous case of Hale *v.* Huntley, 21 Vt. 147, which fully explains Wilds *v.* Blanchard, 7 Vt. 138, the officer did attach a charcoal-pit, where, although the coal was fully burned, some labor and skill were still necessary in order to separate and preserve it properly. While the pit was in a much different state in this case than in the former Vermont case, yet it is clear that the real right of the officer to attach existed in both.

Exemption as determined by common-law distress not followed in Vermont.— Inasmuch as the purpose of the common-law distress was to compel the appearance of defendant, while that of attachment is to satisfy a judgment, the court, in Wilds *v.* Blanchard, 7 Vt. 138, state that they are not confined simply to objects of common-law distress.

Application of distress doctrine as to chattels in actual use.— A stage-coach with horses hitched thereto, and about to start, the passengers for the trip being engaged but not seated, or a coach upon its arrival at its usual stopping-place, although the passengers are not yet distributed, is liable to attachment. While it is true that chattels actually in use could not at common law be distrained for rent, yet this principle was held not to apply to the facts in this case in this advanced state of our jurisprudence. But as to whether or not a stage-coach actually traveling is liable to be stopped and attached, *quære*. Potter *v.* Hall, 3 Pick. (Mass.) 368, 15 Am. Dec. 226.

20. Mack *v.* Parks, 8 Gray (Mass.) 517, 69 Am. Dec. 267; Lovejoy *v.* Lee, 35 Vt. 430. See also *Ex p.* Hurn, 92 Ala. 102, 9 So. 515, 25 Am. St. Rep. 23, 13 L. R. A. 120.

The reason is that the allowance of such procedure would tend to a breach of the peace. There is also a common-law foundation for this holding, inasmuch as at common law chattels in actual use could not, for the same reason, be taken or distrained. Mack *v.* Parks, 8 Gray (Mass.) 517, 69 Am. Dec. 267.

is paid or secured are held to be not liable to attachment at the hands of a state officer.[21]

g. When Used in Transportation of Mail. The wilful obstruction of the mails being expressly prohibited by congress, any vehicle or vessel which is actually engaged in such service would, during such time, be exempt from attachment.[22]

2. When in Custody of Law — a. Rule Stated. Where property has been taken by judicial process and is held by the court or its officers for a specific purpose, or until the termination of a suit, it is clear that its subsequent attachment would interfere with the jurisdiction and administration of justice of the former court and it is therefore not allowable.[23]

b. Applications of Rule — (i) *Property Delivered on Claimant's Bond.* Where property is delivered to a claimant upon the execution of a forthcoming or delivery bond, if the bond is conditioned to hold the property subject to the order of the court,[24] or to return the property should claimant fail in his claim,[25] such property would not be attachable. On the other hand, if the bond operates as an absolute discharge of the property and a relinquishment of the lien thereon,[26] it would then be liable to a subsequent attachment.

(ii) *Property Held Under Prior Levy.* Property which is held by an

21. Peabody *v.* Maguire, 79 Me. 572, 12 Atl. 630; Dennie *v.* Harris, 9 Pick. (Mass.) 364; Harris *v.* Dennie, 3 Pet. (U. S.) 292, 7 L. ed. 683 [*reversing* 5 Pick. (Mass.) 120].

The reason is that the United States has a lien on the goods for the payment of duty imposed thereupon, and being entitled to a virtual custody of them from the time of their arrival in port until the duty is paid or secured, any attachment by a state officer is an interference with such lien and right of custody, and, being repugnant to the laws of the United States, is void. Harris *v.* Dennie, 3 Pet. (U. S.) 292, 7 L. ed. 683.

Exemption not available to third party.— This exemption to attachment while in the custody of the United States collector can be raised only when the collector, United States, or another federal officer is a party, and is not available in a suit between strangers to that lien. Meeker *v.* Wilson, 1 Gall. (U. S.) 419, 16 Fed. Cas. No. 9,392.

22. As for instance a team harnessed to a coach and in charge of the mail-carrier standing in front of a post-office on a mail-route waiting for the exchange of the mail. Harmon *v.* Moore, 59 Me. 428.

Necessity of being actually engaged in the service.—It would seem that the vehicle must actually be carrying the mail and it has been held that a steamboat used for the express purpose of carrying the mail under contract might nevertheless be attached while the mail was not on board, although the seizure would result in a delay of the mail. The seizure to be invalid must, it was held, constitute a wilful obstruction. Parker *v.* Porter, 6 La. 169.

23. *Alabama.*— Read *v.* Sprague, 34 Ala. 101.

Dakota.— Citizens' Nat. Bank *v.* Jenks, 6 Dak. 432, 43 N. W. 947; Straw *v.* Jenks, 6 Dak. 414, 43 N. W. 941, which hold that property of an insolvent debtor in the hands of one seeking to become a preferred creditor by mortgage was *in custodia legis*.

Iowa.— Jones *v.* Peasley, 3 Greene (Iowa) 52.

Nebraska.— Grand Island Banking Co. *v.* Costello, 45 Nebr. 119, 63 N. W. 376.

New Jersey.—Conover *v.* Ruckman, 32 N. J. Eq. 685.

North Carolina.— Williamson *v.* Nealy, 119 N. C. 339, 25 S. E. 953.

South Carolina.— McKenzie *v.* Noble, 13 Rich. (S. C.) 147, holding that, after a decree had been pronounced for plaintiff and a party holding a picture under the orders of the court had been ordered to deliver it to plaintiff, pending an appeal from such order, the picture was in the custody of the court and not subject to attachment.

Texas.— Focke *v.* Blum, 82 Tex. 436, 17 S. W. 770.

Canada.— Potter *v.* Carroll, 9 U. C. C. P. 442.

What constitutes custody of the law.— Where the statute provides that upon the dissolution of the attachment the property attached shall be ordered by the court to be delivered up to defendant, if the property has been sold before such order is made the proceeds are not in the custody of the law. Evans *v.* Virgin, 72 Wis. 423, 39 N. W. 864, 7 Am. St. Rep. 870. Nor is an interest in land for the partition of which a suit is pending in any sense in the custody of the court. Price *v.* Taylor, 22 Ky. L. Rep. 1945, 62 S. W. 270. See also Brown Mfg. Co. *v.* Watson, 3 Tex. App. Civ. Cas. § 329.

24. Kane *v.* Pilcher, 7 B. Mon. (Ky.) 651. See also Gordon *v.* Johnston, 4 La. 304, where it is held that attached property delivered to a claimant on a forthcoming bond could not be taken on execution against the claimant.

25. Tyler *v.* Safford, 24 Kan. 580; Eidson *v.* Woolery, 10 Wash. 225, 38 Pac. 1025.

26. Jones *v.* Peasley, 3 Greene (Iowa) 52; Duncan *v.* Thomas, 1 Oreg. 314; Frieberg *v.* Elliott, 64 Tex. 367; Brown Mfg. Co. *v.* Watson, 3 Tex. App. Civ. Cas. § 329.

officer under a levy of a valid writ of attachment[27] is in the constructive possession of the court and pending such litigation is not subject to attachment by another officer.[28] If, however, the officer unlawfully releases his possession of the property,[29] or fails to take execution upon it within the time prescribed by law,[30] the property would then cease to be within the custody of the law and would therefore be attachable.

(III) *Property Taken in Replevin.* As a general rule where property held by an officer under a levy is replevied from him by a claimant thereof and the proper bond given for its redelivery, it is not, during the pendency of the replevin suit, subject to attachment.[31] If, however, the levy and replevin suits

Change of Texas statute.— The Texas cases just cited were decided previous to a change of the statutes made in 1887. Since this change it is held that after the bond is given, and the property is in the hands of the claimant pending the proceedings, it is *in custodia legis*, in the sense that his possession thereof is protected against levies from any source except subsequent writs against the original defendant. U. S. Carriage Co. *v.* Bay City Buggy Works, 12 Tex. Civ. App. 52, 33 S. W. 381.

27. **If seized on a void attachment it is** not in the custody of the court and may therefore be seized by another. Mississippi Mills *v.* Meyer, 83 Tex. 433, 18 S. W. 748.

28. *Arkansas.*— Derrick *v.* Cole, 60 Ark. 394, 30 S. W. 760.

Ohio.— Bailey *v.* Childs, 46 Ohio St. 557, 24 N. E. 598.

Rhode Island.—Kendrick *v.* Baltimore, etc., R. Co., 3 R. I. 235.

Vermont.—Pond *v.* Baker, 58 Vt. 293, 2 Atl. 164; Coffrin *v.* Smith, 51 Vt. 140; West River Bank *v.* Gorham, 38 Vt. 649.

Washington.—Eidson *v.* Woolery, 10 Wash. 225, 38 Pac. 1025.

Compare Lindan *v.* Arnold, 4 Strobh. (S. C.) 290, where, although not necessary to the decision of the case, the court said that an officer with a writ of foreign attachment may attach property held by another officer under a writ of domestic attachment.

See 5 Cent. Dig. tit. "Attachment," § 182.

Modification of rule.— Under the statutes of some states while the fact that the goods are *in custodia legis* and therefore not subject to actual caption or seizure by another officer is recognized, he is still allowed to attach, subject to the operation of the first attachment. White *v.* Culter, 12 Ill. App. 38; State *v.* Curran, 45 Mo. App. 142. And see *infra*, X, K.

May be attached by officer in possession.— Since this rule arises from the unwillingness of the court to allow its jurisdiction or administration of justice to be interfered with, it follows that no confusion will result by allowing the officer in possession to levy subsequent writs, and this is the rule adopted.

Louisiana.— Hoy *v.* Eaton, 26 La. Ann. 169.

Massachusetts.—Wheeler *v.* Bacon, 4 Gray (Mass.) 550.

Vermont.—West River Bank *v.* Gorham, 38 Vt. 649.

Wisconsin.— Halpin *v.* Hall, 42 Wis. 176.

United States.—Livingstone *v.* Smith, 5 Pet. (U. S.) 90, 8 L. ed. 57.

See also *infra*, X, K.

Doctrine not applicable to surplus.— The principle of *custodia legis* does not apply to a surplus which the officer has after satisfying the execution; and therefore where the property seized under the attachment greatly exceeds in value the claim under which it is seized, the excess, nothing else being in the way, is liable for the debtor's debts and may be seized under junior attachments. Sackhoff *v.* Vandegrift, 98 Ala. 192, 13 So. 495; Roddey *v.* Erwin, 31 S. C. 36, 9 S. E. 729.

29. Chadbourne *v.* Sumner, 16 N. H. 129, 41 Am. Dec. 720; Young *v.* Walker, 12 N. H. 502; Root *v.* Railroad Co., 45 Ohio St. 222, 12 N. E. 812; Pond *v.* Baker, 58 Vt. 293, 2 Atl. 164.

The fact that the property has been removed from the place of attachment for the purpose of being sent out of the state for sale does not render it liable to another attachment if it is in the possession or under the control of the officer. Ela *v.* Shepard, 32 N. H. 277.

If an officer leaves goods intermingled with other goods of the debtor, so that another officer cannot distinguish which has been attached, he may attach the whole. Sawyer *v.* Merrill, 6 Pick. (Mass.) 478. See also *supra*, IX, A, 2, b.

30. Pond *v.* Baker, 58 Vt. 293, 2 Atl. 164.

31. Powell *v.* Rankin, 80 Ala. 316; Scarborough *v.* Malone, 67 Ala. 570; Cordaman *v.* Malone, 63 Ala. 556; McKinney *v.* Purcell, 28 Kan. 446; Shull *v.* Barton, 56 Nebr. 716, 77 N. W. 132, 71 Am. St. Rep. 698; Coos Bay R. Co. *v.* Wieder, 26 Oreg. 453, 38 Pac. 338. See also Sackhoff *v.* Vandegrift, 98 Ala. 192, 13 So. 495 (holding that when goods that have been attached and replevied are of much greater value than the amount of the first attaching creditor's debt they may be seized under subsequent attachments in the same court by another officer. But whether another creditor asserting his claim in another jurisdiction may thus reach the surplus of value and make it available, *quære*); Vanderburgh *v.* Bassett, 4 Minn. 242 (holding that where property is taken by an officer upon a writ of attachment and it is replevied from him and delivered to plaintiff in replevin it cannot afterward be retaken on the same writ). *Contra*, Patterson *v.* Seaton, 64 Iowa 115, 19 N. W. 869.

are fraudulently brought, such property is not *in custodia legis*, and would be liable to attachment by *bona fide* creditors.[32]

3. INTANGIBLE PROPERTY — STOCKS.[33] Stocks of a corporation were not subject to levy at common law, and hence in the absence of an enabling statute are not liable to attachment.[34]

X. LEVY OF ATTACHMENT.

A. In General — 1. NECESSITY OF LEVY — a. To Jurisdiction. In an attachment suit where there is no personal service on defendant a levy is essential to give the court jurisdiction to proceed to judgment.[35]

b. To Creation of Lien. The lien sought to be created by proceedings in attachment is dependent upon the actual levy of such attachment,[36] and an attach-

The reason, as given by Brewer, J., in McKinney *v.* Purcell, 28 Kan. 446, 448, is that "while, by giving a replevin bond, the plaintiff obtains possession of the goods, this does not change the fact that they are still the subject-matter of litigation, and by legal fiction still to be deemed in the possession of the law. If the replevin action be determined adversely to the plaintiff, he has the right to return the very goods replevied, and the defendant has a corresponding right to enforce such return. It is true, the judgment in replevin actions ordinarily runs in the alternative to guard against an inability to make or compel a delivery of the property; but still the action of replevin is in its nature an action to determine and enforce the rightful possession of specific property; and while that action is pending, the law should not permit the seizure, under execution or attachment, of that property, in such a manner as to prevent the full enforcement of the judgment in the replevin action." See also Shull *v.* Barton, 56 Nebr. 716, 77 N. W. 132, 71 Am. St. Rep. 698.

32. Kingman First Nat. Bank *v.* Gerson, 50 Kan. 582, 32 Pac. 905; Jacobi *v.* Schloss, 7 Coldw. (Tenn.) 385.

33. Attachment by garnishment see GARNISHMENT.

34. Barnard *v.* Life Ins. Co., 4 Mackey (D. C.) 63, 64 (where it is said: "It is well settled at common law that that sort of property is of such a shadowy nature that the hand of the law cannot grasp it so as to give to any creditor any right against it which can be enforced through any judicial process"); Foster *v.* Potter, 37 Mo. 525.

The reason, as well stated in the case of Haley *v.* Reid, 16 Ga. 437, 439, is that "to 'levy' means to seize — to take corporeally. It follows that what cannot be seized — what cannot be taken corporeally — cannot be levied on."

35. *Alabama.*— Flournoy *v.* Lyon, 70 Ala. 308.

Arkansas.— Feild *v.* Dortch, 34 Ark. 399.

Colorado.— Crisman *v.* Dorsey, 12 Colo. 567, 21 Pac. 920, 4 L. R. A. 664.

Illinois.— West *v.* Schnebly, 54 Ill. 523; House *v.* Hamilton, 43 Ill. 185; Culver *v.* Rumsey, 7 Ill. App. 422.

Indiana.— The Steam-Boat Tom Bowling *v.* Hough, 5 Blackf. (Ind.) 188.

Iowa.— Rowan *v.* Lamb, 4 Greene (Iowa) 468.

Kentucky.— Williamson *v.* Elliott, 1 Ky. L. Rep. 279.

Missouri.— McCord, etc., Mercantile Co. *v.* Bettles, 58 Mo. App. 384.

Ohio.— Buckeye Pipe Line Co. *v.* Fee, 62 Ohio St. 543, 57 N. E. 446, 78 Am. St. Rep. 743; Root *v.* Columbus, etc., R. Co., 45 Ohio St. 222, 12 N. E. 812.

Tennessee.— Avery *v.* Warren, 12 Heisk. (Tenn.) 559; Nashville Bank *v.* Ragsdale, Peck (Tenn.) 296; Cheatham *v.* Trotter, Peck (Tenn.) 198; Pennebaker *v.* Tomlinson, 1 Tenn. Ch. 111.

United States.— Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931, construing Tennessee statute.

A simulated levy upon property to which defendant has no claim of right will not have the effect of constructive notice to him so as to authorize the court to proceed to judgment. Grier *v.* Campbell, 21 Ala. 327.

Jurisdiction over property relates to time of levy.— On service of the attachment the property attached immediately comes within the jurisdiction of the court, although service of the summons on defendant is necessary to give jurisdiction of his person. The jurisdiction over the property relates to the time of the levy regardless of whether jurisdiction of the person has been acquired or not. Feild *v.* Dortch, 34 Ark. 399.

Omission of levy — Effect on nature of suit.— Where a writ of attachment is sued out in a suit but no property is levied on, the suit stands as if it had been instituted by summons alone. New York, etc., R. Co. *v.* Estill, 147 U. S. 591, 13 S. Ct. 444, 37 L. ed. 292.

Order of sale set aside for failure of record to show attachment of described property.— The judgment ordering the sale of property alleged to have been attached will be set aside where there is nothing in the record to show that the property described in such judgment was attached. Randolph *v.* Hill, 11 Ind. 354.

36. *California.*— Taffts *v.* Manlove, 14 Cal. 47. 73 Am. Dec 610.

Colorado.— Thompson *v.* White, 25 Colo. 226, 54 Pac. 718; Crisman *v.* Dorsey, 12 Colo. 567, 21 Pac. 920, 4 L. R. A. 664; Raynolds *v.* Ray, 12 Colo. 108, 20 Pac. 4.

Kentucky.—Gray *v.* Patton, 13 Bush (Ky.)

ment creditor as such has no rights in his debtor's property until after levy.[37]

2. Effect of Levy — a. Upon Title and Possession of Property. An attachment levied upon property does not change the title thereto,[38] although, as in the case of personalty, it may be taken from the possession and control of defendant,[39] but only enables plaintiff to obtain security for an anticipated judgment.[40] The general property remains in defendant, who may alienate such property subject to the lien of the attachment.[41] An attaching creditor acquires no title to the

625, holding that mere delivery to the sheriff with instructions not to levy for the present creates no right against defendant's property.

Michigan.— Hunt *v.* Strew, 39 Mich. 368.

New York.— Lynch *v.* Crary, 52 N. Y. 181; Rodgers *v.* Bonner, 45 N. Y. 379; Van Camp *v.* Searle, 79 Hun (N. Y.) 134, 29 N. Y. Suppl. 757, 61 N. Y. St. 349; Schieb *v.* Baldwin, 22 How. Pr. (N. Y.) 278; Learned *v.* Vandenburgh, 8 How. Pr. (N. Y.) 77; Burkhardt *v.* Sanford, 7 How. Pr. (N. Y.) 329; Falconer *v.* Freeman, 4 Sandf. Ch. (N. Y.) 565.

Ohio.— Baltimore, etc., R. Co. *v.* May, 25 Ohio St. 347.

South Carolina.— Bethune *v.* Gibson, 2 Brev. (S. C.) 501; Robertson *v.* Forest, 2 Brev. (S. C.) 466; Crowninshield *v.* Strohel, 2 Brev. (S. C.) 80.

Tennessee.— Sharp *v.* Hunter, 7 Coldw. (Tenn.) 389.

Texas.—Sullivan *v.* Cleveland, 62 Tex. 677; Pittman *v.* Rotan Grocery Co., 15 Tex. Civ. App. 676, 39 S. W. 1108; Linz *v.* Atchison, 14 Tex. Civ. App. 647, 38 S. W. 640, 47 S. W. 542.

Wisconsin.— Mahon *v.* Kennedy, 87 Wis. 50, 57 N. W. 1108.

Canada.— Robinson *v.* Bergin, 10 Ont. Pr. 127, holding that the mere fact that an attachment against an absconding debtor is in the sheriff's hands does not bind the debtor's land. Such land is not bound until seizure.

See 5 Cent. Dig. tit. "Attachment," § 452.

"The prime object in levying the attachment is to obtain, pendente lite, a lien; or, in other words, to put the property in the custody of the law until by the judgment of the proper tribunal the plaintiff's claim is established when the lien becomes effective as of the date of the levy." Dorrier *v.* Masters, 83 Va. 459, 473, 2 S. E. 927.

37. McIntosh *v.* Smiley, 32 Mo. App. 125; Baltimore, etc., R. Co. *v.* May, 25 Ohio St. 347; Sharp *v.* Hunter, 7 Coldw. (Tenn.) 389; Gumbel *v.* Pitkin, 124 U. S. 131, 8 S. Ct. 379, 31 L. ed. 374.

Creation of lien by filing of petition and service of summons.— In equitable proceedings to subject property specifically described for the payment of a judgment after return of "no property" on an execution thereon, no attachment levy is necessary to give a lien against such property, since a lien is created by the filing of the petition and service of the summons. Murphy *v.* Cochran, 80 Ky. 239.

Filing a bill operates as lis pendens.— Strictly speaking a lien upon the property described is not created by the mere filing of the bill and without a levy of the writ of attachment, but the filing of a bill operates as a *lis pendens* during which all transfers are void and the property is thus practically secured until the lien of attachment can be made to adhere thereto. Sharp *v.* Hunter, 7 Coldw. (Tenn.) 389.

38. *Alabama.*— Ware *v.* Russell, 70 Ala. 174, 45 Am. Rep. 82; Scarborough *v.* Malone, 67 Ala. 570; Johnson *v.* Burnett, 12 Ala. 743.

Kansas.— Larimer *v.* Kelley, 10 Kan. 298.

Louisiana.— Ft. Pitt Nat. Bank *v.* Williams, 43 La. Ann. 418, 9 So. 117.

Maine.— Crocker *v.* Pierce, 31 Me. 177.

Oregon.— Dickson *v.* Back, 32 Oreg. 217, 51 Pac. 727.

South Dakota.— Griswold *v.* Sundback, 4 S. D. 441, 57 N. W. 339.

Tennessee.—Snell *v.* Allen, 1 Swan (Tenn.) 207.

Vermont.— Briggs *v.* Taylor, 35 Vt. 57; Middlebury Bank *v.* Edgerton, 30 Vt. 182; Johnson *v.* Edson, 2 Aik. (Vt.) 299.

Washington.— Dixon *v.* Barnett, 3 Wash. 645, 29 Pac. 209.

United States.— Starr *v.* Moore, 3 McLean (U. S.) 354, 22 Fed. Cas. No. 13,315, construing New York statute.

See 5 Cent. Dig. tit. "Attachment," § 520.

In order to change the right of property there must, as in the case of the levy of an execution, be a sale under the process. Griswold *v.* Sundback, 4 S. D. 441, 57 N. W. 339; Starr *v.* Moore, 3 McLean (U. S.) 354, 22 Fed. Cas. No. 13,315.

Effect of attachment of stock of shareholder on corporate property.— An attachment of the stock of the shareholder does not encumber property of the company or prevent the assignment of letters patent belonging to it. Gottfried *v.* Miller, 104 U. S. 521, 26 L. ed. 851.

39. Starr *v.* Taylor, 3 McLean (U. S.) 542, 22 Fed. Cas. No. 13,319, construing New York statute.

40. Larimer *v.* Kelley, 10 Kan. 298.

41. *Alabama.*— Ware *v.* Russell, 70 Ala. 174, 45 Am. Rep. 82; Grigg *v.* Banks, 59 Ala. 311.

Kansas.— Kincaid *v.* Frog, 49 Kan. 766, 31 Pac. 704.

Maine.— Wheeler *v.* Nichols, 32 Me. 233; Richardson *v.* Kimball, 28 Me. 463; Chase *v.* Bradley, 26 Me. 531; Brown *v.* Crockett, 22 Me. 537; Nichols *v.* Patten, 18 Me. 231, 36 Am. Dec. 713.

Massachusetts.— First Ward Nat. Bank *v.* Thomas, 125 Mass. 278; Appleton *v.* Ban-

property attached by means of his attachment,[42] and even, it has been held, no right of action against a third person, who may take the property from the officer or destroy it.[43] The attaching officer acquires at most only a special property in the articles attached,[44] and by a levy on realty acquires neither right to possession nor special property therein,[45] nor is the interest or possession of the debtor divested by such levy.[46] Such levy merely creates a specific lien upon the property and takes it into the custody of the law to secure it against alienation of the debtor and the judgment of other creditors and to hold it to be levied upon by execution when judgment shall have been obtained.[47]

b. As Satisfaction of Debt or Judgment. A levy of attachment has been held to be a satisfaction of a debt, if the property is of a sufficient amount, even though the property be wasted by the negligence of the officer. If, however, the loss occurs without fault on the officer's part the claim will not be extinguished.[48]

croft, 10 Metc. (Mass.) 231; Parsons *v.* Merrill, 5 Metc. (Mass.) 356; Arnold *v.* Brown, 24 Pick (Mass.) 89, 35 Am. Dec. 296; Whipple *v.* Thayer, 16 Pick. (Mass.) 25. 26 Am. Dec. 626; Fettyplace *v.* Dutch, 13 Pick. (Mass.) 388, 23 Am. Dec. 688; Denny *v.* Willard, 11 Pick. (Mass.) 519, 22 Am. Dec. 389; Bigelow *v.* Willson, 1 Pick. (Mass.) 485.

Michigan.— Hauser *v.* Beaty, 93 Mich. 499, 53 N. W. 628.

New York.— Klinck *v.* Kelly, 63 Barb. (N. Y.) 622.

South Dakota.— Griswold *v.* Sundback, 4 S. D 441, 57 N. W. 339.

Vermont.— Marshall *v.* Town, 28 Vt. 14.

Washington.— McConnell *v.* Kaufman, 5 Wash. 686, 32 Pac. 782; Dixon *v.* Barnett, 3 Wash. 645, 29 Pac. 209; Renton *v.* St. Louis, 1 Wash. Terr. 215.

United States.— Starr *v.* Moore, 3 McLean (U. S.) 354, 22 Fed. Cas. No. 13,315, construing New York statute.

This right of the debtor is founded on the principle lying at the foundation of the right of property, that the general ownership carries with it the full power of disposition, and when such ownership is not taken away, but only limited, as in the case of a lien, the power of disposing still remains subject only to the lien. Appleton *v.* Bancroft, 10 Metc. (Mass.) 231.

This lien the purchaser may discharge by payment of the debt before execution executed, or he may afterward redeem the estate if it is by law redeemable. Bigelow *v.* Willson, 1 Pick. (Mass.) 485.

42. *Illinois.*— Dobbins *v.* Hanchett, 20 Ill. App. 396.

Kansas.— Kothman *v.* Markson, 34 Kan. 542. 9 Pac. 218.

Massachusetts.— Bigelow *v.* Willson, 1 Pick. (Mass.) 485.

Mississippi.— Saunders *v.* Columbus L., etc., Ins. Co., 43 Miss. 583.

Oregon.— Dickson *v.* Back, 32 Oreg. 217, 51 Pac. 727.

43. Dobbins *v.* Hanchett, 20 Ill. App. 396; State *v.* Rose, 4 N. D. 319, 58 N. W. 514, 26 L. R. A. 593.

44. *Maine.*— Nichols *v.* Valentine, 36 Me. 322.

Massachusetts.— Ladd *v.* North, 2 Mass. 514.

North Dakota.—State *v.* Rose, 4 N. D. 319, 58 N. W. 514, 26 L. R. A. 593.

South Dakota.— Griswold *v.* Sundback, 4 S. D. 441, 57 N. W. 339.

Vermont.— Johnson *v.* Edson, 2 Aik. (Vt.) 299.

45. *Colorado.*— Barton *v.* Continental Oil Co., 5 Colo. App. 341, 38 Pac. 432.

Maine.— Nichols *v.* Valentine, 36 Me. 322.

New Hampshire.— Scott *v.* Manchester Print Works, 44 N. H. 507.

Oregon.— State *v.* Cornelius, 5 Oreg. 46.

South Dakota.— Roblin *v.* Palmer, 9 S. D. 36. 67 N. W. 949.

A seizure of land under an attachment and judgment of condemnation gives no right of property or entry, nor divests any, until sale on process. Owings *v.* Norwood, 2 Harr. & J. (Md.) 96; Davidson *v.* Beatty, 3 Harr. & M. (Md.) 594.

46. Kothman *v.* Markson, 34 Kan. 542, 9 Pac. 218; Perrin *v.* Leverett, 13 Mass. 128; Smith *v.* Collins, 41 Mich. 173, 2 N. W. 177; Saunders *v.* Columbus L., etc., Ins. Co., 43 Miss. 583.

Gives plaintiff no right to possession or to rents and profits.— The attachment of real estate at the commencement of an action gives plaintiff a contingent lien thereon but does not give him a right to the possession of the estate, or to the rents, issues, and profits thereof. Kothman *v.* Markson, 34 Kan. 542, 9 Pac. 218; Columbia Bank *v.* Ingersoll, 1 N. Y. Suppl. 54, 21 Abb. N. Cas. (N. Y.) 241.

47. Camp *v.* Bates, 11 Conn. 51, 27 Am. Dec. 707; Lacey *v.* Tomlinson, 5 Day (Conn.) 77; A. M. Holter Hardware Co. *v.* Ontario Min. Co., 24 Mont. 184, 61 Pac. 3; State *v.* Cornelius, 5 Oreg. 46.

48. Starr *v.* Taylor, 3 McLean (U. S.) 542, 22 Fed. Cas. No. 13,319; Starr *v.* Moore, 3 McLean (U. S.) 354, 22 Fed. Cas. No. 13,315.

Attachment equivalent to levy on execution.— Where a debt is secured by deed of trust and the creditor, instead of proceeding under the deed of trust, brings suit by attachment, there is no doubt that an attachment of sufficient property is, like an execution levied, satisfaction of the debt, and may be so pleaded in an action to have the deed of trust canceled. Yourt *v.* Hopkins, 24 Ill. 326.

According to other decisions, however, the levy of an attachment is not a satisfaction of plaintiff's demand as the levy of an execution would be,[49] and it has been held that the seizure of property, even to the full value of the sum claimed under an order of attachment issued during the pendency of an action, is not necessarily a satisfaction of the judgment afterward obtained, and that it must be shown affirmatively that the property was applied to and satisfied the judgment.[50]

c. Where Obtained by Improper Means. It may be stated as a general rule that where a levy is obtained by any improper means, as for instance by the use of any fraudulent devices to obtain possession of the property, it will be invalid.[51]

B. Who May Levy — 1. In General. It may be stated as a general rule that the writ should be levied by the officer to whom it is directed.[52]

2. Particular Officers — a. Sheriffs and Their Deputies. Attachments may usually be levied by the sheriff of a county,[53] although directed to any constable of the county,[54] and in certain cases, as where the attachment is for more than a certain amount or returnable to certain courts, the sheriff or his deputy alone is authorized to levy.[55] The power of a sheriff to levy an attachment may

49. Cravens *v.* Wilson, 48 Tex. 324.

50. Dickson *v.* Back, 32 Oreg. 217, 51 Pac. 727; Wright *v.* Young, 6 Oreg. 87; Maxwell *v.* Stewart, 21 Wall. (U. S.) 71, 22 Wall. (U. S.) 77, 22 L. ed. 564.

Application in determining rights of attaching and mortgage creditors.—It has been held that the levy of an attachment upon personal property sufficient to satisfy a debt will not affect the judgment afterward obtained by the creditors so as to prevent the satisfaction of such claim out of realty attached at the same time as the personalty, as against the opposition of a creditor who took a mortgage on the realty after the attachment. Dickson *v.* Back, 32 Oreg. 217, 51 Pac. 727.

51. Pomroy *v.* Parmlee, 9 Iowa 140, 74 Am. Dec. 328; Chubbuck *v.* Cleveland, 37 Minn. 466, 35 N. W. 362, 5 Am. St. Rep. 864; Pakas *v.* Steel Ball Co., 68 N. Y. Suppl. 397; Battelle *v.* Youngstown Rolling Mill Co., 16 Lea (Tenn.) 355; Timmons *v.* Garrison, 4 Humphr. (Tenn.) 147.

Attachment of property produced in court for purpose of evidence.— An attachment of property after it had been produced in court upon compulsion as evidence on a criminal charge against the owner, made apparently for the purpose of getting hold of the property, was held invalid. Pomroy *v.* Parmlee, 9 Iowa 140, 74 Am. Dec. 328.

Colorable assignment to give jurisdiction valid.— A mere colorable assignment by a non-resident to citizens of New York, in order that a suit against a foreign corporation might be begun and an attachment sued out, has been held to be valid. Hadden *v.* Dooley, 92 Fed. 274, 63 U. S. App. 173, 34 C. C. A. 338 [*reversing* 84 Fed. 80, and *affirmed* on rehearing in 93 Fed. 728, 35 C. C. A. 554].

52. Pearce *v.* Renfroe, 68 Ga. 194; Menderson *v.* Specker, 79 Ky. 509; Friar *v.* McNama, 70 Mo. App. 581; State *v.* Schaffer, 58 N. J. L. 344, 33 Atl. 285.

Service by special bailiffs of writs not directed to them.— In Georgia it has been held that writs of attachment, although not directed to special bailiffs of the county courts, may be served and returned by them, subject to the rules governing such service and return by constables. Wade *v.* Stout, 36 Ga. 95.

Service of an attachment by a de facto officer is valid as to the rights of third persons. Stickney *v.* Stickney, 77 Iowa 699, 42 N. W. 518.

53. Bain *v.* Mitchell, 83 Ala. 304, 2 So. 706; Peebles *v.* Weir, 60 Ala. 413; Brinsfield *v.* Austin, 39 Ala. 227.

Execution of writ out of county.— A sheriff cannot execute a writ or warrant of attachment out of his own county. Where he does so under a mistake as to the boundary of his county the property attached will be released. Matter of Tilton, 19 Abb. Pr. (N. Y.) 50. *Compare* Starke *v.* Marshall, 3 Ala. 44; Skeels *v.* Oceana Cir. Judge, 119 Mich. 290, 77 N. W. 996.

Right of sheriff to complete levy after expiration of term.—Where a sheriff has begun the execution of a writ of attachment and subsequently goes out of office by expiration of his term he may complete whatever may remain to be done under the writ. Butler *v.* White, 25 Minn. 432.

54. Bain *v.* Mitchell, 82 Ala. 304, 2 So. 706. But see Porter *v.* Stapp, 6 Colo. 32 (where it was held that where a writ of attachment was directed "to any constable of said county" a service of such writ by a sheriff was clearly unauthorized and he would be liable in trespass); Pearce *v.* Renfroe, 68 Ga. 194.

Levy by constable — Delivery of property to sheriff.—When an attachment is issued by a justice of the peace returnable to the circuit court, and placed in the hands of a constable to be executed (Ala. Code, § 2956), if the constable delivers property to the sheriff, the latter holds it in his official capacity as sheriff and not as a mere bailee of the constable. Joseph *v.* Henderson, 95 Ala. 213, 10 So. 843.

55. An attachment for more than fifty dollars returnable to the circuit court can be

also be exercised by a properly appointed and authorized deputy of such sheriff.[56]

b. Constables and Their Deputies. Attachments may in certain cases be levied by a constable,[57] but as a rule their power in this respect is confined to attachments issuing from and returnable to certain courts,[58] and to attachments for sums not exceeding a certain amount fixed by statute.[59] A deputy constable

levied only by the sheriff. Brinsfield *v.* Austin, 39 Ala. 227.

An attachment issued by a justice of the peace and returnable to the circuit court must be levied by a sheriff. A levy by a constable or a special constable is void. Peebles *v.* Weir, 60 Ala. 413.

56. Miller *v.* McMillan, 4 Ala. 527; Whitney *v.* Butterfield, 13 Cal. 335, 73 Am. Dec. 584; Moore *v.* Graves, 3 N. H. 408; Morrel *v.* Gardener, 20 N. J. L. 673.

Appointment of special deputy held sufficient.—Where an attachment was indorsed as follows: "I do hereby authorize R. Thorn, as my special deputy to execute the within attachment. 10th February, 1841. M. E. Gary, Sheriff S. C.," it was held that the appointment of the special deputy was regular. The court said: "There is no statute in this State which prescribes the manner in which sheriffs shall appoint their deputies, and we cannot conceive of any valid objection to the special deputation which is shown by the record in this case." Miller *v.* McMillan, 4 Ala. 527, 530.

Necessity for deputy to show his authority.—A person deputed to serve a writ of attachment has all the powers which may be exercised by the sheriff, except that he is not to be recognized or obeyed as a sheriff or known officer, but must show his authority and make known his business if required by the party who is to obey the same. Burton *v.* Wilkinson, 18 Vt. 186, 46 Am. Dec. 145.

Ratification of levy by unauthorized person.— A sheriff cannot ratify the illegal act of one assuming to act as his deputy and making a levy in his name without his authority. Perkins *v.* Reed, 14 Ala. 536.

Levy by infant deputy.— In Moore *v.* Graves, 3 N. H. 408, it was held that an infant under the age of twenty-one years may be legally deputed by the sheriff to serve and return a particular writ of attachment.

Levy by stranger impowered by deputy.— If a deputy sheriff impowers a stranger to levy an attachment and afterward adopts it by his return it becomes his own act. Clarke *v.* Gary, 11 Ala. 98.

57. *Alabama.*— Carter *v.* Ellis, 90 Ala. 138, 7 So. 531; Brinsfield *v.* Austin, 39 Ala. 227; Langdon *v.* Raiford, 20 Ala. 532.

Georgia.— Pearce *v.* Renfroe, 68 Ga. 194.

Massachusetts.— Briggs *v.* Strange, 17 Mass. 405.

Mississippi.— Wallace *v.* Seales, 36 Miss. 53; Lawrence *v.* Featherston, 10 Sm. & M. (Miss.) 345.

New Jersey.— State *v.* Schaffer, 58 N. J. L. 344, 33 Atl. 285.

Mississippi —Attachment against absconding debtors.— The Mississippi statute which authorizes constables to execute attachments against absconding debtors is enabling in its character and does not embrace the case of non-resident debtors. Constables therefore cannot execute attachments returnable into the circuit courts against non-residents and a bond taken by a constable from a non-resident to replevy property attached is not binding, because taken by an improper officer, and should with the levy be quashed on motion. Lawrence *v.* Featherston, 10 Sm. & M. (Miss.) 345.

Levy by policeman with powers of constable.—Under a city charter conferring upon policemen appointed by the city council all the powers of a constable in respect to the service of process, and apparently authorizing no appointment of police by any other power, one who testifies that in serving and levying an attachment he was acting as a policeman of such city will be presumed to have been appointed by the city council in the absence of any evidence impeaching his title. Miller *v.* Fay, 40 Wis. 633.

Power of constable to attach before giving official bond.— Vt. Comp. Stat. p. 116, §§ 27, 28, give town constables when elected the same powers as sheriffs, and provide that before entering on their duties they shall give bonds to the town as the selectmen may require, and on a constable's refusing to give such bond his office shall be considered vacant. A constable, when elected and before a bond had been required of him, could attach property under a writ, and on his failure to deliver the same on execution when demanded the town would be liable. Bowman *v.* Barnard, 24 Vt. 355.

58. **Attachments issued by and returnable before justices.**— Langdon *v.* Raiford, 20 Ala. 532; Pearce *v.* Renfroe, 68 Ga. 194.

Levy of attachment issued from circuit court without authority of sheriff void.— The levy of an attachment issued out of the circuit court and delivered to a constable instead of the sheriff to be executed, without any authority therefor being given by the sheriff, is void. Weingardt *v.* Billings, 51 N. J. L. 354, 20 Atl. 59.

Service by constable of writ directed to sheriff.— Under Iowa Code, § 3934, the word "sheriff" is extended to include constables, when the proceedings are in a justice's court. Freeman *v.* Lind, 112 Iowa 39, 82 N. W. 800.

59. **Sums exceeding fifty dollars.**— A constable has no authority to levy or serve an original attachment for a sum exceeding fifty dollars and returnable to the circuit court. Brinsfield *v.* Austin, 39 Ala. 227; Martin *v.* Dollar, 32 Ala. 422, in which latter case it was held that the judgment by default based on such void levy is absolutely void.

may, it has been held, execute a domestic attachment, although it is directed to the constable.[60]

c. Coroners. In some jurisdictions it is expressly provided by statute that, in actions where the sheriff is defendant, the service of the attachment shall be made by a coroner, and service in such case by the sheriff's deputy is unauthorized and defective.[61]

d. Elisors. In case there should be neither a sheriff nor a coroner in the county, a writ of attachment may be served by an elisor or special officer appointed by the court.[62]

e. Indifferent Persons Specially Deputed. In some states it is held that a magistrate may appoint an indifferent person to levy an attachment.[63]

f. Town Marshals. A town marshal is not authorized to levy an attachment and hence a levy by him creates no lien, unless he is specially appointed for that purpose.[64]

Where damages sued for do not exceed seventy dollars.— A constable may serve a writ where the sheriff or his deputy is a party, if the damages sued for or recovered do not exceed seventy dollars. Briggs *v.* Strange, 17 Mass. 405.

Where amount does not exceed amount of constable's bond.— Ala. Code, § 2956, authorizes the levy of an attachment for a sum exceeding final jurisdiction of the justice returnable into the circuit court by a constable, provided the amount shall not exceed the amount of the penalty of the constable's bond. Joseph *v.* Henderson, 95 Ala. 213, 10 So. 843; Carter *v.* Ellis, 90 Ala. 138, 7 So. 531. But this statute does not authorize a special constable to levy such an attachment. Carter *v.* Ellis, 90 Ala. 138, 7 So. 531.

60. McCormick *v.* Miller, 3 Penr. & W. (Pa.) 230.

61. Ingraham *v.* Olcock, 14 N. H. 243. See also Clymer *v.* Willis, 3 Cal. 363, 58 Am. Dec. 414; Beach *v.* Schmultz, 20 Ill. 185; McLeod *v.* Harper, 43 Miss. 42. See, generally, SHERIFFS AND CONSTABLES.

"The sheriff can execute a writ against his deputy, but the deputy cannot execute one against the sheriff. This distinction is obvious. The sheriff acts in his own name, and by virtue of his official authority. The deputy acts in the name of the sheriff, and by virtue of the authority from him derived." Ford *v.* Dyer, 26 Miss. 243, 244.

Effect of service and return by coroner of writ directed to sheriff.—Where a writ of attachment properly directed to the sheriff was served and returned by the coroner, who had no authority so to do, it was held that this was not ground for dismissing the suit, although it was matter which would excuse defendant from answering. Such an indorsement is a mere nullity imposing no obligation on defendant to appear, and subjecting him to no legal consequences as a default. But having been legally issued and directed to the proper officer the writ cannot be avoided or made void by matter subsequent. Hughes *v.* Martin, 1 Ark. 386.

62. McFarland *v.* Tunnel, 51 Mo. 334.

Insufficient showing to authorize appointment of special officer.— The credit to be given to the return of an attachment writ served by one appointed therefor, as allowed by statute, depends on the validity of the appointment, evidence of which must accompany the return. Where the clerk in his appointment certifies that it had been shown to him by affidavit that there was "no sheriff, deputy sheriff, or coroner at the county seat of the county, nor in the county, competent to serve attachment process in the suit, but that they and each of them are absent from the county seat, and that several miles additional travel would be necessary in order to secure the service of the process of attachment aforesaid by the said officers," it was held that the showing was insufficient and the appointment was invalid. Currens *v.* Ratcliffe, 9 Iowa 309. An appointment of a special officer to serve process in attachment, made by the clerk of the district court, upon an application which did not show that the court was not in session in the county, or that the judge was absent therefrom, and which failed to show that the sheriff and his deputies were interested in the proceeding, out of the county, or in any way disqualified to act, but contained as an only reason that plaintiffs' attorney had looked with diligence for the sheriff or his deputy, but in vain, and that it was important that papers should be served at once, is unauthorized, and a levy thereunder invalid. Dolan *v.* Topping, 51 Kan. 321, 32 Pac. 1120.

63. Carter *v.* Clark, 28 Conn. 512; Kelly *v.* Paris, 10 Vt. 261, 33 Am. Dec. 199. But see State *v.* Schaffer, 58 N. J. L. 344, 33 Atl. 285, holding that a justice of the peace who issues an attachment in the court for the trial of small causes has no authority to deputize a private citizen to execute and return the same.

Appointment made while writ is blank gives no authority to levy.—A writ of attachment was signed in blank, and on the back thereof was indorsed a written appointment of an indifferent person to execute it. The writ was afterward filled up by the attaching creditor. It was held that the appointment being made while the writ was blank gave no authority to levy. Kelly *v.* Paris, 10 Vt. 261, 33 Am Dec. 199.

64. Citizens Sav. Bank *v.* Miller, 6 Ky. L. Rep. 510.

3. DISQUALIFICATION BY INTEREST. Where an officer is interested in a case, he is disqualified from levying an attachment therein,[65] and this disqualification extends to a deputy sheriff, both in cases where his principal is interested and in cases where he is individually interested.[66]

C. Authority to Levy. The authority of the levying officer is derived from and dependent upon the execution and transmission to him of the writ of attachment,[67] and he must be prepared, if his right is challenged, to produce his authority. If he cannot do it he is a trespasser and may be resisted as such.[68] It would seem, however, that the officer need not actually have the writ in his possession at the time of levying, but that it will be sufficient if he has it within his control.[69]

D. Duty to Levy — 1. IN GENERAL. As in the case of other process when a writ of attachment is delivered to the proper officer he is bound to execute it without inquiring into the regularity of the proceeding whereon the writ is grounded.[70]

2. ON PROPERTY SUBSEQUENTLY ACQUIRED OR DISCOVERED. Although defendant may have had no property at one time, yet if he has acquired property subsequently and before the return of the writ, or if further search develops property belonging to him, it is the duty of the officer to attach the same.[71]

3. WHERE BOND GIVEN TO PREVENT LEVY. In some states it is expressly provided by statute that the officer is not bound to levy the attachment where defendant gives a proper undertaking, but may instead take such undertaking,[72]

65. Dyson *v.* Baker, 54 Miss. 24; McLeod *v.* Harper, 43 Miss. 42; Evarts *v.* Georgia, 18 Vt. 15.

Waiver of objection to levy by interested party.— If the levy of a judgment returnable to a justice's court was void because made by the son of plaintiff, yet, where defendant entered a plea to the superior court and appeared therein at the first term and filed a plea to the grounds of the attachment, he thereby waived all right of objection to the legality of the levy and could not at a subsequent term either by plea or motion call the same in question. Pickett *v.* Smith, 95 Ga. 757, 22 S. E. 669.

66. Dyson *v.* Baker, 54 Miss. 24, where the writ was executed by one of the plaintiffs who was appointed special deputy by the sheriff.

67. Wales *v.* Clark, 43 Conn. 183; Kelly *v.* Breusing, 33 Barb. (N. Y.) 123; Taylor *v.* Evans, (Tex. Civ. App. 1894) 29 S. W. 172.

Levy of an attachment advertised six days before the writ issued is illegal. Wilson *v.* Stricker, 66 Ga. 575.

68. Wales *v.* Clark, 43 Conn. 183.

Writ insufficient to confer authority.— When authority is to be given to a person *sub modo* it is equally necessary that the conditions of the authorization should be strictly observed. Thus it seems that a writ directed "to any sheriff or constable in the State or to George Brooks," without the additional words, "an indifferent person" would confer no authority upon the person named to make service thereof. Brooks *v.* Farr, 51 Vt. 396.

69. Taylor *v.* Evans, (Tex. Civ. App. 1894) 29 S. W. 172 (where it was held that the fact that a writ of attachment is in the possession of a sheriff's deputy twenty miles distant authorizes a levy thereunder by the sheriff); Barney *v.* Rockwell, 60 Vt. 444, 15 Atl. 163.

70. Stevenson *v.* McLean, 5 Humphr. (Tenn.) 332, 42 Am. Dec. 434; Rice *v.* Miller, 70 Tex. 613, 8 S. W. 317, 8 Am. St. Rep. 630. See also Roth *v.* Duvall, 1 Ida. 149.

As to right of officer to refuse to levy without indemnity bond see SHERIFFS AND CONSTABLES.

71. Courtney *v.* Carr, 6 Iowa 238; Dolan *v.* Wilkerson, 57 Kan. 758, 48 Pac. 23.

Indorsement that defendant has no property will not prevent levy under the writ at any time before the return if defendant is discovered to have property. Courtney *v.* Carr, 6 Iowa 238.

72. Ayres *v.* Burr, 132 Cal. 125, 64 Pac. 120; McCutcheon *v.* Weston, 65 Cal. 37, 2 Pac. 727; Preston *v.* Hood, 64 Cal. 405, 1 Pac. 487; Coburn *v.* Pearson, 57 Cal. 306; Goodhue *v.* King, 55 Cal. 377; Fitzgibbon *v.* Calvert, 39 Cal. 261; Heynemann *v.* Eder, 17 Cal. 433; Hoffman *v.* Imes, 13 Mont. 428, 34 Pac. 728; Laveaga *v.* Wise, 13 Nev. 296.

Operation as release of property already attached.— In California the giving of such an undertaking not only prevents the sheriff from making any further levy, but also operates to release property already attached by him. Preston *v.* Hood, 64 Cal. 405, 1 Pac. 487.

Bond not superseded or destroyed by execution of appeal-bond.— An undertaking given under Cal. Code Civ. Proc. § 540, to prevent the levy of an attachment, will justify the sheriff in refusing to execute a subsequent writ of attachment obtained after an appeal, filing of an appeal-bond, and reversal of the judgment first procured, since the

and in others the practice of giving a release bond to prevent an actual levy exists although not expressly authorized by statute.[73]

E. Time of Levy — 1. In General. In the absence of instructions for an immediate levy[74] the officer has the right to make the same at any time within the period prescribed by law.[75] He must, however, act with reasonable diligence in making the levy,[76] and it must be made before the expiration of the time for the return of the writ,[77] and before judgment has been entered.[78]

2. Seizure Before Service of Summons. The seizure of property on an attachment writ may, it has been held, be made before the service of the summons:[79]

proceedings on appeal in nowise affected the validity of the security. Ayres *v.* Burr, 132 Cal. 125, 64 Pac. 120.

Service of writ on defendant and opportunity to give bond not required.— The provision of Mont. Code Civ. Proc. § 181, as to attaching property of defendant unless he "give good and sufficient security to secure the payment of said judgment" does not require that the writ be served on defendant and an opportunity be given him to give a bond or make a deposit of money prior to the levy on his property. It is not the intention of the statute that the officer shall, with this extraordinary writ in his hand, await the action of defendant in giving security. Hoffman *v.* Imes, 13 Mont. 428, 34 Pac. 728.

73. Cook *v.* Boyd, 16 B. Mon. (Ky.) 556; O. Sheldon Co. *v.* Cooke, 177 Mass. 441, 59 N. E. 77; Hartwell *v.* Smith, 15 Ohio St. 200. See also Coleman *v.* Bean, 1 Abb. Dec. (N. Y.) 394, 3 Keyes (N. Y.) 94, 32 How. Pr. (N. Y.) 370 [*affirming* 14 Abb. Pr. (N. Y.) 38]. But see Cole *v.* Parker, 7 Iowa 167, 71 Am. Dec. 439, holding that the sheriff has no authority to take a bond from defendant conditioned to save the former harmless for his failure to levy the attachment and to pay the judgment which might be recovered. Such bond being given to indemnify the sheriff against the breach of his official duty is invalid.

74. Direction for immediate service.—When a plaintiff in attachment is desirous of having it served immediately he has the right so to direct the officer when he delivers to him the process; and the officer receiving such instructions is bound to follow them, and on failure is answerable for the consequences. Tucker *v.* Bradley, 15 Conn. 46.

75. Tucker *v.* Bradley, 15 Conn. 46. *Compare* Mahon *v.* Kennedy, 87 Wis. 50, 57 N. W. 1108, to the effect that it is the officer's duty to levy an attachment as soon as possible after its receipt.

Levy in night-time.—An attachment is not invalid because levied in the night-time. Solinsky *v.* Lincoln Sav. Bank, 85 Tenn. 368, 4 S. W. 836.

Levy on Sunday see Sunday.

76. Wheaton *v.* Neville, 19 Cal. 42; Whitney *v.* Butterfield, 13 Cal. 335, 73 Am. Dec. 584; Tucker *v.* Bradley, 15 Conn. 46; Dewitt *v.* Oppenheimer, 51 Tex. 103.

Reasonable diligence depends upon the particular facts; whether, for instance, the writ is for fraud or because defendant is about to leave the state or remove his property and the like. Whitney *v.* Butterfield, 13 Cal. 335, 73 Am. Dec. 584.

He is bound to act with great diligence if he has knowledge or reasonable ground to believe that danger will result to plaintiff by delaying the service. Tucker *v.* Bradley, 15 Conn. 46.

77. Wheaton *v.* Neville, 19 Cal. 42; Osborn *v.* Cloud, 23 Iowa 104, 92 Am. Dec. 413; Peters *v.* Conway, 4 Bush (Ky.) 565; Nance *v.* Barber, 7 Tex. Civ. App. 111, 26 S. W. 151.

Levy at least six days before the return-day.— How. Anno. Stat. Mich. § 6840, provides that an attachment shall be executed at least six days before the return-day. Matthews *v.* Forslund, 113 Mich. 416, 71 N. W. 854; Tunningly *v.* Butcher, 106 Mich. 35, 63 N. W. 994; Hubbell *v.* Rhinesmith, 85 Mich. 30, 48 N. W. 178; Langtry *v.* Wayne Cir. Judges, 68 Mich. 451, 36 N. W. 211, 13 Am. St. Rep. 352; Kidd *v.* Dougherty, 59 Mich. 240, 26 N. W. 510.

Levy on return-day.—A writ of attachment may be served on the return-day. Tobar *v.* Losano, 6 Tex. Civ. App. 698, 25 S. W. 973.

78. Lynch *v.* Crary, 52 N. Y. 181 [*reversing* 34 N. Y. Super. Ct. 461]; Schieb *v.* Baldwin, 13 Abb. Pr. (N. Y.) 469, 22 How. Pr. (N. Y.) 278.

Insufficient showing of levy against corporation before dissolution.— Where the papers relied on to show that an attachment of the property of a domestic corporation in another state was levied before entry of judgment dissolving the corporation, consisted of affidavits stating that a levy was made, but not showing the facts in regard to the levy, two contradictory returns by the sheriff, one being equivocal in its language and evidently false in respect to its date, and a certificate of the sheriff that the levy was made, which is also on its face false as to its date, the court properly refused to find that the levy was made before the judgment of dissolution. People *v.* Mutual Ben. L. Assoc., 86 Hun (N. Y.) 219, 33 N. Y. Suppl. 191, 67 N. Y. St. 24.

79. Winningham *v.* Trueblood, 149 Mo. 572, 51 S. W. 399; Burkhardt *v.* Sanford, 7 How. Pr. (N. Y.) 329 (under N. Y. Code Civ. Proc. §§ 416, 635); Maguire *v.* Bolen, 94 Wis. 48, 68 N. W. 408; Cox *v.* North Wisconsin Lumber Co., 82 Wis. 141, 51 N. W. 1130; Evans *v.* Virgin, 69 Wis. 153, 33 N. W. 569; Cummings *v.* Tabor, 61 Wis. 185, 21 N. W. 72; Bell *v.* Olmsted, 18 Wis. 69. See also *supra*, VIII, B, 1, b, (III), (B).

One reason for thus holding is that in many

the same being so far in the nature of a proceeding *in rem* as to be a basis of a subsequent service by publication upon a non-resident.[80] It has been held, however, that if defendant is a non-resident, and has not been served with a summons at the time of a levy upon the property, the court at that time has no jurisdiction, either of the subject-matter or of the person of defendant, the writ of attachment has no validity, and the levy under it is wholly void and unauthorized.[81]

3. When Property Pursued Into Another County. Where by statute the officer is authorized to pursue and attach property in an adjoining county within a certain time after its removal the levy must be made within the specified time therefor.[82]

F. Order of Levy. It is the duty of the officer levying attachments to levy them in the order in which he receives them.[83]

G. Rights and Powers of Levying Officer — 1. To Seize and Hold Property — a. In General. An officer having an attachment in his hands has the right to seize the goods of the debtor and hold them until an inventory and appraisal can be made according to law;[84] but beyond this he has no power to do any other act in relation to the goods seized than simply to keep them safely, subject to the direction of the officer granting the process.[85]

b. To What Property Confined — (I) *In General* — (A) *Property of Defendant.* A writ of attachment is no authority to the levying officer to seize or detain goods other than the goods of defendant.[86] Hence the officer is not

cases the attachment is issued against a non-resident, and it is evident that if the attachment must wait until service by publication could be completed the remedy would be fruitless. Bell *v.* Olmsted, 18 Wis. 69. See also Raynolds *v.* Ray, 12 Colo. 108, 20 Pac. 4.

80. Maguire *v.* Bolen, 94 Wis. 48, 68 N. W. 408.

81. Zerega *v.* Benoist, 7 Rob. (N. Y.) 199; Woodward *v.* Stearns, 10 Abb. Pr. N. S. (N. Y.) 395 [*following* Gould *v.* Bryan, 3 Bosw. (N. Y.) 626].

Warrant valid upon service of summons.— Where an attachment is served before defendant was served with summons, upon the service of the summons the warrant becomes valid and operative, and it cannot be set aside on the ground of want of jurisdiction, but only the levy under it and the proceedings under such levy. Zerega *v.* Benoist, 7 Rob. (N. Y.) 199.

82. Thus where the statute provides that "if, after a writ of attachment has been placed in the hands of the sheriff, any property of the defendant is removed from the county, the sheriff may pursue and attach the same in an adjoining county within twenty-four hours after the removal," the legality of the levy depends upon whether it was made within twenty-four hours after the property was removed from the county, and not whether it was made within twenty-four hours after the departure of attachment defendant from the county. Budd *v.* Durall, 36 Iowa 315.

83. *Arkansas.*— Claflin *v.* Furstenheim, 49 Ark. 302, 5 S. W. 291.

Georgia.— Deveney *v.* Burton, 110 Ga. 56, 35 S. E. 268.

Iowa.— Richards *v.* Schreiber, etc., Co., 98 Iowa 422, 67 N. W. 569.

Kansas.—Atchison, etc., R. Co. *v.* Schwarzschild, etc., Co., 58 Kan. 90, 48 Pac. 591, 62 Am. St. Rep. 604; Larabee *v.* Parks, 43 Kan. 436, 23 Pac. 598.

Kentucky.— Sewell *v.* Savage, 1 B. Mon. (Ky.) 260.

Wisconsin.—Mahon *v.* Kennedy, 87 Wis. 50, 57 N. W. 1108.

Writ given on Saturday to be served before one issued on Sunday.— Under Iowa Code (1873), § 2965, providing that where there are several attachments against the same defendant they shall be executed in the order in which they were received by the sheriff, a writ given him on Saturday, but which could not be served on that day, should, on the petition being amended authorizing service on Sunday, be served before a writ issued on Sunday, under a petition authorizing service on that day and placed in his hands on Sunday before the amendment. Richards *v.* Schreiber, etc., Co., 98 Iowa 422, 67 N. W. 569.

84. Bonnel *v.* Dunn, 29 N. J. L. 435.

As to inventory and appraisal of the attached property see *infra*, X, J.

85. Hergman *v.* Dettlebach, 11 How. Pr. (N. Y.) 46.

Unnecessary removal a trespass.— When boxes at a depot for transportation ontain attachable articles, the officer is not authorized to remove said boxes from the depot unnecessarily for the purpose of attachment, and if, showing no necessity therefor, he does so, he is guilty of trespass. Peeler *v.* Stebbins, 26 Vt. 644, where the boxes in question also contained exempt property.

86. *Arkansas.*— Overby *v.* McGee, 15 Ark. 459, 63 Am. Dec. 49.

Georgia.—Bodega *v.* Perkerson, 60 Ga. 516; Wilson *v.* Paulsen, 57 Ga. 596.

Mississippi.— Ford *v.* Dyer, 26 Miss. 243.

Missouri.— State *v.* Koontz, 83 Mo. 323.

bound to levy upon property unless he has probable and reasonable cause to believe that the same belongs to defendant,[87] and may, where he has any reason to doubt that the goods belong to the debtor, insist that the creditor point out property belonging to the debtor and indemnify him against liability.[88] The officer is not required to levy first on personal property.[89]

(B) *Commingled Goods.* Where the goods of defendant and those of a stranger are commingled it is the duty of the officer, if possible, to distinguish them before attaching,[90] and not to attach the whole of them without making the inquiry.[91] If, however, the officer after making reasonable inquiry is unable to distinguish the goods, he may retain the whole until the owner identifies and points out the articles belonging to him.[92]

(C) *Goods in Possession of Third Person.* Possession of personal property being presumptive evidence of title, the law makes no presumption in the officer's favor where he makes a levy upon property in the actual possession of a stranger to the suit under a writ running solely against defendant therein.[93] He is bound to take notice of the fact that the property is not in possession of the debtor, and to inquire of those in whose possession he finds the property for whom they hold it,[94] and both he and the creditor are affected by any knowledge that would be gained by such inquiry.[95]

(II) *Where Officer Received Specific Directions* — (A) *From Creditor.* An officer receiving specific directions as to the attachment of property is bound to follow such directions if he can lawfully do so.[96] While special direction may

Pennsylvania.— Rothermel *v.* Marr, 98 Pa. St. 285.

See 5 Cent. Dig. tit. "Attachment," § 458.

Joint or separate estate.—Where by statute a creditor of joint debtors is allowed to issue a writ of attachment against either the joint or separate estate, under a writ issued against the joint estate only, the separate estate cannot be attached. Feidler *v.* Blow, 1 Ohio Dec. (Reprint) 245, 5 West. L. J. 405; Winchester *v.* Pierson, 1 Ohio Dec. (Reprint) 169, 3 West. L. J. 131.

87. Wadsworth *v.* Walliker, 51 Iowa 605, 2 N. W. 420; Bradford *v.* McLellan, 23 Me. 302; Dewitt *v.* Oppenheimer, 51 Tex. 103; Hill *v.* Pratt, 29 Vt. 119.

He must determine at his peril what property is that of defendant (State *v.* Koontz 83 Mo. 323), and he may be guilty of trespass for taking the goods of a stranger (Overby *v.* McGee, 15 Ark. 459, 63 Am. Dec. 49; Weber *v.* Henry, 16 Mich. 399).

Effect of directions to seize goods claimed by third person.—Where the sheriff is justified by the writ in seizing only the goods of defendant, if the latter directs the seizure of goods claimed by some other person, the proper course in Pennsylvania is for the sheriff either to demand a bond of indemnity or to have an order made upon plaintiff and the claimant of the goods for an interpleader as provided by the act of Jan. 30, 1871. Rothermel *v.* Marr, 98 Pa. St. 285.

Release by officer of tortious levy.— An officer's release of a levy discharges it; and where such levy was tortious and gave no right to th officer making it, such release would be entirely proper and no more than a matter of honest duty. A levy on the property of a stranger to the suit is a trespass which confers no right upon the officer. Weber *v.* Henry, 16 Mich. 399.

88. Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28. See, generally, SHERIFFS AND CONSTABLES.

89. Samuels *v.* Revier, 92 Fed. 199, 63 U. S. App. 752, 34 C. C. A. 294, construing Texas statute.

90. Susskind *v.* Hall, (Cal. 1896) 44 Pac. 328; Carlton *v.* Davis. 8 Allen (Mass.) 94; Moore *v.* Bowman, 47 N. H. 494; Wilson *v.* Lane, 33 N. H. 466. See also *supra*, IX, A, 2, b.

91. Carlton *v.* Davis, 8 Allen (Mass.) 94.

92. Robinson *v.* Holt, 39 N. H. 557, 75 Am. Dec. 233; Wilson *v.* Lane, 33 N. H 466.

93. State *v.* Hope, 88 Mo. 430.

Officer not bound to attach such goods unless specially requested.— An officer is not bound to attach goods not in the possession of the debtor unless specially requested by the creditor or his attorney. Weld *v.* Chadbourne. 37 Me. 221.

94. Ross *v.* Draper, 55 Vt. 404, 45 Am. Rep. 624; Whitcomb *v.* Woodworth, 54 Vt. 544; Flanagan *v.* Wood, 33 Vt 332.

95. Ross *v.* Draper, 55 Vt. 404, 45 Am. Rep. 624.

Cannot take goods from possession of one claiming property.— In serving attachments, either foreign or domestic, a sheriff has no authority to take goods out of the possession of a third person who claims property in them. Moore *v.* Byne, 1 Rich. (S. C.) 94.

96. Weld *v.* Chadbourne, 37 Me. 221; Marshall *v.* Hosmer, 4 Mass. 60; Pierce *v.* Jackson, 65 N. H. 121, 18 Atl. 319; Smith *v.* Judkins, 60 N. H. 127; Lovell *v.* Sahin, 15 N. H. 29.

Louisiana — Property specified in petition. — In Louisiana where plaintiff's petition concludes with a prayer for the attachment of specific property in the hands of a third per-

justify the officer for not going beyond it,[97] it has been held that such direction does not deprive him of the legal authority to obey the general command to attach sufficient to secure the demand, if he has opportunity so to do and chooses to avail himself thereof.[98]

(B) *From Debtor.* In some jurisdictions the debtor may point out property to be seized under attachment, but this right is personal to him, and no complaint in that particular can be made by plaintiff.[99]

2. To Break or Enter Buildings. As a rule an officer may not break the outer door of a dwelling-house for the purpose of levying an attachment;[1] but, if the entry is made without force, peaceably and permissibly, he may proceed to levy upon goods within the house.[2] Where, however, goods are within a store, warehouse, or any building other than a dwelling-house, it would seem that the officer may, if necessary, make a forcible entrance in order to levy the writ after admission has been demanded and refused.[3]

3. To Open Receptacles. As an incident of the officer's power and duty to take actual possession of tangible property, it has been held that he has the right to open boxes, safes, etc., containing property of defendant for the purpose of attaching such property.[4]

son the sheriff cannot attach anything else. Astor *v.* Winter, 8 Mart. (La.) 171.

Instructions to attach personalty instead of realty must be obeyed by the officer. Moulton *v.* Chadborne, 31 Me. 152.

Instructions held to give no discretion.— Instructions to an officer to attach personal property at a certain place and "to do the best he could" give him no discretion beyond that of acting to the best advantage in his opinion. Lovell *v.* Sabin, 15 N. H 29.

97. Turner *v.* Austin, 16 Mass. 181; Goddard *v.* Austin, 15 Mass. 133.

98. Welton *v.* Scott, 4 Conn. 527; Turner *v.* Austin, 16 Mass. 181. See also Marshall *v.* Hosmer, 4 Mass. 60.

99. Hoy *v.* Eaton, 26 La. Ann. 169.

Need not require agent of non-resident defendant to point out property.— Under the Texas procedure, it is not necessary for the sheriff to require the agent of a non-resident to point out property to be levied upon Samuels *v.* Revier, 92 Fed. 199, 63 U. S. App. 752, 34 C. C. A. 294.

1. Swain *v.* Mizner, 8 Gray (Mass.) 182, 69 Am. Dec. 244; Ilsley *v.* Nichols, 12 Pick. (Mass.) 270, 22 Am. Dec. 425; Bailey *v.* Wright, 39 Mich. 96; Closson *v.* Morrison, 47 N. H. 482, 93 Am. Dec. 459.

Breaking and entering door in building leased by several tenants.— Where a building is leased in distinct portions to several tenants, who have exclusive occupation and control of their respective tenements, and use in common the entry and stairway, an officer who has entered through the outer door of the house into the entry has no right to break open the door of one of the rooms of a tenant who occupies all the rooms on both sides of the entry on the third floor of the house, in order to attach the property of a third person therein. Swain *v.* Mizner, 8 Gray (Mass.) 182, 69 Am. Dec. 244.

2. Hitchcock *v.* Holmes, 43 Conn. 528, where an officer having a writ of attachment called at the house of defendant in the writ, and inquired first for defendant, and then for his wife, both of whom were absent. The servant told him that the wife's mother was within and asked him if he would like to see her. He replied he would, and so entered and attached the property. It was held that the entry was lawful.

3. Rountree *v.* Glatt, 13 Ky. L. Rep. 462; Rockwood *v.* Varnum, 17 Pick. (Mass.) 289; Platt *v.* Brown, 16 Pick. (Mass.) 553; Fullam *v.* Stearns, 30 Vt. 443; Burton *v.* Wilkinson, 18 Vt. 186, 46 Am. Dec. 145; Fullerton *v.* Mack, 2 Aik. (Vt.) 415.

May break and enter by night as well as by day.— An officer levying an attachment has the same right after demand for admittance to break an outer door in the night as in the day. Burton *v.* Wilkinson, 18 Vt. 186, 46 Am. Dec. 145.

The officer need not seek elsewhere for the chattels before breaking and entering such shop or building. Clark *v.* Wilson, 14 R. I. 11.

May not take exclusive possession or eject owner.— Although an officer having a writ of attachment may forcibly enter the store of a third person where the debtor's goods are, for the purpose of executing his process and may remain long enough to seize, secure, and inventory the goods, he cannot take exclusive possession of the store of such person or eject him therefrom where such expulsion is not reasonably necessary in order to make a proper attachment. Perry *v.* Carr. 42 Vt. 50; Fullerton *v.* Mack, 2 Aik. (Vt.) 415. *Compare* Messner *v.* Lewis, 20 Tex. 221.

4. U. S. *v.* Graff, 4 Hun (N. Y.) 634, 67 Barb. (N. Y.) 304; Peeler *v.* Stebbins, 26 Vt. 644.

May not open packages for inspection and appraisal.— In Gaskill *v.* Glass, 1 B. Mon. (Ky.) 252, it was held that the sheriff levying an attachment under the attachment law of Pennsylvania had no authority to open packages of goods for inspection and appraisal.

4. To Pursue Property. In some jurisdictions it is expressly provided that an officer to whom a writ of attachment is directed may, if a defendant is in the act of removing any personal property, pursue and take the same in any county in the state and return it to the county from which the writ issued. Under this provision, however, defendant must be in the act of removing the property.[5]

H. Manner of Levy — 1. In General — a. General Rules — (I) *Following Statutory Requirements.* In some jurisdictions it has been held that an attachment may be levied on the visible, tangible effects of a defendant in his actual or constructive possession, as an execution is levied,[6] and with like effect;[7] but the proceeding by attachment being in derogation of the common law, the officer must comply with the statutes in making the levy,[8] although it has been held that substantial compliance is sufficient.[9] Where the levy is asserted not against the rights of defendant in the writ but against third parties, greater strictness is required than if the rights of defendant were alone concerned,[10] and a levy insufficient against other persons may be sufficient to vest the officer with a special property as against a mere trespasser.[11]

(II) *Necessity of Openness and Notoriety.* To affect third persons the levy should be open and notorious,[12] and to this end it has sometimes been required that the officer should go to the place where defendant's property was to be found, and there, in the presence of one or more credible witnesses, declare that he attached such property at the suit of plaintiff.[13]

5. House *v.* Hamilton, 43 Ill. 185.

6. Gates *v.* Pennsylvania Land, etc., Co., 9 Ohio Cir. Ct. 378, 6 Ohio Cir. Dec. 163; Dorrier *v.* Masters, 83 Va. 459, 2 S. E. 927.

See, generally, Executions.

7. Drs. K. & K. U. S. Medical, etc., Assoc. *v.* Post, etc., Job Printing Co., 58 Mich. 487, 25 N. W. 477; Shorten *v.* Drake, 38 Ohio St. 76; Parker *v.* Freeman, 2 Tenn. Ch. 612; Starr *v.* Taylor, 3 McLean (U. S.) 542, 22 Fed. Cas. No. 13,319 (construing New York statute).

8. *Arkansas.*—Richmond *v.* Duncan, 4 Ark. 197.

California.— Rudolph *v.* Saunders, 111 Cal. 233, 43 Pac. 619

Colorado.— Graham *v.* Reno, 5 Colo. App. 330, 38 Pac. 835.

Idaho.—Falk-Bloch Mercantile Co. *v.* Branstetter, (Ida. 1896) 43 Pac. 571.

Indiana.—Marnine *v.* Murphy, 8 Ind. 272; Leach *v.* Swann, 8 Blackf. (Ind.) 68.

Kansas.— Lyeth *v.* Griffis, 44 Kan. 159, 24 Pac. 59.

Louisiana.— Lehman *v.* Broussard, 45 La. Ann. 346, 12 So. 504.

Michigan.— Fairbanks *v.* Bennett, 52 Mich. 61, 17 N. W. 696.

Nebraska.— Ames *v.* Parrott, 61 Nebr. 847, 86 N. W. 503.

Oregon.— Schneider *v.* Sears, 13 Oreg. 69, 8 Pac. 841.

Pennsylvania.— Vandergrift's Appeal, 83 Pa. St. 126; Hayes *v.* Gillespie, 35 Pa. St. 155; Welter *v.* Stull, 5 Kulp (Pa.) 224; Hunter *v.* Clarke, 16 Wkly. Notes Cas. (Pa) 558.

Texas.— Pittman *v.* Rotan Grocery Co., 15 Tex. Civ. App. 676, 39 S. W. 1108.

United States.— James *v.* Jenkins, Hempst. (U. S.) 189, 13 Fed. Cas. No. 7,181*a*, construing Arkansas statute.

Custom no excuse for not following statute. — A failure to levy an attachment in the manner required by the statute will not be excused on the ground of a long-continued practice in the sheriff's office to the contrary. Hunter *v.* Clarke, 16 Wkly. Notes Cas. (Pa.) 558.

Defective levy not cured by entry of judgment.—While the entry of judgment will cure some defects in the issue of the writ of attachment such entry will not cure defects in the levy of the writ, and make what was no lien a valid one. No lien is created unless the service of the writ is made in substantial compliance with the statute. Falk-Bloch Mercantile Co. *v.* Branstetter, (Ida. 1896) 43 Pac. 571.

Defective service not cured by new writ.— After trespass has been brought for the seizure of goods under an attachment which was not properly served, the defect in service cannot, by taking out a new attachment, be cured for the purpose of the action in trespass. Fairbanks *v.* Bennett, 52 Mich. 61, 17 N. W. 696.

9. Williams *v.* Olden, (Ida. 1900) 61 Pac. 517; Hailey First Nat. Bank *v.* Sonnelitner, (Ida. 1898) 51 Pac. 993; Falk-Bloch Mercantile Co. *v.* Branstetter, (Ida. 1896) 43 Pac. 571; Throop *v.* Maiden, 52 Kan. 258, 34 Pac. 801; Saunders *v.* Columbus, etc., Ins. Co., 43 Miss. 583; Bryant *v.* Duffy, 128 Mo. 18, 30 S. W. 317. And see Deutschman *v.* Byrne, 64 Ark. 111, 40 S. W. 780.

10. Russell *v.* Major, 29 Mo. App. 167. See also Rogers *v.* Gilmore, 51 Cal. 309.

11. Miller *v.* Fay, 40 Wis. 633.

12. Poling *v.* Flanagan, 41 W. Va. 191, 23 S. E. 685. See also Root *v.* Columbus, etc., R. Co., 45 Ohio St. 222, 12 N. E. 812, holding that a mere showing that the intention of the parties was to keep the levy secret would of itself avoid the attachment.

13. *Arkansas.*— Gibson *v.* Wilson, 5 Ark. 422, in the presence of a citizen of the county. And see Harrison *v.* Tiader, 29 Ark. 85.

(III) *Necessity of Written Notice to Defendant and Party in Possession.* When so required by statute the officer making the levy must give written notice thereof to defendant, to the party in possession of the property, or other designated person.[14]

b. On Personalty — (I) *In General* — (A) *Rule Stated.* While the cases on the questions of what will constitute a valid levy on personalty are not entirely harmonious,[15] it may be stated as a general test of the sufficiency of the levy that the officer must do such acts as would subject him to an action of trespass but for the protection of the writ,[16] or, as stated in some decisions, the officer must assume

Dakota.— Campbell *v.* Case, 1 Dak. 17, 46 N. W. 504, where it appears that the presence of two witnesses was necessary prior to Dak. Laws (1867–68), pp. 54, 55, §§ 185, 188.

Indiana.— Marnine *v.* Murphy, 8 Ind. 272, in the presence of a disinterested and credible freeholder.

Missouri.— Bryant *v.* Duffy, 128 Mo. 18, 30 S. W. 317; Cabeen *v.* Douglass, 1 Mo. 336, in the presence of one or more credible men of the neighborhood.

Nebraska.— Ames *v.* Parrott, 61 Nebr. 847, 86 N. W. 503, in presence of two residents of the county.

New Jersey.—Thompson *v.* Eastburn, 16 N. J. L. 100, in the presence of a credible person.

Ohio.— Root *v.* Columbus, etc., R. Co., 45 Ohio St. 222, 12 N. E. 812 (in the presence of two freeholders of the county); Davidson *v.* Kuhn, 1 Disn. (Ohio) 405, 12 Ohio Dec. (Reprint) 699 (two credible persons).

Pennsylvania.— Vandergrift's Appeal, 83 Pa. St. 126.

Tennessee.— Earthman *v.* Jones, 2 Yerg. (Tenn.) 483, in the presence of one or more credible persons.

Texas.— Hill *v.* Cunningham, 25 Tex. 25; Morgan *v.* Johnson, 15 Tex. 568, one or more credible witnesses.

See 5 Cent. Dig. tit. "Attachment," § 460.

Witnesses casually present sufficient.—The statutory provision that the levy of an attachment should be in the presence of two credible persons has been held sufficiently complied with if the declaration of attachment is made in the presence of credible persons casually present. Davidson *v.* Kuhn, 1 Disn. (Ohio) 405, 12 Ohio Dec. (Reprint) 699.

Interested person not a competent witness. — The purpose of the requirement being to make the levy public and notorious, it would seem that no person having a direct interest in the levy is a competent witness thereof. Ames *v.* Parrott, 61 Nebr. 847, 86 N. W. 503.

In the case of levy upon land the tendency of the most recent statutes is to substitute a requirement that a copy of the writ and proceedings be filed with the recorder or register of deeds. Ames *v.* Parrott, 61 Nebr. 847, 86 N. W. 503.

14. Shoonover *v.* Osborne, 111 Iowa 140, 82 N. W. 505, 82 Am. St. Rep. 496; Foster *v.* Davenport, 109 Iowa 329, 80 N. W. 404; Schoonover *v.* Osborne, 108 Iowa 453, 79 N. W. 263; Anderson *v.* Moline Plow Co., 101 Iowa 747, 69 N. W. 1028, 63 Am. St. Rep. 424; Citizens Nat. Bank *v.* Converse, 101 Iowa 307, 70 N. W. 200; Hicks *v.* Swan, 97 Iowa 556, 66 N. W. 762; Hamilton *v.* Hartinger, 96 Iowa 7, 64 N. W. 592; Commercial Nat. Bank *v.* Farmers', etc., Nat. Bank, 82 Iowa 192, 47 N. W. 1080; Sioux Valley State Bank *v.* Kellog, 81 Iowa 124, 46 N. W. 859; Moore *v.* Marshalltown Opera-House Co., 81 Iowa 45, 46 N. W. 750; New Haven Lumber Co. *v.* Raymond, 76 Iowa 225, 40 N. W. 820; Newton First Nat. Bank *v.* Jasper County Bank, 71 Iowa 486, 32 N. W. 400; Huxley *v.* Harrold, 62 Mo. 516 [*citing* Lackey *v.* Seibert, 23 Mo. 85]; Drake *v.* Hale, 38 Mo. 346.

Whenever a church pew shall be attached in Massachusetts, notice shall be given in writing by the attaching officer to the clerk of the parish or religious society holding the church in which such pew is situated, or left at his dwelling-house or usual place of abode. Sargent *v.* Peirce, 2 Metc. (Mass.) 80.

The notice of attachment required means notice of levy, not merely notice of the issue of the writ. Hamilton *v.* Hartinger, 96 Iowa 7, 64 N. W. 592.

Notice to be served within reasonable time. — Such notice may be served within a reasonable time after the actual seizure of or levy on the property. Citizens Nat. Bank *v.* Converse, 101 Iowa 307, 70 N. W. 200, where it was held that service within four hours of the seizure and after diligent effort to find defendant is service within a reasonable time.

Waiver of notice.— Defendant in attachment may so acquiesce in the levy as to waive the notice (Foster *v.* Davenport, 109 Iowa 329, 80 N. W. 404; Hamilton *v.* Hartinger, 96 Iowa 7, 64 N. W. 592), as may the tenant or party in possession (Foster *v.* Davenport, 109 Iowa 329, 80 N. W. 404).

15. Jones Lumber, etc., Co. *v.* Faris, 6 S. D. 112, 60 N. W. 403, 55 Am. St. Rep. 814.

In determining what will constitute a sufficient levy regard must be had to the nature of the property, its situation, the expenses of a removal, and the kind of possession which the owner retains of the same. Bicknell *v.* Trickey, 34 Me. 273.

16. *Alabama.*—Abrams *v.* Johnson, 65 Ala. 465; Goode *v.* Longmire, 35 Ala. 668, 76 Am. Dec. 309; Cawthorn *v.* McCraw, 9 Ala. 519; Cobb *v.* Cage, 7 Ala. 619.

Georgia.— Moore *v.* Brown, etc., Furniture Co., 107 Ga. 139, 32 S. E. 835; Jones *v.* Howard, 99 Ga. 451, 27 S. E. 765, 59 Am. St. Rep. 231; Corniff *v.* Cook, 95 Ga. 61, 22 S. E. 47, 51 Am. St. Rep. 55.

such control and possession over the property that the real owner may bring replevin.[17]

(B) *Taking Possession and Removing Property* — (1) IN GENERAL — (a) SEIZING AND TAKING INTO CUSTODY. A levy upon personalty must be made by a seizure and taking of the attached property into custody by the officer,[18] either

Iowa.— Hibbard *v.* Zenor, 75 Iowa 471, 39 N. W. 714, 9 Am. St. Rep. 497; Bickler *v.* Kendall, 66 Iowa 703, 24 N. W. 518; Rix *v.* Silknitter, 57 Iowa 262, 10 N. W. 653; Allen *v.* McCalla, 25 Iowa 464, 96 Am. Dec. 56.

Kansas.— Dodson *v.* Wightman, 6 Kan. App. 835, 49 Pac. 790.

Kentucky.— Howell *v.* Commercial Bank, 5 Bush (Ky.) 93; McBurnie *v.* Overstreet, 8 B. Mon. (Ky.) 300; Purdy *v.* Woolson-Spice Co., 15 Ky. L. Rep. 367.

Maine.— Rand *v.* Sargent, 23 Me. 326, 39 Am. Dec. 625.

Nebraska.— Powell *v.* Yeazel, 46 Nebr. 225, 64 N. W. 695; Grand Island Banking Co. *v.* Costello, 45 Nebr. 119, 63 N. W. 376.

New York.— Rodgers *v.* Bonner, 45 N. Y. 379.

17. Libby *v.* Murray, 51 Wis. 371, 8 N. W. 238; Gallagher *v.* Bishop, 15 Wis. 276.

18. *Alabama.*—Abrams *v.* Johnson, 65 Ala. 465.

Arkansas.— Gibson *v.* Wilson, 5 Ark. 422.

California.— Rogers *v.* Gilmore, 51 Cal. 309.

Colorado.— Crisman *v.* Dorsey, 12 Colo. 567, 21 Pac. 920, 4 L. R. A. 664; Gottlieb *v.* Barton, 13 Colo. App. 147, 57 Pac. 754.

Connecticut.— Tomlinson *v.* Collins, 20 Conn. 364; Hollister *v.* Goodale, 8 Conn. 332, 21 Am. Dec. 624; Williams *v.* Cheesebrough, 4 Conn. 356.

Dakota.— Powell *v.* Kechnie, 3 Dak. 319, 19 N. W. 410.

Delaware.— Stockley *v.* Wadman, 1 Houst. (Del.) 350.

Georgia.— Moore *v.* Brown, etc., Furniture Co., 107 Ga. 139, 32 S. E. 835; Jones *v.* Howard, 99 Ga. 451, 27 S. E. 765, 59 Am. St. Rep. 231; Corniff *v.* Cook, 95 Ga. 61, 22 S. E. 47, 51 Am. St. Rep. 55; King *v.* Sullivan, 93 Ga. 621, 20 S. E. 76; Roebuck *v.* Thornton, 19 Ga. 149; Sheffield *v.* Key, 14 Ga. 528.

Illinois.— Windmiller *v.* Chapman, 139 Ill. 163, 28 N. E. 979.

Iowa.—Citizens Nat. Bank *v.* Converse, 101 Iowa 307, 70 N. W. 200; Melhop *v.* Meinhart, 70 Iowa 685, 28 N. W. 545 (holding this to be true of buildings erected on another's land with reserved right of removal); Bickler *v.* Kendall, 66 Iowa 703, 24 N. W. 518; Crawford *v.* Newell, 23 Iowa 453.

Kansas.— Gardner *v.* Anthony Nat. Bank, 57 Kan. 619, 47 Pac. 516; Throop *v.* Maiden, 52 Kan. 258, 34 Pac. 801; Lyeth *v.* Griffis, 44 Kan. 159, 24 Pac. 59; Myers *v.* Cole, 32 Kan. 138, 4 Pac. 169; Dodson *v.* Wightman, 6 Kan. App. 835, 49 Pac. 790.

Kentucky.— Howell *v.* Commercial Bank, 5 Bush (Ky.) 93; Louisville, etc., R. Co. *v.* Spalding, 7 Ky. L. Rep. 211.

Louisiana.— Anderson *v.* Valentine, 15 La. Ann. 379; Woodworth *v.* Lemmerman, 9 La. Ann. 524; Goodrich *v.* Pattingill, 7 La. Ann. 664; Eymar *v.* Lawrence, 8 La. 38.

Maine.— Bradstreet *v.* Ingalls, 84 Me. 276, 24 Atl. 858; Rand *v.* Sargent, 23 Me. 326, 39 Am. Dec 625.

Massachusetts.— St. George *v.* O'Connell, 110 Mass. 475; Heard *v.* Fairbanks, 5 Metc. (Mass.) 11, 38 Am. Dec. 394; Train *v.* Wellington, 12 Mass. 495; Lane *v.* Jackson, 5 Mass. 157.

Michigan.— Brand *v.* Hinchman, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 363; Patch *v.* Wessels, 46 Mich. 249, 9 N. W. 269; Grover *v.* Buck, 34 Mich. 519; O'Hara *v.* McEnny, 2 Mich. N. P. 164

Minnesota.—Molm *v.* Barton, 27 Minn. 530, 8 N. W. 765; Caldwell *v.* Sibley. 3 Minn. 406.

Mississippi.— Gates *v.* Flint, 39 Miss. 365.

Missouri.— Hauptman *v.* Richards, 85 Mo. App. 188; Westheimer *v.* Giller, 84 Mo. App. 122; Norton *v.* Thiebes-Stierling Music Co., 82 Mo. App. 216; Elliott *v.* Bowman, 17 Mo. App. 693.

New Hampshire.— Johnson *v.* Farr, 60 N. H 426; Dunklee *v.* Fales, 5 N. H. 527; Huntington *v.* Blaisdell, 2 N. H. 317; Odiorne *v.* Colley, 2 N. H. 66, 9 Am. Dec. 39.

New Jersey.— Tomlinson *v.* Stiles, 29 N. J. L. 426.

New York.— Rodgers *v.* Bonner, 45 N. Y. 379; U. S. *v.* Graff, 4 Hun (N. Y.) 634. 67 Barb. (N. Y.) 304; Smith *v.* Orser, 43 Barb. (N. Y.) 187; Skinner *v.* Stuart, 39 Barb. (N. Y.) 206; McAllister *v.* Bailey, 1 N. Y. Suppl. 12, 16 N. Y. St. 484, 14 N. Y. Civ. Proc. 401; Learned *v.* Vandenburgh, 7 How. Pr. (N. Y.) 379.

North Carolina.— State *v.* Poor, 20 N. C. 428, 34 Am. Dec. 387; Anonymous, 1 N. C. 91.

Ohio.— Root *v.* Columbus, etc.. R. Co., 45 Ohio St. 222, 12 N. E. 812; Davis *v.* Lewis, 16 Ohio Cir. Ct. 138.

Oregon.— Schneider *v.* Sears, 13 Oreg 69, 8 Pac. 841.

Pennsylvania.— Dreisbach *v.* Mechanics' Nat. Bank, 113 Pa. St. 554, 6 Atl. 147; Pennsylvania R. Co. *v.* Pennock, 51 Pa. St. 244; Rice *v.* Walinszius, 12 Pa. Super. Ct. 329; Hotchkiss *v.* Pinney, 10 Pa. Dist. 219, 25 Pa. Co. Ct. 65; Thomas *v.* Morasco, 5 Pa. Dist. 133.

South Carolina.— Dawson *v.* Dewan, 12 Rich. (S. C.) 499; Gardner *v.* Hust. 2 Rich. (S. C.) 601; Burrill *v.* Letson, 2 Speers (S. C.) 378; Day *v.* Becher, 1 McMull. (S. C.) 92.

South Dakota.— Jones Lumber, etc., Co. *v.* Faris, 6 S. D. 112, 60 N. W. 403, 55 Am. St. Rep. 814.

Tennessee.— Emmett *v.* Crawford, 10 Lea (Tenn.) 21; Connell *v.* Scott, 5 Baxt. (Tenn.) 595; Nashville Bank *v.* Ragsdale, Peck (Tenn.) 296; Cheatham *v.* Trotter, Peck

actually or constructively, according to the nature of the property,[19] and generally speaking the custody and control should be such as to enable the officer to retain and assert his power over the property, so that it cannot be properly withdrawn or taken by another without his knowing it.[20]

(b) REMOVAL. Where personal property has been attached by an officer, the latter may, and as a general rule should, remove the same and hold it in his individual control,[21] and such removal should be without unreasonable delay, or the

(Tenn.) 198; Pennebaker *v.* Tomlinson, 1 Tenn. Ch. 111.

Texas.— Kessler *v.* Halff, 21 Tex. Civ. App. 91, 51 S. W. 48.

Vermont.— Barney *v.* Rockwell, 60 Vt. 444, 15 Atl. 163; Coffrin *v.* Smith, 51 Vt. 140; Adams *v.* Lane, 38 Vt. 640; Soule *v.* Austin, 35 Vt. 515; Flanagan *v.* Wood, 33 Vt. 332; Putnam *v.* Clark, 17 Vt. 82; Burroughs *v.* Wright, 16 Vt. 619; Lyon *v.* Rood, 12 Vt. 233; Lowry *v.* Cady, 4 Vt. 504, 24 Am. Dec. 628.

Virginia.— Dorrier *v.* Masters, 83 Va. 459, 2 S. E. 927.

Wisconsin.— Mahon *v.* Kennedy, 87 Wis. 50, 57 N. W. 1108; Carey *v.* German American Ins. Co., 84 Wis. 80, 54 N. W. 18, 36 Am. St. Rep 907, 20 L. R. A. 267; Libby *v.* Murray, 51 Wis. 371, 8 N. W. 238; Miller *v.* Fay, 40 Wis. 633.

United States.— Gumbel *v.* Pitkin, 124 U. S. 131, 8 S. Ct. 379, 31 L. ed. 374 (construing Louisiana statute); Corning *v.* Dreyfus, 20 Fed 426 (construing Louisiana statute); *In re* Ashley, 2 Fed. Cas. No. 581, 19 Nat. Bankr. Reg. 237 (construing Vermont statute).

See 5 Cent. Dig. tit. "Attachment," § 464.

Act of federal officer preventing seizure no excuse.— Where a levy is invalid without actual seizure the wrongful acts of an officer of the federal court in preventing the attaching officer from taking possession are no excuse. Gumbel *v.* Pitkin, 124 U. S. 131, 8 S. Ct. 379, 31 L. ed. 374, construing Louisiana statute.

Crops fit for harvest.— Though standing corn and potatoes in the ground may be attached if they are fit for harvest, yet a valid attachment can be made only by severing them from the freehold and keeping them in the officer's custody. Heard *v.* Fairbanks, 5 Metc. (Mass.) 111, 38 Am. Dec. 394.

19. Moore *v.* Brown, etc., Furniture Co., 107 Ga. 139, 32 S. E. 835.

Attachment of property or debts in hands of third persons see GARNISHMENT.

Constructive possession of property capable of actual and exclusive possession is insufficient as against a chattel mortgagee of such property who obtains such possession without committing a trespass or a fraud. Gardner *v.* Anthony Nat. Bank, 57 Kan. 619, 47 Pac. 516.

20. Laughlin *v.* Reed, 89 Me. 226, 36 Atl. 131; Hemmenway *v.* Wheeler, 14 Pick. (Mass.) 408, 25 Am. Dec. 411; Miles *v.* Brown, 38 N. Y. Super. Ct. 400; Hankinson *v.* Page, 12 N. Y. Civ. Proc. 279, 19 Abb. N. Cas. (N. Y.) 274, 24 Blatchf. (U. S.) 422, 31 Fed. 184; Poling *v.* Flanagan, 41 W. Va. 191, 23 S. E. 685.

Informing owner of attachment and forbidding removal.— It is a sufficient taking by an officer charged with executing a writ of attachment if he informs the owner of the goods that he has attached them and forbids their removal. St. George *v.* O'Connell, 110 Mass. 475.

Leaving copy of writ in clerk's office insufficient.— An attempt to attach personal property by leaving a copy of the writ in the town clerk's office, with a return thereon describing the property as being all the property of its kind in the town, and nothing more is wholly inoperative. West River Bank *v.* Gorham, 38 Vt. 649 [*citing* Rogers *v.* Fairfield, 36 Vt. 641; Paul *v.* Burton, 32 Vt. 148].

Mere verbal declaration of a seizure or intent to seize is insufficient. Hollister *v.* Goodale, 8 Conn. 332, 21 Am. Dec. 674; Jones *v.* Howard, 99 Ga. 451, 27 S. E. 765, 59 Am. St. Rep. 231; Shanklin *v.* Francis, 67 Mo. App. 457.

Posting an order of attachment on a lot of staves creates no lien thereon. Johnson *v.* Hatfield, 8 Ky. L. Rep. 427.

Sealing up safe levied on.— In a case where it was questionable if the original levy of the sheriff upon a large bank safe was sufficient, it was held that the officer's subsequent act, while he was claiming to hold possession by his deputy and before any other rights had intervened, of proceeding to "seal up" the safe, was such an overt act of exclusive dominion over it, as would perfect the levy if imperfect before. Jones Lumber, etc., Co. *v.* Faris, 6 S. D. 112, 60 N. W. 403, 55 Am. St. Rep. 814.

Service of copy warrant on person in charge of goods and informing him of the character of the papers without any further steps taken does not constitute a valid levy. Miles *v.* Brown, 38 N. Y. Super. Ct. 400.

21. *Connecticut.*— Pond *v.* Skidmore, 40 Conn. 213; Mills *v.* Camp, 14 Conn. 219, 36 Am. Dec. 488.

Iowa.— Hamilton *v.* Hartinger, 96 Iowa 7, 64 N. W. 592.

New Hampshire.— Huntington *v.* Blaisdell, 2 N. H. 317.

New York.— Grey *v.* Sheridan Electric Light Co., 19 Abb. N. Cas. (N. Y.) 152.

Vermont.— Fullam *v.* Stearns, 30 Vt. 443; Slate *v.* Barker, 26 Vt. 647; Pomroy *v.* Kingsley, 1 Tyler (Vt.) 294.

Presumption of fraud from failure to remove from debtor's possession.—Where an of-

officer will become a trespasser.[22] Removal, however, is not always indispensable,[23] as where an actual removal would occasion great and unnecessary expense, would be positively injurious to the parties, or, from the nature of the property, would be exceedingly inconvenient,[24] and other acts of notoriety which may notify creditors that the goods are in the custody of the law may be equivalent thereto,[25] provided the goods are actually put out of the control of the debtor.[26] Where for any of the reasons stated the removal of the property is inadvisable it is the usual practice for the officer to retain the goods in his custody in the place where levied on, through someone selected to take charge thereof for him;[27] and

ficer having attached personal property does not within a reasonable time remove it out of the possession of the debtor it furnishes presumptive evidence that the transaction is fraudulent. Burrows *v.* Stoddard, 3 Conn. 160.

Sufficient removal.—Where lumber attached was in the mill-yard of another, and the officer removed it from one to four rods, the removal was held sufficient to make an attachment and to make the officer liable to the debtor for the property after the creditor's lien was gone. Fletcher *v.* Cole, 26 Vt. 170.

22. Davis *v.* Stone, 120 Mass. 228; Williams *v.* Powell, 101 Mass. 467, 3 Am. Rep. 396; Heard *v.* Fairbanks, 5 Metc. (Mass.) 111, 38 Pac. 394; Train *v.* Wellington, 12 Mass. 495; Snell *v.* Crowe, 3 Utah 26, 5 Pac. 522; Slate *v.* Barker, 26 Vt. 647.

Delay of seven hours unreasonable.—Where an officer, after attaching furniture in a dwelling-house in the city of Boston and placing a keeper over it, neglected to remove it or take any steps toward such removal for seven hours in the middle of the day, it was held as a matter of law that the officer delayed for an unreasonable time and therefore became a trespasser. Davis *v.* Stone, 120 Mass. 228.

Officer may not lock up premises and exclude defendant therefrom.—An officer who levies an attachment on machinery which defendant is at the time using on premises leased by him has no right to lock up the premises, so as to exclude defendant therefrom, although the lease is also attached. Grey *v.* Sheridan Electric Light Co., 19 Abb. N. Cas. (N. Y.) 152.

23. Howell *v.* Commercial Bank, 5 Bush (Ky.) 93. And see Roth *v.* Wells, 29 N. Y. 471; Hill *v.* White, 46 N. Y. App. Div. 360, 61 N. Y. Suppl. 515.

24. *Colorado.*—Kinnear *v.* Flanders, 17 Colo. 11, 28 Pac. 327; Crisman *v.* Dorsey, 12 Colo. 567, 21 Pac. 920, 4 L. R. A. 664.

Connecticut.—Mills *v.* Camp, 14 Conn. 219, 36 Am. Dec 488.

Iowa.—Hamilton *v.* Hartinger, 96 Iowa 7, 64 N. W. 592.

Maine.—Darling *v.* Dodge, 36 Me. 370; Bicknell *v.* Trickey, 34 Me. 273.

Massachusetts.—Heard *v.* Fairbanks, 5 Metc. (Mass.) 111, 38 Am. Dec. 394; Reed *v.* Howard, 2 Metc. (Mass.) 36; Hemmenway *v.* Wheeler, 14 Pick. (Mass.) 408, 25 Am. Dec. 411; Fettyplace *v.* Dutch, 13 Pick. (Mass.) 388, 23 Am. Dec. 688.

Michigan.—Patch *v.* Wessels, 46 Mich. 249, 9 N. W. 269.

New Hampshire.—West *v.* Meserve, 17 N. H. 432; Smith *v.* Moore, 17 N. H. 380.

Vermont.—Slate *v.* Barker, 26 Vt. 647.

Wisconsin.—Miller *v.* Fay, 40 Wis. 633.

Whether officer acted reasonably and properly a question for the jury.—An attachment of A's interest in the furniture of a summer hotel upon a small island was made in the winter, when the island was uninhabited, and when it was difficult to remove the property from it. The officer, after attaching the property, left it locked up in the hotel, posting a notice of the attachment on the principal door. He afterward visited the island from time to time to see that the property was safe. Two months afterward defendant attached the interest of B in the property, and took possession of a large portion of it. In trover brought by the first attaching officer, the judge, after instructing the jury as to the necessity of an officer taking and holding possession, left it to them to determine, upon all the evidence, whether plaintiff in the circumstances had acted reasonably and properly in the course he had taken to obtain and hold possession of the property and this was held correct. Pond *v.* Skidmore, 40 Conn. 213.

25. *Connecticut.*—Pond *v.* Skidmore, 40 Conn. 213.

Dakota.—Powell *v.* Kechnie, 3 Dak. 319, 19 N. W. 410.

Kansas.—Throop *v.* Maiden, 52 Kan. 258, 34 Pac. 801.

Massachusetts.—Train *v.* Wellington, 12 Mass. 495.

Vermont.—Slate *v.* Barker, 26 Vt. 647.

26. Bryant *v.* Osgood, 52 N. H. 182; Libby *v.* Murray, 51 Wis. 371, 8 N. W. 238.

27. *California.*—Sinsheimer *v.* Whitely, 111 Cal. 378, 43 Pac. 1109, 52 Am. St. Rep. 192.

Iowa.—Hamilton *v.* Hartinger, 96 Iowa 7, 64 N. W. 592.

Louisiana.—Trounstein *v.* Rosenbam, 22 La. Ann. 525.

Massachusetts.—Shephard *v.* Butterfield, 4 Cush. (Mass.) 425, 50 Am. Dec. 796; Train *v.* Wellington, 12 Mass. 495.

Michigan.—Patch *v.* Wessels, 46 Mich. 249, 9 N. W. 269.

New Hampshire.—Huntington *v.* Blaisdell, 2 N. H. 317.

Ohio.—Root *v.* Columbus, etc., R. Co., 45 Ohio St. 222, 12 N. E. 812.

this will be sufficient unless it be done colorably to give the appearance of an attachment where none in truth exists.[28]

(2) Property Capable of Manual Seizure — (a) In General. In the case of tangible property susceptible of manual seizure and delivery, not in the possession of a third person, such property must be actually seized and taken into possession by the levying officer;[29] but while the possession must be actual in the sense that it takes the property from the immediate control of defendant and gives the officer control over it,[30] the officer may take and maintain the actual custody and control of the property without actually touching or handling the same, by such means as will exclude all others from the custody, or will give timely and unequivocal notice of the custody of the attaching officer.[31] It has

Vermont.— Flanagan *v.* Wood, 33 Vt. 332. See also Howes *v.* Spicer, 23 Vt. 508.

Wisconsin.— Mahon *v.* Kennedy, 87 Wis. 50, 57 N. W. 1108.

Levy on bond in hands of third person and return to holder.— Where the sheriff demanded delivery to him of bonds belonging to defendant in the hands of a third person, on whose refusal to deliver the same he threatened to take forcible possession, whereupon an agreement was made that he might levy upon them and return them to such third person, to be held by him as his depositary, it was held sufficient. Coffin *v.* North-Western Constr. Co., 13 N. Y. Civ. Proc. 9.

Unnecessary to close store or remove goods. — A sheriff may make a valid levy on goods in a store by entering the store and declaring that he makes the levy. He need not close the store or remove the goods. Howell *v.* Commercial Bank, 5 Bush (Ky.) 93.

28. Train *v.* Wellington, 12 Mass. 495; Patch *v.* Wessels, 46 Mich. 249, 9 N. W. 269.

29. *Arkansas.*— Meyer *v.* Missouri Glass Co., 65 Ark. 286, 45 S. W. 1062, 67 Am. St. Rep. 927.

Colorado.— Crisman *v.* Dorsey, 12 Colo. 567, 21 Pac. 920, 4 L. R. A. 664; Gottlieb *v.* Barton, 13 Colo. App. 147, 57 Pac. 754.

Iowa.—Nordyke *v.* Charlton, 108 Iowa 414, 79 N. W. 136; Hamilton *v.* Hartinger, 96 Iowa 7, 64 N. W. 592; Hibbard *v.* Zenor, 75 Iowa 471, 39 N. W. 714, 9 Am. St. Rep. 497.

Kansas.— Gardner *v.* Anthony Nat. Bank, 57 Kan. 619, 47 Pac. 516.

Louisiana.— Anderson *v.* Valentine, 15 La. Ann. 379; Stockton *v.* Downey, 6 La. Ann. 581; Simpson *v.* Allain, 7 Rob. (La.) 500; Goubeau *v.* New Orleans, etc., R. Co., 6 Rob. (La.) 345.

Maine.— Bradstreet *v.* Ingalls, 84 Me. 276, 24 Atl. 858.

Massachusetts.— Heard *v.* Fairbanks, 5 Metc. (Mass.) 111, 38 Am. Dec. 394.

Minnesota.— Caldwell *v.* Sibley, 3 Minn. 406.

Missouri.— Westheimer *v.* Giller, 84 Mo. App. 122; Norton *v.* Thiebes-Stierling Music Co., 82 Mo. App. 216.

New York.— Simpson *v.* Jersey City Contracting Co., 47 N. Y. App. Div. 17, 61 N. Y. Suppl. 1033; Robinson *v.* Columbia Spinning Co., 23 N. Y. App. Div. 499, 49 N. Y. Suppl. 4; Adams *v.* Speelman, 39 Hun (N. Y.) 35; Hall *v.* Brooks, 25 Hun (N. Y.) 577; U. S. *v.* Graff, 4 Hun (N. Y.) 634, 67 Barb. (N. Y.) 304; Halben *v.* Reilly, 9 Daly (N. Y.) 271; Kratzenstein *v.* Lehman, 19 Misc. (N. Y.) 600, 44 N. Y. Suppl. 369; Gillig *v.* George C. Treadwell Co., 11 Misc. (N. Y.) 237, 32 N. Y. Suppl. 974, 66 N. Y. St. 459; Hankinson *v.* Page, 12 N. Y. Civ. Proc. 279, 19 Abb. N. Cas. (N. Y.) 274, 24 Blatchf. (U. S.) 422, 31 Fed. 184.

Oregon.—Schneider *v.* Sears, 13 Oreg. 69, 8 Pac. 841; State *v.* Cornelius, 5 Oreg. 46.

Pennsylvania.— Curwensville Mfg. Co. *v.* Bloom, 10 Pa. Co. Ct. 295.

Utah.— Kiesel *v.* Union Pac. R. Co., 6 Utah 128, 21 Pac. 158.

Vermont.— Fisher *v.* Cobb, 6 Vt. 622; Reed *v.* Shepardson, 2 Vt. 120, 19 Am. Dec. 697.

West Virginia.— Poling *v.* Flanagan, 41 W. Va. 191, 23 S. E. 685.

United States.— Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931 (construing Tennessee statute); Corning *v.* Dreyfus, 20 Fed. 426 (construing Louisiana statute); Adler *v.* Roth, 2 McCrary (U. S.) 445, 5 Fed. 895 (construing Arkansas statute).

Property capable of manual delivery embraces that only of which the debtor has in whole or in part legal title. Cutler *v.* James Gould Co., 43 Hun (N. Y.) 516.

30. Lyeth *v.* Griffis, 44 Kan. 159, 24 Pac. 59.

31. *Alabama.*— Inman *v.* Schloss, 122 Ala. 461, 25 So. 739.

Georgia.— Moore *v.* Brown, etc., Furniture Co., 107 Ga. 139, 32 S. E. 835; Roebuck *v.* Thornton, 19 Ga. 149.

Kansas.— Throop *v.* Maiden, 52 Kan. 258, 34 Pac. 801; Dodson *v.* Wightman, 6 Kan. App. 835, 49 Pac. 790.

Maine.— Nichols *v.* Patten, 18 Me. 231, 36 Am. Dec. 713.

Massachusetts.— Merrill *v.* Sawyer, 8 Pick. (Mass.) 397; Gordon *v.* Jenney, 16 Mass. 465; Denny *v.* Warren, 16 Mass. 420; Train *v.* Wellington, 12 Mass. 495.

Michigan.— Brand *v.* Hinchman, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 363.

New Hampshire.—Morse *v.* Smith, 47 N. H. 474. But see Huntington *v.* Blaisdell, 2 N. H. 317, where the court said: "It is not sufficient to be in sight, or hearing. An attachment of property is an arrest, or seizure, or taking of it; and consequently would seem to be defective, unless the property be touched."

[X, H, 1, b, (I), (B), (2), (a)]

also been held that seizure of part of a certain thing will bind the whole when it comes to hand,[32] and where a variety of articles are attached and it requires considerable time to complete the process, if the officer, after he has begun it, continues within a day without unnecessary delay until he has secured all the goods, the taking may be treated as one act.[33]

(b) Instruments For Payment of Money. It is expressly held in some states that personal property capable of manual delivery and therefore requiring an actual taking of the same into custody includes bonds,[34] promissory notes,[35] or other instruments for the payment of money.[36]

Pennsylvania.— Dreisbach *v.* Mechanics' Nat. Bank, 113 Pa. St. 554, 6 Atl. 147; Paxton *v.* Steckel, 2 Pa. St. 93; Rice *v.* Walinszius, 12 Pa. Super. Ct. 329; Hotchkiss *v.* Pinney, 10 Pa. Dist. 219, 25 Pa. Co. Ct. 65.

Vermont.— Slate *v.* Barker, 26 Vt. 647; Lyon *v.* Rood, 12 Vt. 233; Newton *v.* Adams, 4 Vt. 437.

Virginia.— Dorrier *v.* Masters, 83 Va. 459, 2 S. E. 927 [*citing* Bullitt *v.* Winston, 1 Munf. (Va.) 269].

West Virginia.— Poling *v.* Flanagan, 41 W. Va. 191, 23 S. E. 685.

Levy on unopened safe and contents.— A levy on an iron safe and its contents is a levy on the contents thereof, although the sheriff for a considerable time thereafter is unable to open the safe and take out the contents. Elliott *v.* Bowman, 17 Mo. App. 693.

Making an inventory of the goods with a view to the appraisal of the same, as required by statute, will, it has been held, constitute a taking of them in contemplation of law, and from that time the goods will be in the legal custody and possession of the officer under the attachment (Stockley *v.* Wadman, 1 Houst. (Del.) 350; Corniff *v.* Cook, 95 Ga. 61, 22 S. E. 47, 51 Am. St. Rep. 55; Cooper *v.* Newman, 45 N. H. 339), and where an officer entered the house of defendant and attached some of the furniture, gave notice that he attached the whole, and then proceeded to make an inventory, the attachment was held valid as to all the property within the house as against another attachment admitted to have been made before the inventory was completed (Huntington *v.* Blaisdell, 2 N. H. 317).

32. Pennsylvania R. Co. *v.* Pennock, 51 Pa. St. 244. See also Huntington *v.* Blaisdell, 2 N. H. 317, holding that even though a touching of the property be essential, yet it is sufficient if the officer has the power to touch and control all the goods and is engaged in making seizure of all.

33. Bishop *v.* Warner, 19 Conn. 460, where an officer attached property of defendant to an amount which he deemed sufficient for the demand, on the following day determined not to take part of the property attached, but in lieu thereof took certain other effects, together with part of that first attached, and it was held that a jury was justified in treating the attachment as two distinct acts.

Levy on timber in river.— Where the property attached consisted of telegraph poles which were placed in a river to be floated down for a distance of twenty miles before being taken out, and the sheriff, upon his arrival with the writ, found twenty-four already taken out which he levied upon and placed in charge of a deputy with orders to take out the other poles as they arrived, it was held that the same was taken, and in the custody within a reasonable time, considering the situation and location of the property, and that the diligence exercised by him was sufficient compliance with the provisions of the statute to create a lien upon the personal property referred to, prior to that created by a chattel mortgage recorded after the sheriff had levied upon twenty-four poles on the bank but before the other poles had been landed, as they floated down the stream. Falk-Bloch Mercantile Co. *v.* Branstetter, (Ida. 1896) 43 Pac. 571.

34. Caldwell *v.* Sibley, 3 Minn. 406; Kratzenstein *v.* Lehman, 19 Misc. (N. Y.) 600, 44 N. Y. Suppl. 369 [*affirming* 18 Misc. (N. Y.) 590, 42 N. Y. Suppl. 237, and *affirmed* in 19 N. Y. App. Div. 228, 46 N. Y. Suppl. 71]; Hankinson *v.* Page, 12 N. Y. Civ. Proc. 279, 19 Abb. N. Cas. (N. Y.) 274, 24 Blatchf. (U. S.) 422, 31 Fed. 184; Burrill *v.* Letson, 2 Speers (S. C.) 378.

35. Nordyke *v.* Charlton, 108 Iowa 414, 79 N. W. 136; Anderson *v.* Valentine, 15 La. Ann. 379; Erwin *v.* Commercial, etc., Bank, 3 La. Ann. 186, 48 Am. Dec. 447; Naser *v.* New York City First Nat. Bank, 116 N. Y. 492, 22 N. E. 1077, 27 N. Y. St. 670; Anthony *v.* Wood, 96 N. Y. 180, 67 How. Pr. (N. Y.) 424 [*reversing* 29 Hun (N. Y.) 239]; Kratzenstein *v.* Lehman, 19 Misc. (N. Y.) 600, 44 N. Y. Suppl. 369.

36. The expression "other instruments for the payment of money" is to be interpreted as referring to instruments of similar character with bonds and promissory notes, such as are evidences of debt and the title to which passes by delivery merely (Naser *v.* New York City First Nat. Bank, 116 N. Y. 492, 22 N. E. 1077, 27 N. Y. St. 670; Trepagnier *v.* Rose, 18 N. Y. App. Div. 393, 46 N. Y. Suppl. 397; Kratzenstein *v.* Lehman, 19 Misc. (N. Y.) 600, 44 N. Y. Suppl. 369; Pelham *v.* Rose, 9 Wall. (U. S.) 103, 19 L. ed. 602), and there would seem to be fair reason to contend that the provision is intended to include all other instruments which are unilateral contracts for the payment of money only (Kratzenstein *v.* Lehman, 19 Misc. (N. Y.) 600, 44 N. Y. Suppl. 369; Hankinson *v.* Page, 12 N. Y. Civ. Proc. 279, 19 Abb. N. Cas. (N. Y.) 274, 24 Blatchf. (U. S.) 422, 31 Fed. 184). Thus a policy of life insurance

(3) Property Incapable or Difficult of Manual Seizure — (a) In General. Where property is incapable or difficult of manual delivery the officer may not be required to take actual possession thereof,[37] but some notorious act as nearly equivalent to actual seizure as practical must be substituted,[38] and such steps taken as will fasten the property in the hands of the person who has possession or control, to await the judgment in the case, or such person required to place it in the hands of the court.[39] Some statutes prescribe that a levy upon such personalty is to be made by delivering a copy of the writ or order, with a notice specifying the property attached, to the person holding the same or to his authorized agent,[40] while others provide that a certified copy of the writ and of the

has been held to belong to the class of contracts strictly unilateral, where the obligation of the company upon the policy has become fixed by the death of the insured (Kratzenstein *v.* Lehman, 19 Misc. (N. Y.) 600, 44 N. Y. Suppl. 369; Hankinson *v.* Page, 12 N. Y. Civ. Proc. 279, 19 Abb. N. Cas. (N. Y.) 274, 24 Blatchf. (U. S.) 422, 31 Fed. 184). See, however, New York L. Ins. Co. *v.* Universal L. Ins. Co., 88 N. Y. 424 [*overruling* Studwell *v.* Charter Oak Ins. Co., 19 Hun (N. Y.) 127], where it was held that a life-insurance policy which had matured and become due was not an evidence of debt for the absolute payment of money within the meaning of the code), but such a policy during the life of the insured is not (Kratzenstein *v.* Lehman, 19 Misc. (N. Y.) 600, 44 N. Y. Suppl. 369).

Instrument must acknowledge an absolute obligation to pay.— An instrument for the payment of money, within the meaning of N. Y. Code Civ. Proc. § 649, subs. 2, relating to the levy of a warrant of attachment, must be an instrument which acknowledges an absolute obligation to pay, not conditional or contingent, as an existing debt, and such that in an action upon it plaintiff, in order to entitle himself to a recovery, would be required only to offer the instrument in evidence. A policy of fire insurance under which a loss has occurred is not such an instrument. Trepagnier *v.* Rose, 18 N. Y. App. Div. 393, 46 N. Y. Suppl. 397.

37. Warner *v.* Fourth Nat. Bank, 115 N. Y. 251, 22 N. E. 172, 26 N. Y. St. 213 [*reversing* 44 Hun (N. Y.) 374].

Goods not "accessible" when in hands of third person claiming right therein.— Under a statute providing that there must be an actual seizure where the property is "accessible" if such property is in the hands of a third person claiming some right therein it is not accessible within the meaning of the statute. Hauptmann *v.* Richards, 85 Mo. App. 188 [*following* Westheimer *v.* Giller, 84 Mo. App. 122]. See also Moore *v.* Byne, 1 Rich. (S. C.) 94, to the effect that in serving attachments, either foreign or domestic, the sheriff has no authority to take goods out of the possession of a third person who claims property in them.

Growing crops.— "All the possession the statute can intend must be such as the nature of the property renders it susceptible of; and in the case of a growing crop, it could be constructive possession only." Grover *v.* Buck, 34 Mich. 519, 522.

38. State *v.* Poor, 20 N. C. 428, 34 Am. Dec. 387; Evans *v.* Higdon, 1 Baxt. (Tenn.) 245; Poling *v.* Flanagan, 41 W. Va. 191, 23 S. E. 685.

39. Davis *v.* Lewis, 16 Ohio Cir. Ct. 138.

40. *California.*— Rudolph *v.* Saunders, 111 Cal. 233, 43 Pac. 619; Blanc *v.* Paymaster Min. Co., 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149; Raventas *v.* Green, 57 Cal. 254.

Iowa.—Shoonover *v.* Osborne, 111 Iowa 140, 82 N. W. 505, 82 Am. St. Rep. 496; Hicks *v.* Swan, 97 Iowa 556, 66 N. W. 762.

Louisiana.— Grieff *v.* Betterton, 18 La. Ann. 349.

Minnesota.— Caldwell *v.* Sibley, 3 Minn. 406.

New York.— Courtney *v.* Brooklyn Eighth Ward Bank, 154 N. Y. 688, 49 N. E. 54 [*reversing* 14 Misc. (N. Y.) 386, 35 N. Y. Suppl. 1049, 70 N. Y. St. 744, 25 N. Y. Civ. Proc. 156]; Naser *v.* New York City First Nat. Bank, 116 N. Y. 492, 22 N. E. 1077, 27 N. Y. St. 670; Warner *v.* Fourth Nat. Bank, 115 N. Y. 251, 22 N. E. 172, 26 N. Y. St. 213 [*reversing* 44 Hun (N. Y.) 374]; Gibson *v.* National Park Bank, 98 N. Y. 87 [*affirming* 49 N. Y. Super. Ct. 429]; O'Brien *v.* Mechanics', etc., F. Ins. Co., 56 N. Y. 52 [*reversing* 36 N. Y. Super. Ct. 110, 14 Abb. Pr. N. S. (N. Y.) 314, 45 How. Pr. (N. Y.) 453]; Clarke *v.* Goodridge, 41 N. Y. 210; Simpson *v.* Jersey City Contracting Co., 47 N. Y. App. Div. 17, 61 N. Y. Suppl. 1033; Kratzenstein *v.* Lehman, 19 N. Y. App. Div. 228, 46 N. Y. Suppl. 71; Trepagnier *v.* Rose, 18 N. Y. App. Div. 393, 46 N. Y. Suppl. 397; Lane *v.* Wheelwright, 69 Hun (N. Y.) 180, 23 N. Y. Suppl. 576, 53 N. Y. St. 368 [*affirmed* in 143 N. Y. 634, 37 N. E. 826, 60 N. Y. St. 874]; Pardee *v.* Leitch, 6 Lans. (N. Y.) 303; Hayden *v.* National Bank, 3 Silv. Supreme (N. Y.) 566, 7 N. Y. Suppl. 551, 27 N. Y. St. 115; McGinn *v.* Ross, 33 N. Y. Super. Ct. 346; Kuhlman *v.* Orser, 5 Duer (N. Y.) 242; Commercial Travelers' Assoc. *v.* Newkirk, 16 N. Y. Suppl. 177; Adams *v.* Speelman, 10 N. Y. Suppl. 364, 32 N. Y. St. 266 [*affirmed* in 124 N. Y. 666, 27 N. E. 854]; Hankinson *v.* Page, 12 N. Y. Civ. Proc. 279, 19 Abb. N. Cas. (N. Y.) 274, 24 Blatchf. (U. S.) 422, 31 Fed. 184; McGinn *v.* Ross, 11 Abb. Pr. N. S. (N. Y.) 20; Wilson *v.* Duncan, 11 Abb. Pr. (N. Y.) 3; Mechanics',

return may, within a certain time, be deposited in a specified office, and that such attachment shall then be as valid as if the articles had been retained by the officer.[41]

etc., Bank *v.* Dakin, 33 How. Pr. (N. Y.) 316.

Oregon.— Lewis *v.* Birdsey, 19 Oreg. 164, 26 Pac. 623; Schneider *v.* Sears, 13 Oreg. 69, 8 Pac. 841; Carter *v.* Koshland, 12 Oreg. 492, 8 Pac. 556.

South Carolina.— Grollman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272; Schepler *v.* Garriscan, 2 Bay (S. C.) 224; Renneker *v.* Davis, 10 Rich. Eq. (S. C.) 289.

Texas.— Osborn *v.* Koenigheim, 57 Tex. 91; Kessler *v.* Halff, 21 Tex. Civ. App. 91, 51 S. W. 48; Sutton *v.* Gregory, (Tex. Civ. App. 1898) 45 S. W. 932.

Vermont.— Fitch *v.* Rogers, 7 Vt. 403.

Virginia.— Dorrier *v.* Masters, 83 Va. 459, 2 S. E. 927.

West Virginia.— Hall *v.* Virginia Bank, 14 W. Va. 584.

Wisconsin.— Brower *v.* Smith, 17 Wis. 410.

United States.— Marks *v.* Shoup, 181 U. S. 562, 45 L. ed. 1002 (construing Oregon statute); Adler *v.* Roth, 2 McCrary (U. S.) 445, 5 Fed. 895 (construing Arkansas statute).

Notice to bailee of fraudulent transferee sufficient.— It would seem that where property fraudulently conveyed to a third party for the benefit of defendant is by him deposited with a bailee it is not necessary to give notice of attachment to the former before levying on the property in the bailee's hands. Greenleaf *v.* Mumford, 19 Abb. Pr. (N. Y.) 469, 30 How. Pr. (N. Y.) 30.

Requisites of notice.—It was formerly held that the notice must describe particularly the property levied on so as to enable the holder to identify it and deliver it to the sheriff when his own claims are satisfied (Kuhlman *v.* Orser, 5 Duer (N. Y.) 242), and that a notice in general terms was insufficient and void (Clarke *v.* Goodridge, 41 N. Y. 210; Kuhlman *v.* Orser, 5 Duer (N. Y.) 242; O'Brien *v.* Mechanics', etc., F. Ins. Co., 36 N. Y. Super. Ct. 110, 14 Abb. Pr. N. S. (N. Y.) 314, 45 How. Pr. (N. Y.) 453; Harman *v.* Remsen, 2 Abb. Pr. N. S. (N. Y.) 272; Wilson *v.* Duncan, 11 Abb. Pr. (N. Y.) 3). According to more recent decisions, however, it is not necessary that the notice should specify particularly the property or debts supposed to be in the possession of or owing by the individual served, and the general notice by the officer that he attaches all property, debts, etc., belonging or owing to defendant in the attachment suit in the possession or under the control of the individual served is sufficient. O'Brien *v.* Mechanics', etc., F. Ins. Co., 56 N. Y. 52 [*reversing* 36 N. Y. Super. Ct. 110, 14 Abb. Pr. N. S. (N. Y.) 314, 45 How. Pr. (N. Y.) 453]; Drake *v.* Goodridge, 54 Barb. (N. Y.) 78 [*following* Greenleaf *v.* Mumford, 19 Abb. Pr. (N. Y.) 469, 30 How. Pr. (N. Y.) 30, and *disapproving* Kuhlman *v.* Orser, 5 Duer (N. Y.) 242; Wilson *v.* Duncan, 11 Abb. Pr. (N. Y.) 3]; Carter *v.* Koshland, 12 Oreg. 492, 8 Pac. 556.

41. *Illinois.*— Clymore *v.* Williams, 77 Ill. 618.

Maine.— Laughlin *v.* Reed, 89 Me. 226, 36 Atl. 131; Darling *v.* Dodge, 36 Me. 370.

Massachusetts.— Higgins *v.* Drennan, 157 Mass. 384, 32 N. E. 354; Scovill *v.* Root, 10 Allen (Mass.) 414; Polley *v.* Lenox Iron Works, 4 Allen (Mass.) 329; Arnold *v.* Stevens, 11 Metc. (Mass.) 258; Reed *v.* Howard, 2 Metc. (Mass.) 36.

Minnesota.—Molm *v.* Barton, 27 Minn. 530, 8 N. W. 765.

Tennessee.—Lea *v.* Maxwell, 1 Head (Tenn.) 365.

Vermont.— Barron *v.* Smith, 63 Vt. 121, 21 Atl. 269; Pond *v.* Baker, 58 Vt. 293, 2 Atl. 164; Coffrin *v.* Smith, 51 Vt. 140; West River Bank *v.* Gorham, 38 Vt. 649; Fullam *v.* Stearns, 30 Vt. 443; Bucklin *v.* Crampton, 20 Vt. 261; Putnam *v.* Clark, 17 Vt. 82; Stanton *v.* Hodges, 6 Vt. 64.

Such provisions have been held applicable to cord-wood and charcoal in large quantities (Reed *v.* Howard, 2 Metc. (Mass.) 36; Molm *v.* Barton, 27 Minn. 530, 8 N. W. 765); glass in plates three or four feet square and from half an inch to an inch in thickness, some of which is boxed in boxes of five or six hundred pounds each, and some of which remains unboxed in the factory, and requires skill to remove it safely, and which cannot be removed except at unreasonable expense and considerable risk (Polley *v.* Lenox Iron Works, 4 Allen (Mass.) 329); grain or hay (Bucklin *v.* Crampton, 20 Vt. 261; Putnam *v.* Clark, 17 Vt. 82; Stanton *v.* Hodges, 6 Vt. 64; Lowry *v.* Walker, 4 Vt. 76); machinery (Higgins *v.* Drennan, 157 Mass. 384, 32 N. E. 354; Fullam *v.* Stearns, 30 Vt. 443); pig-iron (Scovill *v.* Root, 10 Allen (Mass.) 414); and railroad cars (Hall *v.* Carney, 140 Mass. 131, 3 N. E. 14).

Such provisions do not deprive the officer of the right to take actual possession of the property, if reasonably necessary for its preservation, although the possibility of its removal may be very remote. Laughlin *v.* Reed, 89 Me. 226, 36 Atl. 131.

Construction of statute.— In some states it has been held that such provisions do not change the mode of making an attachment, but merely provide an easier method of preserving it, and that it is still essential to a valid attachment of the articles specified that they should be taken into the possession or placed under the control of the officer (Darling *v.* Dodge, 36 Me. 370; Bryant *v.* Osgood, 52 N. H. 182; Scott *v.* Manchester Print Works, 44 N. H. 507; Chadbourne *v.* Sumner, 16 N. H. 129, 41 Am. Dec. 720; Huntington *v.* Blaisdell, 2 N. H. 317; Odiorne *v.* Colley, 2 N. H. 66, 9 Am. Dec. 39), although it has also been held that the leaving of a copy with the clerk is the act of attachment, taking possession, and notice to all concerned (Putnam *v.* Clark, 17 Vt. 82).

(b) ANIMALS ON RANGE. Owing to the difficulty in taking possession of range stock, provision is made in some of the states for levy upon such property by filing a copy of the writ with a designated officer, together with a notice thereto appended, containing the number and description of stock, that such property or a portion thereof is attached.[42] In others the levy may be made, in the presence of certain credible witnesses, by designating by reasonable estimate the number of the animals, describing them by their marks and brands, or either, and giving notice thereof in writing to the owner, his herder, or agent, if residing within the county and known to the levying officer.[43] Where so required there must be filed with the recorder a copy of the notice attached to the copy of the writ.[44]

(c) *Having Property in View.* Although to make a valid levy upon personalty the officer need not always seize or even touch them, it is usually held that he must have them in his view.[45] It has been held, however, that a view of the property is not absolutely necessary, where the officer assumes dominion over the property, having it, at the time, within his power and subject to immediate seizure.[46]

(d) *Delivering Copy Warrant and Affidavits to Party in Possession.* A provision that the officer levying upon personal property capable of manual delivery shall deliver without delay to the person from whose possession the property is taken, if any, a copy of the warrant and of the affidavits upon which it was granted has been held to be merely directory.[47]

(ii) *WHEN MORTGAGED OR PLEDGED* — (a) *By Seizure Upon Payment or Tender of Amount Due.* An attachment upon chattels mortgaged or pledged to a third party may be levied by seizure of the entire property covered by the mortgage or pledge upon payment or tender of the amount due to the mortgagee or pledgee,[48] or upon depositing the amount due with a proper officer for

42. Harmon *v.* Comstock Horse, etc., Co., 9 Mont. 243, 23 Pac. 470 (with county clerk of county where such animals are running at large); Schofield *v.* Territory, 9 N. M. 526, 56 Pac. 306 (with clerk of probate court of the county in which the brand of such live stock is recorded).

Filing papers after office-hours of last day. — Mont. Code Civ. Proc. c. 6, tit. 7, provides that range stock may be attached between the first day of November and the next succeeding fifteenth day of May, by filing a copy of the process with the recorder of the county. Where the filing was made with the proper officer upon the fourteenth day of May, at ten-thirty P. M., it was held that section 911, fifth division of the compiled statutes, providing that county offices shall be kept open during the business hours of each day, did not prohibit the transaction of official business at other times, and that the service was valid. Harmon *v.* Comstock Horse, etc., Co., 9 Mont. 243, 23 Pac. 470.

If live stock range in more than one county "then the officer may file a like certified copy of the writ and brand in any such county and the same shall have like binding effect as a lien upon such live stock." Schofield *v.* Territory, 9 N. M. 526, 56 Pac. 306.

43. Steinfeld *v.* Menager, (Ariz. 1898) 53 Pac. 495; Donald *v.* Carpenter, 8 Tex. Civ. App. 321, 27 S. W. 1053; Davis *v.* Dallas Nat. Bank, 7 Tex. Civ. App. 41, 26 S. W. 222; Carothers *v.* Wilkerson, 2 Tex. App. Civ. Cas. § 353.

44. Menager *v.* Farrell, (Ariz. 1899) 57 Pac. 607; Steinfeld *v.* Menager, (Ariz. 1898) 53 Pac. 495.

45. *Alabama.*—Abrams *v.* Johnson, 65 Ala. 465.

Illinois.—Culver *v.* Rumsey, 6 Ill. App. 598.

Maine.—Nichols *v.* Patten, 18 Me. 231, 36 Am. Dec. 713.

Massachusetts.—Train *v.* Wellington, 12 Mass. 495.

Minnesota.—Caldwell *v.* Sibley, 3 Minn. 406.

Missouri.—Elliott *v.* Bowman, 17 Mo. App. 693.

New York.—Rodgers *v.* Bonner, 45 N. Y. 379.

Tennessee.—Connell *v.* Scott, 5 Baxt. (Tenn.) 595.

Virginia.—Dorrier *v.* Masters, 83 Va. 459, 2 S. E. 927.

West Virginia.—Poling *v.* Flanagan, 41 W. Va. 191, 23 S. E. 685.

46. Taacks *v.* Schmidt, 18 Abb. Pr. (N. Y.) 307 (holding that where the sheriff directs the master of a vessel to deliver certain goods on board, which were designated in a warrant of attachment in his possession, and the master receipts for the goods, there is a sufficient levy, although the sheriff does not see the goods until the arrival of the vessel at her destination in any county); Fullam *v.* Stearns, 30 Vt. 443; Putnam *v.* Clark, 17 Vt. 82.

47. Adams *v.* Speelman, 10 N. Y. Suppl. 364, 32 N. Y. St. 266 [*affirmed* in 124 N. Y. 666, 27 N. E. 854].

48. *Arizona.*—Mooney *v.* Broadway, (Ariz. 1886) 11 Pac. 114.

California.—Irwin *v.* McDowell, 91 Cal. 119, 27 Pac. 601; Berson *v.* Nunan, 63 Cal. 550.

Iowa.—Webster City Grocery Co. *v.* Losey,

him.[49] If the officer levies an attachment upon the property by seizing the same and appoints a keeper without complying with the foregoing requirements the attachment is unlawful as against the mortgagee,[50] and it has been held that he

108 Iowa 687, 78 N. W. 75; Geiershofer *v.* Nupuf, 106 Iowa 374, 76 N. W. 745; Willson *v.* Felthouse, 90 Iowa 315, 57 N. W. 878; Blotcky *v.* O'Neill, 83 Iowa 574, 49 N. W. 1029.

Maine.— Barrows *v.* Turner, 50 Me. 127; Deering *v.* Lord, 45 Me. 293; Foster *v.* Perkins, 42 Me. 168; Smith *v.* Smith, 24 Me. 555; Barker *v.* Chase, 24 Me. 230; Wolfe *v.* Dorr, 24 Me. 104; Paul *v.* Hayford, 22 Me. 234.

Massachusetts.— Goulding *v.* Hair, 133 Mass. 78; Bicknell *v.* Cleverly, 125 Mass. 164; Porter *v.* Warren, 119 Mass. 535; Hooton *v.* Gamage, 11 Allen (Mass.) 354; Pomeroy *v.* Smith, 17 Pick. (Mass.) 85.

Montana.— Rocheleau *v.* Boyle, 12 Mont. 590, 31 Pac. 533.

New Hampshire.— Briggs *v.* Walker, 21 N. H. 72.

Oklahoma.—Greenville Nat. Bank *v.* Evans-Snyder-Buel Co., 9 Okla. 353, 60 Pac. 249, but this does not apply to a mortgage executed in the Indian Territory on property located therein and subsequently brought into Oklahoma.

South Dakota.— Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

Tennessee.— Memphis First Nat. Bank *v.* Pettit, 9 Heisk. (Tenn.) 447.

Texas.— Stiles *v.* Hill, 62 Tex. 429.

Vermont.— Hefflin *v.* Bell, 30 Vt. 134.

Effect of assignment to, or purchase by, attaching creditor of chattel mortgage.— Where an attaching creditor purchases a prior chattel mortgage and has the same assigned to him, this is not a payment of the mortgage within the provision of the Iowa statute providing that attaching creditors may take possession of mortgaged chattels upon paying the mortgaged debt. Webster City Grocery Co. *v.* Losey, 108 Iowa 687, 78 N. W. 75.

Inconvenience of making tender no excuse.— Mere inconvenience in making a tender required by statute before mortgaged property can be attached will not authorize a disregard of the statutory provision. Foster *v.* Perkins, 42 Me. 168.

Tender after levy insufficient.— In Iowa a tender to the mortgagee of the amount due upon a chattel mortgage, or the deposit of such sum with the clerk of the district court by an attachment creditor after the levy of his attachment upon the mortgaged chattels will not make such valid levy. Blotcky *v.* O'Neill, 83 Iowa 574, 49 N. W. 1029.

Tender must be of a definite sum and money turned into court.—By Vt. Laws (1854), p 15, it was provided that if personal property was purchased with an agreement that it should belong to the vendor till the price was paid, a creditor of the vendee who attached the property must tender to the vendor the amount of his claim within ten days after the attachment, and a mere statement by the attaching creditor that he was ready to pay the claim, and had the money with him with which to pay, was insufficient, as the tender should have been of a definite sum and the money turned into court. Hefflin *v.* Bell, 30 Vt. 134.

Tender unnecessary where assignee has no interest in the mortgage.— No tender to an assignee of a mortgage or demand on him for an account of the amount due on the mortgage is necessary by plaintiff claiming the right of redemption under an attachment of the equity, when such assignee had no interest in the mortgage at the time of the attachment. Millett *v.* Blake, 81 Me. 531, 18 Atl. 293, 10 Am. St. Rep. 275.

Waiver of payment by mortgagee.— No one except the mortgagee can insist that the attaching creditor pay his mortgage or deposit with the clerk a sufficient sum to do so, as provided by statute, and the mortgagee may waive his rights under such statute. Willson *v.* Felthouse, 90 Iowa 315, 57 N. W. 878; Meeker *v.* Wilson, 1 Gall. (U. S.) 419, 16 Fed. Cas. No. 9,392.

49. Deposit with clerk of the district court of the county from which the attachment issued. Blotcky *v.* O'Neill, 83 Iowa 574, 49 N. W. 1029.

Deposit with county clerk or treasurer.— Irwin *v.* McDowell, 91 Cal. 119, 27 Pac. 601; Berson *v.* Nunan, 63 Cal. 550; Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

No application when mortgagee and attaching creditor are one and the same.— S. D. Comp. Laws, §§ 4388, 4389, requiring that before mortgaged personal property can be taken under attachment the officer so taking must pay or tender to the mortgagee the amount of his debt and interest, or deposit the same with the county treasurer, have no application where the mortgagee and the attaching creditor are one and the same person. Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

50. Pomeroy *v.* Smith, 17 Pick. (Mass.) 85.

Attachment in common form voidable at election of mortgagee.— An attachment of goods subject to a mortgage as the property of the mortgagor is not void. It is at most merely voidable at the election of the mortgagee. He may or may not insist on his rights as mortgagee and thus avoid the attachment. Scott *v.* Whittemore, 27 N. H. 309 [*followed* in Clement *v.* Little, 42 N. H. 563; Hill *v.* Wiggin, 31 N. H. 292].

May not take goods from possession of mortgagee's bailee.— An officer has no right by virtue of a writ against the mortgagee to attach and take goods from the possession of a bailee of the mortgagee without paying or tendering the amount due upon the mortgage. Barker *v.* Chase, 24 Me. 230.

Right of officer to undisturbed possession as against mortgagee until completion of inventory.— In Michigan the contention that a sheriff who attaches chattel mortgaged property cannot be disturbed in his possession by

will be liable to the mortgagee as for a conversion, although he does not move or otherwise disturb the property.[51]

(B) *Levy Subject to Mortgage.* Mortgaged chattels may be attached also by levying on the right or equity of redemption, subject to the rights of the holder of the mortgage.[52]

c. On Realty — (I) *In General* — (A) *Rule Stated.* To constitute a valid levy upon land, the officer must do some act which shows that he has seized the property and exercised dominion over it and that is sufficient to put the owner or his tenant upon notice;[53] but owing to the difficulty of making a seizure of lands the law has invented the fiction of constructive seizure, which may be accomplished in various ways under the statutes of the different states.[54] The tenant is not thereby dispossessed,[55] and in the absence of statute requiring it it is not

the mortgagee until an inventory is completed, after which he has the right to fix the character of his levy, and whether in opposition or subject to the mortgage has been settled in the negative. Rosenfield *v.* Case, 87 Mich. 295, 49 N. W. 630 [*following* Merrill *v.* Denton, 73 Mich. 628, 41 N. W. 823].

51. Irwin *v.* McDowell, 91 Cal. 119, 27 Pac. 601; Rocheleau *v.* Boyle, 12 Mont. 590, 31 Pac. 533.

52. *Arizona.*—Mooney *v.* Broadway, (Ariz. 1886) 11 Pac. 114.

Kansas.— Myers *v.* Cole, 32 Kan. 138, 4 Pac. 169, holding that where the officer levies an attachment upon certain goods subject to a mortgage and takes possession of the same as against all persons except the mortgagee, and defendant in the attachment is wholly divested of his possession of the goods, such levy is sufficient as to defendant, whether it be sufficient or not as to some third person claiming some interest in the goods, and he may not be wholly and entirely divested of the possession.

Massachusetts.— Goulding *v.* Hair, 133 Mass. 78.

Michigan.— Hyde *v.* Shank, 77 Mich. 517, 43 N. W. 890; Merrill *v.* Denton, 73 Mich. 628, 41 N. W. 823; Wallen *v.* Rossman, 45 Mich. 333, 7 N. W. 901, the last case holding that an officer who levies subject to a mortgage can afterward change the levy, and the indorsement on his writ is the evidence of his final action.

Texas.— Ellis *v.* Bonner, 80 Tex. 198, 15 S. W. 1045, 26 Am. St. Rep. 731; Stiles *v.* Hill, 62 Tex. 429. And see Robinson *v.* Veal, 1 Tex. App. Civ. Cas. § 311.

See also GARNISHMENT.

Effect of waiver by mortgagor of right of possession.— The waiver by a mortgagor of his right to the possession of the property until the maturity of the mortgage debt, and his consent that the mortgagee may take immediate possession, cannot affect the rights of an attaching creditor who, if he regards the mortgage as valid, should levy subject to the rights of the mortgagee, and if he claims it to be void as to creditors and succeeds in showing such fact the agreement as to possession will not affect that question. Hyde *v.* Shank, 77 Mich. 517, 43 N. W. 890.

Levy on property conveyed in trust for specific purpose.— Upon the acceptance of a deed of trust by a creditor secured thereby who did not participate in fraud in its execution it became a valid lien upon the property to secure his claim, and the trustee was entitled to the possession; a subsequent levy of attachment by another creditor, made by seizure instead of by notice as provided by law, was void and created no lien. Sutton *v.* Simon, 91 Tex. 638, 45 S. W. 559.

53. Baker *v.* Aultman, 107 Ga. 339, 33 S. E. 423, 73 Am. St. Rep. 132; New England Mortg. Security Co. *v.* Watson, 99 Ga. 733, 27 S. E. 160; Smith *v.* Brown, 96 Ga. 274, 23 S. E. 849 (holding that in the absence of a provision for rendering constructive seizure of land complete by entry upon a docket kept for public inspection, the officer must either actually enter upon and take physical possession of the lands, or at least give the defendant or person in possession actual written notice in order to render the levy such notice of depending attachment proceedings as will render a judgment therein binding upon defendant); Rodgers *v.* Bonner, 55 Barb. (N. Y.) 9; Learned *v.* Vandenburgh, 8 How. Pr. (N. Y.) 77.

Mere determination in the mind of the officer is not enough unless evidenced by some unequivocal act clearly indicating his intention of appropriating or singling out certain real estate for the satisfaction of the debt. Shoonover *v.* Osborne, 111 Iowa 140, 82 N. W. 505, 82 Am. St. Rep. 496.

Record in recorder's office of no effect.— Where it did not appear by the return that any seizure of the lands in question was made, or that any change of possession, real or symbolical, was attempted, it was held that the record of the attachment in the office of the recorder of mortgages had no legal effect. Stockton *v.* Downey, 6 La. Ann. 581.

54. Smith *v.* Brown, 96 Ga. 274, 23 S. E. 849.

Statutory provisions as to manner of levy see *infra*, X, H, 1, c, (I), (B).

55. Shoonover *v.* Osborne, 111 Iowa 140, 82 N. W. 505, 82 Am. St. Rep. 496; Perrin *v.* Leverett, 13 Mass. 128; Watson *v.* Todd, 5 Mass. 271; Smith *v.* Collins, 41 Mich. 173, 2 N. W. 177.

Dispossession unauthorized in absence of express directions.— The statute authorizing attachment and sale of land of non-resident

necessary that the officer in levying upon land should take possession of the same,[56] enter upon it,[57] or even, it has been held, have the same in his view.[58]

(B) *Particular Modes* — (1) Declaration on Premises in Presence of Witnesses. In some states the levy may be made by the officer going to the house and lands of defendant, or to the person or house of the person in whose custody and possession defendant's property or estate may be, and then and there declaring in the presence of credible witnesses that he attaches the lands and tenements of such defendant at the suit of plaintiff.[59]

(2) Indorsement on Writ. In some jurisdictions a levy on real property may, by statute, be made by an indorsement of such levy on the writ,[60] or, as it is

and absent debtors for debt, by order of the chancellor, does not authorize the officer levying the same, unless he is so expressly directed, to turn out the defendant or his tenant from the possession, nor is such delivery of possession necessary to give efficacy to the levy of the writ. Wood *v.* Weir, 5 B. Mon. (Ky.) 544.

Officer gains no right of property or possession.— Where real estate is attached the officer serving the writ gains no right of property in or possession of the real estate by the levy. Travis *v.* Topeka Supply Co., 42 Kan. 625, 22 Pac. 991; Scott *v.* Manchester Print Works, 44 N. H. 507.

Seizure not vitiated by permitting widow of deceased to remain on property.— A seizure of property of a deceased husband by the sheriff, made by his going upon the property, giving notice of the seizure to all the occupants, and appointing one of the tenants as keeper, is not vitiated by the fact that he has permitted the widow to remain on the premises. Paul *v.* Hoss, 28 La. Ann. 852.

56. *Kentucky.*— Wood *v.* Weir, 5 B. Mon. (Ky.) 544.

Louisiana.— Budd *v.* Stinson, 20 La. Ann. 573; Boyle *v.* Ferry, 12 La. Ann. 425.

Massachusetts.— Ashmun *v.* Williams, 8 Pick. (Mass.) 402.

Mississippi.— Saunders *v.* Columbus L., etc., Ins. Co., 43 Miss. 583.

New York.—Burkhardt *v.* McClellan, 1 Abb. Dec. (N. Y.) 263, 15 Abb. Pr. (N. Y.) 243 note.

Tennessee.— Burr *v.* Graves, 4 Lea (Tenn.) 552.

Texas.— Miller *v.* Sims, 3 Tex. App. Civ. Cas. § 65.

United States.— Steam Stone-Cutter Co. *v.* Sears, 20 Blatchf. (U. S.) 23, 9 Fed. 8, construing Vermont statute.

Levy not prevented by military occupation of property.—Where real property was seized under a writ of attachment in the mode required by the Louisiana act of 1857, and it was occupied by military forces, this would not interfere with the seizure, for in such case actual possession by the sheriff was not necessary. Budd *v.* Stinson, 20 La. Ann. 573.

57. *Connecticut.*—Wales *v.* Clark, 43 Conn. 183.

Maine.— Crosby *v.* Allyn, 5 Me. 453.

Massachusetts.— Taylor *v.* Mixter, 11 Pick. (Mass.) 341; Perrin *v.* Leverett, 13 Mass. 128.

Michigan.— Campau *v.* Barnard, 25 Mich. 381.

Mississippi.— Saunders *v.* Columbus L., etc., Ins. Co., 43 Miss. 583.

New Hampshire.— Kittredge *v.* Bellows, 7 N. H. 399.

New York.— Rodgers *v.* Bonner, 45 N. Y. 379; Learned *v.* Vandenburgh, 7 How. Pr. (N. Y.) 379.

Tennessee.—Burr *v.* Graves, 4 Lea (Tenn.) 552.

Texas.— Sanger *v.* Trammell, 66 Tex. 361, 1 S. W. 378; Miller *v.* Sims, 3 Tex. App. Civ. Cas. § 65.

Virginia.— Robertson *v.* Hoge, 83 Va. 124, 1 S. E. 667.

Entry presumed where necessary.— Where an officer returns that he attached certain lands, if it be necessary for him to enter upon the land such act will be presumed to have been done. Crosby *v.* Allyn, 5 Me. 453.

58. *Iowa.*—Shoonover *v.* Osborne, 111 Iowa 140, 82 N. W. 505, 82 Am. St. Rep. 496.

Massachusetts.— Taylor *v.* Mixter, 11 Pick. (Mass.) 341.

Michigan.— Campau *v.* Barnard, 25 Mich. 381.

New York.— Rodgers *v.* Bonner, 45 N. Y. 379; Learned *v.* Vandenburgh, 7 How. Pr. (N. Y.) 379.

Virginia.— Robertson *v.* Hoge, 83 Va. 124, 1 S. E. 667.

59. People's Bank *v.* West, 67 Miss. 729, 7 So. 513, 8 L. R. A. 727; Drysdale *v.* Biloxi Canning Co., 67 Miss. 534, 7 So. 541; Tomlinson *v.* Stiles, 29 N. J. L. 426.

If the land is wild, uncultivated, or unoccupied, a return upon the writ by the proper officer that he has attached the land, giving a description thereof by numbers, metes, and bounds, or otherwise, will be a sufficient levy without going upon the land. People's Bank *v.* West, 67 Miss. 729, 7 So. 513, 8 L. R. A. 727.

If there be no person in possession he must make the declaration on the premises, and if there are several distinct lots lying in different places he must proceed in this manner with respect to each lot, but where the several lots constitute one farm this is unnecessary. Tomlinson *v.* Stiles, 29 N. J. L. 426. See *supra*, X, H, 1, a, (II).

60. *Alabama.*— Johnson *v.* Burnell, 12 Ala. 743.

Iowa.— Schoonover *v.* Osborne, (Iowa 1899) 79 N. W. 372; Melhop *v.* Meinhart, 70 Iowa 685, 28 N. W. 545.

worded in some reported cases, by an indorsement on the officer's return upon the process.[61]

(3) Posting Copy of Writ or Order Upon Property. It is a common provision in a number of the states that where there is no occupant of the property a copy of the writ, and description, and notice that the property is attached shall be posted in a conspicuous place on such property.[62]

(4) Service of Writ on Defendant. In some jurisdictions the statutes provide for service of a copy of the writ upon defendant in the action if he can be found in the county.[63]

(5) Service of Writ and Description on Occupant. In other states it is provided that a copy of the writ, usually accompanied by a description of the property attached and a notice that it is attached, shall be left with the occupant of the property.[64]

Massachusetts.— Taylor *v.* Mixter, 11 Pick. (Mass.) 341 [*following* Perrin *v.* Leverett, 13 Mass. 128].

Missouri.— Lackey *v.* Seibert, 23 Mo. 85.

New York.—Learned *v.* Vandenburgh, 7 How. Pr. (N. Y.) 379.

Texas.— Riordan *v.* Britton, 69 Tex. 198, 7 S. W. 50, 5 Am. St. Rep. 37; Sanger *v.* Trammell, 66 Tex. 361, 1 S. W. 378; Hancock *v.* Henderson, 45 Tex. 479; Woldert *v.* Nedderhut Packing Provision Co., 18 Tex. Civ. App. 602, 46 S. W. 378; Miller *v.* Sims, 3 Tex. App. Civ. Cas. § 65.

Virginia.— Cirode *v.* Buchanan, 22 Gratt. (Va.) 205; Clark *v.* Ward, 12 Gratt. (Va.) 440.

No lien until indorsement made.— Under Tex. Rev. Stat. art. 2291, providing that in order to attach real estate, it shall not be necessary for the officer to go upon the ground "but it shall be sufficient for him to indorse such levy upon the writ," it has been held that the lien does not exist until such indorsement is made. Sanger *v.* Trammell, 66 Tex. 361, 1 S. W. 378.

61. Pond *v.* Baker, 55 Vt. 400; Robertson *v.* Hoge, 83 Va. 124, 1 S. E. 667.

62. *California.*— Davis *v.* Baker, 88 Cal. 106, 25 Pac. 1108; Davis *v.* Baker, 72 Cal. 494, 14 Pac. 102; Schwartz *v.* Cowell, 71 Cal. 306, 12 Pac. 252; Watt *v.* Wright, 66 Cal. 202, 5 Pac. 91; Sharp *v.* Baird, 43 Cal. 577; Main *v.* Tappener, 43 Cal. 206; Wheaton *v.* Neville, 19 Cal. 42; Ritter *v.* Scannell, 11 Cal. 238, 70 Am. Dec. 775.

Idaho.— Williams *v.* Olden, (Ida. 1900) 61 Pac. 517; Hailey First Nat. Bank *v.* Sonnelitner, (Ida. 1898) 51 Pac. 993.

Kansas.— Travis *v.* Topeka Supply Co., 42 Kan. 625, 22 Pac. 991; Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911.

Nebraska.— Westervelt *v.* Hagge, 61 Nebr. 647, 85 N. W. 852; Shoemaker *v.* Harvey, 43 Nebr. 75, 61 N. W. 109.

Oregon.— Hall *v.* Stevenson, 19 Oreg. 153, 23 Pac. 887, 20 Am. St. Rep. 803.

United States.—Mickey *v.* Stratton, 5 Sawy. (U. S.) 475, 17 Fed. Cas. No. 9,530, 11 Chic. Leg. N. 314.

Omission fatal to validity of levy.— Where plaintiff in ejectment claims title through an attachment, if it appears that the officer to whom it was directed failed to comply with the requirements of Cal. Code Civ. Proc. § 542, requiring that a copy of the attachment with a description of the property attached and notice that it is attached be left with the occupant of the property or posted upon it, the omissions are fatal, and plaintiff cannot recover. Schwartz *v.* Cowell, 71 Cal. 306, 12 Pac. 252; Watt *v.* Wright, 66 Cal. 202, 5 Pac. 91. And see Mickey *v.* Stratton, 5 Sawy. (U. S.) 475, 17 Fed. Cas. No. 9,530, 11 Chic. Leg. N. 314.

Effect of failure to post on each of several lots.— When an order is levied upon a large number of adjoining town lots failure to place a copy on each separate lot does not render the service void. Blake *v.* Rider, 36 Kan. 693, 14 Pac. 280. But see Hall *v.* Stevenson, 19 Oreg. 153, 23 Pac. 887, 20 Am. St. Rep. 803, holding that posting a copy on one tract will not be sufficient in case of levy on separate and distinct tracts.

Presumption that there was no occupant.— When the officer's return shows that he at a certain time attached certain real estate, and posted a copy of the order in a conspicuous place on the premises, as provided by Kan. Civ. Code, § 198, where there is no occupant, in the absence of anything to the contrary it will be presumed that the officer did his duty and that there was no occupant. Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911. *Contra*, Shoemaker *v.* Harvey, 43 Nebr. 75, 61 N. W. 109.

Sufficient compliance with requirement to post in "conspicuous place."— Where a writ of attachment was posted on the side of a house next a street, the house being near a corner, and there being a vacant lot opposite the side of the house, and two witnesses testify that the notice could be easily and plainly seen by a passer-by, a finding that it was posted in "a conspicuous place," as required by Cal. Code Civ. Proc. § 542, is warranted. Davis *v.* Baker, 88 Cal. 106, 25 Pac. 1108.

63. Thompson *v.* White, 25 Colo. 226, 54 Pac. 718; Great West Min. Co. *v.* Woodmas Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; Grollman *v.* Lipsitz, 43 S. C. 329, 21 S. E. 272.

64. *California.*— Davis *v.* Baker, 72 Cal. 494, 14 Pac. 102; Schwartz *v.* Cowell, 71 Cal.

(c) *Recording.* In some jurisdictions in addition to someone of the foregoing steps, and in others in lieu thereof, it is provided that the levying officer shall file with some designated officer a copy of the writ, certificate of attachment, or the like, together with a description of the property attached and a notice that it is attached.[65] In some jurisdictions these provisions constitute an essential part of a

306, 12 Pac. 252; Sharp *v.* Baird, 43 Cal. 577; Main *v.* Tappener, 43 Cal. 206.

Idaho.— Williams *v.* Olden, (Ida. 1901) 61 Pac. 517; Hailey First Nat. Bank *v.* Sonnelitner, (Ida. 1898) 51 Pac. 993.

Kansas.— Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911; Blake *v.* Rider, 36 Kan. 693, 14 Pac. 280; Wilkins *v.* Tourtellott, 28 Kan. 825.

Kentucky.— Thomas *v.* Mahone, 9 Bush (Ky.) 111; Mannix *v.* Lacey, 7 Ky. L. Rep. 440.

Nebraska.— Westervelt *v.* Hagge, 61 Nebr. 647, 85 N. W. 852.

Oregon.— Hall *v.* Stevenson, 19 Oreg. 153, 23 Pac. 887, 20 Am. St. Rep. 803.

Pennsylvania.— Vandergrift's Appeal, 83 Pa. St. 126.

United States.—Mickey *v.* Stratton, 5 Sawy. (U. S.) 475, 17 Fed. Cas. No. 9,530, 11 Chic. Leg. N. 314.

Presumption of delivery to proper party.— In support of a writ of attachment, where the return recites that the levy was made on certain lands "by delivering a true copy of the within order of attachment to Bridget Cook, she being the wife of James Cook, who was not found, and a white person over the age of sixteen years old and living on the land described," it will be presumed that Bridget Cook was the occupant of the land. Mannix *v.* Lacey, 7 Ky. L. Rep. 440.

The description of the attached property, while it need not be technically correct in every part, must be sufficient to give notice to a reasonably prudent man as to the identity of the property attached. It must describe the same sufficiently to identify it so that a purchaser can tell from the notice itself what property he is buying, and parol evidence is not admissible to help out a defective description. Hailey First Nat. Bank *v.* Sonnelitner, (Ida. 1898) 51 Pac. 993.

65. *California.*— Main *v.* Tappener, 43 Cal. 206; Wheaton *v.* Neville, 19 Cal. 42; Ritter *v.* Scannell, 11 Cal. 238, 70 Am. Dec. 775.

Colorado.— Thompson *v.* White, 25 Colo. 226, 54 Pac. 718; Raynolds *v.* Ray, 12 Colo. 108, 20 Pac. 4; Great West Min. Co. *v.* Woodmas Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204.

Connecticut.—Wales *v.* Clark, 43 Conn. 183.

Idaho.— Hailey First Nat. Bank *v.* Sonnelitner, (Ida. 1898) 51 Pac. 993.

Illinois.— Worcester Nat. Bank *v.* Cheeney, 87 Ill. 602; Hall *v.* Gould, 79 Ill. 16; Gaty *v.* Pittman, 11 Ill. 20.

Indiana.— Porter *v.* Byrne, 10 Ind. 146, 71 Am. Dec. 305.

Kansas.— Travis *v.* Topeka Supply Co., 42 Kan. 625, 22 Pac. 991.

Maine.— Bacon *v.* Denning, 33 Me. 171.

Maryland.— Herzberg *v.* Warfield, 76 Md. 446, 25 Atl. 664; Waters *v.* Duvall, 11 Gill & J. (Md.) 37, 33 Am. Dec. 693; Fitzhugh *v.* Hellen, 3 Harr. & J. (Md.) 206.

Massachusetts.— Pomroy *v.* Stevens, 11 Metc. (Mass.) 244.

Michigan.— People *v.* Colerick, 67 Mich. 362, 34 N. W. 683; Campau *v.* Barnard, 25 Mich. 381.

Mississippi.—Saunders *v.* Columbus L., etc., Ins. Co., 43 Miss. 583.

Missouri.— Winningham *v.* Trueblood, 149 Mo. 572, 51 S. W. 399; Bryant *v.* Duffy, 128 Mo. 18, 30 S. W. 317; Stanton *v.* Boschert, 104 Mo. 393, 16 S. W. 393; Lackey *v.* Seibert, 23 Mo. 85; Richards *v.* Harrison, 71 Mo. App. 224.

Nebraska.— Adams *v.* Boulware, 1 Nebr. 470.

New Hampshire.— Kittredge *v.* Bellows, 7 N. H. 399; Pemigewasset Bank *v.* Burnham, 5 N. H. 275.

New York.— Hodgman *v.* Barker, 60 Hun (N. Y.) 156, 14 N. Y. Suppl. 574, 38 N. Y. St. 578, 20 N. Y. Civ. Proc. 341; Fitzgerald *v.* Blake, 42 Barb. (N. Y.) 513.

North Carolina.— Grier *v.* Rhyne, 67 N. C. 338.

Oregon.— Dickson *v.* Back, 32 Oreg. 217, 51 Pac. 727; Rhodes *v.* McGarry, 19 Oreg. 222, 23 Pac. 971.

Tennessee.— Brown *v.* Dickson, 2 Humphr. (Tenn.) 394, 37 Am. Dec. 560.

Texas.— Riordan *v.* Britton, 69 Tex. 198, 7 S. W. 50, 5 Am. St. Rep. 37; Davis *v.* John V. Farwell Co., (Tex. Civ. App. 1899) 49 S. W. 656; Woldert *v.* Nedderhut Packing Provision Co., 18 Tex. Civ. App. 602, 46 S. W. 378.

Vermont.— Pond *v.* Baker, 55 Vt. 400; Burchard *v.* Fair Haven, 48 Vt. 327; Washburn *v.* New York, etc., Min. Co., 41 Vt. 50; Braley *v.* French, 28 Vt. 546.

Virginia.— Raub *v.* Otterback, 92 Va. 517, 23 S. E. 883; Robertson *v.* Hoge, 85 Va. 124, 1 S. E. 667; Cirode *v.* Buchanan, 22 Gratt. (Va.) 205; Clark *v.* Ward, 12 Gratt. (Va.) 440.

Acts to be performed in statutory order.— Where land is attached under a statute declaring that the levy shall be made by leaving a copy of the writ with the occupant, or if there be no occupant by posting a copy on the land and filing a copy, with a description of the land attached, in the county recorder's office, the several acts required to complete the service must be done in the order named in the statute. Main *v.* Tappener, 43 Cal. 206. *Compare* Raynolds *v.* Ray, 12 Colo. 108, 20 Pac. 4, holding that an attachment of real estate, by filing a copy of the attachment, with a description of the property attached, in the county recorder's office, creates a valid lien, although no service is had on defendant until afterward.

Effect of mistake in describing land.—

valid levy on real property,[66] while in others they merely provide a method of giving notice of the attachment lien and a compliance therewith is no part of the levy.[67]

(II) *Interests in Land.* In some jurisdictions the terms "real property" or "land" are held to embrace all titles, legal or equitable, and any interest in land, either legal or equitable, is subject to attachment.[68] Where this is the case, it would seem that in the absence of express provisions as to levy, a levy upon an interest in land may be sufficiently made in the same manner as is prescribed for

Where one lot of land is intended to be levied on by an attachment, but the entry of the officer describes another lot by mistake, there has been in fact no levy made on the right lot and the judgment on the attachment may be set aside. Wardlaw *v.* Wardlaw, 50 Ga. 544.

Entry on attachment docket.— Ga. Code, § 4532, declares: "In all cases it shall be the duty of the officer levying attachments to levy them in the order in which they came in his hands, and it shall be his duty to enter upon the same the year, month, day of the month, and hour of the day on which he made the levy. Said attachment must be entered on the execution or attachment docket by the clerk of the superior court, in order to be good against third persons, where the levy is upon land." Deveney *v.* Burton, 110 Ga. 56, 60, 35 S. E. 268.

Requirement satisfied by leaving copy in proper office.— An attachment of real estate is effected by the officer's leaving in the town-clerk's office a copy of the writ with his return of such attachment thereon. The making of the record or entries respecting it, which it is the duty of the town-clerk to make, does not constitute any part of the attachment itself. Braley *v.* French, 28 Vt. 546.

66. *California.*—Main *v.* Tappener, 43 Cal. 206; Wheaton *v.* Neville, 19 Cal. 42.

Colorado.— Thompson *v.* White, 25 Colo. 226, 54 Pac 718.

Idaho.— Hailey First Nat. Bank *v.* Sonnelitner, (Ida. 1898) 51 Pac. 993.

Illinois.—A levy of attachment on real estate creates no lien until a certificate of the levy is duly filed in the office of the recorder of the county in which the land is situated. Such a lien cannot be created by simply giving notice to a purchaser. Hall *v.* Gould, 79 Ill. 16; Gaty *v.* Pittman, 11 Ill. 20; Clayburg *v.* Ford, 3 Ill. App. 542. See also Martin *v.* Dryden, 6 Ill. 187.

Michigan.— Davis Sewing Mach. Co. *v.* Whitney, 61 Mich. 518, 28 N. W. 674.

Missouri.— Winningham *v.* Trueblood, 149 Mo. 572, 51 S. W. 399; Stanton *v.* Boschert, 104 Mo. 393, 16 S. W. 393; Richards *v.* Harrison, 71 Mo. App. 224.

New Hampshire.— Kittredge *v.* Bellows, 7 N. H. 399; Pemigewasset Bank *v.* Burnham, 5 N. H. 275.

Texas.— Woldert *v.* Nedderhut Packing Provision Co., 18 Tex. Civ. App. 602, 46 S. W. 378.

Virginia.— Where an attaching creditor fails to record or docket his attachment as required by Code (1873), c. 182, § 5, the purchaser for a valuable consideration of the land subsequent to, and without notice of, the attachment holds the land free from the lien of the same. Cammack *v.* Soran, 30 Gratt. (Va.) 292.

67. Coffin *v.* Ray, 1 Metc. (Mass.) 212; Woldert *v.* Nedderhut Packing Provision Co., 18 Tex. Civ. App. 602, 46 S. W. 378.

Notice by record unnecessary to bind parties with knowledge.— Under the general rule that no notice by record is necessary to bind parties who have actual knowledge of facts charging them in law with notice, when, on the trial of a claim to land levied upon under an execution issued from a judgment rendered in an attachment case, it appeared that after the declaration in attachment had been filed claimant, who was the father of defendant in attachment, with knowledge that the attachment had been issued and that the son had no property except that in controversy in the claim case, took from him a deed thereto, it was held error to direct a verdict in claimant's favor, even though the entry respecting the attachment, on the attachment docket, did not embrace a description of the property. Deveney *v.* Burton, 110 Ga. 56, 35 S. E. 268.

Who affected with constructive notice.—An attachment levied on real estate is constructive notice only to such persons as may acquire, from parties or privies to the action, subsequent interests in the attached realty. Travis *v.* Topeka Supply Co., 42 Kan. 625, 22 Pac. 991. But an entry in the encumbrance book of the fact that an attachment has been levied on land in an action against one not the holder of the legal title does not constitute constructive notice to the purchaser of such title. Bailey *v.* McGregor, 46 Iowa 667 [*citing* Salem Farmers' Nat. Bank *v.* Fletcher, 44 Iowa 252; Eldred *v.* Drake, 43 Iowa 569].

Notice by recording attachment writ against wife under her maiden name.—Where attached real estate stood on the records in the maiden name of a married woman, and she was sued subsequently to her marriage under that name, recording the attachment was sufficient notice to enable the attaching creditor to prevail over subsequent purchasers of the lands. Cleaveland *v.* Boston Five Cents Sav. Bank, 129 Mass. 27.

68. Fish *v.* Fowlie, 58 Cal. 373; Louisville Bank *v.* Barrick, 1 Duv. (Ky.) 51. See also *supra*, IX, A, 3, b.

the levy of an attachment upon lands themselves.[69] In other jurisdictions, however, it is held that an equitable interest in realty can be attached only by bill in equity.[70]

2. On Property Held Jointly — a. By Partners. In an attachment against one or more members of a firm the officer must proceed to levy the same upon property owned by them jointly with others in the same manner that he is required to do under an execution.[71] Partners having a community of interest in every part as well as in the whole of the partnership effects, an effectual seizure can only be made of the undivided interest of a partner by taking possession of the entire property attached for preservation to abide the result of the suit;[72] but this power is to be exercised as far as possible in harmony with the rights of other persons. Therefore, when the sheriff exceeds this limit, and instead of levying on the debtor's interest levies upon and seizes the property as the sole property of the debtor, he is a trespasser.[73]

b. By Tenants in Common — (I) *Personalty.* An officer in levying upon an interest of a tenant in common in personal property has the right to take possession of the property,[74] but the officer's authority does not extend

69. See Wallace *v.* Monroe, 22 Ill. App. 602; Bullene *v.* Hiatt, 12 Kan. 98, 20 Kan. 557; Louisville Bank *v.* Barrick, 1 Duv. (Ky.) 51; Burr *v.* Graves, 4 Lea (Tenn.) 552.

A leasehold being a chattel real can be seized and sold only as realty, and the levy upon it can be only by description of the realty out of which it is carved. Vandergrift's Appeal, 83 Pa. St. 126; Titusville Novelty Iron Works' Appeal, 77 Pa. St. 103.

70. Lane *v.* Marshall, 1 Heisk. (Tenn.) 30 [*followed* in Hillman *v.* Werner, 9 Heisk. (Tenn.) 586]. See also Herndon *v.* Pickard, 5 Lea (Tenn.) 702.

71. Smith *v.* Orser, 43 Barb. (N. Y.) 187.

Must be levied as in case of tenancy in common.— In Vermont the property of partners is attached as if they were tenants in common. Reed *v.* Shepardson, 2 Vt. 120, 19 Am. Dec 697, where it was held that the interest of one partner in the goods of the firm cannot be attached to any avail without taking the goods themselves, and that the officer thus attaching is not a trespasser by taking the undivided portion of a separate debtor, though the firm proved to be insolvent.

Must be levied as upon individual property.—A writ of attachment against an individual member of a copartnership can be levied only upon his interest in the partnership property in the same manner as levies are made upon individual property by virtue of such writs. Cogswell *v.* Wilson, 17 Oreg. 31, 21 Pac. 388.

72. Lee *v.* Bullard, 3 La. Ann. 462; Hacker *v.* Johnson, 66 Me. 21; Douglas *v.* Winslow, 20 Me. 89; Atkins *v.* Saxton, 77 N. Y. 195; Zoller *v.* Grant, 56 N. Y. Super. Ct. 279, 3 N. Y. Suppl. 539, 19 N. Y. St. 311; Shaver *v.* White, 6 Munf. (Va.) 110, 8 Am. Dec. 730.

Right to attach partner's interest in specific portion of goods.— A creditor of one partner of a firm may attach such partner's interest in a specific portion of a stock of goods belonging to the firm, and is not required in order to render the attachment regular to take the partner's interest in the entire stock of goods. Fogg *v.* Lawry, 68 Me. 78, 79, 28 Am. Rep. 19, where the court said: "A private creditor might not be justified in attaching his debtor's interest in an entire stock of goods of a partnership, if the demand is small and the stock large, and the debtor's interest therein much more than necessary to satisfy all claims against it. We see no more necessity of attaching the debtor's interest in the whole of a particular stock, than there would be to attach his interest in all the property of the firm of which he is a member, however extended and situated."

Attachment of entire property subject to paramount claims of firm creditors.— An officer can make an actual attachment of a debtor's interest in the goods of the partnership and hold the entire property in his hands on account of the interest so attached, subject to the paramount claims of the creditors of the firm. Hacker *v.* Johnson, 66 Me. 21 [*following* Douglas *v.* Winslow, 20 Me. 89].

73. Atkins *v.* Saxton, 77 N. Y. 195; Zoller *v.* Grant, 56 N. Y. Super. Ct 279, 3 N. Y. Suppl. 539, 19 N. Y. St. 311; Snell *v.* Crowe, 3 Utah 26, 5 Pac. 522.

74. Veach *v.* Adams, 51 Cal. 609. And see Bernal *v.* Hovious, 17 Cal. 541, 79 Am. Dec. 147; Waldman *v.* Broder, 10 Cal. 378; Gaar *v.* Hurd, 92 Ill. 315. See also Coulson *v.* Panhandle Nat. Bank, 54 Fed. 855, 13 U. S. App. 39, 4 C. C. A. 616 [*distinguishing* Brown *v.* Bacon, 63 Tex. 595; Claggett *v.* Kilbourne, 1 Black (U. S.) 346, 17 L. ed. 213, holding that a provision of the Texas statute for the levy of attachment where defendant has an interest, but to the possession of which he is not entitled, by serving notice upon the person entitled to possession, does not apply to a defendant who is a joint owner of chattels and has possession of the same. In such a case the proper method of levy is by taking possession of defendant's half interest]. See *supra*, IX, F, 2.

Part owners of a ship are tenants in common and not joint tenants or copartners, and one part owner has an interest in the prop-

to making a division of the property so as to set apart the share of the tenant sued.[75]

(II) *Realty.* An attachment upon real property of tenants in common should be levied upon the debtor's undivided share in whole or in part.[76]

I. Amount of Property to Be Attached — 1. In General. In levying an attachment, the officer should take so much of the property not exempt as will be sufficient to pay the debt demanded with costs,[77] interest, and incidental expenses,[78] and it has been held that there should also be a proper allowance for the depreciation in value incident to the property seized and to the forced sale.[79] The officer must, however, decide for himself as to the extent and sufficiency of the seizure,[80] exercising a cautious and reasonable discretion such as should influence the conduct of prudent and discreet men in the management of their own affairs.[81]

2. Excessive Levy — a. In General. Although a levying officer may be liable to an action by the party injured,[82] an attachment is not necessarily rendered void by the mere fact of being excessive.[83] The question as to whether or not a levy of an attachment was excessive cannot be raised on a motion to quash,[84] and can be raised only by the parties to the action.[85] The question as to what constitutes an excessive levy is a question of fact and is properly left for the jury.[86]

b. Remedy For. It has been held that where the officer levies upon a larger amount of property than is necessary this will not authorize a release of the property on the ground of excessive levy, but that in such case it is the officer's

erty on which an attachment may be levied without the necessity of executing the same, as in case of partnership, by service of summons of garnishment in order to reach his interest. Walter *v.* Kierstead, 74 Ga. 18.

75. Veach *v.* Adams, 51 Cal. 609.

76. Brown *v.* Bailey, 1 Metc. (Mass.) 254, holding that a levy on a specified portion of the estate by metes and bounds is improper, since this would be an encroachment upon the right of the tenant to have partition of the whole tenement; that such levy was not void but voidable only by the other cotenants, and that where the other cotenants release, or if upon a partition their full shares are set off in other parts of the common estate, and the part levied on is assigned to the party whose share has thus been levied on by metes and bounds, such partition operates by way of estoppel and release because no one has any longer a right to contest its validity.

77. Dreisbach *v.* Mechanics' Nat. Bank, 113 Pa. St. 554, 6 Atl. 147; Hughes *v.* Tennison, 3 Tenn. Ch. 641; Dewitt *v.* Oppenheimer, 51 Tex. 103. See also Bradford *v.* McLellan, 23 Me. 302.

78. Dewitt *v.* Oppenheimer, 51 Tex. 103.

79. Dewitt *v.* Oppenheimer, 51 Tex. 103.

80. Fitzgerald *v.* Blake, 42 Barb. (N. Y.) 513.

81. Dewitt *v.* Oppenheimer, 51 Tex. 103.

82. Liability of officer for excessive levy see Sheriffs and Constables.

83. Merrill *v.* Curtis, 18 Me. 272; Backus *v.* Barber, 107 Mich. 468, 65 N. W. 379; McConnell *v.* Kaufman, 5 Wash. 686, 32 Pac. 782.

84. Branshaw *v.* Tinsley, 4 Tex. Civ. App. 131, 23 S. W. 184.

85. Connelly *v.* Edgerton, 22 Nebr. 82, 34 N. W. 76. And see also Merrill *v.* Curtis, 18 Me. 272.

86. Backus *v.* Barber, 107 Mich. 468, 65 N. W. 379.

Effect of conflicting evidence as to value of property attached.— Where the amount claimed in the affidavit was one hundred dollars and there is evidence that the property attached was worth twelve hundred dollars, also other evidence which tends to greatly reduce the value thus placed upon the goods by the sheriff, and no question as to the excessiveness of the levy is raised in the court below, the appellate court cannot say that there has been an excessive levy and that the attachment afforded no justification or warrant for seizing the property. Oliver *v.* Town, 28 Wis. 328.

Facts constituting an excessive levy.— The levy of an attachment for seventy-six dollars and seventy-four cents and the probable cost of the proceeding upon five head of racing horses valued at one thousand two hundred and twenty-five dollars was oppressively excessive, and in no event should the attaching creditors have been permitted to retain more than sufficient property to satisfy the debt. Anderson *v.* Heile, (Ky. 1901) 64 S. W. 849.

Instruction withdrawing certain facts from the jury held not fundamentally erroneous.— An attachment was levied on a stock of merchandise by actual seizure and on cattle and land by notice and indorsement on the writ. A charge that in reckoning whether the levy was excessive the value of the cattle and land was not to be taken into account was held not to be so fundamentally erroneous as to justify reversal. Baines *v.* Jemison, (Tex. Civ. App. 1893) 27 S. W. 182.

duty to retain sufficient to satisfy the claim and to discharge the balance.[87] The usual method of obtaining relief is by an application by the debtor, or his successor in interest, to the court from which the attachment issued,[88] which, after investigation as to the value of the property, may discharge the attachment as to so much thereof as is in excess in value of the damages alleged.[89]

J. Inventory and Appraisal — 1. Necessity For. It is commonly required that the officer making a levy must make and return an inventory and an appraisal of the property attached;[90] but where the scheduling and appraising of property

87. Wadsworth *v.* Walliker, 51 Iowa 605, 2 N. W. 420.

88. Hughes *v.* Tennison, 3 Tenn. Ch. 641; McConnell *v.* Kaufman, 5 Wash. 686, 32 Pac. 782.

89. Tucker *v.* Green, 27 Kan. 355.

Election by complainant as to property on which he will retain the levy.— In Tennessee the court is authorized, upon the answer or petition of defendants, to reduce an excessive levy of an attachment by a release of property in excess of complainant's demand and costs, complainant being allowed to elect on which property he will retain the levy, and in the absence of such election by proportioning the burden of the debt upon the defendants where there are several claiming in different rights, and each defendant may replevy the property claimed by him, or become the receiver upon proper bond. Hughes *v.* Tennison, 3 Tenn. Ch. 641.

90. *Alabama.*— Toulmin *v.* Lesesne, 2 Ala. 359.

Arkansas.— Pearce *v.* Baldridge, 7 Ark. 413; Desha *v.* Baker, 3 Ark. 509.

Indiana.— McNamara *v.* Ellis, 14 Ind. 516; Leach *v.* Swann, 8 Blackf. (Ind.) 68.

Kansas.— Carson *v.* Golden, 36 Kan. 705, 14 Pac. 166; Douglass *v.* Hill, 29 Kan. 527; Gapen *v.* Stephenson, 18 Kan. 140; Dodson *v.* Wightman, 6 Kan. App. 835, 49 Pac. 790; Emerson *v.* Thatcher, 6 Kan. App. 325, 51 Pac. 50; Harding *v.* Kansas City Guaranty L. & T. Co., 3 Kan. App. 519, 43 Pac. 835.

Louisiana.— Woodworth *v.* Lemmerman, 9 La. Ann. 524.

Maine.— Kennedy *v.* Pike, 43 Me. 423; Snow *v.* Cunningham, 36 Me. 161; Moulton *v.* Chadborne, 31 Me. 152; Chase *v.* Bradley, 26 Me. 531.

Massachusetts.— Adams *v.* Wheeler, 97 Mass. 67; McGough *v.* Wellington, 6 Allen (Mass.) 505.

Michigan.— Tunningly *v.* Butcher, 106 Mich. 35, 63 N. W. 994; White *v.* Prior, 88 Mich. 647, 50 N. W. 655; Federspiel *v.* Johnstone, 87 Mich. 303, 49 N. W. 581; Langtry *v.* Wayne Cir. Judges, 68 Mich. 451, 36 N. W. 211, 13 Am. St. Rep. 352; Michels *v.* Stork, 44 Mich. 2, 5 N. W. 1034; Grover *v.* Buck, 34 Mich. 519; Stearns *v.* Taylor, 27 Mich. 88; Wyckoff *v.* Wyllis, 8 Mich. 47.

Montana.— Silver Bow Min., etc., Co. *v.* Lowry, 5 Mont. 618, 6 Pac. 62.

New Hampshire.— Huntington *v.* Blaisdell, 2 N. H. 317; Odiorne *v.* Colley, 2 N. H. 66, 9 Am. Dec. 39.

New Jersey.— Tomlinson *v.* Stiles, 29 N. J. L. 426 [*affirming* 28 N. J. L. 201].

New York.— Kuhlman *v.* Orser, 5 Duer (N. Y.) 242; Watts *v.* Willett, 2 Hilt. (N. Y.) 212; McGinn *v.* Ross, 11 Abb. Pr. N. S. (N. Y.) 20; Greenleaf *v.* Mumford, 19 Abb. Pr. (N. Y.) 469, 30 How. Pr. (N. Y.) 30; Taacks *v.* Schmidt, 18 Abb. Pr. (N. Y.) 307; Learned *v.* Vandenburgh, 7 How. Pr. (N. Y.) 379.

Ohio.— Mitchell *v.* Eyster, 7 Ohio 257; Shelden *v.* Sharpless, 2 Ohio Dec. (Reprint) 1, 1 West. L. Month. 42; Grussell *v.* Poll, 7 Ohio S. & C. Pl. Dec. 428, 5 Ohio N. P. 439.

Pennsylvania.— Wilson *v.* Shapiro, 2 Pa. Dist. 367, 12 Pa. Co. Ct. 466.

Utah.— Snell *v.* Crowe, 3 Utah 26, 5 Pac. 522.

Wisconsin.— Hopkins *v.* Langton, 30 Wis. 379.

See 5 Cent. Dig. tit. "Attachment," § 505.

Appraisal unnecessary except where delivery bond is given.— In Smith *v.* Coopers, 9 Iowa 376, it was held that an appraisal of property levied on by the sheriff is not essential to make valid the attachment, except where a delivery bond is given.

Essential to valid judgment or sale.— Without an inventory or appraisal no valid judgment in attachment or sale thereunder can be rendered or made. Tomlinson *v.* Stiles, 28 N. J. L. 201. And see McNamara *v.* Ellis, 14 Ind. 516.

Lien attaches only to property shown in inventory.— When the return of the sheriff on an order of attachment shows that he levied an order on certain property designated in the inventory and appraisal, and returns the same with the order, and the inventory and appraisal contain only a description of certain articles of personal property, the lien of the attachment does not attach to any other property except such as is shown in the inventory. Harding *v.* Kansas City Guaranty L. & T. Co., 3 Kan. App. 519, 43 Pac. 835.

Necessity for schedule obviated by specific description in return.— Where the officer in his return to a writ of attachment gives a specific description of the property attached a schedule reiterating the same facts is unnecessary. Pearce *v.* Baldridge, 7 Ark. 413.

Provision as to appraisal held inapplicable to vessel.— Me. Rev. Stat. c. 114, §§ 53–57, in regard to the appraisal of attached property, does not apply to a vessel all fitted and about starting to sea under contract to carry freight, at the port of the owner's residence. Moulton *v.* Chadborne, 31 Me. 152.

Value determined by appraisal at time of levy.— Where land subject to attachment is

taken on attachment is for the protection and benefit of defendant,[91] if such schedule and appraisal is omitted by order or consent of defendant, no rights of other creditors being involved, he will not be heard to object to such omission,[92] and where the provision requiring the inventory is considered as being for the benefit of a creditor it can only be enforced by him.[93] On attachment against an absconding debtor where there was an appraisal at the time the property was attached, a second appraisal after judgment and before sale is unnecessary.[94]

2. WHO MAY MAKE. The manner of making such inventory and appraisal is dependent upon statutes. In some jurisdictions the officer is required to make the inventory and appraisal with the assistance of a specified number of credible and disinterested householders,[95] who shall be first sworn by the officer.[96] In others he is required to make an inventory in the presence of two witnesses,[97] two residents of the county,[98] or by two disinterested freeholders.[99]

3. TIME OF MAKING. It is not essential to the validity of a levy that the inventory and appraisal should be made immediately,[1] but it will be sufficient if the same is made within a reasonable time.[2]

transferred to a trustee, and timber cut therefrom before levy under a judgment recovered, the attachment creditor is not entitled to the proceeds of the timber paid to the trustee, since the value of property attached is determined by appraisal at the time of levy and not as of the time of the service of the attachment. Chase *v.* Bradley, 26 Me. 531.

91. Shelden *v.* Sharpless, 2 Ohio Dec. (Reprint) 1, 1 West. L. Month. 42; Grussell *v.* Poll, 7 Ohio S. & C. Pl. Dec. 428, 5 Ohio N. P. 439.

92. Grussell *v.* Poll, 7 Ohio S. & C. Pl. Dec. 428, 5 Ohio N. P. 439.

93. McGinn *v.* Ross, 11 Abb. Pr. N. S. (N. Y.) 20.

94. Donely *v.* McGrann, 1 Harr. (Del.) 453.

95. One.— McNamara *v.* Ellis, 14 Ind. 516; Leach *v.* Swann, 8 Blackf. (Ind.) 68; Thompson *v.* Eastburn, 16 N. J. L. 100.

Two.— Harding *v.* Kansas City Guaranty L. & T. Co., 3 Kan. App. 519, 43 Pac. 835; Taacks *v.* Schmidt, 18 Abb. Pr. (N. Y.) 307.

Appraisal by different persons under same writ.— Where different pieces of property are attached under the same writ different persons may be called in to assist in the appraisal thereof. Will *v.* Whitney, 15 Ind. 194.

Effect of failure of officer to participate in appraisal.— The failure of the under-sheriff to participate with the appraisers in the appraisal of the property is not such an omission in the service of the writ as required the court to quash it or set aside the levy as to all the property. Emerson *v.* Thatcher, 6 Kan. App. 325, 51 Pac. 50.

A mistake in summoning only one householder instead of two as required will not vitiate the attachment. Gapen *v.* Stephenson, 18 Kan. 140.

Proper appraisal question for court.— Whether attached property has been appraised with "the assistance of a disinterested and credible householder" of the proper county is a question for the court in determining whether such property should be ordered to be sold, or an ordinary judgment rendered only. Foster *v.* Dryfus, 16 Ind. 158.

96. Hopkins *v.* Langtry, 30 Ark. 379; Harding *v.* Kansas City Guaranty L. & T. Co., 3 Kan. App. 519, 43 Pac. 835. *Contra*, Will *v.* Whitney, 15 Ind. 194.

Right of deputy sheriff to administer oath.—Where a deputy sheriff serves an order of attachment he may administer the oath to the appraisers of the property attached. Dunlap *v.* McFarland, 25 Kan. 488.

97. Woodworth *v.* Lemmerman, 9 La. Ann. 524.

98. In Nebraska it is provided that the officer together with two residents of the county, in whose presence he has made his declaration of attachment, shall make an inventory and appraisal, such residents having been first sworn and affirmed. Connelly *v.* Miller, 22 Nebr. 82, 34 N. W. 76.

99. Wyckoff *v.* Wyllis, 8 Mich. 47.

Waiver of objection to appraiser.— Where the sheriff's return upon an attachment, showing an appraisal of the property levied on, by disinterested freeholders, duly sworn, as required by statute, is not disputed or assailed in any manner in the attachment suit, the party whose goods were so levied on cannot object, when the attachment proceedings come collaterally in question, that the appraisers were members of his own family, and consequently not disinterested, that they were not freeholders, or were not sworn; he having been personally served, and not shown to have been ignorant of the facts. The statutory requirement of disinterested freeholders as appraisers is for his protection, and it cannot be presumed that members of his family have an interest adverse to his. Grover *v.* Buck, 34 Mich. 519.

1. Dodson *v.* Wightman, 6 Kan. App. 835, 49 Pac. 790; Greenleaf *v.* Mumford, 19 Abb. Pr. (N. Y.) 469, 30 How. Pr. (N. Y.) 30. But see Watts *v.* Willett, 2 Hilt. (N. Y.) 212, to the effect that after making an attachment the officer shall immediately make an inventory, etc.

2. Toulmin *v.* Lesesne, 2 Ala. 359; Wilson *v.* Shapiro, 2 Pa. Dist. 367, 12 Pa. Co. Ct.

4. FORM AND REQUISITES — a. In General. The inventory must be just, true, and minute as to all the property seized, and the estimated value of the several articles of personal property should be stated.[3] It has also been held that such articles as are perishable must be enumerated.[4]

b. Signature. Where so required by statute the inventory or appraisal should be signed by the officer before returning the same,[5] and the appraisement should be signed by the appraisers.[6]

5. SERVICE OF INVENTORY. In some states the officer is required to serve on defendant a copy of the inventory at the same time he serve the latter with a copy of the writ.[7] It has been held, however, that the failure of the officer to serve a copy of the inventory on defendant can be taken advantage of by the latter only and is not available for a subsequent attaching creditor.[8]

6. CONCLUSIVENESS OF APPRAISAL. Upon the question of whether any specific property, real or personal, has been attached, the inventory returned by the officer is conclusive,[9] and the appraised value of such property is *prima facie* evidence of its real value as against the officer.[10] Where, however, personal property seized by the officer is afterward sold by him at official sale, the value of the goods is not determined solely by the appraisal, but the amount received

466, the latter case holding a delay of four days not unreasonable.

3. Taacks *v.* Schmidt, 18 Abb. Pr. (N. Y.) 307.

Effect of failure to mention indebtedness covered by return and notice.— Inability or inadvertence to mention, in the inventory filed by the sheriff, a debt due to attachment defendant as residuary legatee, will not defeat the lien of the attachment, where the attachment itself and the notice were broad enough to cover such indebtedness, since the court may authorize an amendment of the inventory. Dunn *v.* Arkenburgh, 48 N. Y. App. Div. 518, 62 N. Y. Suppl. 861 [*affirmed* in 165 N. Y. 669, 59 N. E. 1122].

Effect of failure to place value on books, etc., seized.— Where books, ledgers, and other accounts of a concern were attached by creditors, but the appraisers placed no value opposite them in the inventory of the property taken, this failure was held not to deprive the creditor of the benefit of his attachment. New York Rubber Co. *v.* Gandy Belting Co., 11 Ohio Cir. Ct. 618, 5 Ohio Cir. Dec. 286.

Consideration of return in connection with appraisal.— Where the appraisals of property seized under a writ of attachment are referred to in, and attached to, the sheriff's return, the latter must be considered in connection with them in determining whether the appraisal was properly made. Horton *v.* Monroe, 98 Mich. 195, 57 N. W. 109.

4. Taacks *v.* Schmidt, 18 Abb. Pr. (N. Y.) 307.

5. Harding *v.* Kansas City Guaranty L. & T. Co., 3 Kan. App. 519, 43 Pac. 835.

Omission of signature a mere irregularity. — Under an Ohio statute the omission of the sheriff to sign the inventory and appraisal was held to be a mere irregularity which did not affect the validity of the proceedings. Mitchell *v.* Eyster, 7 Ohio 257.

6. Hopkins *v.* Langton, 30 Wis. 379, where it was held that while the appraisal and return could not be held sufficient without the appraisers' signatures yet such defect was an amendable one.

7. Matthews *v.* Forslund, 113 Mich. 416, 71 N. W. 854; Cary *v.* Everett, 107 Mich. 654, 65 N. W. 566; Tunningly *v.* Butcher, 106 Mich. 35, 63 N. W. 994; Federspiel *v.* Johnstone, 87 Mich. 303, 49 N. W. 581; Stearns *v.* Taylor, 27 Mich. 88; Wyckoff *v.* Wyllis, 8 Mich. 47; Watts *v.* Willett, 2 Hilt. (N. Y.) 212; Duffee *v.* Records, 2 Pennyp. (Pa.) 343, 12 Wkly. Notes Cas. (Pa.) 287.

Omission to certify writ remedied by duly certified inventory.— The fact that the copy of the writ of attachment served was not certified by the officer, where it is in fact a true copy, and is accompanied by a copy of the inventory duly certified, will not render the service invalid, such defect being purely formal, and the certificate of the inventory leaving no doubt as to the character of the proceeding. Leonard *v.* Woodward, 34 Mich. 514.

Service of such copy by any other than levying officer does not give the court jurisdiction. Cary *v.* Everett, 107 Mich. 654, 65 N. W. 566.

Service on president or cashier of bank.— The act providing that service of an attachment shall be made by delivering "to said defendant, or defendants, or one of them, a copy of said attachment with an inventory of the property" is complied with, where defendant is a bank, by making such service upon its president or cashier. Mechanics' Nat. Bank *v.* Miners' Bank, 13 Wkly. Notes Cas. (Pa.) 515.

8. Duffee *v.* Records, 2 Pennyp. (Pa.) 343, 12 Wkly. Notes Cas. (Pa.) 287.

Waiver of service by absconding.— A defendant in attachment waived service of copy of the writ and inventory by absconding from the county and state. Thomas *v.* Richards, 69 Wis. 671, 35 N. W. 42.

9. Carson *v.* Golden, 36 Kan. 705, 14 Pac. 166.

10. Learned *v.* Vandenburgh 7 How. Pr. (N. Y.) 379.

by the officer at such sale is competent evidence of value as is also the opinion of persons familiar with the goods and acquainted generally with the value of such goods.[11]

K. Where Property Levied on Under Other Process — 1. Personalty — a. Who May Levy — (I) *In General.* Since a seizure and taking possession by the officer is essential in case of a levy upon personalty,[12] it has been held in some jurisdictions that where goods are held by an officer under other process, an attachment can be levied thereupon only by such officer,[13] even though the officer holding the property assents to the subsequent so-called levy,[14] or though such officer or his keeper agrees to act also as the keeper of the second officer.[15] According to the decisions in other states, however, if personal property is levied upon under a writ, it may still be subjected to further levies either by the same or another officer, such levy being made subject to the prior levy or levies.[16]

(II) *Deputies.* In some jurisdictions it is held that a deputy is so far a different officer from his principal as to come within the meaning of the rule forbidding levies on the same property by different officers, and that he is, therefore, unable to levy upon goods already attached by such principal.[17] In other jurisdic-

11. Douglass *v.* Hill, 29 Kan. 527.

12. See *supra*, X, H, 1, b, (I), (B), (1).

There can be no joint possession by officers making different attachment.—The constructive or actual possession of the same by the officer making the first attachment excludes the possession of other officers making or attempting to make subsequent attachments. Coffrin *v.* Smith, 51 Vt. 140.

Rule no longer applies after possession relinquished.—An attachment of personal property by an officer after it had been attached, and while it still remained in the custody of another, would undoubtedly be an unlawful interference with the rights of the latter, and might afford ground for maintaining an action of trover to recover its value. But that is expressly upon the ground that possession is necessary to constitute or to preserve and continue an attachment. When possession is given up, or the property is abandoned or restored to the debtor, the lien created by the attachment is lost. Polley *v.* Lenox Iron Works, 15 Gray (Mass.) 513. See also Coffrin *v.* Smith, 51 Vt. 140, holding that when the constructive possession of property acquired by the first attachment ceases its effect upon the second attachment also ceases and the latter attachment, which had been kept in abeyance, became operative and in force.

13. *Kentucky.*— Oldham *v.* Scrivener, 3 B Mon. (Ky.) 579.

Massachusetts.— Polley *v.* Lenox Iron Works, 15 Gray (Mass.) 513; Robinson *v.* Ensign, 6 Gray (Mass.) 300; Denny *v.* Hamilton, 16 Mass. 402; Thompson *v.* Marsh, 14 Mass. 269; Watson *v.* Todd, 5 Mass. 271.

Nebraska.— Merrill *v.* Wedgwood, 25 Nebr. 283, 41 N. W. 149.

New Hampshire.— Pierce *v.* Jackson, 65 N. H. 121, 18 Atl. 319; Fellows *v.* Wadsworth, 62 N. H. 26; Sinclair *v.* Tarbox, 2 N. H. 135; Odiorne *v.* Colley, 2 N. H. 66, 9 Am. Dec. 39.

Ohio.— Bailey *v.* Childs, 46 Ohio St. 557, 24 N. E. 598; Davidson *v.* Kuhn, 1 Disn. (Ohio) 405, 12 Ohio Dec. (Reprint) 699.

Texas.— Heye *v.* Moody, 67 Tex. 615, 4 S. W. 242.

Vermont.— Coffrin *v.* Smith, 51 Vt. 140; West River Bank *v.* Gorham, 38 Vt. 647; Rogers *v.* Fairfield, 36 Vt. 641; Burroughs *v.* Wright, 19 Vt. 510. *Compare* Hall *v.* Walbridge, 2 Aik. (Vt.) 215, from which it would seem that personal chattels attached on mesne process by one officer may be subsequently attached on other process by other officers, and thus successive liens created in favor of different officers.

United States.— Corning *v.* Dreyfus, 20 Fed. 426, construing Louisiana statute. See also Perry *v.* Sharpe, 8 Fed. 15, construing Ohio statute.

See 5 Cent. Dig. tit. "Attachment," § 486.

Levy of foreign attachment on goods held under execution.— Where goods have been levied on by a sheriff under executions in his hands, and before they are sold a writ of foreign attachment against the same defendant is lodged in his office, he may levy the attachment also on the goods, and this is not a case where the property or fund is protected by being in the custody of the law. Day *v.* Becher, 1 McMull. (S. C.) 92.

14. Bailey *v.* Childs, 46 Ohio St. 557, 24 N. E. 598.

15. Robinson *v.* Ensign, 6 Gray (Mass.) 300. But see Davidson *v.* Kuhn, 1 Disn. (Ohio) 405, 12 Ohio Dec. (Reprint) 699; National Wall-Paper Co. *v.* Fourth Nat. Bank, (Tenn. Ch. 1898) 51 S. W. 1002.

16. *Connecticut.*—Tomlinson *v.* Collins, 20 Conn. 364; Cole *v.* Wooster, 2 Conn. 203.

Illinois.— White *v.* Culter, 12 Ill. App. 38.

Missouri.—Patterson *v.* Stephenson, 77 Mo. 329; State *v.* Curran, 45 Mo. App. 142.

New York.— Benson *v.* Berry, 55 Barb. (N. Y.) 620.

United States.—Brooks *v.* Fry, 45 Fed. 776 (construing Arkansas statute); Bates *v.* Days, 5 McCrary (U. S.) 342, 17 Fed. 167 (construing Missouri statute).

17. Strout *v.* Bradbury, 5 Me. 313; Walker *v.* Foxcroft, 2 Me. 270; Bagley *v.* White, 4 Pick. (Mass.) 395, 16 Am. Dec. 353; Thomp-

tions, however, the acts of the deputy are regarded as the acts of the principal, and a deputy may levy an attachment upon property already attached by his principal through another deputy.[18]

b. Manner of Levy — (I) *By Same Officer.* No affirmative or overt act on the part of the first officer is necessary in making a levy under a subsequent writ,[19] where he holds actual or constructive possession of the property.[20]

(II) *By Different Officer.* Where the subsequent levy is made by

son *v.* Marsh, 14 Mass. 269; Vinton *v.* Bradford, 13 Mass. 114, 7 Am. Dec. 119; Pierce *v.* Jackson, 65 N. H. 121, 18 Atl. 319; Moore *v.* Graves, 3 N. H. 408; West River Bank *v.* Gorham, 38 Vt. 649.

Possession held insufficient to prevent levy by deputy.— Where the holder of a chattel mortgage requests the sheriff to take possession of mortgaged goods, which are surrendered to him by the mortgagor, and he posts notices of sale under the mortgage, but no notice is given as provided for in Wash. Terr. Code, § 1993, his possession is not such as will prevent a levy of the same goods being made on a writ of attachment by a deputy sheriff; nor does such possession avoid the necessity of the actual levy by the sheriff of a writ of attachment placed in his own hands. E. C. Meacham Arms Co. *v.* Strong, 3 Wash. Terr. 61, 13 Pac. 245.

18. Claflin *v.* Furstenheim, 49 Ark. 302, 5 S. W. 291; Heye *v.* Moody, 67 Tex. 615, 4 S. W. 242.

19. *California.*—O'Connor *v.* Blake, 29 Cal. 312.

Connecticut.— Tomlinson *v.* Collins, 20 Conn. 364, where it is said that perhaps the delivery of a second writ to the first attaching officer, with directions to attach the goods in his custody is of itself a sufficient attachment.

Iowa.— German Sav. Bank *v.* Capital City Oatmeal Co., 108 Iowa 380, 79 N. W. 270.

Massachusetts.— Turner *v.* Austin, 16 Mass. 181; Knap *v.* Sprague, 9 Mass. 258, 6 Am. Dec. 64.

Missouri.— State *v.* Curran, 45 Mo. App. 142.

Nebraska.— Merrill *v.* Wedgwood, 25 Nebr. 283, 41 N. W. 149.

New Hampshire.—Whitney *v.* Farwell, 10 N. H. 9.

New York.—Wehle *v.* Conner, 83 N. Y. 231.

Vermont.—Adams *v.* Lane, 38 Vt. 640.

Wisconsin.— Evans *v.* Virgin, 72 Wis. 423, 39 N. W. 864, 7 Am. St. Rep. 870, holding that the mere receipt of a subsequent writ is in effect a constructive levy upon the property held by him under a prior one.

United States.— Naumburg *v.* Hyatt, 24 Fed. 898, construing North Carolina statute.

The requirement of actual seizure of the property is satisfied in the case of successive levies by the same officer by a constructive application of the succeeding writ to the surplus after satisfying the previous attachment. Patterson *v.* Stephenson, 77 Mo. 329.

One inventory sufficient.— In case of different levies by same officer it is sometimes provided that one inventory and appraisal shall be sufficient, and that it shall not be necessary to return the same with more than one order. Atchison, etc., R. Co. *v.* Schwarzschild, etc., Co., 58 Kan. 90, 48 Pac. 591, 62 Am. St. Rep. 604.

20. *Iowa.*— German Sav. Bank *v.* Capital City Oatmeal Co., 108 Iowa 380, 79 N. W. 270.

Massachusetts.— Knap *v.* Sprague, 9 Mass. 258, 6 Am. Dec. 64.

Nebraska.— Merrill *v.* Wedgwood, 25 Nebr. 283, 41 N. W. 149, holding that if after levy the attached property is taken from the custody of the officer, as by replevin, and he receives other orders of attachment, no lien will be created upon the property thereby.

Vermont.—Adams *v.* Lane, 38 Vt. 640, holding that no lien by a subsequent attachment can be created upon the proceeds of a previous sale of goods under attachment by an officer unless such subsequent attachment is made while the first attachment is subsisting.

Washington.—Anderson *v.* Land, 5 Wash. 493, 32 Pac. 107, 34 Am. St. Rep. 875, holding that upon the dissolution of an attachment the right of the officer to the control and possession of the property ceases, and if he is afterward clothed with authority to seize property of the defendant, he must act on such authority independently of any effect or power of the old writ.

Wisconsin.— Bell *v.* Shafer, 58 Wis. 223, 16 N. W. 628, holding that if property has never come into a receiptor's actual possession, or has been returned by him to defendant, it must be seized wherever it can be found on the subsequent attachment, and that a mere return by the officer is insufficient.

The possession by a receiptor of property attached has been held to be so far the possession of the sheriff, that the latter, while the receiptor retains actual possession, may make a second attachment upon another writ by making a return to that effect and giving the receiptor notice with direction to hold the property to answer upon the second attachment. Whitney *v.* Farwell, 10 N. H. 9; Bell *v.* Shafer, 58 Wis. 223, 16 N. W. 628. See also Tomlinson *v.* Collins, 20 Conn. 364, where it was held that where an officer has once attached property and placed it with the creditor as bailee, and another writ is placed in his hands by another creditor, he may again attach the property without notifying the bailee thereof. But *compare* Waterman *v.* Treat, 49 Me. 309, 77 Am. Dec. 261, holding that where an officer delivers attached property to a receiptor, and takes a receipt for its redelivery or the payment of a sum of money, the attachment is thereby dissolved, and a subsequent valid attachment, even by the same officer, cannot be made without a new seizure of the property.

another officer, the possession of the first officer is not to be disturbed, but the levy is made by notifying the officer in possession of the making of it;[21] nor need the return specify or describe the property; it is sufficient to refer to the property as all which is in the custody of the officer in possession.[22]

2. REALTY. Since in the case of levy upon realty, the officer levying acquires neither title, possession, nor special property,[23] there is no reason why an attachment creditor may not acquire a valid lien by the levy of a writ of attachment on land on which another officer has already levied an attachment or execution,[24] subject, of course, to the lien of the prior attachment or execution creditor.[25]

L. Successive Levies Under Same Writ. In the absence of fraud there is no reason which will prevent a second levy upon personal property, under the outstanding writ, where such property has once been taken but afterward surrendered by mistake or otherwise, no other rights intervene, and the legal owner interposes no protest against such second levy.[26] Where an officer attaches property at different times on the same writ copies need not be left in each instance, the leaving of a single copy including a list of all the property attached before the time of service elapses being held, on a plea in abatement, to constitute good service.[27]

M. Defects and Objections — 1. IN GENERAL. As a general rule where a return has been made which is sufficient on its face every reasonable presumption will be made in favor of the validity of the levy.[28] Where the return is good

21. White *v.* Culter, 12 Ill. App. 38; Patterson *v.* Stephenson, 77 Mo. 329; State *v.* Curran, 45 Mo. App. 142.

Written notice unnecessary.— Where two or more writs of attachment are served by different officers at different times on the same property, it is incumbent on the officer serving the later writ to give reasonable notice thereof to the officer who served the earlier one, but the law prescribes no form or manner of notice, and neither a copy of the writ and return or any other written notice is necessary. Nothing more is necessary than that the officer should be reasonably informed of the later attachment, so that when the lien of the attachment in his own hands is dissolved he may deliver the estate attached to the rightful claimant. Brainard *v.* Bushnell, 11 Conn. 16.

22. State *v.* Curran, 45 Mo. App. 142.

23. See *supra*, X, H, 1, c, (I), (A).

24. Johnson *v.* Burnett, 12 Ala. 743; Watson *v.* Todd, 5 Mass. 271. And see Oldham *v.* Scrivener, 3 B. Mon. (Ky.) 579.

25. Johnson *v.* Burnett, 12 Ala. 743.

26. Dolan *v.* Wilkerson, 57 Kan. 758, 48 Pac. 23 (holding that the fact that the officer in whose hands the writ was placed, after making an ineffectual attempt to levy, relinquishes any claim by reason of such levy, did not prevent him from making another levy under the same writ on property of defendant at any time before the actual return of the writ); Butte First Nat. Bank *v.* Boyce, 15 Mont. 162, 38 Pac. 829 (where the attachment creditor released the lien of the attachment upon an agreement for an execution by the debtor of an assignment of all his goods and property, making the attachment creditor a preferred creditor, and such assignment was executed. It was held that if such deed of assignment was void by reason of any fraudulent provision therein, the attaching creditor might retake the goods by a second levy under the original writ).

Effect of illegality of first attachment or alteration of writ.— A second attachment of property by the same officer on the same writ is not necessarily wrongful because the first was illegal, or because the writ was altered by the attorney after the same, it not appearing that the first attachment was made for the purpose of making the second, or that the second was effected by means of the first. Gile *v.* Devens, 11 Cush. (Mass.) 59, where, after the levy, the property attached was found not to belong to the person named in the writ, and thereupon the owner's name was inserted in the writ, and a second levy on the same property made by the same officer on behalf of the same parties under the writ as altered.

27. U. S. Bank *v.* Taylor, 7 Vt. 116.

28. Crosby *v.* Allyn, 5 Me. 453 (holding that, where the officer returns that he attached certain lands, if it be necessary for him to enter upon the land, such entry will be presumed); Horton *v.* Monroe, 98 Mich. 195, 57 N. W. 109 (where it was presumed that the levy of an attachment was made in the county); Drysdale *v.* Biloxi Canning Co., 67 Miss. 534, 7 So. 541 (holding that where the indorsement of an officer was a sufficient levy upon land if wild or unoccupied, but insufficient if cultivated or occupied, the supreme court in an action to have the attachment set aside will treat the levy as a valid levy on wild or unoccupied land in the absence of an averment in the debtor's bill that the land was in fact cultivated or occupied); Boyd *v.* Buckingham, 10 Humphr. (Tenn.) 433 (holding that where process in attachment was seasonably issued, but it did not appear from the officer's return on what day the attachment was levied, it will be presumed that it was served in due time).

on its face it cannot be attacked in a collateral proceeding unless it is void.[29]

2. WHO MAY OBJECT — a. For Failure to File Writ and Return. Where, in order to render an attachment of realty valid against a subsequent purchaser or attaching creditor, the writ and officer's return, or a copy thereof, must be deposited in the clerk's office, omission to comply with this requirement can be taken advantage of only by parties subsequently purchasing or attaching such real estate.[30]

b. For Insufficient Levy on Property Capable of Manual Seizure. Where the levying officer fails to take into his possession such property as is capable of manual seizure, plaintiff may have reason to complain, but defendant is not injured thereby, and such levy will not be set aside on his motion.[31]

c. Where Effected Through Unlawful Detention. Although it is indisputable that where possession of property has been unlawfully obtained for the purpose of levying thereupon, such levy is wrongful and cannot be upheld as against any one who is so situated that he can urge its invalidity, yet such objection is not available to a party whose right also springs solely from a seizure effected through the unlawful detention.[32]

3. TIME TO OBJECT. An objection to the manner of levying an attachment, which is not suggested by answer or upon the hearing below, cannot be taken for the first time on appeal, and will be regarded as waived;[33] but where a levy created no lien on account of an irregular return, it was held immaterial that there was no objection to its validity until after the submission of the case, since the court may disregard such levy at any stage of the proceedings.[34] The question of whether a certain levy made by serving notice on the party claimed to be in possession is valid is properly determinable upon proceedings to enforce the same, and not upon a motion to set it aside and vacate it, since if as made it is invalid there was no valid levy to set aside or vacate.[35]

4. WAIVER OF OBJECTIONS. The conduct of defendant may make an otherwise invalid levy good by way of waiver,[36] estoppel, or agreement.[37]

5. EFFECT OF ENTRY OF JUDGMENT. While the entry of judgment may cure some defects in the issue of a writ of attachment such entry will not cure defects in the levy of the writ and make what was no lien a valid one.[38]

XI. RETURN.

A. Necessity of. The return is a necessary part of the proceeding,[39] for by

29. Deware *v.* Wichita Valley Mill, etc., Co., 17 Tex. Civ. App. 394, 43 S. W. 1047; Carothers *v.* Wilkerson, 2 Tex. App. Civ. Cas. § 353.

30. Pomroy *v.* Stevens, 11 Metc. (Mass.) 244.

31. Mechanics' Nat. Bank *v.* Miners' Bank, 13 Wkly. Notes Cas. (Pa.) 515.

32. Corning *v.* Dreyfus, 20 Fed. 426.

33. Willitts *v.* Waite, 25 N. Y. 577.

34. Price *v.* Taylor, 22 Ky. L. Rep. 249, 57 S. W. 255.

35. Simpson *v.* Jersey City Contracting Co., 47 N. Y. App. Div. 17, 61 N. Y. Suppl. 1033.

36. Taffts *v.* Manlove, 14 Cal. 47, 73 Am. Dec. 610; Wharton *v.* Conger, 9 Sm. & M. (Miss.) 510; Eisenbud *v.* Gellert, 26 Misc. (N. Y.) 367, 55 N. Y. Suppl. 952.

37. Taffts *v.* Manlove, 14 Cal. 47, 73 Am. Dec. 610; Marx *v.* Ciancimino, 59 N. Y. App. Div. 570, 69 N. Y. Suppl. 672; Buckwheat *v.* St. Croix Lumber Co., 75 Wis. 194, 43 N. W. 1130.

Counter-claim as an estoppel to object to want of service of notice.— Where defendants whose property is attached file counter-claims based on a wrongful levy of the attachment, the sheriff takes manual possession, and continues to hold the property until the trial, neither party will be heard to say that there was no valid levy because notice of the attachment was not served. Schoonover *v.* Osborne, 108 Iowa 453, 79 N. W. 263.

Estoppel by admission of levy in bill.— If a subsequently attaching creditor admit in his bill that an attachment has been issued at the suit of another creditor, levied, and the property placed in the custody of the law, such creditor is estopped to deny the validity of the levy of the first attachment. Lea *v.* Maxwell, 1 Head (Tenn.) 365.

38. Falk-Bloch Mercantile Co. *v.* Branstetter, (Ida. 1896) 43 Pac. 571.

39. Haynes *v.* Small, 22 Me. 14; Main *v.* Lynch, 54 Md. 658; Wilder *v.* Holden, 24 Pick. (Mass.) 8.

it alone is the court advised of the levy and its sufficiency,[40] and without it cannot proceed to the final adjudication of the cause.[41] Failure of the officer to make his return constitutes him a trespasser *ab initio*.[42] The court may, however, direct him to make the return,[43] or, in its discretionary power to allow amendments, may, when necessary, order it to be made *nunc pro tunc*.[44]

B. By Whom Made. The return must be made by a person authorized by law to levy the writ,[45] but the duty of making it is official and not personal.[46]

C. To What Court. The court to which the return must be made is fixed either by the express directions of the writ, or, where the direction as to return is general by statute.[47]

40. *Indiana.*— The Steam-Boat Tom Bowling *v.* Hough, 5 Blackf. (Ind.) 188.

Iowa.— Collier *v.* French, 64 Iowa 577, 21 N. W. 90; Rock *v.* Singmaster, 62 Iowa 511, 17 N. W. 744.

Maine.— Bessey *v.* Vose, 73 Me. 217 [*citing* Carleton *v.* Ryerson, 59 Me. 438].

Vermont.— McKenzie *v.* Ransom, 22 Vt. 324.

Virginia.— Robertson *v.* Hoge, 83 Va. 124, 1 S. E. 667. See also Murphy *v.* Orgill, (Miss. 1898) 23 So. 305, where, however, the decision might also have been influenced by the fact that there was a failure to show that the claimants had bonded the property as required by the code.

41. Morris *v.* School Trustees, 15 Ill. 266; Rock *v.* Singmaster, 62 Iowa 511, 17 N. W. 744; City Nat. Bank *v.* Cupp, 59 Tex. 268, 271 (where the court said: "It may be admitted that, until the writ was lodged in court with the return indorsed upon it, no judgment could be entered up foreclosing the lien. Yet this would result, not from the fact that the lien was lost for want of the presence of the process in court, but for want of evidence brought to the court's notice that it had been properly executed. Had the court proceeded to foreclose the lien without proof made in this way, probably the judgment might have been erroneous"); Robertson *v.* Hoge, 83 Va. 124, 1 S. E. 667. *Compare* Rodgers *v.* Bonner, 55 Barb. (N. Y.) 9 (holding that a statutory provision touching the return of an attachment to the officer issuing is merely directory to the officer and that his omission to do his duty is not available in a collateral action to defeat the remedy of plaintiff in the attachment suit); Lea *v.* Maxwell, 1 Head (Tenn.) 365 (where, although there is a statement that the force and efficacy of a levy could not be impaired by a failure to make a return, yet, being an equitable attachment, the property was described in the bill and in the writ, and the court had proper evidence of the levy and a proper description of the property).

Presumption of return from giving release bond.— Under a statute which permits a bond to release an attachment to be entered into when the sheriff has returned the writ, if such a bond be actually taken by a clerk, the higher court will presume that the writ had been returned although the return-day has not come. Morrison *v.* Alphin, 23 Ark. 136.

42. Williams *v.* Ives, 25 Conn. 568; Wiggin *v.* Atkins, 136 Mass. 292.

43. Rock *v.* Singmaster, 62 Iowa 511, 17 N. W. 744.

A return will not be compelled where an action by attachment has been settled by the parties before any proceedings had under the writ. Atwell *v.* Wigderson, 80 Wis. 424, 50 N. W. 347.

44. Bancroft *v.* Sinclair, 12 Rich. (S. C.) 617.

Failure to return affords no presumption that the writ has not been served so as to justify the court in issuing a second attachment. Baldwin *v.* Wright, 3 Gill (Md.) 241.

45. Where made by sheriff of one county when directed to sheriff of another the return is void. Olney *v.* Shepherd, 8 Blackf. (Ind.) 146.

Where made by a special appointee of the clerk the validity and efficacy of a return must be determined by the validity of the appointment which must accompany the return. Currens *v.* Ratcliffe, 9 Iowa 309.

Where the statute prescribes the manner of return, as where it directs a constable, coroner, city marshal, or appointee who has served an attachment to hand the return over to the sheriff who shall report to the court, a return by the constable directly to the court confers no jurisdiction. Barnett *v.* Ring, 55 Miss. 97.

46. Hence, if a sheriff fails to make a return in obedience to an order of court his successor in office may make it. Carter *v.* O'Bryan, 105 Ala. 305, 16 So. 894.

47. To office whence it originated.— Green *v.* Lanier, 5 Heisk. (Tenn.) 662. See also Rome First Nat. Bank *v.* Ragan, 92 Ga. 333, 18 S. E. 295 (holding that a statute providing for issuing attachments against debtors on the ground of fraud confers no authority for issuing attachments returnable to any court except the superior court; that as the writ has to be issued by a superior court judge it could not have been the intention of the legislature that the superior court was to prepare business for justice's courts and all others which might have jurisdiction over ordinary attachments); Still *v.* Wilkens, 66 Tex. 715, 2 S. W. 59 (holding that, under Tex. Rev. Stat. art. 4842, where an attachment issued from the court of one county was levied in another, the original writ must be returned to the county from which it issued, but the officer making the levy should return the claim bond and a copy of the writ to the court of the county where the levy was made having jurisdiction to adjudicate the claim).

To superior court of any county, without

D. Time of Making. In the absence of statutory limitation,[48] an attachment return must be made within a reasonable time,[49] but the mere fact that the return was not made until after the return-day of the writ will not defeat the lien.[50] On the other hand if the return shows a substituted service upon defendant it must necessarily not be made before the return-day of the writ.[51]

E. Form and Requisites[52] — **1. In General — a. Recitals — (I)** *Generally*

regard to whether the debtor had property therein subject to levy, when issued against a non-resident for a debt exceeding one hundred dollars. Nashville, etc., R. Co. *v.* Cleghorn, 94 Ga. 413, 21 S. E. 227.

To term of court where suit is pending, if issued in a pending suit. Grinberg *v.* Singerman, 90 Va. 645, 19 S. E. 161; Craig *v.* Williams, 90 Va. 500, 18 S. E. 899, 44 Am. St. Rep. 934.

48. **In Georgia** under the attachment law of 1856 and 1799 the writ might be made returnable to the next term of the superior or inferior court at the option of the party issuing out the writ, provided the term of the court to which it was made returnable did not commence within twenty days next after the issue of such writ. Irvin *v.* Howard, 37 Ga. 18; Duke *v.* Horton, 32 Ga. 637; Wanet *v.* Corbet, 13 Ga. 441.

In Illinois it is provided by statute that the writ shall be made returnable on the first day of the next term of the court in which the action may be commenced, and if ten days shall not intervene between the time of suing out the same and the next term of the court, it shall be made returnable to the next succeeding term at plaintiff's option. Hecht *v.* Feldman, 153 Ill. 390, 39 N. E. 121; St. Louis Mechanics' Sav. Inst. *v.* Givens, 82 Ill. 157; Edwards *v.* Haring, 59 Ill. App. 147.

In Indiana writs of foreign attachment issued under the statute of 1838 should be made returnable to the first day of the term next after they issue. Andrews *v.* Reid, 7 Blackf. (Ind.) 256. See also Harlow *v.* Becktle, 1 Blackf. (Ind.) 237.

In Pennsylvania, under the act of Mar. 17, 1869, it has been held that the writ should be made returnable to the next return-day after the issue thereof, regardless of whether it be the first return-day or the next term of court. Snellenburg *v.* Mayernick, 20 Pa. Co. Ct. 135.

49. Gerdes *v.* Sears, 13 Oreg. 358, 10 Pac. 631.

Return fixes time of attachment.— The attachment will be considered as having been made at the time the return bears date. Almy *v.* Wolcott, 13 Mass. 73. See also McMillan *v.* Gaylor, (Tenn. Ch. 1895) 35 S. W. 453, holding that a levy will take effect from the time the officer returns a memorandum sufficient to identify the property levied upon, and containing the date and hour of the levy, although subsequently an attorney makes out the return in full.

50. Reed *v.* Perkins, 14 Ala. 231; Horton *v.* Monroe, 98 Mich. 195, 57 N. W. 109; Willis *v.* Mooring, 63 Tex. 340 [*following* City Nat. Bank *v.* Cupp, 59 Tex. 268].

Length of time which may elapse before return.— The courts are not uniform in determining the length of time that may elapse before a return is made. Thus in a Wisconsin case (Hibbard *v.* Pettibone, 8 Wis. 270) it was held that where a return should have been made the first Monday in April, and was not in fact made until July 17, the action became discontinued. On the other hand, it has been held in Kentucky (Bourne *v.* Hocker, 11 B. Mon. (Ky.) 23) that a failure of three months to make a return could not be considered an abandonment; and in Texas (Riordan *v.* Britton, 69 Tex. 198, 7 S. W. 50, 5 Am. St. Rep. 37. See also City Nat. Bank *v.* Cupp, 59 Tex. 268) a return eleven months after the writ was issued was held to be allowable, although in this case due diligence was used to procure the return. See also Westphal *v.* Sherwood, 69 Iowa 364, 28 N. W. 640, holding that, under Iowa Code, § 3010, the return need not be made by the first day of the first term at which defendant is required to appear, unless the officer has in fact attached sufficient property.

Return not premature.—In Louisiana, if the sheriff knows of no property of defendant and plaintiff's counsel can point none out to him, a return at once is neither premature nor illegal. Guay *v.* Andrews, 8 La. Ann. 141. See also Hitchcock *v.* Hahn, 60 Mich. 459, 27 N. W. 600, where an officer in his return to a writ of attachment issued January 18, and returnable February 5, certified to a seizure of property thereunder on January 18, and further returned that he was unable to find defendant in his bailiwick. The writ and the return were filed on the return-day and it was held that the return was not premature; and that the certificate of his inability to find defendant had no reference to the date of the seizure but took effect from the date of the filing.

51. Reynolds *v.* Marquette Cir. Judge, 125 Mich. 445, 84 N. W. 628; Drew *v.* Claypool, 61 Mich. 233, 28 N. W. 78; Kraft *v.* Raths, 45 Mich. 20, 7 N. W. 232. *Compare* Glover *v.* Rawson, 3 Pinn. (Wis.) 226, holding that while it is the duty of the sheriff in such a case to retain the writ until the return-day thereof, yet if he makes a *non est inventus* return within a day or two after he receives it, and before the return-day, the court is bound to receive it and is justified in proceeding to judgment; and if defendant is injured thereby his remedy is against the sheriff and not by writ of error.

If defendant enters a voluntary appearance in the case a return before the return-day will not invalidate the proceedings. Dunlap *v.* McFarland, 25 Kan. 488, from which it would seem that a return one day before the return-day is not of itself a fatal irregularity.

52. For forms of returns see the following cases:

— (A) *Fact and Manner of Levy.* The return must show that property has been seized,[53] either actually or constructively,[54] and, while, as a rule,[55] it is sufficient if it shows that there has been a substantial compliance with the statute,[56] it is usually necessary that it set out the acts done by the officer, and the manner in which the writ was executed, that the court may itself judge of its sufficiency.[57]

District of Columbia.— Giddings *v.* Squier, 4 Mackey (D. C.) 49.

Indiana.—Carson *v.* The Steam-Boat Talma, 3 Ind. 194, steamboat.

Iowa.—Shoonover *v.* Osborne, 111 Iowa 140, 82 N. W. 505, 82 Am. St. Rep. 496.

Kentucky.— White *v.* O'Bannon, 86 Ky. 93, 9 Ky. L. Rep. 334, 5 S. W. 346.

Maine.— Bean *v.* Ayers, 70 Me. 421; Fuller *v.* Nickerson, 69 Me. 228 (with annexed specification); Colson *v.* Wilson, 58 Me. 416 (showing attachment of mortgaged chattels and notice to the mortgagee); Kendall *v.* Irving, 42 Me. 339.

Maryland.— Boarman *v.* Patterson, 1 Gill (Md.) 372, containing a schedule of the attached goods.

Massachusetts.— Bemis *v.* Leonard, 118 Mass. 502, 19 Am. Rep. 470.

New Hampshire.—Scott *v.* Manchester Print Works, 44 N. H. 507; Wendell *v.* Mugridge, 19 N. H. 109; Cogswell *v.* Mason, 9 N. H. 48 (real estate); Kittredge *v.* Bellows, 7 N. H. 399 (copy left with town-clerk).

New York.— Bascom *v.* Smith, 31 N. Y. 595.

Pennsylvania.— Simon *v.* Johnson, 7 Kulp (Pa.) 166.

Rhode Island.— Greenwich Nat. Bank *v.* Hall, 11 R. I. 124, real estate.

Vermont.— Barron *v.* Smith, 63 Vt. 121, 21 Atl. 269 (personal property); Pond *v.* Baker, 58 Vt. 293, 2 Atl. 164 (held sufficient though not commended by the court); Washburn *v.* New York, etc., Min. Co., 41 Vt. 50 (real estate); Fullam *v.* Stearns, 30 Vt. 443 (machinery); Blodgett *v.* Adams, 24 Vt. 23 (hay and grain); Strickland *v.* Martin, 23 Vt. 484.

West Virginia.— Sims *v.* Charleston Bank, 3 W. Va. 415.

53. The term "levy" implies a seizure, and a return of an officer in attachment that he "levied on the following slaves," naming them, was held sufficient. Baldwin *v.* Conger, 9 Sm. & M. (Miss.) 516. See also Eastern Kentucky R. Co. *v.* Holbrook, 4 Ky. L. Rep. 730.

54. Poole *v.* Brooks, 12 Rob. (La.) 484; Newton *v.* Strang, 48 Mo. App. 538.

It need not include words merely declaratory of the officer's responsibility and not directory where seizure is shown. Jaffray's Appeal, 101 Pa. St. 583.

55. Strict and specific compliance with the statute must, in some jurisdictions, be clearly shown by the return itself. Elder *v.* Ludeling, 50 La. Ann. 1077, 23 So. 929; Sheldon *v.* Comstock, 3 R. I. 84; Shearer *v.* Davis, etc., Lumber Co., 78 Wis. 278, 47 N. W. 360.

56. *District of Columbia.*— See Reynolds *v.* Smith, 7 Mackey (D. C.) 27.

Kentucky.— Mannix *v.* Lacey, 7 Ky. L. Rep. 440.

Maine.— Blanchard *v.* Day, 31 Me. 494.

Mississippi.—Saunders *v.* Columbus L., etc., Ins. Co., 43 Miss. 583.

New Jersey.— Dodge *v.* Butler, 42 N. J. L. 370; Morrel *v.* Buckley, 20 N. J. L. 667.

Oregon.—At least so far as subsequently attaching creditors with notice are concerned. Sabin *v.* Mitchell, 27 Oreg. 66, 39 Pac. 635.

57. *California.*— Brusie *v.* Gates, 80 Cal. 462, 22 Pac. 284 [*criticizing* Ritter *v.* Scannell, 11 Cal. 238, 70 Am. Dec. 775]; Porter *v.* Pico, 55 Cal. 165; Sharp *v.* Baird, 43 Cal. 577.

Iowa.— Westphal *v.* Sherwood, 69 Iowa 364, 28 N. W. 640.

Kansas.—Harding *v.* Kansas City Guaranty L. & T. Co., 3 Kan. App. 519, 43 Pac. 835.

Louisiana.— Kilbourne *v.* Frellsen, 22 La. Ann. 207; Stockton *v.* Downey, 6 La. Ann. 581.

Michigan.— Kidd *v.* Dougherty, 59 Mich. 240, 26 N. W. 510; Town *v.* Tabor, 34 Mich. 262.

Minnesota.— Scott, etc., Lumber Co. *v.* Sharvy, 62 Minn. 528, 64 N. W. 1132.

Mississippi.— Cantrell *v.* Letwinger, 44 Miss. 437; Ezelle *v.* Simpson, 42 Miss. 515. And see Gustavus *v.* Marx, 44 Miss. 446, where the judgment was reversed because of the insufficiency of the return.

New Jersey.— Crisman *v.* Swisher, 28 N. J. L. 149.

New York.—Watts *v.* Willett, 2 Hilt. (N. Y.) 212.

Pennsylvania.— Lambert *v.* Challis, 35 Pa. St. 156 note. See also Dawson *v.* Kirby, 6 Pa. Dist. 13, 27 Pittsb. Leg. J. N. S. (Pa.) 234, holding that a return is insufficient which does not show whether defendant was in the county, and whether the property attached was taken in possession of the constable or released on bond.

Rhode Island.—Sheldon *v.* Comstock, 3 R. I. 84.

Texas.— Brown *v.* Hudson, 14 Tex. Civ. App. 605, 38 S. W. 653.

See 5 Cent. Dig. tit. "Attachment," § 1154.

A return is insufficient which merely states that the officer has attached "according to law" (Kilbourne *v.* Frellsen, 22 La. Ann. 207; Stockton *v.* Downey, 6 La. Ann. 581; Sheldon *v.* Comstock, 3 R. I. 84), or that the writ was "duly served" (Benjamin *v.* Shea, 83 Iowa 392, 49 N. W. 989).

If fraud or force is used to prevent the officer from obtaining possession of the property, and he serves the writ on the person in whose hands the property is, he should state these facts in his return and show that he has attached as nearly as possible according to the

(B) *Date of Levy.* The return to be sufficient should show also the date of the levy.[58]

(C) *Description of Property Attached* — (1) IN GENERAL — (a) PERSONALTY. Although a total failure of the return to designate or describe attached personalty will render the attachment inoperative,[59] it is difficult to lay down a precise or general rule as to what constitutes a sufficient description.[60] It seems, however, that the property attached should be described with such reasonable certainty as to render it distinguishable,[61] and, while its location should be shown,[62] it

statutes. Pennsylvania R. Co. *v.* Pennock, 51 Pa. St. 244.

Naming persons in whose presence attachment made.— Under a statute requiring the levy of an attachment to be made in the presence of one or more credible persons of the neighborhood, it has been held that the return must state the names of the persons in whose presence the attachment was made. Cabeen *v.* Douglass, 1 Mo. 336.

Where both real and personal property were attached a return which does not show what disposition was made of the personalty is defective. Tucker *v.* Byars, 46 Miss. 549. Likewise, under a statute providing that the personal property of a defendant should be first taken under an attachment, a return showing that real property had been attached, which does not show that an unsuccessful search was made for personal property, or if such property was found that it was taken and was not enough to satisfy the claim, is insufficient. Willets *v.* Ridgway, 9 Ind. 367.

A mere irregularity in form, which in no way affects the substance of the return, will not invalidate it. Spengler *v.* O'Shea, 65 Miss. 75, 3 So. 378 (holding that, under a statute providing that a constable, after a levy on land, should hand the writ to the sheriff, who should return it to the circuit clerk, failure of the sheriff to indorse thereon the date of his return is not fatal to a proceeding where the constable's return was regular and properly noted in the sheriff's attachment docket); Hart *v.* Forbes, 60 Miss. 745; Johnson *v.* Gilkeson, 81 Mo. 55. See also Dronillard *v.* Whistler, 29 Ind. 552, holding that the return is not vitiated by the description of an appraiser as a "reputable" instead of a "credible" householder; or by an omission to state that he is a "disinterested" person, if it appears that he was not a party to the suit.

58. Newton *v.* Strang, 48 Mo. App. 538.

59. Ahern *v.* Purnell, 62 Conn. 21, 25 Atl. 393; Hunter *v.* Clarke, 16 Wkly. Notes Cas. (Pa.) 558. *Compare* Green *v.* Pyne, 1 Ala. 235, holding that the failure to specifically describe the property in the return should be remedied by the court compelling the officer to amend his return, and not by quashing the attachment.

Parol evidence is not admissible to show what property was attached where the return does not in some manner designate the property. Sanford *v.* Pond, 37 Conn. 588.

Reference to other papers in some other court or case for a description of the property is not sufficient (Harding *v.* Kansas City Guaranty L. & T. Co., 3 Kan. App. 519, 43 Pac. 835); but the return may refer to an appraisement returned with the writ (Grebe *v.* Jones, 15 Nebr. 312, 18 N. W. 81).

60. Baxter *v.* Rice, 21 Pick. (Mass.) 197.

61. Hiles Carver Co. *v.* King, 109 Ga. 180, 34 S. E. 353; Bruce *v.* Pettengill, 12 N. H. 341; Messner *v.* Lewis, 20 Tex. 221; Mills *v.* Waller, Dall. (Tex.) 416; West River Bank *v.* Gorham, 38 Vt. 649; Rogers *v.* Fairfield, 36 Vt. 641; Paul *v.* Burton, 32 Vt. 148; Fullam *v.* Stearns, 30 Vt. 443; Bucklin *v.* Crampton, 20 Vt. 261.

Sufficient description.—Returns that the officer had levied upon four horses, describing their color, as the property of defendant (Fleming *v.* Burge, 6 Ala. 373), on a "certain stock of dry goods, clothing, boots and shoes, hats and caps, trunks, valises, goods, wares, and merchandise in a certain store house on lot number 6 in block 22 in town of Temple," valued at the sum of one thousand dollars, found in the possession of J. S. (Sweetser *v.* Sparks, 3 Tex. Civ. App. 33, 21 S. W. 724), on "a lot of dry goods, . . . and an iron safe, situated in a store house occupied by Hilliard Brothers" (Hilliard *v.* Wilson, 76 Tex. 180, 13 S. W. 25), or on "all the wood and coal of the defendant lying on a lot of land belonging to B. H., situate in B." (Reed *v.* Howard, 2 Metc. (Mass.) 36) have been held sufficient. See also Clement *v.* Little, 42 N. H. 563; Ela *v.* Shepard, 32 N. H. 277; Brown *v.* Hudson, 14 Tex. Civ. App. 605, 38 S. W. 653; Davis *v.* Dallas Nat. Bank, 7 Tex. Civ. App. 41, 26 S. W. 222; Carothers *v.* Wilkerson, 2 Tex. App. Civ. Cas. § 353; Pond *v.* Baker, 58 Vt. 293, 2 Atl. 164.

Insufficient description.— A return that the attachment was levied on "all the stock and goods in said defendant's store, situated on Main street" does not contain a sufficient description of the property. Ahern *v.* Purnell, 62 Conn. 21, 25 Atl. 393. Nor does a description of cider as situated "in defendant's cellar" identify it with sufficient certainty when it is in the cellar of another house on the farm occupied by a tenant situated a mile from the house in which defendant lives. Barron *v.* Smith, 63 Vt. 121, 21 Atl. 269.

Excusable misdescription.— When from the appearance and use of the articles it is clear that they may have been naturally and in good faith misdescribed, as where, for instance, an officer attaches halters, ropes for tying oxen, hame collars, etc., and in his return calls them harnesses, such error will not avoid the attachment. Briggs *v.* Mason, 31 Vt. 433.

62. Kenîston *v.* Stevens, 66 Vt. 351, 29 Atl. 312, holding that a return on an attachment levied on cows, which did not describe the

has been held that this alone, in the absence of a statement of its quality or kind, is insufficient.[63]

(b) Realty. On attachment of realty the return should describe the land with such precision that it may be readily identified.[64] While there is respectable authority to the effect that the description should be as specific as that required in a deed,[65] and while such a description would no doubt in all cases be sufficient,[66] yet, inasmuch as the object of the attachment is to secure the jurisdiction of the court over the land until plaintiff establishes his claim, it would seem that the same certainty ought not to be required as when the title is divested.[67]

(2) Defendant's Ownership. By the better practice, and in some jurisdictions necessarily, the return should show, either by express statement or necessary

cows as situated on any farm or in any place, or in any person's possession, or even as being within the town, was insufficient.

Sufficient description of location.—Where a return enumerated property as "one buggy-wagon, one Prescott organ, 40 bobbin logs, situated on defendant's farm," the expression "on defendant's farm," although there is no comma between it and the word "logs," refers to all the property and not to the logs only. Barron *v.* Smith, 63 Vt. 121, 21 Atl. 269.

63. Ahern *v.* Purnell, 62 Conn. 21, 25 Atl. 393, holding, however, that where the only sheep on defendant's farm were in a barn on a part thereof leased to a tenant, the description in a return that they were on defendant's farm was sufficient.

"All the hay and grain in the barns and in stacks" on a certain farm, in an officer's return, may be held to properly include grain in the straw. Briggs *v.* Taylor, 35 Vt. 57.

A return that all the hay and grain in defendant's barn had been attached is not rendered invalid by the fact that defendant had two barns, one of which contained hay only, since the return related to the hay and grain, and not to the barns, and could have no reference to the barns in which hay only was located. Stanton *v.* Hodges, 6 Vt. 64.

Shares of stock, being distinguishable from each other only by their respective owners, a description in the return of the attaching officer specifying the number of shares attached and the owner is sufficient. Stamford Bank *v.* Ferris, 17 Conn. 259. Nor need the sheriff append to his return the certificate shown him by the officer of the corporation when he made the levy. Thompson *v.* Wells, 57 Ill. App. 436.

64. Price *v.* Taylor, 22 Ky. L. Rep. 249, 57 S. W. 255; Norfleet *v.* Logan, 21 Ky. L. Rep. 1200, 54 S. W. 713; Pumphrey *v.* Rafferty, 5 Ky. L. Rep. 765; City Nat. Bank *v.* Cupp, 59 Tex. 268 (where at least as between plaintiff and defendant in attachment, the description of the property was clearly sufficient); Meuley *v.* Zeigler, 23 Tex. 88; Robertson *v.* McClay, 19 Tex. Civ. App. 513, 48 S. W. 35; Raub *v.* Otterback, 92 Va. 517, 23 S. E. 883; Robertson *v.* Hoge, 83 Va. 124, 1 S. E. 667.

All defendant's real estate in a certain town.—A return by an officer that he had attached all the real estate owned by defendant in a certain town constitutes a valid attachment of all of defendant's lands which come within that description. Moore *v.* Kidder, 55 N. H. 488; Clemons *v.* Clemons, 69 Vt. 545, 38 Atl. 314 [*approving* Young *v.* Judd, Brayt. (Vt.) 151]. See also Veazie *v.* Parker, 23 Me. 170; Roberts *v.* Bourne, 23 Me. 165, 39 Am. Dec. 614; Crosby *v.* Allyn, 5 Me. 453; Taylor *v.* Mixter, 11 Pick. (Mass.) 341; Whitaker *v.* Sumner, 9 Pick. (Mass.) 308.

Defendant's homestead farm.—A return that "the homestead farm of the debtor, containing about thirty acres, more or less" had been attached creates a lien on the whole farm, although it in fact contained one hundred and fifty acres. Designating the property as the homestead was a sufficient description of the whole land, and the number of acres being only a part of the description and being inconsistent with the more general description should be rejected as a mistake of the officer or as repugnant. Bacon *v.* Leonard, 4 Pick. (Mass.) 277.

If an equity of redemption is attached by an officer a description of the property as the debtor's right of redemption in property conveyed by a certain mortgage is sufficient. Wolfe *v.* Dorr, 24 Me. 104.

Omission to set out the number of feet frontage on a certain street, of certain premises, is not fatal if the description of the property is otherwise definite. Clark *v.* Empire Lumber Co., 87 Ga. 742, 13 S. E. 826.

65. Fitzhugh *v.* Hellen, 3 Harr. & J. (Md.) 206 (holding that the description must be sufficiently certain to lay a legal foundation for a judgment of condemnation); Henry *v.* Mitchell, 32 Mo 512; Biggs *v.* Blue, 5 McLean (U. S.) 148, 3 Fed. Cas. No. 1,403.

66. Hays *v.* Bouthalier, 1 Mo. 346; Marston *v.* Stickney, 58 N. H. 609; Moore *v.* Kidder, 55 N. H. 488; Howard *v.* Daniels, 2 N. H. 137.

67. Price *v.* Taylor, 22 Ky. L. Rep. 1945, 62 S. W. 270; White *v.* O'Bannon, 86 Ky. 93, 9 Ky. L. Rep. 334, 5 S. W. 346 (where a return "Levied this attachment on one hundred and forty acres of land near Eminence, Henry County, the property of defendants" was held sufficient); Lambard *v.* Pike, 33 Me. 141; Whitaker *v.* Sumner, 9 Pick. (Mass.) 308 (where it is said that whether a description must be as certain as in a deed may be doubted); Robertson *v.* Kinkhead, 26 Wis. 560.

intendment, that the property was attached as belonging to defendant,[68] or that he had an interest or ownership therein.[69] A failure to so state, however, is a defect which at the proper time may be amended.[70]

(3) VALUE. Although the return in attachment need not, in the absence of statute, contain a valuation of the property attached, yet, inasmuch as it is the officer's duty to seize a sufficient amount to cover the claim sued on, it would

68. *Alabama.*— Thornton *v.* Winter, 9 Ala. 613 [*approving* Kirksey *v.* Bates, 1 Ala. 303]; Miller *v.* McMillan, 4 Ala. 527, the last case holding that the legal conclusion from a return stating the number of bales of cotton with their marks, and affirming that they were the property of defendants, was that the cotton was the property of all the defendants in the attachment.

Georgia.— Tuells *v.* Torras, 113 Ga. 691, 39 S. E. 455.

Illinois.— Reitz *v.* People, 77 Ill. 518; Foster *v.* Illinski, 3 Ill. App. 345. *Compare* Hogue *v.* Corbit, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232, holding that while it was the better practice that such statement should expressly appear, yet its omission would not, in a collateral suit, invalidate a title, the basis of which was the levy.

Kansas.— Repine *v.* McPherson, 2 Kan. 340.

Kentucky.— Mason *v.* Anderson, 3 T. B. Mon. (Ky.) 293.

Michigan.— Baxter *v.* Grove, 92 Mich. 291, 52 N. E. 294, holding that a return which failed to show that the property attached was in the possession of, or belonged to, either of defendants, would not authorize the issue of a writ to another county, under a statute providing for its issue to the sheriff of another county in which defendants may be found for service.

Missouri.— Anderson *v.* Scott, 2 Mo. 15.

New Jersey.— Yardley *v.* Yardley, 32 N. J. L. 215, holding that if the legal import of the language of the return show the property to be that of defendant it is sufficient.

Ohio.— Pelton *v.* Platner, 13 Ohio 209, 42 Am. Dec. 197.

Virginia.— Offtendinger *v.* Ford, 86 Va. 917, 12 S. E. 1; Robertson *v.* Hoge, 83 Va. 124, 1 S. E. 667; Clay *v.* Neilson, 5 Rand. (Va.) 596.

See 5 Cent. Dig. tit. "Attachment," § 1155.

Contra, Saunders *v.* Columbus L., etc., Ins. Co., 43 Miss. 583; Colfax Bank *v.* Richardson, 34 Oreg. 518, 54 Pac. 359, 75 Am. St. Rep. 664; Willis *v.* Mooring, 63 Tex. 340 [*distinguishing* Menley *v.* Zeigler, 23 Tex. 88, on the ground that it was a judicial attachment]; Stoddart *v.* McMahon, 35 Tex. 267 [*refusing* to follow Menley *v.* Zeigler, 23 Tex. 88, in so far at least as it referred to attachment when issued as an auxiliary process]; Tobar *v.* Losano, 6 Tex. Civ. App. 698, 25 S. W. 973.

As to presumption that property was defendant's, although not in fact so stated, see *infra,* XI, E, 2, b, note 84.

Effect of misnomer or misstatement of ownership.— Where an officer, commanded to attach the lands of defendants, late copartners, etc., makes a mistake in stating in his return that the property belongs to one of the parties, it has been held not to destroy the effect of the attachment in respect to the other. Such misstatement may be rejected as a mistake of the officer, or as being repugnant to the levy and more general description of the property in the return. Robertson *v.* Kinkhead, 26 Wis. 560 [*citing* Bacon *v.* Leonard, 4 Pick. (Mass.) 277]. Nor would the mistake in the name of defendant, if the property attached could easily be designated after striking out the name, be fatal to the attachment. Frost *v.* Paine, 12 Me. 111. On the other hand, it is held that where the writ ran against three defendants, a return that the officer attached "all the rights, title and interest of defendant" is too vague and uncertain to create a lien on the estate of any one of the defendants. Hathaway *v.* Larrabee, 27 Me. 449.

A prima facie case of ownership in defendant is not made out by a return which states that defendants are not found in the county, and does not state in whose possession the officer found the property attached. Doane *v.* Glenn, 1 Colo. 495.

A return is sufficient that the officer had attached the property described "as the property of defendant." Cousins *v.* Alworth, 44 Minn. 505, 47 N. W. 169, 10 L. R. A. 504. See also Wharton *v.* Conger, 9 Sm. & M. (Miss.) 510.

69. Tuells *v.* Torras, 113 Ga. 691, 39 S. E. 455; Hiles Carver Co. *v.* King, 109 Ga. 180, 34 S. E. 353; Newton *v.* Strang, 48 Mo. App. 538.

Defendant's possession is not negatived by a return stating that the property was seized at a certain railroad depot. Moore *v.* Brewer, 94 Ga. 260, 21 S. E. 460.

Statement of amount of defendant's interest.—While it is proper for the return to state that all the right, title, or interest of defendant in certain property has been attached (Kendall *v.* Irving, 42 Me. 339), yet, as the amount of interest which defendant has in the property can more properly be determined by the court than by the officer, the return need not show the exact extent of his interest (Drew *v.* Bequindre, 2 Dougl. (Mich.) 93).

70. Stout *v.* Brown, 64 Ark. 96, 40 S. W. 701; Mason *v.* Anderson, 3 T. B. Mon. (Ky.) 293; Todd *v.* Missouri Pac. R. Co., 33 Mo. App. 110.

Amendment of return, generally, see *infra,* XI, E, 3.

seem not only to be proper but the better practice, that the return show the approximate value of the property taken.[71]

(D) *Personal Service or Notice.* Under statutes requiring service of personal notice of the attachment upon defendant, if he can be found, the return must affirmatively show that such service was properly made,[72] or that it could not have been upon reasonable effort.[73] Where the statute requires that, upon the inability of the officer to find defendant, he shall leave a copy at his usual place of abode,[74] or with the tenant or party in possession,[75] or that it shall be

71. Barton *v.* Ferguson, 1 Indian Terr. 263, 37 S. W. 49.

Such statement of value is only prima facie evidence against the officer, and does not estop him from showing the true value, although it casts upon him the burden of proof. Pierce *v.* Strickland, 2 Story (U. S.) 292, 19 Fed. Cas. No. 11,147. On the other hand, if there is no other evidence of value than that contained in the return, it will be taken in an action against the officer as the correct value. French *v.* Stanley, 21 Me. 512.

72. Crary *v.* Barber, 1 Colo. 172 (holding that, under a statute requiring that the writ shall be read to defendant, or a true copy delivered to him, a return which states that the service was made by reading to defendant the name of plaintiff and the amount claimed and when and where defendant was to answer the complaint is insufficient); Tucker *v.* Byars, 46 Miss. 549; Watts *v.* Willett, 2 Hilt. (N. Y.) 212. See also Talcott *v.* Rosenberg, 8 Abb. Pr. N. S. (N. Y.) 287; Strickland *v.* Martin, 23 Vt. 484.

Defect not fatal.—Failure to state that a copy was served is a mere irregularity, if the return otherwise shows the attachment to have been levied. Wagstaff *v.* Moser, 8 Kan. App. 855, 55 Pac. 554 [*citing* Wilkins *v.* Tourtellott, 42 Kan. 176, 22 Pac. 11]; Dunlap *v.* McFarland, 25 Kan. 488; Schweigel *v.* L. A. Shakman Co., 78 Minn. 142, 80 N. W. 871, 81 N. W. 529. See also Fears *v.* Thompson, 82 Ala. 294, 2 So. 719.

Return insufficient because of place of service.—An officer's return that he gave defendant a copy at a place out of his precinct is extra-official and is not proper evidence of notice. Arnold *v.* Tourtellot, 13 Pick. (Mass.) 172.

Sufficient statement that service was made.—A return indorsed by the sheriff on a writ of attachment in the following language: "I served a certified copy of the within writ on Charles L. Dolph, . . . by delivering the same to Charles L. Dolph, and . . . I served a certified copy, together with a copy of the inventory, on C. M. Dingman," is fairly to be interpreted as denoting service of a copy of the writ as well as the inventory upon the last named. Watson *v.* Dingman, 120 Mich. 443, 79 N. W. 639.

73. Reynolds *v.* Marquette Cir. Judge, 125 Mich. 445, 84 N. W. 628; Farr *v.* Kilgour, 117 Mich. 227, 75 N. W. 457; Holden *v.* Ranney, 45 Mich. 399, 8 N. W. 78 (holding that a return that the officer personally attempted to serve notice on defendant by offering him a copy "but he ran away. I could not deliver a copy to him," is insufficient). See also Barney *v.* Patterson, 6 Harr. & J. (Md.) 182.

A return showing diligent "search" for defendant, where the statute requires diligent "inquiry," is insufficient. Thomas *v.* Morasco, 5 Pa. Dist. 133.

It is sufficient that the return shows that the officer made a diligent search for defendant during all the time in which personal service could be made. Davidson *v.* Fox, 120 Mich. 385, 79 N. W. 1106. The statute does not contemplate a search in the sense that the sheriff must make a tour of the entire county to find defendant. Horton *v.* Monroe, 98 Mich. 195, 57 N. W. 109 [*citing* Hitchcock *v.* Hahn, 60 Mich. 459, 27 N. W. 600]. But a return which merely shows that property was attached and that no personal service was made on any of the defendants but fails to show that they could not be found is insufficient. Cochrane *v.* Johnson, 95 Mich. 67, 54 N. W. 707. So too a statement in a return that a copy of the attachment was left with defendant's wife because defendant could not be found within the county sufficiently shows that defendant was not personally served, inasmuch as lawful service could only have been made within the county. Williams *v.* Barnaman, 19 Abb. Pr. (N. Y.) 69.

Where there is more than one defendant to an attachment suit, a return by the sheriff that he could not find the defendants is equivalent to certifying that neither could be found, and would be false if one was found or could have been served with the process. Hitchcock *v.* Hahn, 60 Mich. 459, 27 N. W. 600.

74. Adams *v.* Abram, 38 Mich. 302; Proctor *v.* Whitcher, 15 N. Y. App. Div. 227, 44 N. Y. Suppl. 190; Watts *v.* Willett, 2 Hilt. (N. Y.) 212; Willard *v.* Sperry, 16 Johns. (N. Y.) 121; Sheldon *v.* Comstock, 3 R. I. 84.

Under the early Vermont statute, the return must not only show that a copy of the writ was left at the last and usual place of abode of the defendant, but it must also state the situation in which such copy was left. Inasmuch, however, as this condition is for the benefit of defendant the attachment is valid as to the subsequent creditors without it. Newton *v.* Adams, 4 Vt. 437.

75. Anderson *v.* Moline Plow Co., 101 Iowa 747, 69 N. W. 1028, 63 Am. St. Rep. 424; Williams *v.* Barnaman, 19 Abb. Pr. (N. Y.) 69.

Such a condition is not fulfilled by a statement that the property was not, to the sheriff's knowledge, in the possession of any per-

posted in some designated or conspicuous place,[76] the return must show that such requirements have been observed.

(II) *When Levy Is Made Subject to Other Levies.* The return of an officer that he makes the attachment subject to other attachments is evidence of the order in which the writs are served,[77] but is by no means conclusive as to the validity of a former levy.[78] Where the levy is made subject to the levy of an officer who is in possession the return of the latter must show what was done in respect to the subsequent levy.[79]

b. Signature. The officer should of course sign the return.[80] It has been

son at the time of its seizure. White *v.* Prior, 88 Mich. 647, 50 N. W. 655.

In Louisiana the return of a domiciliary service should show the name of the person in possession, and whether or not the property was at, or was kept at, the domicile of defendant. Lehman *v.* Broussard, 45 La. Ann. 346, 12 So. 504.

Must show that tenant holds under defendant.— Under a statute providing that in the attachment of real estate it is "the duty of the sheriff to leave a copy of the writ with the tenant, or other person in actual possession, holding under the defendant in the attachment," the return must show that the party in possession with whom the copy was left was "holding under the defendant in the attachment." Bryan *v.* Trout, 90 Pa. St. 492; Hayes *v.* Gillespie, 35 Pa. St. 155; Falk *v.* Wurzburger, 3 Kulp (Pa.) 321.

A return which by fair implication states that a copy of the writ and notice was left with the parties in possession is sufficient as against subsequent creditors with notice, although it does not specifically show that the statute has been literally complied with. Sabin *v.* Mitchell, 27 Oreg. 66, 39 Pac. 635; Thielens *v.* White, 13 Wkly. Notes Cas. (Pa.) 194.

76. Wilson *v.* Ray, T. U. P. Charlt. (Ga.) 109; Connell *v.* Medlock, 24 La. Ann. 512; Jones *v.* Walker, 15 Gray (Mass.) 353.

Sufficient statutory compliance.— A return by an officer that he attached real estate by "posting" a copy of the writ in a conspicuous place thereon is a sufficient showing of the "leaving" of a copy in such place as to defeat any collateral attack on the proceeding. Colfax Bank *v.* Richardson, 34 Oreg. 518, 54 Pac. 359, 75 Am. St. Rep. 664. If the return shows that a copy was posted on the premises omission to state that the copy was left in a conspicuous place, although an irregularity, is not a fatal omission (Davis *v.* Baker, 72 Cal. 494, 14 Pac. 102; Lewis *v.* Quinker, 2 Metc. (Ky.) 284; Lively *v.* Southern Bldg., etc., Assoc., 46 W. Va. 180, 33 S. E. 93), and if the return shows that a copy was left in a conspicuous place it need not point out such place (Colfax Bank *v.* Richardson, 34 Oreg. 518, 54 Pac. 359, 75 Am. St. Rep. 664 [*distinguishing* Hall *v.* Stevenson, 19 Oreg. 153, 23 Pac. 887, 20 Am. St. Rep. 803]). So too if a levy of real estate is made by posting a copy of the writ thereon the return need not affirmatively show that the premises were unoccupied at the time, in which case alone a valid levy could be made by posting. Ritter *v.* Scannell, 11 Cal. 238, 70 Am. Dec. 775.

Insufficient compliance.— A return showing that a "notice," instead of a copy of the writ, had been posted in the most public part of the property was insufficient to show a valid execution of the writ. Sharp *v.* Baird, 43 Cal. 577.

77. Thurston *v.* Huntington, 17 N. H. 438.

If he returns that the levies on two writs were contemporaneous when in fact one was precedent to the other an action will lie against him for a false return. State *v.* Harrington, 28 Mo. App. 287.

78. Therefore the return of an officer making a subsequent levy that it was made on a stock of goods subject to the rights of the first attachment is not equivalent to showing that the first attachment was levied on the entire stock of goods, and it may be shown that there had been no levy made on any of the goods. National Wall-Paper Co. *v.* Fourth Nat. Bank, (Tenn. Ch. 1898) 51 S. W. 1002.

79. Hence, in consequence of such defective return, where the intermediate levy was ignored in the application of the proceeds of the property by the successor in office of the party who was in possession, the latter and his sureties are liable on his official bond. State *v.* Curran, 45 Mo. App. 142.

Where an officer in possession under attachment attaches under a second writ he need only return that he so attached the right, title, and interest of defendant in the property, such interest being in his possession. O'Connor *v.* Blake, 29 Cal. 312.

Where the officer has both writs in his possession when he comes upon the property it has been held in an early case that he should return each of them as levied upon the whole property found. Violette *v.* Tyler, 2 Cranch C. C. (U. S.) 200, 28 Fed. Cas. No. 16,955.

80. Wilkins *v.* Tourtellott, 28 Kan. 825, 834, where it is said, "the mere fact that a paper is filed containing a recital of certain acts, which paper is unsigned by any one, contains no evidence either that the acts so stated were in fact done, or, if done, by whom they were done. Process, in the nature of an order of attachment, must not only be executed in a certain way, but also by a certain officer, and the signature of the officer is essential to show what was done, and by whom it was done." See also Clymore *v.* Williams, 77 Ill. 618. *Compare* Lea *v.* Maxwell, 1 Head (Tenn.) 365, where, without deciding whether or not the officer could sign after his term of office had expired, it was

held, however, that the omission of such signature is a defect which may be corrected by amendment.[81]

2. Aider of Defects — a. By Extrinsic Evidence. Where the return clearly shows that certain property was attached, the performance by the officer of certain acts in connection therewith may be shown by parol evidence,[82] or by facts appearing elsewhere in the proceeding.[83]

b. By Presumption. Since, in the absence of a showing to the contrary, an officer is presumed to have done his duty, the courts in many instances will presume that the statute has been complied with, if the return, although informal in some respects, is set forth in language sufficiently definite to justify an intendment of regularity, and there is no affirmative evidence of an omission.[84] When, how-

held that, under the circumstances of the case, the signature was not essential to the validity of the levy.

The necessity of swearing to the return depends upon statute. Under the Pennsylvania act of 1869 it need not be thus verified. Mechanics' Nat. Bank *v.* Miners' Bank, 13 Wkly. Notes Cas. (Pa.) 515. And see Edmonds *v.* Buel, 23 Conn. 242, holding that an indifferent person to whom a writ was directed for service need not make oath as to the truth of his return.

81. Wilkins *v.* Tourtellott, 28 Kan. 825; Childs *v.* Barrows, 9 Metc. (Mass.) 413.

Amendment of return, generally, see *infra*, XI, E, 3.

82. Sinsheimer *v.* Whitely, 111 Cal. 378, 43 Pac. 1109, 52 Am. St. Rep. 192; Brusie *v.* Gates, 80 Cal. 462, 22 Pac. 284; Davis *v.* Baker, 72 Cal. 494, 14 Pac. 102; Porter *v.* Pico, 55 Cal. 165; Ritter *v.* Scannell, 11 Cal. 238, 70 Am. Dec. 775; Garity *v.* Gigie, 130 Mass. 184; Smith *v.* Moore, 17 N. H. 380.

Such evidence must be clear and satisfactory, and cannot rest upon presumption. Hence if the witnesses will not testify positively to a performance of one of the necessary acts the testimony is not sufficient. Brusie *v.* Gates, 80 Cal. 462, 22 Pac. 284.

83. Grebe *v.* Jones, 15 Nebr. 312, 18 N. W. 81 (appraisement returned with and referred to in the return); Bell *v.* Moran, 25 N. Y. App. Div. 461, 50 N. Y. Suppl. 982; Williams *v.* Barnaman, 19 Abb. Pr. (N. Y.) 69. See also Brown *v.* Elmendorf, (Tex. Civ. App. 1894) 25 S. W. 145, where the return recited a levy at a certain date "on the property, a list of which is hereto attached, made a part of this return." There were two lists: one of personalty, on which was a note that it was levied on at the date shown by the return, the other, of realty, was noted as being levied on at a later date. It was held that these lists were admissible in evidence as a part of the return, and would justify a finding that the property was levied on at the time mentioned therein. *Compare* Kirksey *v.* Bates, 1 Ala. 303.

84. *California.*— Porter *v.* Pico, 55 Cal. 165; Ritter *v.* Scannell, 11 Cal. 238, 70 Am. Dec. 775.

Connecticut.— Baker *v.* Baldwin, 48 Conn. 131, where the return failed to state that the property attached was sufficient to pay the judgment.

Georgia.— Hiles Carver Co. *v.* King, 109 Ga. 180, 34 S. E. 353, holding that after the presumption is invoked the burden of showing any omission of duty which renders the seizure illegal or invalid is on the party making the attack upon the levy.

Iowa.— Rowan *v.* Lamb, 4 Greene (Iowa) 468 [*overruling* Tiffany *v.* Glover, 3 Greene (Iowa) 387].

Kansas.— Wilkins *v.* Tourtellott, 42 Kan. 176, 22 Pac. 11; Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911; Dunlap *v.* McFarland, 25 Kan. 488.

Kentucky.— Anderson *v.* Sutton, 2 Duv. (Ky.) 480; Lewis *v.* Quinker, 2 Metc. (Ky.) 284 (failure to state that a copy was left in a conspicuous place on the premises).

Maine.— Hathaway *v.* Larrabee, 27 Me. 449; Smith *v.* Smith, 24 Me. 555; Childs *v.* Ham, 23 Me. 74 (where the return failed to state that sufficient property was attached to pay the judgment); Crosby *v.* Allyn, 5 Me. 453 (holding that the return need not state that the officer entered upon the land even if such entry be necessary).

Michigan.— Bushey *v.* Raths, 45 Mich. 181, 7 N. W. 802.

Mississippi.— Saunders *v.* Columbus L., etc., Ins. Co., 43 Miss. 583; Redus *v.* Wofford, 4 Sm. & M. (Miss.) 579.

Missouri.— Johnson *v.* Gilkeson, 81 Mo. 55.

New Jersey.— Dodge *v.* Butler, 42 N. J. L. 370; Boyd *v.* King, 36 N. J. L. 134, 136, in which latter case the court said: "To render the return of the attachment fatally defective, when there has been in substance an execution of the process, it must be made to appear affirmatively that an essential act has been omitted to be done. When there is no clear exhibition of such omission it cannot be inferred."

New York.— Talcott *v.* Rosenberg, 8 Abb. Pr. N. S. (N. Y.) 287.

Pennsylvania.— Prather *v.* Chase, 3 Brewst. (Pa.) 206. At least no presumption after judgment will be indulged to invalidate it. Thompson *v.* Owen, 8 Kulp (Pa.) 36.

Texas.— Willis *v.* Mooring, 63 Tex. 340.

Vermont.— Fletcher *v.* Cole, 26 Vt. 170; Bucklin *v.* Crampton, 20 Vt. 261, in the latter case the return stating that the officer attached thirty tons of hay as the property of defendant, "in a barn on the premises," it was presumed, in the absence of any further description, that the premises occupied by defendant were intended.

ever, the obscurity of the return is such that its import cannot be ascertained with reasonable certainty, the court will not, to make it effective, indulge in mere conjectural construction.[85]

c. By Waiver. By appearing generally,[86] by admitting the fact of levy in his answer,[87] or by reading an amended return in support of his motion to vacate the attachment in the court below,[88] attachment defendant[89] waives any formal defects in the return.[90]

3. AMENDMENT — a. Right to Amend — (1) *GENERALLY.* While it has been held that an officer has an absolute right to amend his return, to conform to the facts, at any time before the cause is submitted to the jury,[91] the better rule would seem to be that he can amend without leave of the court only before it becomes a part of the record.[92] Such leave will usually be

Virginia.— Thus, as he is without authority to serve the writ outside of his bailiwick, and the presumption of law in the absence of evidence to the contrary is that he executed it legally, the return need not show that the service was in his bailiwick. North America Guarantee Co. *v.* Lynchburg First Nat. Bank, 95 Va. 480, 28 S. E. 909. *Compare* Shearer *v.* Davis, etc., Lumber Co., 78 Wis. 278, 47 N. W. 360.

See 5 Cent. Dig. tit. "Attachment," § 1166.

Failure to state defendant's ownership of property attached.—Upon this principle, where the return properly describes property, it has been presumed to have been attached as that of defendant.

Alabama.— King *v.* Bucks, 11 Ala. 217; Lucas *v.* Godwin, 6 Ala. 831; Bickerstaff *v.* Patterson, 8 Port. (Ala.) 245.

Iowa.— Rowan *v.* Lamb, 4 Greene (Iowa) 468 [*overruling* Tiffany *v.* Glover, 3 Greene (Iowa) 387].

Michigan.— Horton *v.* Monroe, 98 Mich. 195, 57 N. W. 109.

Mississippi.— Saunders *v.* Columbus L., etc., Ins. Co., 43 Miss. 583.

New York.— Johnson *v.* Moss, 20 Wend. (N. Y.) 145.

Texas.— Willis *v.* Mooring, 63 Tex. 340.

Wisconsin.— Robertson *v.* Kinkhead, 26 Wis. 560.

See 5 Cent. Dig. tit. "Attachment," § 1166.

Where the officer testifies to his custom in making levies of attachment generally, the question whether the inference from that custom is sufficient to repel the presumption that the officer performed his duty is for the trial court, and its decision on the evidence will not be disturbed. Porter *v.* Pico, 55 Cal. 165.

85. Hathaway *v.* Larrabee, 27 Me. 449. See also Millard *v.* Hayward, 107 Mich. 219, 65 N. W. 104 [*distinguishing* Hitchcock *v.* Hahn, 60 Mich. 459, 27 N. W. 600] (holding that, where a return was filed on the return-day, February 5, and recited that the property was attached January 12, and that after diligent search the officer had been unable to find defendant, and this statement was dated January 15, no presumption could be invoked that the officer continued to look for defendant from the date of the writ to the date of the filing); Kittredge *v.* Bellows, 4 N. H. 424].

Where the code requires a full return of all the officer's proceedings on or before the return-day of the writ it has been held that it will not be presumed that he levied on any other property than that which he specified in the return. Phillips *v.* Harvey, 50 Miss. 489.

An obscurity or irregularity in the date will be considered in connection with the date of the writ, and not understood as prior thereto. Millett *v.* Blake, 81 Me. 531, 18 Atl. 293, 10 Am. St. Rep. 275; Mechanics' Nat. Bank *v.* Miners' Bank, 13 Wkly. Notes Cas. (Pa.) 515, the latter case holding that, where a return stated that the attachment was served May 17, and in a subsequent clause that "on the same day, to wit: April 17, 1883, I attached," the irregularity will be considered as a mere clerical error, and it will be held that the attachment was made on April 17.

86. Leopold *v.* Steel, 41 Ill. App. 17; Williams *v.* Stewart, 3 Wis. 773.

A traverse of the attachment affidavit is a general appearance. Madison First Nat. Bank *v.* Greenwood, 79 Wis. 269, 45 N. W. 810, 48 N. W. 421.

87. Buffington *v.* Mosby, 17 Ky. L. Rep. 1307, 34 S. W. 704; Young *v.* South Tredegar Iron Co., 85 Tenn. 189, 2 S. W. 202, 4 Am. St. Rep. 752.

88. Stewart *v.* Houston, 25 Ark. 311.

89. Waiver by intervener.— An intervener who consents to the property remaining in the custody of the attaching officer, and who joins in a delivery bond for it, waives the irregularities in a return affecting the validity of the levy. J. I. Case Threshing Mach. Co. *v.* Merrill, 68 Iowa 540, 27 N. W. 742.

90. Where the levy is void for failure of the return to show that the sheriff went upon the land and there declared a levy, as required by the code, such defect is not waived by defendants' failure to urge the objection, and a subsequent lien-holder may raise it. Peoples Bank *v.* West, 67 Miss. 729, 7 So. 513, 8 L. R. A. 727.

91. O'Connell *v.* Ackerman, 62 Md. 337; Main *v.* Lynch, 54 Md. 658.

92. Harris *v.* Russell, 93 Ala. 59, 9 So. 541; Nelson *v.* Cook, 19 Ill. 440; Bicknell *v.* Trickey, 34 Me. 273; Cochrane *v.* Johnson, 95 Mich. 67, 54 N. W. 707; Watson *v.*

granted,[93] either upon the application of the officer or of an interested party,[94] but this is true only when the return as amended would show legal service,[95] and then only when there is sufficient on record before the court to enable it to reasonably infer that the amendment is in accord with the facts,[96] and merely affects the evidence, and not the fact, of service.[97] An amendment should not be allowed which would release the property attached and included within the original return.[98]

(11) *After Expiration of Officer's Term.* The fact that the officer's term of office has expired will not as a rule prevent the court's exercising its discretion in allowing an amendment to an attachment return.[99]

Toms, 42 Mich. 561, 4 N. W. 304; Myers *v.* Prosser, 40 Mich. 644.

Mere clerical errors (Mechanics' Nat. Bank *v.* Miners' Bank, 13 Wkly. Notes Cas. (Pa.) 515) such, for instance, as a mistake of date in the return of the levy, it has been held may be corrected at any time (Ritter *v.* Scannell, 11 Cal. 238, 70 Am. Dec. 775).

93. Where the cause is removed to the federal court the state court has no power, after such removal, to allow an amendment. Hall *v.* Stevenson, 19 Oreg. 153, 23 Pac. 887, 20 Am. St. Rep. 803; Tallman *v.* Baltimore, etc., R. Co., 45 Fed. 156.

94. *Colorado.*— McClure *v.* Smith, 14 Colo. 297, 23 Pac. 786.

Connecticut.— Sanford *v.* Pond, 37 Conn. 588.

Georgia.— Guckenheimer *v.* Day, 74 Ga. 1.

Illinois.— Smith *v.* Clinton Bridge Co., 13 Ill. App. 572. See also Plato *v.* Turrill, 18 Ill. 273.

Iowa.— See Foster *v.* Davenport, 109 Iowa 329, 80 N. W. 404; Hicks *v.* Swan, 97 Iowa 556, 66 N. W. 762.

Kansas.— Harding *v.* Kansas City Guaranty L. & T. Co., 3 Kan. App. 519, 43 Pac. 835.

Michigan.— Kidd *v.* Dougherty, 59 Mich. 240, 26 N. W. 510; Green *v.* Kindy, 43 Mich. 279, 5 N. W. 297.

Missouri.— Buller *v.* Woods, 43 Mo. App. 494.

New Hampshire.— Clement *v.* Little, 42 N. H. 563; Wendell *v.* Mugridge, 19 N. H. 109.

New York.— Guck *v.* Manning, 63 Hun (N. Y.) 345, 17 N. Y. Suppl. 915, 44 N. Y. St. 391, 22 N. Y. Civ. Proc. 94 [*affirmed* in 137 N. Y. 630, 33 N. E. 745, 51 N. Y. St. 932]; Vanderheyden *v.* Gary, 38 How. Pr. (N. Y.) 367.

Pennsylvania.— Maris *v.* Schermerhorn, 3 Whart (Pa.) 13.

South Dakota.— Chaffee *v.* Runkel, 11 S. D. 333, 77 N. W. 583.

Texas.— Hill *v.* Cunningham, 25 Tex. 25; Messner *v.* Lewis, 20 Tex. 222; Briggs *v.* Lane, 1 Tex. App. Civ. Cas. § 960.

United States.— Pacific Postal Tel. Cable Co. *v.* Fleischner, 66 Fed. 899, 29 U. S. App. 227, 14 C. C. A. 166 [*affirming* 55 Fed. 738]; Cushing *v.* Laird, 4 Ben. (U. S.) 70, 6 Fed. Cas. No. 3,508, 4 Am. L. Rev. 615, 3 Am. L. T. Rep. 50.

See 5 Cent. Dig. tit. "Attachment," § 1160 *et seq.*

Leave must be granted by court below.— Leave to amend will not be granted by the supreme court; and while there are facts shown which would authorize an amendment of the return in the court below, the supreme court will not, by mandamus, compel the trial court to set aside its proceedings. People *v.* Judges Calhoun Cir. Ct., 1 Dougl. (Mich.) 417.

95. Reynolds *v.* Marquette Cir. Judge, 125 Mich. 445, 84 N. W. 628; Ford *v.* Wilson, Tapp. (Ohio) 274; Sheldon *v.* Comstock, 3 R. I. 84.

96. Fairfield *v.* Paine, 23 Me. 498, 41 Am. Dec. 357; Baxter *v.* Rice, 21 Pick. (Mass.) 197; Wendell *v.* Mugridge, 19 N. H. 109; Connelly *v.* Lerche, 56 N. J. L. 95, 28 Atl. 430.

An amendment may be allowed where an officer, upon receiving a writ with directions to attach certain real estate of the debtor, made a memorandum upon the writ that he attached accordingly, setting out the day and month, but afterward by mistake returned that he attached on the same day of the succeeding month, the memorandum being something to amend by (Haven *v.* Snow, 14 Pick. (Mass.) 28 [*distinguishing* Emerson *v.* Upton, 9 Pick. (Mass.) 167; Thatcher *v.* Miller, 13 Mass. 270]; or where the return describes the property attached as belonging to one defendant, when in fact it belongs to two (North West Bank *v.* Taylor, 16 Wis. 609).

An officer cannot amend his return by inserting the hour when the copy was left with the town-clerk, because the amendment relating back to the commencement, the copy left with the clerk would not be a true copy, and the variance might be available to a party claiming under the mortgage in another form. Taylor *v.* Emery, 16 N. H. 359.

97. Wilkins *v.* Tourtellott, 28 Kan. 825; Downs *v.* Flanders, 150 Mass. 92, 22 N. E. 585.

98. Williams *v.* Brackett, 8 Mass. 240; Griffith *v.* Short, 14 Nebr. 259, 15 N. W. 335.

99. *Connecticut.*— Palmer *v.* Thayer, 28 Conn. 237 [*distinguishing* Wilkie *v.* Hall, 15 Conn. 32].

Georgia.— Wilson *v.* Ray, T. U. P. Charlt. (Ga.) 109.

Illinois.— Morris *v.* School Trustees, 15 Ill. 266.

Iowa.— Jeffries *v.* Rudloff, 73 Iowa 60, 34 N. W. 756, 5 Am. St. Rep. 654.

Kansas.— Rapp *v.* Kyle, 26 Kan. 89.

United States.— Cushing *v.* Laird, 4 Ben.

(III) *After Lapse of Time.* The mere fact that a considerable length of time has elapsed,[1] that the suit has been begun,[2] or that a judgment has been rendered,[3] will not in itself preclude an amendment of the return in attachment.

(IV) *When Rights of Third Parties Intervene.* As a rule, however, an amendment cannot be permitted when the rights of innocent third parties, acquired previous thereto, would be thereby injuriously affected.[4]

b. Notice to Adverse Party. If the desired amendment would affect the jurisdiction, it is essential that notice be given to the parties affected by it.[5]

c. Effect of Amendment. The amended return takes the place of the imperfect one,[6] and with but few exceptions,[7] relates back to the time of the original return.[8]

F. Recording — 1. Necessity of. A statutory provision for the recording of a copy of the writ and descriptive part of the return, in the attachment of realty and bulky personalty, is imperative, and observance thereof is necessary for the preservation of the lien against subsequent purchasers.[9]

(U. S.) 70, 6 Fed. Cas. No. 3,508, 4 Am. L. Rev. 615, 3 Am. L. T. Rep. 50.

Contra, Cole *v.* Dugger, 41 Miss. 557.

See 5 Cent. Dig. tit. "Attachment," § 1165.

1. Palmer *v.* Thayer, 28 Conn. 237 [*distinguishing* Wilkie *v.* Hall, 15 Conn. 32]; Jeffries *v.* Rudloff, 73 Iowa 60, 34 N. W. 756, 5 Am. St. Rep. 654 (where the amendment was allowed after the expiration of fourteen months); Hutchins *v.* Brown, 4 Harr. & M. (Md.) 498 (where the amendment was allowed after six years); Cassidy Bros. Commission Co. *v.* Estep, 63 Mo. App. 540 (where the amendment was allowed thirteen months after the original return). But see Hovey *v.* Wait, 17 Pick. (Mass.) 196, where, however, the rights of third parties had intervened.

2. Cassidy Bros. Commission Co. *v.* Estep, 63 Mo. App. 540.

3. Tennent-Stribbling Shoe Co. *v.* Hargardine-McKittrick Dry Goods Co., 58 Ill. App. 368; Mason *v.* Anderson, 3 T. B. Mon. (Ky.) 293. *Compare* Maulsby *v.* Farr, 3 Mo. 438, which holds that, after a motion to set aside the judgment by default, it was too late to amend the return. This conclusion may, however, have been also affected by the fact that the defect was one which the court was of the opinion was not amendable.

4. *California.*— Webster *v.* Haworth, 8 Cal. 21, 68 Am. Dec. 287.

Maine.— Bessey *v.* Vose, 73 Me. 217; Milliken *v.* Bailey, 61 Me. 316; Fairfield *v.* Paine, 23 Me. 498, 41 Am. Dec. 357; Banister *v.* Higginson, 15 Me. 73, 32 Am. Dec. 134; Berry *v.* Spear, 13 Me. 187.

Maryland.— Main *v.* Lynch, 54 Md. 658.

Massachusetts.— Hovey *v.* Wait, 17 Pick. (Mass.) 196 [*distinguishing* Haven *v.* Snow, 14 Pick. (Mass.) 28]; Emerson *v.* Upton, 9 Pick. (Mass.) 167. *Compare* Johnson *v.* Day, 17 Pick. (Mass.) 106.

Oregon.— Hall *v.* Stevenson, 19 Oreg. 153, 28 Pac. 887, 20 Am. St. Rep. 803.

Vermont.— Pond *v.* Campbell, 56 Vt. 674, but the mere fact that defendant has made a voluntary assignment for the benefit of creditors will not preclude the subsequent amendment, as the assignee takes the estate subject to all existing equities.

United States.— Pacific Postal Tel. Cable Co. *v.* Fleischner, 66 Fed. 899, 29 U. S. App. 227, 14 C. C. A. 166 [*affirming* 55 Fed. 738].

5. Haynes *v.* Knowles, 36 Mich. 407. See also Cochrane *v.* Johnson, 95 Mich. 67, 54 N. W. 707, where the return was amended by the sheriff so that it authorized the serving of notice upon defendant by publication. The order of the court permitting the amendment was an *ex parte* one, and made two months after the amendment had in fact been made and after the publication of notice. It was held that, without deciding whether or not the court had power to authorize the amendment in this manner, yet, inasmuch as it was made without notice to the adverse party, it did not cure the defect and the court acquired no jurisdiction.

6. Buller *v.* Woods, 43 Mo. App. 494, holding that it cannot therefore be collaterally attacked for irregularity or error.

7. Where the leaving of a copy of the writ and return with the town-clerk constitutes the attachment, and the return which was first made is amended, the attachment must be considered as made on the day when the amended copy of the return was left with the clerk. Cogswell *v.* Mason, 9 N. H. 48.

8. *Connecticut.*— Hannon *v.* Bramley, 65 Conn. 193, 32 Atl. 336.

Iowa.— Jeffries *v.* Rudloff, 73 Iowa 60, 34 N. W. 756, 5 Am. St. Rep. 654.

Missouri.— Kitchen *v.* Reinsky, 42 Mo. 427.

Texas.— Hill *v.* Cunningham, 25 Tex. 25.

United States.— Fleischner *v.* Pacific Postal Tel. Cable Co., 55 Fed. 738.

9. *Iowa.*— Benjamin *v.* Davis, 73 Iowa 715, 36 N. W. 717; Collier *v.* French, 64 Iowa 577, 21 N. W. 90; Blodgett *v.* Huiscamp, 64 Iowa 548, 21 N. W. 25; Bailey *v.* McGregor, 46 Iowa 667; Farmers' Nat. Bank *v.* Fletcher, 44 Iowa 252; Eldred *v.* Drake, 43 Iowa 569; Tama City First Nat. Bank *v.* Hayzlett, 40 Iowa 659.

Maine.— Bessey *v.* Vose, 73 Me. 217; Carleton *v.* Ryerson, 59 Me. 438.

Massachusetts.—Cheshire *v.* Briggs, 2 Metc. (Mass.) 486.

Michigan.— Davis Sewing Mach. Co. *v.* Whitney, 61 Mich. 518, 28 N. W. 674.

2. Place of Recording. The prescribed place of recording the return must be strictly observed,[10] but where the place is *de facto* a proper one, it has been held that the officer is not required to determine whether or not it is the place *de jure*.[11]

3. Time of Recording. In Massachusetts where the transcript of the return must be recorded within three days after levy of the attachment, in computing the time Sundays and fractions of a day[12] and the day of the attachment[13] are to be excluded.

4. Sufficiency of Record. The purpose of the recording being to give the public notice of the attachment,[14] the copy placed upon the record must contain a sufficient description of the property.[15] Where the copy varies from the original in an

New Hampshire.— Bryant *v.* Osgood, 52 N. H. 182; Kittredge *v.* Bellows, 7 N. H. 399; Pemigewasset Bank *v.* Burnham, 5 N. H. 275.

Vermont.— Burchard *v.* Fair Haven, 48 Vt. 327.

Necessity of original return stating that copy had been left for record.— Inasmuch as the original return itself, and not the copy left with the clerk for record, is the evidence of the validity of the levy, it is necessary that the original return itself should state that a copy of the writ and a copy of the descriptive part of the return had been filed with the recording officer. Carleton *v.* Ryerson, 59 Me. 438; Kendall *v.* Irving, 42 Me. 339; Cox *v.* Johns, 12 Vt. 65. *Compare* Kelley *v.* Barker, 63 N. H. 70.

By whom the copies must be transmitted.— In the absence of statutory provision the copy may be sent by a servant of the officer in all cases where the precise hour of the day when they are left is not material. Pemigewasset Bank *v.* Burnham, 5 N. H. 275.

10. Benjamin *v.* Davis, 73 Iowa 715, 36 N. W. 717 (holding that a recording at a place other than that specified is a nullity); Grant *v.* Albee, 89 Me. 299, 36 Atl. 397 (holding that, under a statute providing that in an attachment of personalty made in an unincorporated place, a copy should be recorded in the office of the clerk of the oldest "adjoining" town in the county, an attachment made in township 36, and recorded in the clerk's office in W which, though the nearest town to township 36, nowhere adjoins it, is not a compliance with the statute).

What constitutes an "unincorporated place." — Under a statute providing that the recording should take place within the town or corporate place in which the attachment was made, but that if it was made in an unincorporated place, then in the town adjoining, a plantation which is organized and has a clerk's office and other plantation officers, is not an "unincorporated place" within the meaning of the statute. Parker *v.* Williams, 77 Me. 418, 1 Atl. 138.

11. Cookson *v.* Parker, 93 Me. 488, 45 Atl. 505, holding that the statute was complied with by filing the copy in the office of the clerk of an acting *de facto* plantation in which the property was situated, and that the officer was neither required nor allowed to enter upon an investigation to ascertain whether or not some technical irregularity might be found in the proceedings taken for organizing such plantation, which would affect its corporate existence.

12. Hannum *v.* Tourtellott, 10 Allen (Mass.) 494.

13. Bemis *v.* Leonard, 118 Mass. 502, 19 Am. Rep. 470.

14. Lincoln *v.* Strickland, 51 Me. 321; Arper *v.* Baze, 9 Minn. 108. *Compare* French *v.* De Bow, 38 Mich. 708, where the statute not expressly stating that the recording should constitute constructive notice, it was held that it could not be so construed.

When the constructive notice is complete.— It is sometimes not only the duty of the officer to leave a copy of the writ and return at the clerk's office, but it is also his duty to have it entered in the books. Under such a statute the constructive notice is complete when such copy is entered in the proper book, although the entry is not indexed. Blodgett *v.* Huiscamp, 64 Iowa 548, 21 N. W. 25. On the other hand, if the statute merely requires him to leave a copy with the clerk, it would seem that the constructive notice is complete when the copy is left by him, even though the clerk should neglect to record it, or should make an insufficient record thereof; the reason being that the clerk is not an agent of plaintiff in the attachment, and therefore, if plaintiff's agent (the officer) fully performs his duty as laid down by the statute, plaintiff ought not suffer for any neglect of the clerk. See Sykes *v.* Keating, 118 Mass. 517; Braley *v.* French, 28 Vt. 546.

15. Bryant *v.* Osgood, 52 N. H. 182; Pond *v.* Baker, 55 Vt. 400; Fullam *v.* Stearns, 30 Vt. 443.

Sufficiency of record as to personalty.— A record of the return of an attachment of bulky personal property simply designating it as all of the property of its kind in the town is sufficient to constitute a constructive notice of the attachment. Adams *v.* Lane, 38 Vt. 640; Paul *v.* Burton, 32 Vt. 148. Where the record shows an attachment of fifty tons of hay it need not state that the hay was too bulky to be removed, as the court can properly take notice of such fact. Davis *v.* Leary, 177 Mass. 526, 59 N. E. 191.

Misnomer of owner.— Where real estate was described as belonging to "Augustu," the word "Augustu" being so written as to make it difficult to tell whether it was "Augusta", or "Augustu," it was held insufficient to create a valid lien on the real estate of "Augustus" M, the register being also misled

unimportant detail the defect is not fatal,[16] but where it materially varies from the original,[17] or where the copy is such that the original, if like it, would be altogether void,[18] it will not constitute notice. Where the statute requires the officer to file a statement of the sum sued for, a mere statement of the *ad damnum* of the writ is insufficient,[19] although if the amount claimed exceed the *ad damnum*, such a statement would, it seems, be sufficient.[20] The copy filed must be duly attested when so required by statute.[21]

G. Operation and Effect of Return — 1. In General — a. As Evidence of Fact and Manner of Levy. The return is competent evidence to prove the fact and manner of the levy[22] and the nature of the property taken thereunder.[23]

b. Conclusiveness as to Facts Stated Therein — (1) *Generally.* As between the parties and their privies,[24] the return, as to matters necessary to be included therein,[25] is, in the absence of fraud,[26] generally conclusive and cannot be contradicted for the purpose of defeating any rights acquired thereunder.[27] It is not

thereby. Shaw *v.* O'Brion, 69 Me. 501. To same effect see Dutton *v.* Simmons, 65 Me. 583, 20 Am. Rep. 729.

Where the officer names but one defendant in his copy to the clerk, it is sufficient to hold the real estate of the one named, but not of the other. Lincoln *v.* Strickland, 51 Me. 321.

16. Lewiston Steam-Mill Co. *v.* Foss, 81 Me. 593, 18 Atl. 288 (mistake in name of defendants); Huntington *v.* Cobleigh, 5 Vt. 49.

17. Collier *v.* French, 64 Iowa 577, 21 N. W. 90 (where the original return showed the land to be in township 68, and the copy laid upon the record showed it to be in township 67); Bessey *v.* Vose, 73 Me. 217 (where the officer's return was dated October 5, and the copy returned to the register bore date of October 18). See also Cox *v.* Johns, 12 Vt. 65.

18. Herring *v.* Harmon [*cited* in Huntington *v.* Cobleigh, 5 Vt. 49, 56].

19. Nash *v.* Whitney, 39 Me. 341.

Filing of a statement of the "sum sued for" where the statute requires a statement of the "value of defendant's property" is insufficient. Farrin *v.* Rowse, 52 Me. 409.

20. The reason being that no more than that sum could be recovered in any event. Lincoln *v.* Strickland, 51 Me. 321.

21. Farrin *v.* Rowse, 52 Me. 409.

22. *Connecticut.*— Jones *v.* Gilbert, 13 Conn. 507.

Indiana.— Foster *v.* Dryfus, 16 Ind. 158.

Kansas.— Dolan *v.* Wilkerson, 57 Kan. 758, 48 Pac. 23, and the fact that a memorandum of an ineffectual levy is indorsed upon the writ will not render it and the return incompetent.

Maine.— Darling *v.* Dodge, 36 Me. 370, holding that it is also competent to prove by parol evidence that the property attached is identical with that in dispute.

Massachusetts.— Wilder *v.* Holden, 24 Pick. (Mass.) 8, even though the writ may have never been returned to the court.

Vermont.— Stanton *v.* Hodges, 6 Vt. 64.

23. Polley *v.* Lenox Iron Works, 4 Allen (Mass.) 329, holding that an officer's return was proper evidence to show that the property attached by him was of such a nature that it could not easily be removed, and might therefore be attached by depositing a copy of the writ and return with the town-clerk.

24. Not conclusive against third parties. — The return is not conclusive between third parties. Warren *v.* Kimball, 59 Me. 264; Angier *v.* Ash, 26 N. H. 99; Brown *v.* Davis, 9 N. H. 76; Sanger *v.* Trammell, 66 Tex. 361, 1 S. W. 378; Stinson *v.* Hawkins, 4 McCrary (U. S.) 500, 13 Fed. 833, in which last case defendant, being a party to the attachment suit, was concluded by the return, although plaintiff was not.

25. The matter must be material and proper to the return.— Central Min., etc., Co. *v.* Stoven, 45 Ala. 594; Lovejoy *v.* Hutchins, 23 Me. 272; Messer *v.* Bailey, 31 N. H. 9; Angier *v.* Ash, 26 N. H. 99; Sheldon *v.* Comstock, 3 R. I. 84.

26. Lathrop *v.* Blake, 23 N. H. 46; Brown *v.* Davis, 9 N. H. 76.

27. *Alabama.*— Governor *v.* Bancroft, 16 Ala. 605; Clarke *v.* Gary, 11 Ala. 98 (until amended).

Arkansas.— Stewart *v.* Houston, 25 Ark. 311.

Illinois.— Major *v.* People, 40 Ill. App. 323, until leave to amend to conform to the truth.

Maine.— Warren *v.* Kimball, 59 Me. 264; Haynes *v.* Small, 22 Me. 14. *Compare* Dutton *v.* Simmons, 65 Me. 583, 20 Am. Rep. 729, where the court, after a discussion of this principle, holds that the case does not fall within the reason of the rule which precludes all contradiction of the officer's return and that his return that he has registered the certificate as required by law is only *prima facie* evidence of the facts therein stated, and may be contradicted and controlled by the production of the certificate itself.

Michigan.— Michels *v.* Stork, 52 Mich. 260, 17 N. W. 833. See also Hewitt *v.* Durant, 78 Mich. 186, 44 N. W. 318; Wallen *v.* Rossman, 45 Mich. 333, 7 N. W. 901.

Minnesota.—State *v.* Penner, 27 Minn. 269, 6 N. W. 790.

New Hampshire.— Morse *v.* Smith, 47 N. H. 474 (holding that it was also conclusive against those claiming under the debtor by subsequent purchase with notice); Dickinson *v.* Lovell, 35 N. H. 9; Clough *v.* Monroe,

conclusive, however, as to the ownership[28] or amount[29] of property, or as to the date[30] or facts and circumstances attending the service[31] of a writ.

(II) *When Officer Is Party to Action.* The return may always be contradicted by the officer, in a suit against him for a false return,[32] and it is only *prima facie* evidence for or against him in other actions to which he is a party.[33]

2. When Defective.[34] A mere misstatement in a return,[35] or a failure to state all the facts connected with the levy[36] will not of itself defeat the legal effect of the levy or affect the jurisdiction of the court; but it has been held that a return defective in omitting a special description of the estate attached, in connection with the usual requisites of a return, will be supplanted by subsequent attachments, the returns of which do comply with the statute.[37]

34 N. H. 381; Messer *v.* Bailey, 31 N. H. 9; Bailey *v.* Kimhall, 26 N. H. 351; Angier *v.* Ash, 26 N. H. 99; Wendell *v.* Mugridge, 19 N. H. 109; Brown *v.* Davis, 9 N. H. 76.

Rhode Island.— Sheldon *v.* Comstock, 3 R. I. 84.

Texas.— Schneider *v.* Ferguson, 77 Tex. 572, 14 S. W. 154; Matthews *v.* Boydstun, (Tex. Civ. App. 1895) 31 S. W. 814.

Vermont.— Southwick *v.* Weeks, 3 Vt. 49, holding, however, that evidence which does not deny the truth of the return, but simply sets up matters in avoidance of its effect, is clearly admissible, and that therefore, although an officer has not stated in his return that one attachment was subject to another, he might nevertheless show such fact.

United States.— Stinson *v.* Hawkins, 4 McCrary (U. S.) 500, 13 Fed. 833.

28. State *v.* Ogle, 2 Houst. (Del.) 371; Haynes *v.* Small, 22 Me. 14.

29. If goods were seized and not included in the inventory, either because of fraud or mistake, the fact may be shown by parol evidence. Jefferson County Sav. Bank *v.* Eborn, 84 Ala. 529, 4 So. 386.

30. Warren *v.* Kimball, 59 Me. 264.

31. Pomroy *v.* Parmlee, 9 Iowa 140, 74 Am. Dec. 328.

32. Angier *v.* Ash, 26 N. H. 99. And see Sheriffs and Constables.

33. *Connecticut.*—Buckingham *v.* Osborne, 44 Conn. 133. *Compare* Williams *v.* Cheesebrough, 4 Conn. 356.

Iowa.— Kingsbury *v.* Buchanan, 11 Iowa 387.

Maine.—Waterhouse *v.* Smith, 22 Me. 337; Nichols *v.* Patten, 18 Me. 231, 36 Am. Dec. 713.

Massachusetts.— See Boynton *v.* Willard, 10 Pick. (Mass.) 166.

New Hampshire.— Angier *v.* Ash, 26 N. H. 99.

34. Effect of quashing return.— The quashing of a return on account of defects contained therein is in effect a quashing of the levy and a release of the property taken thereunder. Currens *v.* Ratcliffe, 9 Iowa 309.

35. As where the return showed that the goods were attached as the property of the mortgagee when the writ ran against both mortgagor and mortgagee. Buck-Reiner Co. *v.* McCoy, 85 Iowa 577, 52 N. W. 514.

The qualifying term that land was "supposed" to belong to the debtor does not impair the effect of the attachment where the land is in fact his property. Banister *v.* Higginson, 15 Me. 73, 32 Am. Dec. 134.

Misdescription of property does not justify removal.— A misdescription of property will not justify one who removes it with knowledge of the attachment. Smart *v.* Batchelder, 57 N. H. 140.

Showing attachment of non-attachable property.—If the return shows upon its face that property has been attached which the sheriff could not legally take under the writ the levy will to that extent be set aside and the property thus taken be relieved from the charge. Curtis *v.* Steever, 36 N. J. L. 304.

36. Rowan *v.* Lamb, 4 Greene (Iowa) 468 [*overruling* Tiffany *v.* Glover, 3 Greene (Iowa) 387]; Miller *v.* Galland, 4 Greene (Iowa) 191.

Defective statement of return-day.— Inasmuch as the terms of a circuit court are fixed by law a party is conclusively charged with the knowledge thereof, and an incorrect statement in the return of the return-day of the writ is not a ground for granting any relief against a judgment by default upon an attachment. Chastain *v.* Armstrong, 85 Ala. 215, 3 So. 788.

Collateral impeachment of defective return.— Irregularities in a return which might have been grounds for quashing it on motion do not render the proceedings liable to impeachment collaterally. Loughridge *v.* Bowland, 52 Miss. 546.

37. Owen *v.* Neveau, 128 Mass. 427, where the statute in question (Mass. Stat. (1880), c. 123, § 55) provided that an attachment of real estate which had been fraudulently conveyed by the debtor to a third person should not be valid against subsequent attaching creditors or *bona fide* purchasers, unless the officer also returned, in addition to his general return, a brief description of the estate attached, and the name or names of the person or persons in whom the record of legal title stands. *Compare* Fleischner *v.* Pacific Postal Tel. Cable Co., 55 Fed. 738, holding that while the return was defective in that it contained no inventory of the attached property, yet, under section 322 of the Washington statute, the defect was one that could be amended so as to show that a legal cause for the attachment existed, and that the subsequently attaching creditors were not entitled to priority over defendant, their only remedy being to compel an amendment.

XII. NATURE AND PRIORITY OF ATTACHMENT LIEN.

A. In General — 1. Nature. Although the charge which a creditor obtains against the property of his debtor by levying an attachment thereon is commonly called a lien,[38] it is not, in a strict sense, a fixed lien on property,[39] but only a right to obtain payment out of the property attached in preference to others[40] which is inchoate or contingent[41] until the creditor has obtained final judgment in the attachment suit,[42] and a judgment for defend-

38. Nomenclature.— This right is constantly spoken of as a lien in the books of reports, in the arguments of the bar, and in the opinions of the bench, and although an attachment of real estate does not require a change of possession, that does not make it any the less a lien in the sense attached to that term. Hubbard *v.* Hamilton Bank, 7 Metc. (Mass.) 340. It has been said also that an attachment places property in the custody of the law (Cordaman *v.* Malone, 63 Ala. 556; Metzner *v.* Graham, 57 Mo. 404); that it places property in the custody of the law and creates a lien (Peck *v.* Webber, 7 How. (Miss.) 658; Brandon Iron Co. *v.* Gleason, 24 Vt. 228); that it sequesters the property to await the judgment (Davenport *v.* Lacon, 17 Conn. 278); and that it "operates as a lien" (Ward *v.* McKenzie, 33 Tex. 297, 7 Am. Rep. 261).

39. Shirk *v.* Thomas, 121 Ind. 147, 22 N. E. 976, 16 Am. St. Rep. 381; *In re* Bellows, 3 Story (U. S.) 428, 3 Fed. Cas. No. 1,278, 7 Law Rep. 119; *In re* Cheney, 5 Fed. Cas. No. 2,636, 5 Law Rep. 19. *Contra*, Ingraham *v.* Phillips, 1 Day (Conn.) 117, holding that an attachment created a lien within the meaning of the bankruptcy acts of 1800. See also a remark of Story, J., in *Ex p.* Foster, 2 Story (U. S.) 131, 145, 9 Fed. Cas. No. 4,960, 5 Law Rep. 55, that "An attachment does not come up to the exact definition, or meaning of a lien, either in the general sense of the common law, or in that of the maritime law, or in that of equity jurisprudence," but usage has perhaps justified the employment of the word "lien" as denoting a charge upon property created by statute.

40. Beck *v.* Brady, 6 La. Ann. 444; Emerson *v.* Fox, 3 La. 178.

Nature of right.— The lien acquired by an attaching creditor is not an interest in property and cannot be conveyed or assigned separate from the debt which it secures (Lyon *v.* Sandford, 5 Conn. 544); but it constitutes a cloud on the legal title (Mullins *v.* Aikin, 2 Heisk. (Tenn.) 535); and although arising by operation of law (Harrison *v.* Trader, 29 Ark. 85), has been held to be as specific as if created by virtue of a voluntary act of the debtor and to stand on as high equitable grounds as a mortgage lien (Carter *v.* Champion, 8 Conn. 549, 21 Am. Dec. 695; McFadden *v.* Blocker, 2 Indian Terr. 260, 48 S. W. 1043. *Compare* Bigelow *v.* Topliff, 25 Vt. 273, 60 Am. Dec. 264).

Lien as a basis for equitable action.— The right acquired by attaching property is sufficient to justify a creditor in filing a bill in equity to clear the property from adverse claims (Francis *v.* Lawrence, 48 N. J. Eq. 508, 22 Atl. 259; Cocks *v.* Varney, 45 N. J. Eq. 72, 17 Atl. 108; Smith *v.* Muirheid, 34 N. J. Eq. 4; Greenleaf *v.* Mumford, 19 Abb. Pr. (N. Y.) 469, 30 How. Pr. (N. Y.) 30; Rinchey *v.* Stryker, 26 How. Pr. (N. Y.) 75; Matlock *v.* Babb, 31 Oreg. 516, 49 Pac. 873; Bennett *v.* Minott, 28 Oreg. 339, 39 Pac. 997, 44 Pac. 288. *Contra*, Melville *v.* Brown, 16 N. J. L. 363), or in applying for an injunction against the sale of the attached property under an execution issued on a subsequent judgment (Schuster *v.* Rader, 13 Colo. 329, 22 Pac. 505); but the lien acquired by attachment of property must be perfected in a court of law before resort can be had to equity to secure the benefits therefrom (Morton *v.* Grafflin, 68 Md. 545, 13 Atl. 341, 15 Atl. 298; Rhodes *v.* Amsinck, 38 Md. 345). See also Alley *v.* Carrol, 6 Heisk. (Tenn.) 221, where it was held that a bill in equity could properly be filed to preserve the lien of attachment when necessary papers were lost and could not be supplied.

41. Contingent rather than inchoate is the proper word to describe the nature of the right. McFadden *v.* Blocker, 2 Indian Terr. 260, 48 S. W. 1043.

42. *Arkansas.*— Lamb *v.* Belden, 16 Ark. 539.

California.— Myers *v.* Mott, 29 Cal. 359, 89 Am. Dec. 49.

Illinois.— Moore *v.* Hamilton, 7 Ill. 429.

Indian Territory.— McFadden *v.* Blocker, 2 Indian Terr. 260, 48 S. W. 1043.

Maryland.— Western Nat. Bank *v.* National Union Bank, 91 Md. 613, 46 Atl. 960; May *v.* Buckhannon River Lumber Co., 70 Md. 448, 17 Atl. 274.

Massachusetts.— Gay *v.* Raymond, 140 Mass. 69, 2 N. E. 782; Grosvenor *v.* Gold, 9 Mass. 209.

Michigan.— Fuller *v.* Hasbrouck, 46 Mich. 78, 8 N. W. 697.

New Hampshire.— Smith *v.* Brown, 14 N. H. 67.

Pennsylvania.— Bradley *v.* Prendergast, 2 Del. Co. (Pa.) 527.

United States.— Pratt *v.* Law, 9 Cranch (U. S.) 456, 3 L. ed. 791, construing Maryland statute.

An illustration of the contingent nature of the lien is found in Lee *v.* Smyser, 96 Ky. 369, 16 Ky. L. Rep. 497, 29 S. W. 27, where it was held that a lien on real estate could be acquired without filing an affidavit that

ant on the merits of the suit from which no appeal is taken[43] terminates the lien.[44]

2. Date of Origin. The prevailing doctrine is that the lien dates from the time when the writ of attachment is levied, or, as the proposition is often stated, the title of the purchaser of attached property at an execution sale relates back

defendant had no personal property, although such an affidavit was essential before real estate could be sold.

Less binding than judgment lien.—The same binding force does not exist in the case of an attachment lien as in the case of a judgment lien. Reeves *v.* Johnson, 12 N. J. L. 29.

43. **An appeal must be perfected** within the statutory time in order to continue the attachment lien (Peterson *v.* Hays, 85 Iowa 14, 51 N. W. 1143; McCormick Harvesting-Mach. Co. *v.* Jacobson, 77 Iowa 582, 42 N. W. 499); and some statutes only allow two days within which to perfect an appeal that will continue such lien (Harger *v.* Spofford, 44 Iowa 369); although the right to appeal in general may continue for a longer period (Munn *v.* Shannon, 86 Iowa 363, 53 N. W. 263). *Compare* Meloy *v.* Orton, 42 Fed. 513, construing Wisconsin statute, where it was held that the lien would not continue pending appeal unless notice was immediately given, a proper bond tendered, and a special order made by the court.

An attachment lien is not continued after judgment for defendant by a writ of review which is sued out by plaintiff (Clap *v.* Bell, 4 Mass. 99; Johnson *v.* Edson, 2 Aik. (Vt.) 299); by a writ of error which is subsequently sued out (Sherrod *v.* Davis, 17 Ala. 312); or by the pendency of a motion for a new trial (Ranft *v.* Young, 21 Nev. 401, 32 Pac. 490).

When a dismissal of an attachment suit is vacated it has been held that the lien of the attachment continues. Jaffray *v.* H. B. Claflin Co., 119 Mo. 117, 24 S. W. 761. *Contra*, O'Connor *v.* Blake, 29 Cal. 312. *Compare* Hubbell *v.* Kingman, 52 Conn. 17, where a judgment of nonsuit which was set aside at the same term was held not to destroy the attachment lien.

Payment of judgment.— Where an attaching creditor secures a judgment for part of his claim and appeals therefrom defendant is not entitled to have the attachment vacated on paying the amount of the judgment. Wright *v.* Rowland, 4 Abb. Dec. (N. Y.) 649, 4 Keyes (N. Y.) 165, 36 How. Pr. (N. Y.) 248 [*reversing* 36 How. Pr. (N. Y.) 115].

New York — Stay of proceedings pending appeal.— Although N. Y. Code Civ. Proc. § 3343, subs. 12, declares that an attachment is annulled when final judgment is entered for defendant, a stay of proceedings pending appeal suspends the effect of such annulment and continues the attachment lien, and a motion to vacate the attachment is improper because the warrant stands annulled by operation of law. McKean *v.* National L. Assoc., 24 Misc. (N. Y.) 511, 53 N. Y. Suppl. 980, 28 N. Y. Civ. Proc. 146.

44. *Alabama.*— Sherrod *v.* Davis, 17 Ala. 312.

Iowa.— Munn *v.* Shannon, 86 Iowa 363, 53 N. W. 263; Harrow *v.* Lyon, 3 Greene (Iowa) 157.

Kansas.— Boston *v.* Wright, 3 Kan. 227.

Maine.— Bachelder *v.* Perley, 53 Me. 414.

Maryland.— Higgins *v.* Grace, 59 Md. 365.

Massachusetts.— Suydam *v.* Huggeford, 23 Pick. (Mass.) 465; Clap *v.* Bell, 4 Mass. 99.

Missouri.— Bradbury *v.* Cole, 62 Mo. App. 263; Boekhoff *v.* Gruner, 47 Mo. App. 22.

Nevada.— Ranft *v.* Young, 21 Nev. 401, 32 Pac. 490.

New Jersey.— Paul *v.* Bird, 25 N. J. L. 559.

Tennessee.— Maxwell *v.* Lea, 6 Heisk. (Tenn.) 247.

Vermont.— Johnson *v.* Edson, 2 Aik. (Vt.) 299.

United States.— Meloy *v.* Orton, 42 Fed. 513 (construing Wisconsin statute); Clark *v.* Wilson, 3 Wash. (U. S.) 560, 5 Fed. Cas. No. 2,841 (construing Pennsylvania statute).

A nonsuit is such a judgment in favor of defendant that it puts an end to the attachment lien. Brown *v.* Harris, 2 Greene (Iowa) 505, 52 Am. Dec. 535. But see Dollins *v.* Pollock, 89 Ala. 351, 7 So. 904, where it was held that a voluntary nonsuit in an attachment case which was immediately set aside by the court did not impair the lien of the attachment.

The reversal of a judgment in favor of plaintiff in an attachment suit, where it is not reversed on a principle which shows that the action in which it was rendered cannot be sustained, will not put an end to the attachment lien. Allen *v.* Adams, 17 Conn. 67.

The lien is discharged by a judgment for defendant, although the clerk fails to perform the ministerial duty of certifying the judgment to the register of deeds (Meloy *v.* Orton, 42 Fed. 513, construing Wisconsin statute); or although there has been a judgment for plaintiff on a plea in abatement (Boekhoff *v.* Gruner, 47 Mo. App. 22).

Effect upon attachment issue.—Although it has been held that a judgment for defendant on the merits will not cure an error respecting the attached property which wrongfully threw costs on plaintiff (Hilton *v.* Ross, 9 Nebr. 406, 2 N. W. 862), it has been also decided that alleged errors or irregularities at the trial of the attachment issue are immaterial after judgment for defendant on the merits (Bradbury *v.* Cole, 62 Mo. App. 263), and an appeal from an order of the court refusing to vacate an attachment was refused because such order was a nullity (Ranft *v.* Young, 21 Nev. 401, 32 Pac. 490).

to the time of levy;[45] but in some jurisdictions the lien is held to arise as soon as the writ is placed in the sheriff's hands for service.[46]

45. *Alabama.*— Grigg *v.* Banks, 59 Ala. 311: Langdon *v.* Raiford, 20 Ala. 532.

California.— Godfrey *v.* Monroe, 101 Cal. 224, 35 Pac. 761; Riley *v.* Nance, 97 Cal. 203, 31 Pac. 1126, 32 Pac. 315; Sharp *v.* Baird, 43 Cal. 577.

Colorado.— Thompson *v.* White, 25 Colo. 226, 54 Pac. 718; Breene *v.* Merchants', etc., Bank, 11 Colo. 97, 17 Pac. 280; Tilton *v.* Cofield, 2 Colo. 392.

Delaware.— Stockley *v.* Wadman, 1 Houst. (Del.) 350.

Florida.— McClellan *v.* Solomon, 23 Fla. 437, 2 So. 825, 11 Am. St. Rep. 381.

Iowa.— Shoonover *v.* Osborne, 111 Iowa 140, 82 N. W. 505, 82 Am. St. Rep. 496; Citizens Nat. Bank *v.* Converse, 101 Iowa 307, 70 N. W. 200; Kuhn *v.* Graves, 9 Iowa 303. *Compare* Howard *v.* Traer, 47 Iowa 702.

Louisiana.— Trounstein *v.* Rosenham, 22 La. Ann. 525; Harris *v.* Andrews, 20 La. Ann. 561; Cochran *v.* Walker, 10 La. Ann. 431; Tufts *v.* Carradine, 3 La. Ann. 430.

Maine.— Brown *v.* Williams, 31 Me. 403; Abbott *v.* Sturtevant, 30 Me. 40; Gilbert *v.* Merrill, 8 Me. 295.

Maryland.— Cockey *v.* Milne, 16 Md. 200.

Massachusetts.—Almy *v.* Wolcott, 13 Mass. 73.

Michigan.— Hunt *v.* Strew, 39 Mich. 368.

Mississippi.— Redus *v.* Wofford, 4 Sm. & M. (Miss.) 579.

Missouri.— Hall *v.* Stephens, 65 Mo. 670, 27 Am. Rep. 302; Huxley *v.* Harrold, 62 Mo. 516; Lackey *v.* Seibert, 23 Mo. 85.

Nebraska.—Wright *v.* Smith, 11 Nebr. 341, 7 N. W. 537.

New York.— Burkhardt *v.* McClellan, 1 Abb. Dec. (N. Y.) 263, 15 Abb. Pr. (N. Y.) 243 note; Wilson *v.* Forsyth, 24 Barb. (N. Y.) 105; Kuhlman *v.* Orser, 5 Duer (N. Y.) 242; Thacher *v.* Bancroft, 15 Abb. Pr. (N. Y.) 243; Burkhardt *v.* Sanford, 7 How. Pr. (N. Y.) 329; American Exch. Bank *v.* Morris Canal, etc., Co., 6 Hill (N. Y.) 362.

North Carolina.— Morehead *v.* Western North Carolina R. Co., 96 N. C. 362; McMillan *v.* Parsons, 52 N. C. 163.

Ohio.— Parker *v.* Miller, 9 Ohio 108; Central Sav. Bank Co. *v.* Langenbach, 1 Ohio S. & C. Pl. Dec. 182, 1 Ohio N. P. 124.

Oregon.— Maxwell *v.* Bolles, 28 Oreg. 1, 41 Pac. 661.

Texas.— Baird *v.* Trice, 51 Tex. 555 [*overruling* Stone *v.* Darnell, 20 Tex. 11]; Walton *v.* Cope, 3 Tex. Civ. App. 499, 22 S. W. 765.

West Virginia.— Poling *v.* Flanagan, 41 W. Va. 191, 23 S. E. 685.

Wisconsin.— Robertson *v.* Kinkhead, 26 Wis. 560.

United States.— Tyrell *v.* Rountree, 7 Pet. (U. S.) 464, 8 L. ed. 749 [*affirming* 1 McLean (U. S.) 95, 24 Fed. Cas. No. 14,313], construing Tennessee statute.

Canada.— Kingsmill *v.* Warrener, 13 U. C. Q. B. 18; Potter *v.* Carroll, 9 U. C. C. P. 442; Robinson *v.* Bergin, 10 Ont. Pr. 127.

See 5 Cent. Dig. tit. "Attachment," § 525.

A second attachment on property binds the debtor's interest from the time when it is levied (Norton *v.* Babcock, 2 Metc. (Mass.) 510); and after a first attachment was voluntarily abandoned an attempt by a second attaching creditor to obtain priority over an intervening purchaser by tacking his lien to that of the previous attachment was unsuccessful (Smith *v.* Whitfield, 67 Tex. 124, 2 S. W. 822. But see Shirk *v.* Wilson, 13 Ind. 129, where it was held that the lien of creditors filing claims under an attachment suit dated from the time when the first writ was given to the sheriff. *Compare* Zeigenhager *v.* Doe, 1 Ind. 296).

46. *Arkansas.*— Cross *v.* Fombey, 54 Ark. 179, 15 S. W. 461; Bergman *v.* Sells, 39 Ark. 97.

Indiana.— Thomas *v.* Johnson, 137 Ind. 244, 36 N. E. 893; Fee *v.* Moore, 74 Ind. 319; Shirk *v.* Wilson, 13 Ind. 129.

Kentucky.— Phelps *v.* Ratcliffe, 3 Bush (Ky.) 334 (holding, where amended pleadings describing property not mentioned in the original petition were filed, that a lien dated from the time when a writ issued on such pleadings had been placed in the hands of the officer); Kentucky Exch. Bank *v.* Gillispie, 19 Ky. L. Rep. 1317, 43 S. W. 401; Thompson *v.* Callings, 1 Ky. L. Rep. 402. *Compare* Gray *v.* Robinson, 9 Ky. L. Rep. 765.

New Jersey.— Tomlinson *v.* Stiles, 28 N. J. L. 201 (decided under statute expressly changing the former holdings in Vreeland *v.* Bruen, 21 N. J. L. 214; Lummis *v.* Boon, 3 N. J. L. 305, which followed the prevailing rule).

Pennsylvania.— Dreisbach *v.* Mechanics' Nat. Bank, 113 Pa. St. 554, 6 Atl. 147; Philadelphia Nat. Bank *v.* Hilgert, 3 Pennyp. (Pa.) 437; Rice *v.* Walinszius, 12 Pa. Super. Ct. 329; Underhill *v.* McManus, 4 Pa. Dist. 404; Harrison *v.* Hilgert, 16 Phila. (Pa.) 87, 40 Leg. Int. (Pa.) 46; Bradley *v.* Prendergast, 2 Del. Co. (Pa.) 527. But in foreign attachments the goods of defendant are not bound until the writ is levied. Posey's Estate, 1 Chest. Co. Rep. (Pa.) 351.

See 5 Cent. Dig. tit. "Attachment," § 525.

In Tennessee the property is bound from the filing of an attachment bill in chancery or the issue of the attachment writ at law, provided the property is described in the bill or writ. Vance *v.* Cooper, 2 Heisk. (Tenn.) 93 [*reversing* 2 Coldw. (Tenn.) 497]; Burrough *v.* Brooks, 3 Head (Tenn.) 392. But see Sharp *v.* Hunter, 7 Coldw. (Tenn.) 389, where a purchaser, before the institution of attachment proceedings, whose deed was recorded between the date of filing the bill and the levy, was allowed to prevail over the attaching creditor.

3. DURATION. An attachment lien on real estate continues until judgment in the suit has been entered and docketed[47] when it merges in the judgment lien,[48] and in the absence of statute an attachment lien on personal property will continue for a reasonable time after judgment, to allow the issue and levy of an execution.[49] In New England, however, the duration of the lien after final judgment[50] is regulated by express enactments which usually set the time for its continuance at thirty days in the case of personal property[51] and at a longer period in the case of real estate.[52]

Directions not to levy would prevent an attachment writ from becoming a lien on defendant's property as soon as it was delivered into the sheriff's hands, and a transfer of the property before the officer was directed to execute the writ would have priority over the attachment. Gray *v.* Patton, 13 Bush (Ky.) 625; Blakely *v.* Smith, 16 Ky. L. Rep. 109, 26 S. W. 584.

47. Docketing is essential before the attachment lien merges in the judgment lien. Weinreich *v.* Hensley, 121 Cal. 647, 54 Pac. 254; Emery *v.* Yount, 7 Colo. 107, 1 Pac. 686; Davis *v.* Jenkins, 46 Kan. 19, 26 Pac. 459. In Hill *v.* Baker, 32 Iowa 302, 7 Am. Rep. 193, it was held that when the attachment lien merges in the judgment lien the latter relates back to the beginning of the former.

Where the judgment was not docketed so as to become a lien, the lien of attachment continues for the same length of time that the statute fixes for the life of a judgment lien. Bagley *v.* Ward, 37 Cal. 121, 99 Am. Dec. 256; Floyd *v.* Sellers, 7 Colo. App. 498, 44 Pac. 373. But see Campbell *v.* Atwood, (Tenn. Ch. 1897) 47 S. W. 168, where it was held that failure to sell real estate within a year after judgment was rendered did not defeat an attachment lien, although a judgment lien by statute was limited in duration to one year. *Compare* Emery *v.* Yount, 7 Colo. 107, 1 Pac. 686.

48. Riley *v.* Nance, 97 Cal. 203, 31 Pac. 1126, 32 Pac. 315; Bagley *v.* Ward, 37 Cal. 121, 99 Am. Dec. 256; Speelman *v.* Chaffee, 5 Colo. 247; Tilton *v.* Cofield, 2 Colo. 392; Green *v.* Dougherty, 55 Mo. App. 217.

49. Speelman *v.* Chaffee, 5 Colo. 247; Avery *v.* Stephens, 48 Mich. 246, 12 N. W. 211; Bushey *v.* Raths, 45 Mich. 181, 7 N. W. 802.

Reasonable time.— One year was held to be a reasonable time after judgment within which to issue execution in Speelman *v.* Chaffee, 5 Colo. 247; and thirty days was regarded as a reasonable period in Geiges *v.* Greiner, 68 Mich. 153, 36 N. W. 48.

50. By final judgment the statute probably means one from which no appeal is taken, as such judgment is final upon the matters in controversy, whether litigated or upon default (Leighton *v.* Reed, 28 Me. 87); and a judgment is final in spite of a subsequent review, for a judgment on a review is not intended (Bingham *v.* Pepoon, 9 Mass. 239); but a judgment in favor of an attaching creditor which is reversed for error not inconsistent with his ultimate recovery is not a final judgment (Allen *v.* Adams, 17 Conn. 67).

51. Gordon *v.* Wilkins, 20 Me. 134; Norris *v.* Bridgham, 14 Me. 429; Stackpole *v.* Hilton, 121 Mass. 449; Knap *v.* Sprague, 9 Mass. 258, 6 Am. Dec. 64; Murphy *v.* Hill, 68 N. H. 544, 44 Atl. 703; Carpenter *v.* Snell, 37 Vt. 255; Dewey *v.* Fay, 34 Vt. 138; Blodgett *v.* Adams, 24 Vt. 23; Goodrich *v.* Church, 20 Vt. 187; Allen *v.* Carty, 19 Vt. 65; Clark *v.* Washburn, 9 Vt. 302. And in Nixon *v.* Phelps, 29 Vt. 198, it was held that where the lien was lost by failure to take out execution within the proper time, the attaching officer could not maintain a suit in favor of the creditor for a wrongful taking of the property from him.

In Connecticut a lien created by attachment of personal property continues for sixty days after final judgment (Sanford *v.* Pond, 37 Conn. 588; Beers *v.* Place, 36 Conn. 578), or, if the goods are encumbered by a prior attachment, for sixty days after such encumbrance is removed (Gates *v.* Bushnell, 9 Conn. 530); but it is no excuse for failure to demand the goods within sixty days that they have been fraudulently disposed of (Gates *v.* Bushnell, 9 Conn. 530).

In Rhode Island execution must be issued during the same term that final judgment in the attachment suit is recovered and must be levied on the attached property, whether it be real estate or personalty, before the return-day of the execution. Steere *v.* Stafford, 12 R. I. 131.

52. Duration of attachment lien on land.— In Connecticut an attachment lien on land continues for four months after final judgment (Beers *v.* Place, 36 Conn. 578); in Maine, Massachusetts, New Hampshire, and Rhode Island it continues for the same period as in the case of personal property (Brown *v.* Allen, 92 Me. 378, 42 Atl. 793; Heywood *v.* Hildreth, 9 Mass. 393; Murphy *v.* Hill, 68 N. H. 544, 44 Atl. 703; Steere *v.* Stafford, 12 R. I. 131); and in Vermont it continues for five months (Whipple *v.* Sheldon, 63 Vt. 197, 21 Atl. 271. See also Sowles *v.* Witters, 55 Fed. 159, where it was held that the right of an attaching creditor to sell real estate after the five months specified by the Vermont statute had elapsed was not affected by an attachment sale under a void judgment rendered by defendant's consent for the purpose of avoiding his obligations).

Computation of time.— In computing time the first of the thirty days is the day after the last day of the term at which judgment is entered (Portland Bank *v.* Maine Bank, 11

4. EXTENT. As a general rule the lien only covers the property upon which levy was made,[53] but there is some conflict as to whether it is restricted to the amount set forth in the affidavit and writ, or whether it will also include costs recovered in the suits,[54] or a demand which is added by amendment subsequent

Mass. 204) or after the rising of the court (Paul *v.* Burton, 32 Vt. 148, holding furthermore that a temporary adjournment was not a rising of the court); and the day upon which the execution issues is to be excluded (Allen *v.* Carty, 19 Vt. 65. But see Spencer *v.* Champion, 13 Conn. 11, looking *contra*). The time expires with the end of the thirty days, although the last day be Sunday (Alderman *v.* Phelps, 15 Mass. 225), and if judgment is rendered by consent as of a prior date the time is reckoned from such prior date (Davis *v.* Blunt, 6 Mass. 487, 4 Am. Dec. 168).

A stay of the issue of execution will continue an attachment lien beyond the period within which levy must usually be made. Steere *v.* Stafford, 12 R. I. 131; Rowan *v.* Union Arms Co., 36 Vt. 124.

The lien is lost by failure to levy on the attached property within the period which the statutes provide for the continuance of the lien (Leighton *v.* Reed, 28 Me. 87; Small *v.* Hutchins, 19 Me. 255; Aiken *v.* Medex, 15 Me. 157), even though the judgment is by default (Nihan *v.* Knight, 56 N. H. 167; Haynes *v.* Thom, 28 N. H. 386), unless the default was suffered by defendant without the knowledge of plaintiff (Rowe *v.* Page, 54 N. H. 190). *Compare* Hackett *v.* Pickering, 5 N. H. 19, where it was held that the attachment lien was not *ipso facto* dissolved by the lapse of thirty days after the end of the term when defendant was defaulted.

Preservation of lien.— It is not necessary that the officer complete the extent under the execution till after the thirty days have elapsed (Heywood *v.* Hildreth, 9 Mass. 393), and delivering the execution to the officer within the required period is sufficient to continue the lien (Dewey *v.* Fay, 34 Vt. 138; Bliss *v.* Stevens, 4 Vt. 88; Enos *v.* Brown, 1 D. Chipm. (Vt.) 280), although the attachment was made by the sheriff's deputy (Ayer *v.* Jameson, 9 Vt. 363); but where an attachment was made by one officer, and the execution delivered to a different one, a demand must be made on the attaching officer within thirty days (Blodgett *v.* Adams, 24 Vt. 23), and a demand upon the receiptor for attached goods within the thirty days was held sufficient to preserve the lien, although the goods were not delivered till after the expiration of that time (Merrill *v.* Curtis, 18 Me. 272). But see Morse *v.* Knowlton, 5 Allen (Mass.) 41, where it was held that an attaching plaintiff in possession of the proceeds of the attached property lost the lien of his attachment by refusing, until after the lapse of thirty days, to deliver them to the officer who held the execution in the attachment suit, or to receipt to him for the property.

53. Goddard-Peck Grocery Co. *v.* Adler-Goldman Commission Co., 67 Ark. 359, 55 S. W. 136; May *v.* Buckhannon River Lumber Co., 70 Md. 448, 17 Atl. 274; Gillig *v.* George C. Treadwell Co., 11 Misc. (N. Y.) 237, 32 N. Y. Suppl. 974, 66 N. Y. St. 459; Learned *v.* Vandenburgh, 8 How. Pr. (N. Y.) 77; Doersom *v.* Garber, 2 Del. Co. (Pa.) 267.

Illustrative cases.—Although in Arkansas all a debtor's property is bound from the time when the attachment writ issues, after the writ has been levied the lien only extends to the property taken under the levy (Goddard-Peck Grocery Co. *v.* Adler-Goldman Commission Co., 67 Ark. 359, 55 S. W. 136), in Tennessee the lien only extends to the property of defendant which is specifically mentioned in the writ of attachment (Lacy *v.* Moore, 6 Coldw. (Tenn.) 348), and in South Carolina a creditor, after exhausting the property levied on in satisfying his claim, cannot even claim the right to share *pro rata* with other creditors in the distribution of unattached assets (Renneker *v.* Davis, 10 Rich. Eq. (S. C.) 289). So, where an attachment was instituted by serving the process on a railway company the lien did not extend to property beyond the county at the time of the service (Sutherland *v.* Peoria Second Nat. Bank, 78 Ky. 250), but where a levy was made on real estate and a sawmill situated thereon, the lien bound removable fixtures within the mill (Newhall *v.* Kinney, 56 Vt. 591).

Right to after-acquired property.— An attachment on shares of stock includes after-declared dividends (Jacobus *v.* Monongahela Nat. Bank, 35 Fed. 395, construing Pennsylvania statute); but the attaching creditor acquires no interest in insurance subsequently placed on the property by the debtor (Donnell *v.* Donnell, 86 Me. 518, 30 Atl. 67).

54. Restrictions upon amount of lien.— It has been held that the lien of the attachment upon real estate is restricted to the amount claimed in the writ, because sound policy requires that the extent of the lien shall be known as soon as it exists, in order to preserve the rights of third parties and prevent unnecessary restrictions upon the sale of property. Hubbell *v.* Kingman, 52 Conn. 17. To same effect see Tilton *v.* Cofield, 2 Colo. 392.

Lien includes costs.— On the other hand it has been held that the lien is commensurate with the judgment and costs (Searle *v.* Preston, 33 Me. 214), on the theory that the interest of the attaching creditor at the time of the levy was not merely a lien for the amount which would have discharged his claim, but was the right to have the property held aud appropriated to the satisfaction of the judgment thereafter obtained (Miller *v.* James, 86 Iowa 242, 53 N. W. 227, where personal property had been levied on). See also Gilbert *v.* Merrill, 8 Me. 295, where an equity of re-

to the original writ.[55] It seems clear, however, that the attachment lien will bind the surplus proceeds arising from any sale of the attached property.[56]

5. INDESTRUCTIBILITY — a. Generally. The charge against attached property acquired by an attaching creditor, or lien of attachment as it is commonly called, cannot be destroyed or taken away by an intermediate act of the debtor himself[57]

demption was attached and an intermediate purchaser attempted to redeem the land by tendering the amount claimed in the attachment, but the court held that the equity of redemption was indivisible and that the sheriff was entitled to have paid over to him the full amount realized by the sale on execution.

55. The amount actually due on plaintiff's demand at the time of the service of the attachment fixes a limit beyond which the lien of an attachment cannot extend. Syracuse City Bank *v.* Coville, 19 How. Pr. (N. Y.) 385. So judgment by collusion between the debtor and the attaching creditor for a larger amount than the original claim would not affect injuriously the rights of intervening purchasers (Oconto Co. *v.* Esson, (Wis. 1901) 87 N. W. 855); and adding to the original demand and taking judgment for a larger sum than that claimed in the affidavit with knowledge of an intervening sale has been held to destroy the lien entirely (Tilton *v.* Cofield, 2 Colo. 392).

In the absence of intervening rights an addition to the amount for which the writ was originally sued out has been sustained. Glendale Fruit Co. *v.* Hirst, (Ariz. 1899) 59 Pac. 103. See also Suksdorff *v.* Bingham, 13 Oreg. 369, 12 Pac. 818, where it was held that the lien would extend to an increased amount over the original claim where the increase was necessitated by a merely clerical error.

56. Lien binds surplus proceeds arising from sale on the foreclosure of a mortgage (Harvey *v.* Foster, 64 Cal. 296, 30 Pac. 849; Western Union Tel. Co. *v.* Caldwell, 141 Mass. 489, 6 N. E. 737; Wiggin *v.* Heywood, 118 Mass. 514; Carty *v.* Fenstemaker, 14 Ohio St. 457; De Wolf *v.* Murphy, 11 R. I. 630; Dahoney *v.* Allison, 1 Tex. Unrep. Cas. 112. *Compare* Rice *v.* O'Keefe, 6 Heisk. (Tenn.) 638); from a sale by agreement between the owner and the attaching creditor (Kendallville First Nat. Bank *v.* Stanley, 4 Ind. App. 213, 30 N. E. 799); from a sale under partition proceedings (Western Nat. Bank *v.* National Union Bank, 91 Md. 613, 46 Atl. 960); or under an order of the surrogate (Tallman *v.* Hollister, 9 How. Pr. (N. Y.) 508). *Compare* a remark by Holmes, J., in Western Union Tel. Co. *v.* Caldwell, 141 Mass. 489, 492, 6 N. E. 737, that "it is true that, as the lien is gone at law by the sale of the *res*, the substituted claim upon the proceeds has the characteristic infirmities of merely equitable rights."

An attaching creditor has also been allowed to purchase a prior chattel mortgage, to foreclose it, and to apply any surplus to the satisfaction of the judgment in the attachment suit. Webster City Grocery Co. *v.* Losey, 108 Iowa 687, 78 N. W. 75. See also Thurman *v.* Blankenship, etc., Co., 79 Tex. 171, 15 S. W. 387, where it is held that when the attached property is sold by the sheriff the proceeds take the place of the property, and the property passes free from the lien which subsequently affects the proceeds only.

57. *Alabama.*— Striplin *v.* Cooper, 80 Ala. 256; Grigg *v.* Banks, 59 Ala. 311; Randolph *v.* Carlton, 8 Ala. 606.

Colorado.— Gates Iron Works *v.* Cohen, 7 Colo. App. 341, 43 Pac. 667.

Connecticut.— Davenport *v.* Lacon, 17 Conn. 278.

Kentucky.— Steel *v.* Seale, 4 Ky. L. Rep. 42.

Louisiana.—Bach *v.* Goodrich, 9 Rob. (La.) 391.

Maine.— Brown *v.* Williams, 31 Me. 403.

Nebraska.— Campbell *v.* Nesbitt, 7 Nebr. 300.

South Carolina.—Goore *v.* McDaniel, 1 McCord (S. C.) 480.

Ineffectual attempts by debtor to defeat lien.—It has been held that a debtor cannot defeat a valid lien against himself by claiming a homestead accruing subsequently to an attachment by reason of his marriage, or because of his residence on the attached land (Bullene *v.* Hiatt, 12 Kan. 98, 20 Kan. 557; Avery *v.* Stephens, 48 Mich. 246, 12 N. W. 211; Kelly *v.* Dill, 23 Minn. 435; Bradley *v.* Wacker, 13 Ohio Cir. Ct. 530; Baird *v.* Trice, 51 Tex. 555 [*overruling* Stone *v.* Darnell, 20 Tex. 11]; Broches *v.* Carroll, 2 Tex. Unrep. Cas. 143); by mortgaging attached land (Riley *v.* Nance, 97 Cal. 203, 31 Pac. 1126, 32 Pac. 315; Harvey *v.* Grymes, 8 Mart. (La.) 395) or personal property which has been released on a receipt (Barnard *v.* Towne, 70 N. H. 154, 46 Atl. 687); or by selling the property (Clark *v.* Empire Lumber Co., 87 Ga. 742, 13 S. E. 826 [joint deed by husband and wife after attachment suit against husband]; Nutter *v.* Connet, 3 B. Mon. (Ky.) 199; Abbott *v.* Sturtevant, 30 Me. 40; Miller *v.* Jamison, 24 N. J. Eq. 41 [purchaser with notice of the attachment]; Bowlby *v.* De Wit, 47 W. Va. 323, 34 S. E. 919), even though the sale be for valuable consideration (Ozmore *v.* Hood, 53 Ga. 114; Shenandoah Valley R. Co. *v.* Griffith, 76 Va. 913) or to a cotenant of the attached real estate (Saunders *v.* McLean, 65 Miss. 397, 4 So. 299). See also Hunt *v.* Mansfield, 31 Conn. 488, where it was held that the purchaser of a judgment in an attachment suit could enforce the lien of attachment against a purchaser of the attached property, although the latter paid a valuable consideration and bought without actual knowledge of the attachment.

A purchaser after levy is not a purchaser without notice, even though the land levied on stood in the name of defendant's wife.

by judicial proceedings to which the creditor is not a party,[58] except in the case

Leathwhite *v.* Bennet, (N. J. 1887) 11 Atl. 29.

Agreements regarding exchange of attached property.—Where attaching plaintiff and his debtor agreed that attached property should be exchanged, and that the property received in exchange be held subject to the attachment, the agreement was sufficient to maintain the attachment lien, and the creditor was allowed to recover in an action of trover against a bailee of the substituted property who had wrongfully disposed of it. Paine *v.* Tilden, 20 Vt. 554. Under an agreement, whereby an attachment defendant agrees that a third person shall have the property attached on payment of the claims of the attaching creditor, the payment of such claim is a condition precedent to the passage of any title to such person as against a subsequently attaching creditor of the defendant. Tomlinson *v.* Collins, 20 Conn. 364.

Effect of general assignment.—In the absence of statutory provision a general assignment by defendant which includes the attached property will not defeat the lien of a previous attachment (Plume, etc., Mfg. Co. *v.* Caldwell, 136 Ill. 163, 26 N. E. 599, 29 Am. St. Rep. 305; Dietz *v.* Sutcliffe, 80 Ky. 650; Kentucky Exch. Bank *v.* Gillispie, 19 Ky. L. Rep. 1317, 43 S. W. 401; Allen *v.* Wells, 22 Pick. (Mass.) 450, 33 Am. Dec. 757; Dreisbach *v.* Mechanics' Nat. Bank, 113 Pa. St. 554, 6 Atl. 147; Franklin F. Ins. Co. *v.* West, 8 Watts & S. (Pa.) 350; Conway *v.* Butcher, 8 Phila. (Pa.) 272; State *v.* Whatcom County Super. Ct., 14 Wash. 324, 44 Pac. 542; Bierer *v.* Binrock, 9 Wash. 63, 36 Pac. 975; Smith *v.* Parkersburg Co-Operative Assoc., 48 W. Va. 232, 37 S. E. 645; Flash *v.* Wilkerson, 20 Fed. 257, 22 Fed. 689 [both assignment and attachment being in Tennessee]. *Compare* Neufelder *v.* North British, etc., Ins. Co., 10 Wash. 393, 39 Pac. 110, 45 Am. St. Rep. 793), but in some jurisdictions statutes provide that a general assignment by an attachment defendant will defeat the attachment lien (Plassan *v.* Titus, 20 La. Ann. 345; Tufts *v.* Casey, 15 La. Ann. 258; Marr *v.* Lartigue, 2 Mart. (La.) 88; McKinney *v.* Baker, 9 Oreg. 74; Tichenor *v.* Coggins, 8 Oreg. 270), provided the assignment complied with all statutory requirements (O'Connell *v.* Hansen, 29 Oreg. 173, 44 Pac. 387), or that there are no preferences therein (Noyes *v.* Johnson, 13 R. I. 183) and that it is made by a resident debtor (Pierce *v.* Crompton, 13 R. I. 312). *Compare* Aldrich *v.* Arnold, 13 R. I. 655. See also Josephi *v.* Furnish, 27 Oreg. 260, 41 Pac. 424, where it was held that a purchaser of attached property who was seeking to replevy it from the sheriff could not set up a subsequent assignment to defeat the justification of the sheriff under the writ.

58. Lyon *v.* Sandford, 5 Conn. 544; Robinson *v.* Morrison, 2 App. Cas. (D. C.) 129.

The appointment of a receiver to take charge of corporate assets does not destroy an attachment lien previously acquired on property of the corporation (Kittredge *v.* Osgood, 161 Mass. 384, 37 N. E. 369; Hubbard *v.* Hamilton Bank, 7 Metc. (Mass.) 340; Arnold *v.* Weimer, 40 Nebr. 216, 58 N. W. 709; Fenton *v.* Lumberman's Bank, Clarke (N. Y.) 286; Ford *v.* Lamson, 17 Ohio Cir. Ct. 539, 9 Ohio Cir. Dec. 374), even though the attached property comes into the possession of the receiver (Matter of Atlas Iron Constr. Co., 19 N. Y. App. Div. 415, 46 N. Y. Suppl. 467; Hughes *v.* Dale, 16 Ohio Cir. Ct. 645). *Compare* New York Rubber Co. *v.* Gandy Belting Co., 11 Ohio Cir. Ct. 618, 5 Ohio Cir. Dec. 286. And see Ward *v.* Connecticut Pipe Mfg. Co., 71 Conn. 345, 41 Atl. 1057, 71 Am. St. Rep. 207, 42 L. R. A. 706, where it was held that the Connecticut statute providing that the appointment of a receiver for a corporation dissolves attachments made within sixty days did not apply to proceedings in other states.

The reference of a case to arbitration will not discharge the lien of an attachment (Seavey *v.* Beckler, 132 Mass. 203; Hill *v.* Hunnewell, 1 Pick. (Mass.) 192); but a general submission of all demands between plaintiff and defendant will release the attachment (Clark *v.* Foxcroft, 7 Me. 348; Mooney *v.* Kavanagh, 4 Me. 277; Hill *v.* Hunnewell, 1 Pick. (Mass.) 192). *Compare* Mosier *v.* McCan, 3 U. C. Q. B. O. S. 77.

A valid lien acquired by attachment is not affected by proceedings in foreign jurisdictions (Upton *v.* Hubbard, 28 Conn. 274, 73 Am. Dec. 670); by the claim of attachment defendant's widow that the property by statute is exempt for her (Blake *v.* Durrell, 103 Ky. 600, 20 Ky. L. Rep. 270, 45 S. W. 883; Brown *v.* Williams, 31 Me. 403); by a new county line which places part of the attached property beyond the county (Tyrell *v.* Rountree, 7 Pet. (U. S.) 464, 8 L. ed. 749 [*affirming* 1 McLean (U. S.) 95, 24 Fed. Cas. No. 14,313], construing Tennessee statute); by partition proceedings against the attached property (Adkins *v.* Beane, 42 Ill. App. 366; Argyle *v.* Dwinel, 29 Me. 29; Crosby *v.* Allyn, 5 Me. 453; Proctor *v.* Newhall, 17 Mass. 81); by qualification of trustees, subsequently to the attachment as required by the code, although the property was assigned prior to the attachment (White *v.* Pittsburgh Nat. Bank of Commerce, 80 Md. 1, 30 Atl. 567); by further unauthorized services of the same writ by the officer making the attachment (Twining *v.* Foot, 5 Cush. (Mass.) 512; Almy *v.* Wolcott, 13 Mass. 73); by failure of the sheriff to make a proper return of the writ (Ritter *v.* Scannell, 11 Cal. 238, 70 Am. Dec. 775; Cousins *v.* Alworth, 44 Minn. 505, 47 N. W. 169, 10 L. R. A. 504); by the entry and subsequent removal of a void judgment (Hodson *v.* Tibbetts, 16 Iowa 97; Edison Electric Light Co. *v.* American Electric Mfg. Co., 26 Wkly. Notes Cas. (Pa.) 119), although a sale under a void judgment has been held to extinguish the lien (Palmer *v.* McMaster, 10 Mont. 390, 25 Pac. 1056);

of bankruptcy and in some states of proceedings in insolvency,[59] or by legislative interference.[60]

b. Effect of Defendant's Death.[61] In some jurisdictions statutes regarding the disposition of decedents' estates provide that attachments levied before the death of defendant shall not affect the disposition of the estate,[62] but in the absence of statute there seems to be no reason why the attachment lien should not continue after the death of defendant[63] when the principal action survives;[64] and *a fortiori* this result should follow when judgment is obtained during the lifetime of attachment defendant.[65]

or by irregularities in the proceedings prior to the issue of the attachment (Budd *v.* Long, 13 Fla. 288. See also Kirkman *v.* Patton, 19 Ala. 32, where it was held that an attachment lien could not be defeated merely by showing irregularities in the process, when defendant had not availed himself of such irregularities by properly pleading in abatement).

59. Effect of bankruptcy or insolvency of debtor on attachment lien see BANKRUPTCY; INSOLVENCY.

60. McFadden *v.* Blocker, 2 Indian Terr. 260, 48 S. W. 1043; Hannahs *v.* Felt, 15 Iowa 141; Hall *v.* Stephens, 65 Mo. 670, 27 Am. Rep. 302. See also Bath *v.* Miller, 51 Me. 341, where it was held that a statute authorizing a city to take possession of property of a railroad company on its failure to pay coupons on scrip issued by the city did not entitled the city to vacate an attachment by thus taking possession.

A vested interest.— The lien of an attaching plaintiff is a vested right or interest of which he cannot be divested without his voluntary act or without having his day in court. McBride *v.* Harn, 48 Iowa 151. See also State *v.* Rose, 4 N. D. 319, 58 N. W. 514, 26 L. R. A. 593, where it was held that an attachment lien was private property within the protection of constitutional provisions. *Compare* Kilborn *v.* Lyman, 6 Metc. (Mass.) 299.

Restoration of lien.—An attachment dissolved by the insolvency of the debtor was held not to be reinstated by a subsequent act of legislature, since such act could not constitutionally have a retrospective effect. Ridlon *v.* Cressey, 65 Me. 128.

61. See, generally, ABATEMENT AND REVIVAL, 1 Cyc. 53.

The death of the attaching creditor has been held to destroy the lien of the attachment. Matter of Vargas, 19 Wend. (N. Y.) 154.

62. The death of defendant and insolvency of his estate will destroy an attachment lien provided the decree of insolvency is properly entered. Lamar *v.* Gunter, 39 Ala. 324; Hapgood *v.* Fisher, 30 Me. 502.

In Massachusetts, although formerly the death of defendant must be attended by the insolvency of his estate to dissolve an attachment (Bullard *v.* Dame, 7 Pick. (Mass.) 239), the statutes now provide that defendant's death of itself has that effect, provided administration of the estate be granted within a year thereafter (Kingsbury *v.* Baker, 17 Pick. (Mass.) 429), although it does not prevent the creditor from taking a judgment against the estate of the debtor in the hands of the administrator (Gass *v.* Smith, 6 Gray (Mass.) 112). The attachment lien is dissolved although the debtor has conveyed the property to another after the levy (Bullard *v.* Dame, 7 Pick. (Mass.) 239), has mortgaged it subsequently to the attachment (Parsons *v.* Merrill, 5 Metc. (Mass.) 356), or although insolvency proceedings were instituted during the lifetime of the debtor and the commissioner of insolvency was authorized to continue any attachment lien against his property (Day *v.* Lamb, 6 Gray (Mass.) 523).

63. *Illinois.*— Sharpe *v.* Morgan, 144 Ill. 382, 33 N. E. 22 [*affirming* 44 Ill. App. 346].

Kentucky.— Blake *v.* Durrell, 103 Ky. 600, 20 Ky. L. Rep. 270, 45 S. W. 883.

Massachusetts.— Grosvenor *v.* Gold, 9 Mass. 209, modified by later statute.

Missouri.— Shea *v.* Shea, 154 Mo. 599, 55 S. W. 869, 77 Am. St. Rep. 779.

New Hampshire.— Bowman *v.* Stark, 6 N. H. 459.

Oklahoma.— Mosley *v.* Southern Mfg. Co., 4 Okla. 496, 46 Pac. 508.

Oregon.— White *v.* Ladd, 34 Oreg. 422, 56 Pac. 515, where the creditor also put in his claim against the executrix.

Tennessee.— Lookout Bank *v.* Susong, 90 Tenn. 590, 18 S. W. 389; Boyd *v.* Roberts, 10 Heisk. (Tenn.) 474. *Compare* McKnight *v.* Hughes, 4 Lea (Tenn.) 522, where it was held that the heirs of the decedent could compel the attaching creditor to exhaust the personal assets of the estate before resorting to attached real estate.

But see Barron *v.* Southern Brooklyn Saw Mill Co., 18 Abb. N. Cas. (N. Y.) 352, where defendant died before the service of summons on him by publication had been completed, and it was held that the lien of the attachment was gone.

64. When the principal action abates by the death of defendant an attachment made in the suit will not prevent such abatement, and the attachment will fail along with the principal cause of action. Maxwell *v.* Lea, 6 Heisk. (Tenn.) 247.

65. Cunningham *v.* Burk, 45 Ark. 267; Waitt *v.* Thompson, 43 N. H. 161, 80 Am. Dec. 136; Fitch *v.* Ross, 4 Serg. & R. (Pa.) 557. *Compare* Reynolds *v.* Nesbitt, 196 Pa. St. 636, 46 Atl. 841, 79 Am. St. Rep. 736, where it was held that the death of defendant before final judgment dissolved the attachment.

The attaching creditor must proceed by re-

c. **Who May Release.** The attaching plaintiff or his attorney[66] has the right to release an attachment lien on property[67] without an order of court,[68] and in the case of an attachment on real estate, they alone have the power to make a release;[69] but where chattels are seized by the attaching officer it seems that he has the power,[70] although not the right,[71] to release the attachment.

d. **What Constitutes Waiver.** Under some circumstances an attaching creditor will be deemed to have waived the lien of his attachment. Thus he may waive by delay, by conduct which indicates an abandonment of his rights,[72] by

viving the judgment against the representative of the deceased attachment defendant. Cunningham *v.* Burk, 45 Ark. 267. *Compare* Lowenberg *v.* Tironi, 62 Miss. 19, where plaintiff obtained judgment on a plea in abatement after defendant's death and before the appointment of an administrator, and it was held that he should revive the suit by scire facias against the administrator in order to obtain a general personal judgment.

66. **An attorney at law** has authority to release an attachment of real or personal estate at any time before judgment in a suit which he is employed to prosecute. Benson *v.* Carr, 73 Me. 76. See, generally, Attorney and Client.

67. Meyers *v.* Birotte, 41 La. Ann. 745, 6 So. 607; Fosgate *v.* Mahon, 16 Johns. (N. Y.) 162. *Compare* Magill *v.* Manson, 20 Gratt. (Va.) 527, where a plaintiff who had attached defendant's effects both at law and in equity was allowed to dismiss his attachment at law and proceed in equity.

Being only a lien an attachment may be released, discharged, lost, or abandoned by the party originally instituting the suit. Bachelder *v.* Perley, 53 Me. 414; Owen *v.* Neveau, 128 Mass. 427.

If plaintiff has not proceeded vexatiously he can abandon an attachment after having obtained a warrant of attachment and order for publication of the summons. Mojarietta *v.* Saenz, 58 How. Pr. (N. Y.) 505.

Defendant's right to an order vacating an attachment is not defeated by the withdrawal of the attachment by plaintiff. Corn Exch. Bank *v.* Bossio, 8 N. Y. App. Div. 306, 40 N. Y. Suppl. 994, 75 N. Y. St. 388.

Where the rights of third persons depend on the continuance of an attachment suit under statutes providing for *pro rata* distribution among attaching creditors, an attachment cannot be released to the detriment of subsequently applying creditors. McLain *v.* Draper, 109 Ind. 556, 8 N. E. 910; People *v.* Judges Calhoun Cir. Ct., 1 Dougl. (Mich.) 417; Duffin *v.* Wolf, 21 N. J. L. 475; Cummins *v.* Blair, 18 N. J. L. 151; Rice *v.* Baldwin, 20 Fed. Cas. No. 11,750*a*, 27 Int. Rev. Rec. 130, 11 Reporter 627 (construing Indiana statute). *Compare* Wells *v.* Columbia Nat. Bank, 6 Wash. 621, 34 Pac. 160, where a creditor was allowed to release his attachment, although claims had been filed in the suit by laborers under a provision of the statutes.

68. Smith *v.* Robinson, 64 Cal. 387, 1 Pac. 353.

Mode of release.— Destruction of papers by plaintiff is not a competent method of ending attachment proceedings after the writ has been levied, but the papers should be sent to court and there disposed of (Dean *v.* Massey, 7 Ala. 601); and the discontinuance of an attachment suit must be filed with the clerk of court in order to be valid (Smith *v.* Warden, 35 N. J. L. 346).

After trustees had been appointed under the New York statute relative to attachments, the court granted a supersedeas on showing a settlement between the attaching creditor and his debtor, but the trustees' rights were protected. Matter of Bunch, 9 Wend. (N. Y.) 473.

69. Barton *v.* Continental Oil Co., 5 Colo. App. 341, 38 Pac. 432; Braley *v.* French, 28 Vt. 546.

The reason why an officer has not the power to release the attachment on real estate is because his agency is terminated whenever the duties are performed for which the process was put into his hands. Braley *v.* French, 28 Vt. 546.

70. Barton *v.* Continental Oil Co., 5 Colo. App. 341, 38 Pac. 432; Braley *v.* French, 28 Vt. 546 (where the court states that the attaching officer has a special property in the chattels and therefore the power to release such special property).

Release by reason of officer's failure to retain custody of the attached property see *infra*, XIII, B, 1, a.

71. Gordon *v.* Wilkins, 20 Me. 134.

Right of officer to release.— Even though the writ did not specially direct the attachment of the chattels which were taken into custody, the officer cannot rightfully release such attachment after it has been completed (Turner *v.* Austin, 16 Mass. 181); but by previous authority, or by subsequent ratification, the officer making the levy may be constituted the agent of plaintiff to discharge the attachment (Smith *v.* Robinson, 64 Cal. 387, 1 Pac. 353; Owen *v.* Neveau, 128 Mass. 427). The latter may, however, countermand an authority to the officer to release an attachment. Hatch *v.* Jerrard, 69 Me. 355.

72. Barth *v.* Loeffelholtz, 108 Wis. 562, 84 N. W. 846.

Burden of proof.— The law does not presume or favor abandonments, and it is incumbent upon the party who asserts an abandonment of the attachment to establish the fact. Wright *v.* Westheimer, 2 Ida. 962, 28 Pac. 430, 35 Am. St. Rep. 269.

Dismissal of the original action in which an attachment was levied operates to release the

claiming benefits,[73] or by prosecuting other judicial proceedings[74] which are inconsistent with the continuation of the attachment.

attachment lien (Wills Point Bank *v.* Bates, 76 Tex. 329, 13 S. W. 309; Brandon Iron Co. *v.* Gleason, 24 Vt. 228); even though the suit is revived during the same term (Union Mfg. Co. *v.* Pitkin, 14 Conn. 174); and so does a settlement of the suit (Felker *v.* Emerson, 17 Vt. 101).

The creditor may lose his lien by failing to take any action for a year after the writ has been sued out (Upper Canada Bank *v.* Spafford, 3 U. C. Q. B. O. S. 78); by failing to prosecute his suit to judgment and execution with all due diligence (Van Loan *v.* Kline, 10 Johns. (N. Y.) 129); by delaying several years without any sufficient cause for such delay (Petree *v.* Bell, 2 Bush (Ky.) 58); or by failing to enter the writ of attachment at the return-term thereof (Munroe *v.* St. Germain, 69 N. H. 200, 42 Atl. 900). *Compare* Nims *v.* Spurr, 138 Mass. 209, where it was held that the lien was not lost by the failure to return a special precept for attachment until after the return-day thereof.

No presumption of abandonment arises from the circumstance that the attaching creditor takes out a general execution on his judgment in the attachment suit (Liebman *v.* Ashbacker, 36 Ohio St. 94); by a delay of two years in securing judgment in the suit (Westervelt *v.* Hagge, 61 Nebr. 647, 85 N. W. 852); by a delay of nine months in levying an execution on the attached real estate (Lant *v.* Manley, 75 Fed. 627, 43 U. S. App. 623, 21 C. C. A. 457); by delaying eleven months before issuing an alias order of sale after the first order is returned without a sale (Davis *v.* John V. Farwell Co., (Tex. Civ. App. 1899) 49 S. W. 656); by the delay incident to reviving an attachment suit against a personal representative after the death of attachment defendant (Puckett *v.* Richardson, 6 Lea (Tenn.) 49); or by a stay of execution on attached real estate, although the contrary is true where personal property has been seized (Ensworth *v.* King, 50 Mo. 477). *Compare* Greene *v.* Tims, 16 Ala. 541, where it was held that the facts did not justify the assumption as a conclusion of law that the lien of the attachment was lost.

But a failure to give indemnity to the sheriff when he rightfully demands it operates as an abandonment of the attachment (Cudahy *v.* Rhinehart, 133 N. Y. 248, 30 N. E. 1004, 44 N. Y. St. 898 [*affirming*, on this point, 60 Hun (N. Y.) 414, 15 N. Y. Suppl. 514, 39 N. Y. St. 860, 21 N. Y. Civ. Proc. 52]), and allowing the sheriff to return "no property found" on an execution issued in the attachment suit has the same effect (Butler *v.* White, 25 Minn. 432. *Compare* Merchants' Nat. Bank *v.* Greenhood, 16 Mont. 395, 41 Pac. 250, 851, where the sheriff returned "no property found" on an execution issued in the attachment suit, but qualified his return by stating that the attached property was in the hands of an assignee who claimed to have a good title, and it was held that this return did not constitute an abandonment of the attachment lien).

Waiver of lien by taking judgment in improper form see *infra*, XVI, D, 3.

The release of part of attached land will not postpone the attaching creditor to a mortgage made on the balance subsequently to the levy of the attachment, when he is ignorant of the mortgage. Johnson *v.* Bell, 58 N. H. 395.

Effect of abandonment.—Where attachment has been voluntarily abandoned, all effects of the lien are gone as completely as though the attachment had never been levied. French *v.* Stanley, 21 Me. 512; Smith *v.* Whitfield, 67 Tex. 124, 2 S. W. 822.

73. It constitutes an inconsistent claim to benefits for an attaching creditor to prove the claim sued on in the attachment suit in bankruptcy proceedings (Stark *v.* Curd, 88 Ky. 164, 10 Ky. L. Rep. 740, 10 S. W. 419; Bowley *v.* Bowley, 41 Me. 542) or against an assignee for the benefit of creditors (F. A. Drew Glass Co. *v.* Baldwin, 27 Mo. App. 44), but the right of other attaching creditors could not be affected by the action of one in filing his claim against an assignee (Neufelder *v.* German American Ins. Co., 6 Wash. 336, 33 Pac. 870, 36 Am. St. Rep. 166, 22 L. R. A. 287), accepting the position of assignee under a deed of trust (Ryhiner *v.* Ruegger, 19 Ill. App. 156), or giving assent to a deed of trust for the benefit of all creditors (Marr *v.* Washburn, etc., Mfg. Co., 167 Mass. 35, 44 N. E. 1062; Gathercole *v.* Bedel, 65 N. H. 211, 18 Atl. 319; Rahity *v.* Stringfellow, 72 N. C. 328). *Compare* Gathercole *v.* Bedel, 65 N. H. 211, 18 Atl. 319, where it was provided by statute that assent by an attaching creditor to a subsequent assignment dissolved the attachment.

Bidding at a sale under the mortgage in one state does not estop a creditor from insisting upon his attachment on the property in another state. Chapman *v.* Pittsburg, etc., R. Co., 26 W. Va. 299.

74. What constitutes inconsistent proceedings.— Arresting the debtor is inconsistent with the continuation of the attachment, and therefore shows that it has been abandoned. Cox *v.* Watkins, 3 Cranch C. C. (U. S.) 629, 6 Fed. Cas. No. 3,307, construing Maryland statute. For an attaching creditor to consent to a judgment in his own favor before the return-day of the process has the same effect (Gilbert *v.* Gilbert, 33 Mo. App. 259); but levying a second writ of attachment against the same property as a precautionary measure does not show an abandonment of the first levy (Wright *v.* Westheimer, 2 Ida. 962, 28 Pac. 430, 35 Am. St. Rep. 269). See also Beall *v.* Barclay, 10 B. Mon. (Ky.) 261, where it was held that a creditor who had obtained a lien on real estate by an attachment in chancery did not waive the same by levying an execution thereupon under a judgment which he had subsequently obtained in

B. Priorities — 1. In General — a. Rule Stated. The rights of a creditor to property attached must be determined by the state of the title at the time the attachment was made,[75] and in the absence of fraud and statutory regulations he only obtains the rights which the debtor had in the property at that time[76] for

an action at law. *Compare* Watts *v.* Stevenson, 169 Mass. 61, 47 N. E. 447, where plaintiff was allowed to maintain an action on a bond given to avoid proposed attachment although attachment defendant had subsequently been arrested, and an action was also begun on a recognizance given to secure his release from arrest.

75. Richardson *v.* Bailey, 69 N. H. 384, 41 Atl. 263, 76 Am. St. Rep. 176.

After-acquired interest by a debtor in land will not inure to the benefit of an attaching creditor (Crocker *v.* Pierce, 31 Me. 177); but when an equity of redemption is attached, and the mortgage is subsequently paid off, the creditor can levy his execution in the attachment suit on the legal title as if no mortgage had existed (Whitcomb *v.* Simpson, 39 Me. 21. *Compare* Doton *v.* Russell, 17 Conn. 146, where an equity of redemption was attached, after the attachment the mortgage debt was paid and the legal title conveyed to a third person, and it was held that the attaching creditor only obtained a lien on the equity of redemption since the legal fee did not vest in the mortgagor subsequently to the attachment).

No estoppel arises against a creditor to assert his ownership to property, by reason of his levying an attachment thereupon (Lewis *v.* Morse, 20 Conn. 211), when he was unaware that the levy was made on goods in which he had an interest (Steele *v.* Putney, 15 Me. 327).

76. *Arkansas.*—Tennant *v.* Watson, 58 Ark. 252, 24 S. W. 495; Merrick *v.* Hutt, 15 Ark. 331.

Colorado.— McMillen *v.* Gerstle, 19 Colo. 98, 34 Pac. 681; Perkins *v.* Adams, (Colo. App. 1901) 63 Pac. 792; Banks *v.* Rice, 8 Colo. App. 217, 45 Pac. 515; Gates Iron Works *v.* Cohen, 7 Colo. App. 341, 43 Pac. 667.

Georgia.—Mabry *v.* Metropolitan Trust Co., 94 Ga. 619, 21 S. E. 589.

Illinois.— Kinnah *v.* Kinnah, 184 Ill. 284, 56 N. E. 376; Samuel *v.* Agnew, 80 Ill. 553.

Indiana.— Shirk *v.* Thomas, 121 Ind. 147, 22 N. E. 976, 16 Am. St. Rep. 381.

Iowa.— Rogers *v.* Highland, 69 Iowa 504, 29 N. W. 429, 58 Am. Rep. 230; Bacon *v.* Thompson, 60 Iowa 284, 14 N. W. 312; Manny *v.* Adams, 32 Iowa 165; Harshberger *v.* Harshberger, 26 Iowa 503; Stephenson *v.* Walden, 24 Iowa 84.

Kansas.— Northwestern Forwarding Co. *v.* Mahaffey, 36 Kan. 152, 12 Pac. 705.

Kentucky.— H. A. Thierman Co. *v.* Laupheimer, 21 Ky. L. Rep. 1631, 55 S. W. 925.

Louisiana.— Kern *v.* Day, 45 La. Ann. 71, 12 So. 6; Ft. Pitt Nat. Bank *v.* Williams, 43 La. Ann. 418, 9 So. 117; Frazier *v.* Willcox, 4 Rob. (La.) 517; Deloach *v.* Jones, 18 La. 447; Hepp *v.* Glover, 15 La. 461, 35 Am. Dec. 206.

Maine.— Crocker *v.* Pierce, 31 Me. 177; Argyle *v.* Dwinel, 29 Me. 29.

Maryland.— Horwitz *v.* Ellinger, 31 Md. 492, where a statute giving a creditor more speedy remedy on certain grounds of attachment was held not to give him any right to acquire more interest in the property attached than he could have acquired in the absence of the statute.

Missouri.— Hannah *v.* Davis, 112 Mo. 599, 20 S. W. 686.

Nebraska.—Westervelt *v.* Hagge, 61 Nebr. 647, 85 N. W. 852; Barnes *v.* Cox, 58 Nebr. 675, 79 N. W. 550; Chicago, etc., R. Co. *v.* Omaha First Nat. Bank, 58 Nebr. 548, 78 N. W. 1064.

New Jersey.— Jamison *v.* Miller, 27 N. J. Eq. 586.

New York.— De Comeau *v.* Guild Farm Oil Co., 3 Daly (N. Y.) 218.

Ohio.— Smyth *v.* Anderson, 31 Ohio St. 144; Straus *v.* Wessel, 30 Ohio St. 211.

Oregon.— Oregon R., etc., Co. *v.* Gates, 10 Oreg. 514.

Pennsylvania.— Patten *v.* Wilson, 34 Pa. St. 299; Palmer's Estate, 2 Del. Co. (Pa.) 180.

South Carolina.— Metts *v.* Piedmont, etc., L. Ins. Co., 17 S. C. 120.

South Dakota.— Kohn *v.* Lapham, 13 S. D. 78, 82 N. W. 408.

Tennessee.— Wood *v.* Thomas, 2 Head (Tenn.) 160; Arledge *v.* White, 1 Head (Tenn.) 241; Thacker *v.* Chambers, 5 Humphr. (Tenn.) 313, 42 Am. Dec. 431.

Vermont.— Brigham *v.* Avery, 48 Vt. 602.

West Virginia.— Parkersburg First Nat. Bank *v.* Harkness, 42 W. Va. 156, 24 S. E. 548, 32 L. R. A. 408; Neill *v.* Rogers Bros. Produce Co., 41 W. Va. 37, 23 S. E. 702.

United States.— U. S. *v.* Canal Bank, 3 Story (U. S.) 79, 25 Fed. Cas. No. 14,715, 7 Law Rep. 88 (construing Maine statute); Merrill *v.* Rinker, Baldw. (U. S.) 528, 17 Fed. Cas. No. 9,471 (construing Pennsylvania statute and holding that doctrine of reputed ownership did not change general rule).

Equitable interests.— An attachment of property in an action against the legal owner does not affect the rights of the equitable owners of the property (De Celis *v.* Porter, 59 Cal. 464; Westervelt *v.* Hagge, 61 Nebr. 647, 85 N. W. 852, in which latter case the legal owner was a fraudulent transferee), or the right of a defrauded *cestui que trust* to reach property purchased with misapplied trust funds (McLaughlin *v.* Carter, 13 Tex. Civ. App. 694, 37 S. W. 66). See also Furman *v.* McMillian, 2 Lea (Tenn.) 121, where it was held that a joint purchaser of land who had paid more than his share of the purchase-

the creditor is not in the position of a *bona fide* purchaser.[77] An attaching creditor does, however, succeed to all the incidental rights to which the debtor was entitled.[78]

b. Applications of Rule — (i) *Liens.* The rule which has just been stated that an attaching creditor acquires only the rights which the debtor himself had in the attached property applies with equal force where the debtor holds title to the property subject to a valid outstanding charge or lien;[79] and it is held to be immaterial whether this lien arises by agreement between the parties[80] or

price was entitled to be fully reimbursed out of the proceeds of the sale of the land before an attaching creditor of his coöwner became entitled to any part of the proceeds.

An outstanding power of sale will not be defeated by an attachment of the property subject to the power in an action against the holder of the legal title. Braman *v.* Stiles, 2 Pick. (Mass.) 460, 13 Am. Dec. 445; Smyth *v.* Anderson, 31 Ohio St. 144.

The right of third persons to partition proceedings cannot be defeated by an attachment against the owner of an undivided interest in land (Argyle *v.* Dwinel, 29 Me. 29), even though it is necessary to sell the land and divide the proceeds (State *v.* Huxley, 4 Harr. (Del.) 343).

An attaching creditor must exercise a right to redeem property within the time limited for the debtor to redeem (Merrick *v.* Hutt, 15 Ark. 331), and he must remove fixtures before the time when the debtor's right to remove them has expired (Morey *v.* Hoyt, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611).

An estoppel which is good against the debtor also binds the attaching creditor. Hoffman *v.* Wilhelm, 68 Iowa 510, 27 N. W. 483; Jamison *v.* Miller, 27 N. J. Eq. 586; Dupree *v.* Woodruff, (Tex. 1892) 19 S. W. 469.

A rescission of a contract to convey real estate which binds the vendee is also binding on his attaching creditor. Fleming *v.* Martin, 2 Head (Tenn.) 43. *Compare* Neil *v.* Tenney, 42 Me. 322.

Although a sovereign is usually entitled to priority over ordinary creditors he is not preferred to adverse claimants against the attached property because the sovereign must claim through the debtor, who has no special privilege entitling him to priority. U. S. *v.* Canal Bank, 3 Story (U. S.) 79, 25 Fed. Cas. No. 14,715, 7 Law Rep. 88.

77. Schweizer *v.* Tracy, 76 Ill. 345; Depeyster *v.* Gould, 3 N. J. Eq. 474, 29 Am. Dec. 723; Dixon *v.* Barnett, 3 Wash. 645, 29 Pac. 209.

The reason for this rule is that if the levy should fail of its purpose plaintiff would lose nothing and, having parted with no value, would be in no worse position than he was before. Perkins *v.* Adams, (Colo. App. 1901) 63 Pac. 792; Gates Iron Works *v.* Cohen, 7 Colo. App. 341, 43 Pac. 667.

78. **The creditor is entitled to** notice regarding partition proceedings against the attached property (Munroe *v.* Luke, 19 Pick. (Mass.) 39), or to redeem the property from a previous mortgage when the debtor had a right to do so (Lyon *v.* Sandford, 5 Conn. 544); and where an equity of redemption was attached a subsequent agreement to extend the time of performance of conditions in the bond for conveyance inured to the benefit of the attaching creditor of the obligee (Whitmore *v.* Woodward, 28 Me 392).

A personal privilege of a minor on coming of age to disaffirm a previous deed cannot be exercised by an attaching creditor. Kendall *v.* Lawrence, 22 Pick. (Mass.) 540. *Compare* Slocomb *v.* Arkansas Real Estate Bank, 2 Rob. (La.) 92, where it was held that a creditor who attached chattels subsequently to their sale could not avail himself of the debtor's privilege to rescind because the purchase-money was not paid.

Proof of attachment.— In a collateral proceeding a party cannot prove the existence of his attachment lien by means of a copy of the attachment on file in the office of the register of deeds, but must offer the original attachment in evidence. Stanhilber *v.* Graves, 97 Wis. 515, 73 N. W. 48.

79. Banks *v.* Rice, 8 Colo. App. 217, 45 Pac. 515; Adoue *v.* Jemison, 65 Tex. 680.

80. Metcalfe *v.* Fosdick, 23 Ohio St. 114.

Pledging property confers a valid lien which prevails over the claims of a subsequently attaching creditor of the pledgor (Tuttle *v.* Robinson, 78 Ill. 332; Skillman *v.* Bethany, 2 Mart. N. S. (La.) 104; Canfield *v.* McLaughlin, 9 Mart. (La.) 303; Coe *v.* Bicknell, 44 Me. 163; Danforth *v.* Denny, 25 N. H. 155; Fain *v.* Jones, 3 Head (Tenn.) 307), and the rights of *bona fide* pledgees of property are not impaired by an attachment of the property by a creditor of the pledgor (Petitt *v.* Memphis First Nat. Bank, 4 Bush (Ky.) 334; Parkersburg First Nat. Bank *v.* Harkness, 42 W. Va. 156, 24 S. E. 548, 32 L. R. A. 408).

Bailment.—As no lien is created by a simple bailment attaching creditors of the bailor may seize the property, although there was an agreement that the bailee should sell it (Rollins *v.* Watson, 8 La. Ann. 435); but a further agreement that the proceeds of the sale should be applied in satisfaction of the bailee's claim against the bailor would prevent a seizure by the bailor's creditors (Handley *v.* Pfister, 39 Cal. 283, 2 Am. Rep. 449), and when a bailee of goods has converted them to his own use, an attaching creditor of the bailor cannot seize the goods with which the bailee intended to replace, but has not yet replaced, the original bailed articles (Wood *v.* Fales, 24 Pa. St. 246, 64 Am. Dec. 655).

Creditors of the bailee cannot attach the bailed property, although the bailee has sold

by operation of law,[81] or whether it arises by reason of a prior garnishment proceeding.[82]

(II) *MORTGAGES.* The charge of a prior mortgage will hold against a subsequent attachment,[83] even though the attachment be for the purchase-price of

it to the bailor immediately before the bailment (Redwitz *v.* Waggaman, 33 La. Ann. 26), or although there was a stipulation that the property should become the property of the bailee at the end of the term of the bailment (Paris *v.* Vail, 18 Vt. 277). *Compare* Churchill *v.* Bailey, 13 Me. 64; and see also Reed *v.* McIlroy, 44 Ark. 346, where it was held that property in the possession of an agent who acted for an undisclosed principal could not be attached by his creditors, unless the conduct of the parties had misled creditors in giving the agent credit.

A contract for a future lien, although perfected after an attachment without notice, was held not to be prior to that attachment. Bailey *v.* Warner, 28 Vt. 87.

Validity of lien.— While the lienor must ordinarily retain possession of the property on which he has a lien (Reed *v.* Ash, 3 Nev. 116), it has been held that his possession is not necessary in the absence of fraud (Caldeway *v.* Bickel, 14 Ky. L. Rep. 925); but a valid lien may be waived by an inconsistent agreement of the lienor (Fortune *v.* Smith, 28 Fed. 353), or by the lienor's parting with possession of the property on which he has a lien by reason of a pledge (Whitaker *v.* Sumner, 20 Pick. (Mass.) 399). Even against an invalid lien, however, the party attaching must show that he was a creditor, that his attachment was levied, and that it was sufficient in all respects. Houston *v.* McCluney, 8 W. Va. 135. See also Harris *v.* Dennie, 3 Pet. (U. S.) 292, 7 L. ed. 683, where it was held that a lien on property for duties in favor of the United States could be enforced for duties due on goods previously imported, even though an attachment had been levied and the officer making the levy had offered to give security for payment of the duties on the attached merchandise.

An agreement for a secret trust to secure purchase-money advanced by a third person will not prevail against an attaching creditor of the purchaser, because to give validity to such an agreement would allow an evasion of the laws respecting pledges and mortgages. Huntington *v.* Clemence, 103 Mass. 482.

81. *Iowa.*— Keith *v.* Losier, 88 Iowa 649, 55 N. W. 952, *lis pendens.*

Kentucky.—Finck, etc., Lumber Co. *v.* Mehler, 102 Ky. 111, 19 Ky. L. Rep. 1146, 43 S. W. 403, 766, statutory lien for building materials.

Louisiana.— Harmon *v.* Juge Fils, 6 La. Ann. 768 (lien for rent); Tiernan *v.* Murrah, 1 Rob. (La.) 443 (lien for wages).

Maryland.— Thompson *v.* Baltimore, etc., Steam Co., 33 Md. 312, lien for rent.

Massachusetts.— De Wolf *v.* Dearborn, 4 Pick. (Mass.) 466, carrier's lien.

Michigan.— Wight *v.* Maxwell, 4 Mich. 44, where it was further held that a statutory lien for materials furnished in building a ship was not displaced by proceedings against the vessel in another state to which it had been removed.

Nebraska.— Reynolds *v.* McMillan, 43 Nebr. 183, 61 N. W. 699, lien for taxes.

New York.— Taacks *v.* Schmidt, 18 Abb. Pr. (N. Y.) 307, lien for custom duties.

Tennessee.— Ruston *v.* Perry Lumber Co., 104 Tenn. 538, 58 S. W. 268, lien for wages.

Texas.— Sullivan *v.* Cleveland, 62 Tex. 677, lien for rent.

Virginia.— Williamson *v.* Gayle, 7 Gratt. (Va.) 152.

United States.— Cotton *v.* Dacey, 61 Fed. 481, *lis pendens.*

See 5 Cent. Dig. tit. "Attachment," § 550.

A subsequently accruing lien, although arising by virtue of a statute, will be postponed to the claims of an attaching creditor of the lienee. Young *v.* Stoutz, 74 Ala. 574; Bell *v.* Gaylord, 6 N. M. 227, 27 Pac. 494. *Compare* Garrison *v.* Webb, 107 Ala. 499, 18 So. 297, where the lien did not arise because the parties did not come within the terms of the statute.

82. Rockwood *v.* Varnum, 17 Pick. (Mass.) 289; Platt *v.* Brown, 16 Pick. (Mass.) 553; Burlingame *v.* Bell, 16 Mass. 318; Middlebury Bank *v.* Edgerton, 30 Vt. 182.

83. McDonald *v.* Bowman, 40 Nebr. 269, 58 N. W. 704 [*reversing* 35 Nebr. 93, 52 N. W. 828]. *Compare* Prude *v.* Morris, 38 La. Ann. 767.

A mortgage to a trustee to secure the payment of a *bona fide* indebtedness will prevail over the claims of a subsequently attaching creditor. International Trust Co. *v.* Davis, etc., Mfg. Co., 70 N. H. 118, 46 Atl. 1054; Clay *v.* East Tennessee, etc., R. Co., 6 Heisk. (Tenn.) 421; Compton *v.* Seley, (Tex. Civ. App. 1894) 27 S. W. 1077. *Compare* Bowker Fertilizing Co. *v.* Spaulding, 93 Me. 96, 44 Atl. 371.

A mortgage executed subsequently to an attachment will prevail over a second attachment which is subsequently levied. Clark *v.* Austin, 2 Pick. (Mass.) 528. *Compare* Frankle *v.* Douglas, 1 Lea (Tenn.) 476.

Where an attachment is levied on property subject to a mortgage a failure to make a deposit to secure the first mortgage as required by statute will not postpone the attachment to a subsequent mortgage. Geiershofer *v.* Nupuf, 106 Iowa 374, 76 N. W. 745; Haydock *v.* Patton, 92 Iowa 247, 60 N. W. 533.

Where a mortgagee of personal property purchased a claim secured by an attachment lien on the same property it was held that he acquired an equitable lien as against attachments subsequently levied, although the statutory lien of the prior attachment was technically extinguished by the enforcement of his mortgage. Armstrong *v.* McAlpin, 18 Ohio St. 184.

the goods so mortgaged and attached;[84] but the mortgage must be a valid instrument or the attachment will prevail.[85]

(III) *Property Obtained by Fraud.* Where property has been purchased on fraudulent representations, a creditor of the purchaser attaching it acquires only the rights which the purchaser himself has, and the defrauded vendor can enforce his right to have the sale set aside against the attaching creditor as well as he could have enforced it against the fraudulent vendee.[86]

c. Common-Law Exception. The only exception, independent of statute, to this limitation upon the right acquired by an attaching creditor exists in the case where the adverse claimant participates in a fraudulent purpose of the debtor;[87]

Waiver of mortgage by attaching mortgaged property.— By attaching property subject to his mortgage for a claim other than that secured by the mortgage a creditor waives his rights under the mortgage (Haynes *v.* Sanborn, 45 N. H. 429; Dix *v.* Smith, 9 Okla. 124, 60 Pac. 303, 50 L. R. A. 714. *Compare* Ellinwood *v.* Holt, 60 N. H. 57), so that he is no longer obliged to account to the mortgagor for its value (Libby *v.* Cushman, 29 Me. 429); but the mortgagee is not estopped from claiming under his mortgage if he had no notice that the property attached was included within the mortgage (Howe *v.* Wadsworth, 59 N. H. 397), and it has been held that an attaching creditor may lawfully purchase an outstanding mortgage to protect his attachment lien (Lacy *v.* Gentry, (Tex. Civ. App. 1900) 56 S. W. 949).

84. Finke *v.* Pike, 50 Mo. App. 564; Corning *v.* Rinehart Medicine Co., 46 Mo. App. 16.

85. *Connecticut.*— Bramhall *v.* Flood, 41 Conn. 68.

Kentucky.— Pearce *v.* Hall, 12 Bush (Ky.) 209.

Maine.— Stedman *v.* Perkins, 42 Me. 130.

Massachusetts.— Jones *v.* Richardson, 10 Metc. (Mass.) 481.

Nebraska.— Price *v.* McComas, 21 Nebr. 195, 31 N. W. 511.

Validity of mortgage.— A mortgage is valid, although given to secure the liability of the mortgagee as an indorser on a note of the mortgagor (Rogers *v.* Abbott, 128 Mass. 102), or although the property was held by a United States marshal for a supposed breach of navigation law at the time when the mortgage was executed (Mitchell *v.* Cunningham, 29 Me. 376); but an acceptance of a mortgage by a mortgagee because it is beneficial to him cannot be presumed to defeat an attachment levied before an actual ratification (Kuh *v.* Garvin, 125 Mo. 547, 28 S. W. 847). See also Union Nat. Bank *v.* Barker, 145 Mo. 356, 46 S. W. 1096, where the attaching creditor was unsucessful in his attempt to prove a prior mortgage invalid.

In New Hampshire a statute authorizing an attaching creditor of mortgaged real estate to demand an account on oath of the mortgagee has the effect of postponing the mortgage when the mortgagee does not render a true account; but the postponement only operates in favor of those creditors who demanded the account. Kimball *v.* Morrison, 40 N. H. 117.

86. *Arkansas.*—Taylor *v.* Mississippi Mills, 47 Ark. 247, 1 S. W. 283.

Illinois.— Schweizer *v.* Tracy, 76 Ill. 345 [*distinguishing* Burnell *v.* Robertson, 10 Ill. 282].

Kentucky.— Lane *v.* Robinson, 18 B. Mon. (Ky.) 623; Carstairs *v.* Kelley Co., 17 Ky. L. Rep. 309, 29 S. W. 622.

Louisiana.— Galbraith *v.* Davis, 4 La. Ann. 95; Gasquet *v.* Johnston, 2 La. 514; Parmele *v.* McLaughlin, 9 La. 436. *Compare* Stockton *v.* Craddick, 4 La. Ann. 282, where the property obtained by fraud was real estate, and the attaching creditor who prevailed over the defrauded vendor had no notice of the nature of the vendee's title.

Nebraska.— See Westervelt *v.* Hagge, 61 Nebr. 647, 85 N. W. 852, where it was held that creditors of a grantee who attached real property conveyed to him in fraud of the grantor's creditors obtained no right in the same against subsequent mortgagees of the grantor to whom the property had been reconveyed.

New Hampshire.— Connor *v.* Follansbee, 59 N. H. 124.

Contra, Gibbs *v.* Chase, 10 Mass. 125; Dickson *v.* Culp, 9 Baxt. (Tenn.) 57.

A fortiori this is true where a suit was pending to have the sale set aside at the time the attachment was levied. Jefferson County Sav. Bank *v.* McDermott, 99 Ala. 79, 10 So. 154; Kinnah *v.* Kinnah, 184 Ill. 284, 56 N. E. 376.

87. Fraud or collusion by which the rights of the attaching creditor are impaired postpones the fraudulent party. Link *v.* Gibson, 93 Ill. App. 433; Frazier *v.* Willcox, 4 Rob. (La.) 517; Westervelt *v.* Hagge, 61 Nebr. 647, 85 N. W. 852; Kimbro *v.* Clark, 17 Nebr. 403, 22 N. W. 788; Parkersburg First Nat. Bank *v.* Harkness, 42 W. Va. 156, 24 S. E. 548, 32 L. R. A. 408.

Where the alleged fraud is not made out by sufficient evidence an alleged fraudulent mortgagee will prevail over the claims of an attaching creditor of the mortgagor. Mize *v.* Turner, 15 Ky. L. Rep. 67, 22 S. W. 83; Dunham *v.* Stevens, 160 Mo. 95, 60 S. W. 1064. Where all the requisites for creating a valid mortgage have been complied with it devolves upon the attaching creditor to show that the debt secured by the mortgage was not actual and honest (Hasie *v.* Connor, 53 Kan. 713, 37 Pac. 128), and an attaching creditor's belief that a mortgage is being withheld from rec-

but the creditor may invoke the aid of the rule that a sale of personal property without change of possession is fraudulent and void as to third persons.[88]

ord to delay and defraud creditors will not give him priority over the mortgagee (Allen *v.* McCalla, 25 Iowa 464, 96 Am. Dec. 56). See also Walker *v.* Collins, 50 Fed. 737, 4 U. S. App. 406, 1 C. C. A. 642, where a defrauded vendor of goods sued for the contract price and attached the goods after they had passed into the hands of a *bona fide* purchaser, and it was held that by suing for the price he affirmed the fraudulent contract, and therefore the purchaser acquired a good title. But see *supra*, V, G, 1, note 87.

Estoppel to set up fraud.— A creditor cannot affirm a sale by garnishing the proceeds and then declare the sale fraudulent and proceed to attach the property sold. Carter *v.* Smith, 23 Wis. 497. *Compare* Whitehill *v.* Basnett, 24 W. Va. 142, where an attaching creditor made an ineffectual attempt to have a vendor's lien on real estate declared fraudulent, although his right to attach was dependent on the fact that the deed reserving the lien passed a valid title.

88. Where no change of possession follows a sale of personalty an attaching creditor of the vendor will prevail over the claims of the vendee.

Connecticut.—Cohen *v.* Schneider, 70 Conn. 505, 40 Atl. 455; Seymour *v.* O'Keefe, 44 Conn. 128.

Louisiana.— Shultz *v.* Morgan, 27 La. Ann. 616; Bancker *v.* Brady, 26 La. Ann. 749; Zacharie *v.* Kirk, 14 La. Ann. 433; Lee *v.* Bullard, 3 La. Ann. 462; Olivier *v.* Townes, 2 Mart. N. S. (La.) 93; Fisk *v.* Chandler, 7 Mart. (La.) 24; Norris *v.* Mumford, 4 Mart. (La.) 20.

Missouri.— Franklin *v.* Gumersell, 11 Mo. App. 306.

Maine.— Reed *v.* Reed, 70 Me. 504; Mason *v.* Sprague, 47 Me. 18; Richardson *v.* Kimball, 28 Me. 463 (vessel sold while in port).

New Hampshire.— Parker *v.* Marvell, 60 N. H. 30; Page *v.* Carpenter, 10 N. H. 77.

Oregon.— Gill *v.* Frank, 12 Oreg. 507, 8 Pac. 764, 53 Am. Rep. 378.

Vermont.—Perrin *v.* Reed, 35 Vt. 2; Flanagan *v.* Wood, 33 Vt. 332; Hart *v.* Farmers, etc., Bank, 33 Vt. 252; Judd *v.* Langdon, 5 Vt. 231; Boardman *v.* Keeler, 1 Aik. (Vt.) 158, 15 Am. Dec. 670.

See 5 Cent. Dig. tit. "Attachment," § 570; and, generally, SALES.

The reason of the rule is that, as against a person who was once the owner of the property and all who claim by purchase from him, the continued possession is to be regarded as a sure *indicium* of continued ownership, and that the possessor would obtain by such continued possession a false credit to the injury of third persons if there was no such rule to protect them. Capron *v.* Porter, 43 Conn. 383. *Compare* Killey *v.* Scannell, 12 Cal. 73.

A fortiori a mere contract for sale without transfer of possession would not postpone an attaching creditor of the vendor to the person contemplating the purchase. Smart *v.* Batchelder, 57 N. H. 140; Taacks *v.* Schmidt, 18 Abb. Pr. (N. Y.) 307. And in McCutchin *v.* Platt, 22 Wis. 561, an attaching creditor prevailed over a purchaser who was ignorant of the sale and who had not yet received a bill of sale which had been mailed to him. *Compare* Hinckley *v.* Bridgham, 46 Me. 450.

Conflict of laws.—Where a contract of sale is invalid by the laws of the state where it is made an attaching creditor of the vendor will prevail over the rights of the vendee, although the contract was valid in the jurisdiction where the attachment was made. Bond *v.* Cummings, 70 Me. 125.

An attaching plaintiff must show that defendant is actually indebted to him before he has any standing to object to a sale as fraudulent. Freiburg *v.* Foreman, 1 Tex. App. Civ. Cas. § 473.

Necessity of actual fraud.— In some jurisdictions retention of possession of a chattel by the vendor is only *prima facie* evidence, and good faith may be shown by the purchaser (Poling *v.* Flanagan, 41 W. Va. 191, 23 S. E. 685); but it has been held to be very strong if not conclusive evidence of a mere colorable sale (Lucas *v.* Birdsey, 41 Conn. 357; Blakeslee *v.* Hatstat, 41 Conn. 301). *Compare* Gibson *v.* Stevens, 8 How. (U. S.) 384, 12 L. ed. 1123; and in Bradford *v.* McLellan, 23 Me. 302, the burden of proof was held to be on the officer who failed to attach property in the possession of the debtor to show that it did not belong to him. See also Smith *v.* Foster, 18 Vt. 182 (where it was held that on the facts of the case actual fraud must be shown to defeat the purchasers' claims); Page *v.* Carpenter, 10 N. H. 77 (where it was suggested that an excuse for failure to transfer possession might be shown).

Recording and notice.— When the rights of the attaching creditor depend upon fraud in the sale he is not affected by the fact that the transfer is recorded (Cohen *v.* Schneider, 70 Conn. 505, 40 Atl. 455), or that he has actual notice of the sale (Perrin *v.* Reed, 35 Vt. 2; Hart *v.* Farmers, etc., Bank, 33 Vt. 252); and so a failure to record will not put the purchaser in a worse position (Clark *v.* Ward, 12 Gratt. (Va.) 440). But see Dixon *v.* Barnett, 3 Wash. 645, 29 Pac. 209, where it was held that recording a bill of sale was sufficient notice to creditors of the vendor, although he retained possession of the property.

Mortgaged personal property in the mortgagor's possession, after the maturity of the mortgage debt, may be levied on under a writ of attachment, and the lien thus acquired is prior to the claims of the mortgagee. Hewitt *v.* General Electric Co., 164 Ill. 420, 45 N. E. 725 [*reversing* 61 Ill. App. 168].

The doctrine has been applied in the case of the sale of chattels situated on leased premises (Carter *v.* Willard, 19 Pick.

d. Statutory Exceptions From Requirements For Recording Transfers — (I) *Personal Property.* Where statutes regarding chattel mortgages or conditional sales [89] require that such mortgages or sales must be recorded to be valid against creditors and purchasers for value, in default of such record an attaching creditor of such mortgagor or vendor will acquire a greater right than his debtor had in the property mortgaged or conditionally sold;[90] and it has been held that the knowledge of the attaching creditor regarding the unrecorded mortgage is immaterial.[91]

(Mass.) 1; Flanagan *v.* Wood, 33 Vt. 332) and in the case of chattels pledged without transfer of possession (Houston *v.* Howard, 39 Vt. 54); and a delegation of the proceeds of sales of property for the discharge of the debt cannot place the delegated creditor in a better position than would an actual sale (Wilson *v.* Smith, 12 La. 375); but where two persons jointly owning personal property retained possession of it after a sale, a creditor of one of the joint owners could not by attachment acquire any right in the interest of the coöwner (Partridge *v.* Wooding, 44 Conn. 277). See also Lucas *v.* Birdsey, 41 Conn. 357, where the vendor who retained possession was authorized to exchange the property, and it was held that his creditor who attached the property received in exchange could not hold it against the purchaser.

89. **In the absence of statute** an attaching creditor of a conditional vendee will generally be postponed to the rights of the vendor.

Alabama.— Thornton *v.* Cook, 97 Ala. 630, 12 So. 403.

California.— Kellogg *v.* Burr, 126 Cal. 38, 58 Pac. 306.

Connecticut.— Mack *v.* Story, 57 Conn. 407, 18 Atl. 707; Lewis *v.* McCabe, 49 Conn. 141, 44 Am. Rep. 217; Hughes *v.* Kelly, 40 Conn. 148. But see Hotchkiss *v.* Higgins, 52 Conn. 205, 52 Am. Rep. 582, where it was held that a delivery of goods with the optional right to purchase on the part of the receiver did not give him an attachable interest, but a delivery with an optional right to return did pass title to him, and the property could be attached by his creditors.

Maine.— Peabody *v.* Maguire, 79 Me. 572, 12 Atl. 630.

Massachusetts.— Hill *v.* Freeman, 3 Cush. (Mass.) 257.

New Hampshire.— Holt *v.* Holt, 58 N. H. 276; McFarland *v.* Farmer, 42 N. H. 386.

New York.— Empire State Type Founding Co. *v.* Grant, 114 N. Y. 40, 21 N. E. 49, 22 N. Y. St. 302 [*reversing* 44 Hun (N. Y.) 434].

Rhode Island.— Goadell *v.* Fairbrother, 12 R. I. 233, 34 Am. Rep. 631.

Vermont.— Buckmaster *v.* Smith, 22 Vt. 203; Smith *v.* Foster, 18 Vt. 182.

See, generally, Sales.

In Vermont an attaching creditor was given the right by statute to perform the condition of a conditional sale, and thereby acquire a right to hold the property against the vendor (Duncan *v.* Stone, 45 Vt. 118; Fales *v.* Roberts, 38 Vt. 503; Armington *v.* Houston, 38 Vt. 448, 91 Am. Dec. 366), provided part of the purchase-money had already been paid by the conditional vendee (Rowan *v.* State Bank, 45 Vt. 160); but this act has been superseded by one which requires a conditional sale to be recorded in order to be valid against an attaching creditor (Whitcomb *v.* Woodworth, 54 Vt. 544).

What not a conditional sale.—Where machinery was delivered to a manufacturing concern, and affixed to the realty under an agreement that if it was satisfactory the company should pay a certain price and acquire title to it, it was held that this was not a conditional sale, and recording was not necessary to protect the property against attaching creditors of the company. Gates Iron Works *v.* Cohen, 7 Colo. App. 341, 43 Pac. 667. Where a vendee has obtained credit by showing a bill of sale which is absolute on its face, the vendor cannot prove by parol testimony that the sale was only conditional. Sanborn *v.* Chittenden, 27 Vt. 171. *Compare* Hunt *v.* Douglass, 22 Vt. 128.

After a complete rescission of a conditional sale an attachment against the purchaser was not effective against the debtor of the seller. Steen *v.* Harris, 81 Ga. 681, 8 S. E. 206.

90. *Idaho.*— Falk-Bloch Mercantile Co. *v.* Branstetter, (Ida. 1896) 43 Pac. 571.

Iowa.— National Cash Register Co. *v.* Broeksmit, 103 Iowa 271, 72 N. W. 526; Bacon *v.* Thompson, 60 Iowa 284, 14 N. W. 312.

Kansas.— Smith-Frazer Boot, etc., Co. *v.* Ware, 47 Kan. 483, 28 Pac. 159.

Louisiana.— Stephenson *v.* Lee, 6 La. Ann. 758.

Missouri.— Morgan Mach. Co. *v.* Rauch, 84 Mo. App. 514. *Compare* Huiser *v.* Beck, 55 Mo. App. 668, where it was held that a mortgagee was entitled to a reasonable time in which to have a chattel mortgage recorded, and that if he did have it recorded within a reasonable time the mortgage would prevail over an attachment levied subsequently to the execution, but before the record, of the mortgage.

Nebraska.— New Home Sewing Mach. Co. *v.* Beals, 44 Nebr. 816, 62 N. W. 1092; Peterson *v.* Tufts, 34 Nebr. 8, 51 N. W. 297.

New Hampshire.— Town *v.* Griffith, 17 N. H. 165.

West Virginia.— Ballard *v.* Great Western Min., etc., Co., 39 W. Va. 394, 19 S. E. 510.

The reason why the rule that an attachment lien is only effective against the debtor's interest does not postpone the creditor is that the law regards the mortgagor as the absolute owner in so far as the creditor is concerned. McFadden *v.* Blocker, 2 Indian Terr. 260, 48 S. W. 1043.

91. McFadden *v.* Blocker, 2 Indian Terr. 260, 48 S. W. 1043; Greenville Nat. Bank *v.*

(II) *Real Estate*—(A) *In General.* The phraseology of some statutes regarding the registration of titles to real estate places an attaching creditor on a par with a purchaser, and in those states a creditor levying his attachment without notice of a prior unrecorded deed is entitled to priority over the grantee under the unrecorded deed;[92] but unless aided by statute the general

Evans-Snyder-Buel Co., 9 Okla. 353, 60 Pac. 249; Baxter *v.* Smith, 2 Wash. Terr. 97, 4 Pac. 35. But see Kern *v.* Wilson, 82 Iowa 407, 48 N. W. 919, where it was held that an attaching creditor with actual notice of a prior chattel mortgage was bound thereby, although the mortgage had been wrongfully indexed. See, generally, CHATTEL MORTGAGES.

Sufficiency of notice.—It has been held that actual notice to the sheriff levying on property conditionally sold is not sufficient, but that notice must be given to the attaching creditor himself (Thomas *v.* Richards, 69 Wis. 671, 35 N. W. 42); and that an officer's right to make an attachment is not defeated by his finding the property in the possession of a third person, where it does not appear that he would have learned by inquiry that the property was in the hands of such person under a conditional sale (Whitcomb *v.* Woodworth, 54 Vt. 544).

Protection of mortgagee's interest.—A mortgagee's interest in chattels will be protected, if the mortgage is filed for record, before the levy of an attachment (Corning *v.* Rinehart Medicine Co., 46 Mo. App. 16; Moore *v.* Masterson, 19 Tex. Civ. App. 308, 46 S. W. 855); and the same is true where the mortgage is admittedly postponed to one attachment, and the contest is between the mortgagee and a second attaching creditor (Hurt *v.* Redd, 64 Ala. 85), or if there is no fraud, and he takes possession before a levy is made (Prouty *v.* Barlow, 74 Minn. 130, 76 N. W. 946; Petring *v.* Chrisler, 90 Mo. 649, 3 S. W. 405; Greeley *v.* Reading, 74 Mo. 309); and where property was already in possession of a receiptor under a prior attachment it was a sufficient taking possession by the mortgagee as against a subsequent attachment for the receiptor to agree to hold the goods as servant of the mortgagee (Wheeler *v.* Nichols, 32 Me. 233). Sufficient change of possession of the mortgaged property to protect the mortgagee's rights was not made out in Moresi *v.* Swift, 15 Nev. 215. See also Corbett *v.* Littlefield, 84 Mich. 30, 47 N. W. 581, 22 Am. St. Rep. 681, where it was held that registration of a chattel mortgage in Nebraska would not protect the mortgagee against an attachment in Michigan, the property having been removed there without his knowledge or consent.

92. *Alabama.*— Hardaway *v.* Semmes, 38 Ala. 657.

Colorado.— Campbell *v.* Denver First Nat. Bank, 22 Colo. 177, 43 Pac. 1007; Jerome *v.* Carbonate Nat. Bank, 22 Colo. 37, 43 Pac. 215; Wahrenberger *v.* Waid, 8 Colo. App. 200, 45 Pac. 518; Gates Iron Works *v.* Cohen, 7 Colo. App. 341, 43 Pac. 667.

Connecticut.— Quinebaug Bank *v.* French, 17 Conn. 129, where a second mortgage on real estate was released after an attachment levy, and the release recorded, but a deed of the mortgagor's interest in the equity had not been put on record, and it was held that the grantee from the mortgagor could not show that the second mortgage had been in fact assigned to him, such not being the state of the title as shown by the records.

Illinois.— Thomas *v.* Burnett, 128 Ill. 37, 21 N. E. 352, 4 L. R. A. 222; Martin *v.* Dryden, 6 Ill. 187; Clayburg *v.* Ford, 3 Ill. App. 542.

Louisiana.— Flower *v.* Pearce, 45 La. Ann. 853, 13 So. 150; Williams *v.* Heffner, 30 La. Ann. 1193; Ft. Wayne First Nat. Bank *v.* Ft. Wayne Artificial Ice Co., 105 La. 133, 29 So. 379; Emerson *v.* Fox, 3 La. 178.

Maine.— Brown *v.* Lunt, 37 Me. 423; Lawrence *v.* Tucker, 7 Me. 195; Stanley *v.* Perley, 5 Me. 369.

Massachusetts.— Mansfield *v.* Dyer, 131 Mass. 200; Woodward *v.* Sartwell, 129 Mass. 210. See also Atty.-Gen. *v.* Massachusetts Ben. L. Assoc., 173 Mass. 378, 53 N. E. 879, where the court construed the statute providing that no trust concerning lands shall prevent a creditor without notice of the trust from attaching the land.

Minnesota.— Shaubhut *v.* Hilton, 7 Minn. 506. But the contrary was true prior to the Minnesota act of 1858. Baze *v.* Arper, 6 Minn. 220: Greenleaf *v.* Edes, 2 Minn. 264. *Compare* Lyman *v.* Gaar, 75 Minn. 207, 77 N. W. 828, 74 Am. St. Rep. 452, where it was held that the statutes making an unrecorded conveyance void against an attachment levy did not apply to an unrecorded assignment of a contract for sale of land.

Ohio.— Wright *v.* Franklin Bank, 59 Ohio St. 80, 51 N. E. 876; Paine *v.* Mooreland, 15 Ohio 435, 45 Am. Dec. 585; Parker *v.* Miller, 9 Ohio 108 (provided the deed was not recorded within the time provided by statute). *A fortiori* the rule applies where the unrecorded deed is defective. Paine *v.* Mooreland, 15 Ohio 435, 45 Am. Dec. 585.

Oregon.—Security Trust Co. *v.* Loewenberg, 38 Oreg. 159, 62 Pac. 647; Meier *v.* Hess, 23 Oreg. 599, 32 Pac. 755; Riddle *v.* Miller, 19 Oreg. 468, 23 Pac. 807; Rhodes *v.* McGarry, 19 Oreg. 222, 23 Pac. 971; Dickey *v.* Henarie, 15 Oreg. 351, 15 Pac. 464.

Tennessee.— Burrough *v.* Brooks, 3 Head (Tenn.) 392; Hervey *v.* Champion, 11 Humphr. (Tenn.) 568; Tappan *v.* Harrison, 2 Humphr. (Tenn.) 172. *Contra,* Alexander *v.* Bland, Cooke (Tenn.) 431; Vinson *v.* Huddleston, Cooke (Tenn.) 253; Lemmon *v.* Alexander, 1 Overt. (Tenn.) 84, the last three cases having been decided under an earlier statute.

Texas.— Catlin *v.* Bennatt, 47 Tex. 165; Caldwell *v.* Bryan, 20 Tex. Civ. App. 168, 49

rule will prevail, and the creditor will be postponed to the unrecorded conveyance.[98]

S. W. 240; Robertson *v.* McClay, 19 Tex. Civ. App. 513, 48 S. W. 35; Thomson *v.* Shackelford, 6 Tex. Civ. App. 121, 24 S. W. 980.

Vermont.— Hart *v.* Farmers, etc., Bank, 33 Vt. 252; Slocum *v.* Catlin, 22 Vt. 137.

United States.— Southern Bank, etc., Co. *v.* Folsom, 75 Fed. 929, 43 U. S. App. 713, 21 C. C. A. 568 (construing Tennessee statute); Stafford Nat. Bank *v.* Sprague, 21 Blatchf. (U. S.) 473, 17 Fed. 784 (construing Connecticut statute); U. S. *v.* Canal Bank, 3 Story (U. S.) 79, 25 Fed. Cas. No. 14,715, 7 Law Rep. 88 (construing Maine statute).

See 5 Cent. Dig. tit. "Attachment," § 565.

It is a sufficient recording to deposit a deed with the town-clerk with instructions to record it (Bigelow *v.* Topliff, 25 Vt. 273, 60 Am. Dec. 264), although the register makes an error in description in transcribing the deed on the records (Durgin *v.* Mitchell, 50 N. H. 586 note).

Presumptions as to time.— A deed recorded about four-thirty in the afternoon will not be presumed to have been executed prior to an attachment levied at ten in the morning of the same day (Bissell *v.* Nooney, 33 Conn. 411); and where a deed of land was acknowledged before a register of deeds and an attachment levied on the land at the same time the deed was handed to the register the attachment had priority because the deed could not be recorded before a certificate of acknowledgment had been written (Sigourney *v.* Larned, 10 Pick. (Mass.) 72). See also Taylor *v.* Emery, 16 N. H. 359, where it was held that an attachment would not be presumed to have been made before five o'clock P. M. as against a deed recorded at that hour on the same day.

Necessity for record title to be in debtor.— The actual interest of a debtor in property may be reached by attachment without regard to the state of the record title (Davenport *v.* Lacon, 17 Conn. 278; Ealer *v.* Freret, 11 La. Ann. 455); but where the registry shows no title in debtor the creditor cannot claim the benefits of a fiction to get more than his debtor really owned (Cowley *v.* McLaughlin, 141 Mass. 181, 4 N. E. 821; Haynes *v.* Jones, 5 Metc. (Mass.) 292; Hovey *v.* Blanchard, 13 N. H. 145; Hamilton-Brown Shoe Co. *v.* Lewis, 7 Tex. Civ. App. 509, 28 S. W. 101). See also Slocum *v.* Catlin, 22 Vt. 137, where the purchaser of the equity of redemption who had paid the mortgage debt, but who had neglected to cause his deed from the mortgagor to be recorded until after a creditor of the mortgagor had attached the equity of redemption, was held to have an equitable lien upon the premises for the amount of the mortgage.

The rule regarding the postponement of unrecorded instruments has been applied in the case of unrecorded leases (Flower *v.* Pearce, 45 La. Ann. 853, 13 So. 150; Dickey *v.* Henarie, 15 Oreg. 351, 15 Pac. 464); of unregistered partition proceedings (McMechan *v.* Griffing, 9 Pick. (Mass.) 537); of an outstanding unrecorded equity (Morrell *v.* Cawood, 8 Baxt. (Tenn.) 176; Houston *v.* McCluney, 8 W. Va. 135); and in the case of unregistered title bonds (Catlin *v.* Bennatt, 47 Tex. 165). See also Perkins *v.* Adams, (Colo. App. 1901) 63 Pac. 792, where it was held that an attachment against an executor of property which stood in his name, but which in fact belonged to his decedent, was valid against the claims of the estate, as the attaching creditors would be presumed to know that the executor in his individual capacity had a right to purchase the property.

93. *California.*— Ukiah Bank *v.* Petaluma Sav. Bank, 100 Cal. 590, 35 Pac. 170; Le Clert *v.* Oullahan, 52 Cal. 252; Plant *v.* Smythe, 45 Cal. 161. *Compare* Morrow *v.* Graves, 77 Cal. 218, 19 Pac. 489, where fraudulently conveyed real estate was sold to *bona fide* purchasers, and they prevailed over the claim of an attaching creditor of the fraudulent grantor, although their deed to the land was not recorded till after the attachment was levied.

Dakota.— Bateman *v.* Backus, 4 Dak. 433, 34 N. W. 66.

Indiana.— Shirk *v.* Thomas, 121 Ind. 147, 22 N. E. 976, 16 Am. St. Rep. 381.

Iowa.— Moorman *v.* Gibbs, 75 Iowa 537, 39 N. W. 832; Tama City First Nat. Bank *v.* Hayzlett, 40 Iowa 659; Savery *v.* Browning, 18 Iowa 246; Norton *v.* Williams, 9 Iowa 528.

Kansas.— Burke *v.* Johnson, 37 Kan. 337, 15 Pac. 204, 1 Am. St. Rep. 252 (where purchaser had only an equity); Northwestern Forwarding Co. *v.* Mahaffey, 36 Kan. 152, 12 Pac. 705.

Kentucky.—Spratt *v.* Allen, 20 Ky. L. Rep. 1824, 50 S. W. 234; Brooks-Waterfield Co. *v.* Bush, 8 Ky. L. Rep. 208, 1 S. W. 424 (where the claimant of the land who prevailed over the attaching creditor of the holder of the record title had only an equity).

Michigan.— Millar *v.* Babcock, 25 Mich. 137; Columbia Bank *v.* Jacobs, 10 Mich. 349, 81 Am. Dec. 792. See also Horton *v.* Hubbard, 83 Mich. 123, 47 N. W. 115, where it was held that the levy of an attachment subsequently to a contract to convey land would not defeat a bill for specific performance by the vendee.

Missouri.— Mauch Chunk First Nat. Bank *v.* Rohrer, 138 Mo. 369, 39 S. W. 1047; Chandler *v.* Bailey, 89 Mo. 641, 1 S. W. 745; Sappington *v.* Oeschli, 49 Mo. 244; Reed *v.* Ownby, 44 Mo. 204; Potter *v.* McDowell, 43 Mo. 93; Stillwell *v.* McDonald, 39 Mo. 282; Valentine *v.* Havener, 20 Mo. 133; Davis *v.* Owenby, 14 Mo. 170, 55 Am. Dec. 105.

Nebraska.— Harral *v.* Gray, 10 Nebr. 186, 4 N. W. 1040.

New Jersey.—Lanahan *v.* Lawton, 50 N. J. Eq. 276, 23 Atl. 476; Maisch *v.* Hoffman, 42 N. J. Eq. 116, 7 Atl. 349; Campion *v.* Kille, 15 N. J. Eq. 476 [*affirming* 14 N. J. Eq. 229]. To same effect see Canda *v.* Powers, 38 N. J. Eq. 412; Garr *v.* Hill, 9 N. J. Eq. 210, where the purchaser prevailed although

(B) *Effect of Notice.* An attaching creditor's actual knowledge[94] of a prior unrecorded deed before the time when his attachment is levied[95] will

he had only an equity in the attached land. *Compare* Miller *v.* Jamison, 26 N. J. Eq. 404.

New York.— Lamont *v.* Cheshire, 65 N. Y. 30; Wilson *v.* Kelly, 31 Hun (N. Y.) 75; Bennett *v.* Rosenthal, 11 Daly (N. Y.) 91 (where the unrecorded instrument was an assignment which operated as the execution of a power given by a preceding will).

South Dakota.— Murphy *v.* Plankinton Bank, 15 S. D. 501, 83 N. W. 575; Kohn *v.* Lapham, 13 S. D. 78, 82 N. W. 408; Roblin *v.* Palmer, 9 S. D. 36, 67 N. W. 949.

Wisconsin.— Karger *v.* Steele-Wedeles Co., 103 Wis. 286, 79 N. W. 216.

See 5 Cent. Dig. tit. "Attachment," § 565.

Necessity for recording before judgment.— The conveyance must be recorded before the attached property is sold on execution (Sappington *v.* Oeschli, 49 Mo. 244; Reed *v.* Ownby, 44 Mo. 204; Harral *v.* Gray, 10 Nebr. 186, 4 N. W. 1040), and if the deed has not been recorded a purchaser in good faith at the execution sale acquires a valid title (Columbia Bank *v.* Jacobs, 10 Mich. 349, 81 Am. Dec. 792; Chandler *v.* Bailey, 89 Mo. 641, 1 S. W. 745; Adams *v.* Buchanan, 49 Mo. 64).

94. What constitutes sufficient notice.— An attaching creditor is chargeable with notice in the same manner as a subsequent purchaser (McLaughlin *v.* Shepherd, 32 Me. 143, 52 Am. Dec. 646; Matthews *v.* Demerritt, 22 Me. 312); and although attornment by a tenant in possession to the grantee is not sufficient (Wahrenberger *v.* Waid, 8 Colo. App. 200, 45 Pac. 518; Veazie *v.* Parker, 23 Me. 170), an open and notorious possession of land by the grantee is constructive notice of his title (U. S. *v.* Howgate, 2 Mackey (D. C.) 408; Kent *v.* Plummer, 7 Me. 464; Davis *v.* Blunt, 6 Mass. 487, 4 Am. Dec. 168; Farnsworth *v.* Childs, 4 Mass. 637, 3 Am. Dec. 249; Anonymous, Quincy (Mass.) 370; Galley *v.* Ward, 60 N. H. 331; Hicks *v.* Riddick, 28 Gratt. (Va.) 418; Stafford Nat. Bank *v.* Sprague, 21 Blatchf. (U. S.) 473, 17 Fed. 784; Weld *v.* Madden, 2 Cliff. (U. S.) 584, 29 Fed. Cas. No. 17,373), even, it was held, though the possessor denied that he had title thereto (Hackett *v.* Callender, 32 Vt. 97). *Compare* Wooldridge *v.* Mississippi Valley Bank, 36 Fed. 97, where an absolute deed was in fact a mortgage, and the possession of the premises by the grantor was held insufficient to give attaching creditors of the grantee notice of the real nature of the instrument. It is not notice of an unrecorded deed, however, that a subsequent deed of the same premises by the grantee (Roberts *v.* Bourne, 23 Me. 165, 39 Am. Dec. 614), a subsequent mortgage (Veazie *v.* Parker, 23 Me. 170), or an unacknowledged deed (Brown *v.* Lunt, 37 Me. 423) has been recorded; or that a declaration of trust is filed by a *cestui que trust* when such a declaration is not a recordable instrument (Clark *v.* Watson, 141 Mass. 248, 5 N. E. 298); and proof of knowledge of an intended conveyance does not show knowledge of an actual passing of the title (Cushing *v.* Hurd, 4 Pick. (Mass.) 253, 16 Am. Dec. 335). See also Richardson *v.* Smith, 11 Allen (Mass.) 134, where the attaching creditor had heard that all his debtor's property had been conveyed for the purpose of paying his debts, and although the alleged grantee did not deny the conveyance it was held that the creditor did not have knowledge thereof as he had searched the records and found no conveyance.

Putting creditor on inquiry.— It has been held enough to show facts sufficient to put the attaching creditor on an inquiry (German Sav. Bank *v.* Armour Packing Co., (Iowa 1898) 75 N. W. 503; McLaughlin *v.* Shepherd, 32 Me. 143, 52 Am. Dec. 646; Riddle *v.* Miller, 19 Oreg. 468, 23 Pac. 807), for he will be affected with notice of everything of which he had the means of obtaining knowledge (McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274); but in other jurisdictions proof of facts sufficient to put a party on inquiry, or to amount to an implied or constructive notice is not sufficient (Parker *v.* Osgood, 3 Allen (Mass.) 487), for the attaching creditor must be shown to have had actual notice (Sibley *v.* Leffingwell, 8 Allen (Mass.) 584). Where a tract of land was subject to a mortgage, and a portion of it was conveyed by a recorded deed which recited that the grantee took the title subject to the mortgages, this was notice to the grantee's creditors of an agreement on his part to pay the mortgage debt. Iowa L. & T. Co. *v.* Mowery, 67 Iowa 113, 24 N. W. 747. In Clark *v.* Jenkins, 5 Pick. (Mass.) 280, a warranty deed from the mortgagor to the mortgagee was recorded, and it was held to be for the jury to determine whether such deed was notice to an attaching creditor of the unrecorded mortgage.

Knowledge of agent.— An attaching creditor is affected by the knowledge of the officer employed to make the attachment (Tucker *v.* Tilton, 55 N. H. 223. *Contra*, Stanley *v.* Perley, 5 Me. 369); but not by the knowledge of an attorney employed merely to draw the writ (Tucker *v.* Tilton, 55 N. H. 223).

Knowledge of debtor.— Where title of record is in the debtor, an attaching creditor may prevail, although the debtor had knowledge of an unrecorded deed from his grantor which was prior to the one from which the debtor derived his title. Coffin *v.* Ray, 1 Metc. (Mass.) 212.

95. Subsequent notice of an unrecorded deed between the time of the attachment and the levy of execution will not defeat an attaching creditor's priority. Emerson *v.* Littlefield, 12 Me. 148; Kent *v.* Plummer, 7 Me. 464; Stanley *v.* Perley, 5 Me. 369; Coffin *v.* Ray, 1 Metc. (Mass.) 212; Stowe *v.* Meserve, 13 N. H. 46. *Contra*, Hoy *v.* Allen, 27 Iowa 208; Hope *v.* Blair, 105 Mo. 85, 16 S. W. 595, 24 Am. St. Rep. 366; Reynolds *v.* Haskins, 68 Vt. 426, 35 Atl. 349; Hackett *v.* Callender, 32 Vt. 97.

always postpone his rights to those of the grantee under the unrecorded deed.[96]

2. BETWEEN SUCCESSIVE ATTACHMENTS — a. Generally. In the absence of statutes providing for *pro rata* distribution among attaching creditors[97] the question of priority between attachments is dependent upon which is earlier in point of time[98] irrespective of the time when judgment is recovered in the

96. *Alabama.*—Buford *v.* Shannon, 95 Ala. 205, 10 So. 263.

Colorado.— Campbell *v.* Denver First Nat. Bank, 22 Colo. 177, 43 Pac. 1007.

Illinois.— Ogden *v.* Haven, 24 Ill. 57; Cox *v.* Milner, 23 Ill. 476.

Iowa.—German Sav. Bank *v.* Armour Packing Co., (Iowa 1898) 75 N. W. 503; Allen *v.* McCalla, 25 Iowa 464, 96 Am. Dec. 56.

Kansas.— Northwestern Forwarding Co. *v.* Mahaffey, 36 Kan. 152, 12 Pac. 705.

Kentucky.— Bailey *v.* Welch, 4 B. Mon. (Ky.) 244.

Massachusetts.— Priest *v.* Rice, 1 Pick. (Mass.) 164, 11 Am. Dec. 156; Prescott *v.* Heard, 10 Mass. 60.

Minnesota.—Lamberton *v.* Merchants' Nat. Bank, 24 Minn. 281.

New Hampshire.— Tucker *v.* Tilton, 55 N H. 223.

New Jersey.—Merchants' Bldg., etc., Assoc. *v.* Barber, (N. J. 1894) 30 Atl. 865; Garwood *v.* Garwood, 9 N. J. L. 193.

New York.— Lamont *v.* Cheshire, 65 N. Y. 30.

Oregon.— Riddle *v.* Miller, 18 Oreg. 460, 23 Pac. 807; Boehreinger *v.* Creighton, 10 Oreg. 42.

Texas.— Catlin *v.* Bennatt, 47 Tex. 165.

Vermont.— Perrin *v.* Reed, 35 Vt. 2.

United States.— Weld *v.* Madden, 2 Cliff. (U. S.) 584, 29 Fed. Cas. No. 17,373. *Contra*, Southern Bank, etc., Co. *v.* Folsom, 75 Fed. 929, 43 U. S. App. 713, 21 C. C. A. 568, construing Tennessee statute.

An outstanding unrecorded equity in land cannot be defeated by the attachment of a creditor who has notice of such equity.

Connecticut.— Goddard *v.* Prentice, 17 Conn. 546.

Kentucky.— Bailey *v.* Welch, 4 B. Mon. (Ky.) 244.

Montana.— Princeton Min. Co. *v.* Butte First Nat. Bank, 7 Mont. 530, 19 Pac. 210.

Oregon.— Osgood *v.* Osgood, 35 Oreg. 1, 56 Pac. 1017; Riddle *v.* Miller, 18 Oreg. 460, 23 Pac. 807.

Texas.— Catlin *v.* Bennatt, 47 Tex. 165.

Vermont.— Hackett *v.* Callender, 32 Vt. 97.

Virginia.— Hicks *v.* Riddick, 28 Gratt. (Va.) 418.

Contra, Houston *v.* McCluney, 8 W. Va. 135.

Creation of equitable interest.— Apparent exceptions to the preceding statement are due to the fact that an agreement between two persons to whom a legal title had been conveyed was not definite enough to create an equity in favor of the one paying the entire purchase-price (Hurt *v.* Prillaman, 79 Va. 257); or to the unusual doctrine that a contract to convey without payment of purchase-money does not operate to create an equity in the obligee under the contract (McCombs *v.* Howard, 18 Ohio St. 422).

97. **Pro rata sharing** see *infra*, XII, B, 2, c.

98. *Louisiana.*— Hepp *v.* Glover, 15 La. 461, 35 Am. Dec. 206. *Compare* Garland *v.* Grinnell, 8 La. 57.

Massachusetts.— Atlas Bank *v.* Nahant Bank, 23 Pick. (Mass.) 480.

Mississippi.— Boone *v.* McIntosh, 62 Miss. 744.

Missouri.— Stephenson *v.* Parker Stationery Co., 142 Mo. 13, 43 S. W. 380.

Montana.— Steinhart *v.* Fyhrie, 5 Mont. 463, 6 Pac. 367.

New York.— Greenleaf *v.* Mumford, 19 Abb. Pr. (N. Y.) 469, 30 How. Pr. (N. Y.) 30.

Rhode Island.— De Wolf *v.* Murphy, 11 R. I. 630.

Texas.— Dalsheimer *v.* Morris, 8 Tex. Civ. App. 268, 28 S. W. 240. *Compare* Sanger *v.* Trammell, 66 Tex. 361, 1 S. W. 378, where the first levy was not properly completed, and it was held that the attaching creditor who first obtained a valid levy was entitled to priority.

Virginia.— Farmers Bank *v.* Day, 6 Gratt. (Va.) 360; Erskine *v.* Staley, 12 Leigh (Va.) 406.

See 5 Cent. Dig. tit. "Attachment," §§ 535, 539.

Priority of personal service on defendant.— An attachment subsequently levied has been held to take priority because service was first obtained on defendant. Carney *v.* Taylor, 4 Kan. 178.

The rule is not affected by the circumstance that a subsequently attaching creditor shows superior diligence in getting a fraudulent conveyance of the property set aside (Patrick *v.* Montader, 13 Cal. 434; Levy *v.* Marx, (Miss. 1895) 18 So. 575; State *v.* Hickman, 150 Mo. 626, 51 S. W. 680) or in defeating a previous fraudulent attachment (Lillienthal *v.* A. P. Hotaling Co., 15 Oreg. 371, 15 Pac. 630); that one of the attaching creditors is a non-resident (Barnett *v.* Kinney, 2 Ida. 706, 23 Pac. 922, 24 Pac. 624), even though the non-resident begins his suit in a federal court (Bates *v.* Days, 5 McCrary (U. S.) 342, 17 Fed. 167); that an attaching creditor had notice of a prior unrecorded attachment (Kent *v.* Roberts, 2 Story (U. S.) 591, 14 Fed. Cas. No. 7,715); that a statute specially gives a right of attachment of goods sold for the unpaid purchase-money (Arkadelphia Lumber Co. *v.* McNutt, 68 Ark. 417, 59 S. W. 761, 82 Am. St. Rep. 299; Fox *v.* Arkansas Industrial Co., 52 Ark. 450, 12 S. W. 875; Straus *v.* Rothan, 102 Mo. 261, 14 S. W. 940 [*affirming* 41 Mo. App. 602, and

suit;[99] but the first attaching creditor is held to strict compliance with

overruling Boyd *v.* J. M. Ward Furniture, etc., Co., 38 Mo. App. 210; Bolckow Milling Co. *v.* Turner, 23 Mo. App. 103]); that the property is a fund in the hands of the attaching creditor which belongs to attachment defendant (Arledge *v.* White, 1 Head (Tenn.) 241); or that the earlier attaching creditor secured his priority by falsely telling his competitor that the earlier attachment had already been levied (Bardwell *v.* Perry, 19 Vt. 292, 47 Am. Dec. 687), by falsely telling his competitor that the debtor is solvent, and that he does not intend to press his claim against him (Glaser *v.* Ft. Smith First Nat. Bank, 62 Ark. 171, 34 S. W. 1061, 35 L. R. A. 765), or by concealing the debtor's property until he could perfect his process and levy under it (Dooley *v.* Hadden, 179 U. S. 646, 21 S. Ct. 259, 45 L. ed. 357 [*reversing* 92 Fed. 274, 63 U. S. App. 173, 34 C. C. A. 338, 93 Fed. 728, 35 C. C. A. 554], construing New York statute). But see Bull *v.* Loveland, 10 Pick. (Mass.) 9, where it was held that after a creditor had agreed to place his demand in the hands of assignee he must notify other creditors of his intention to attach before he could secure priority by levying an attachment.

An attachment under the log lien act takes precedence over a general attachment which is prior in time. Halpin *v.* Hall, 42 Wis. 176.

A distress for rent takes priority over an attachment served simultaneously with it, even though the court had erroneously taken jurisdiction over the distress (Canterberry *v.* Jordan, 27 Miss. 96), because the right of a landlord to distrain for rent is not affected by attachment proceedings (Acker *v.* Witherell, 4 Hill (N. Y.) 112); but an attachment on property off the rented premises is preferred to a distress for rent, because distress can only be had against property situated on the premises (Mosby *v.* Leeds, 3 Call (Va.) 439).

Simultaneous attachments.— Attachments made at the same instant stand upon an equal footing and the attaching creditors share equally in the proceeds arising from the sale of the attached property (Lee *v.* Hinman, 6 Conn. 165; Fairfield *v.* Paine, 23 Me. 498, 41 Am. Dec. 357; Durant *v.* Johnson, 19 Pick. (Mass.) 544; Thurston *v.* Huntington, 17 N. H. 438; Stone *v.* Abbott, 3 Baxt. (Tenn.) 319; Wilson *v.* Blake, 53 Vt. 305); but when the claim of one creditor can be satisfied with less than half the proceeds the remainder goes to satisfy the other attachment (Blaisdell *v.* Pray, 68 Me. 269; Sigourney *v.* Eaton, 14 Pick. (Mass.) 414, 25 Am. Dec. 414). See also Thurston *v.* Huntington, 17 N. H. 438, where it was held that the simultaneously attaching creditors shared equally in the proceeds, although one of the officers making the levy had levied several writs and returned them in a particular order and subject to each other. Attachments have been held to be simultaneous when one officer attached one minute after a certain hour, and the other attached "immediately" after the same hour (Shove *v.* Dow, 13 Mass. 529); and where two creditors executed bonds of indemnity on the same day and one obtained the first order from the chancellor, but the other had ten minutes priority in having his process served (Dyer *v.* Mears, 2 B. Mon. (Ky.) 528).

Attachments on the same day.—Although as a general rule the hour of the day at which an attachment is levied is considered in determining its claim to priority (Brainard *v.* Bushnell, 11 Conn. 16; Gomila *v.* Milliken, 41 La. Ann. 116, 5 So. 548; Fairfield *v.* Paine, 23 Me. 498, 41 Am. Dec. 357; Western Nat. Bank *v.* National Union Bank, 91 Md. 613, 46 Atl. 960; Ginsberg *v.* Pohl, 35 Md. 505), it has been held that there is no priority between attachments levied on the same day (Yelverton *v.* Burton, 26 Pa. St. 351; Long's Appeal, 23 Pa. St. 297), either by an express provision of statute (Steffens *v.* Wanbocker, 17 S. C. 475), or on the theory that the law disregarded fractions of a day (Stone *v.* Abbott, 3 Baxt. (Tenn.) 319). But see Davis *v.* Chadwick, 3 Pa. Co. Ct. 540, where it was held that a sheriff must return goods taken on an attachment writ to a constable who had levied another writ on the same goods earlier in the day.

Directions not to levy.— A creditor is postponed to a subsequent attachment when he directs the officer receiving the writ not to levy it (Moore *v.* Fitz, 15 Ind. 43); or not to levy it unless another attachment issues (Florsheim Dry Goods Co. *v.* George Taylor Commission Co., 59 Ark. 307, 27 S. W. 79). See also Remington *v.* Weber, 11 Utah 181, 39 Pac. 822, where it was held that a subsequent attachment would prevail against a prior one when the first was not accompanied with instructions as to service, and did not specify debtors of the attachment defendant on whom the writ should be served.

Marshaling.—Where the first attachment is levied on two stocks of goods and a second is levied on but one of them, the second attaching creditor may require the first to exhaust the other stock before resorting to that upon which the second levy was made. This rule was enforced although a third attaching creditor had levied on the stock which was not covered by the second attachment. Heye *v.* Moody, 67 Tex. 615, 4 S. W. 242. *Compare* Silvers *v.* Edwards, 9 Ky. L. Rep. 945, 7 S. W. 619, where the principle of marshaling was applied when the claim against one parcel of the attached land was made by a third person other than a subsequently attaching creditor.

99. *Alabama.*— Alexander *v.* King, 87 Ala. 642, 6 So. 382.

Arkansas.— Hanauer *v.* Casey, 26 Ark. 352.

Maine.— Cole *v.* Butler, 43 Me. 401.

New York.—Van Camp *v.* Searle, 147 N. Y. 150, 41 N. E. 427, 70 N. Y. St. 878.

the law, and must take all the steps necessary to subject the attached property to sale under execution in satisfaction of his claim.[1]

b. How Time Is Reckoned. In conformity with the rule that the lien of attachment dates from the levy[2] the prevailing doctrine makes the moment of levy the material point of time in determining which of two or more attachments is senior to the others.[3] When successive writs are delivered to the same officer for service, statutes directing the levy of writs in the order in which the officer

Pennsylvania.— Harrison *v.* Hilgert, 16 Phila. (Pa.) 87, 40 Leg. Int. (Pa.) 46.

United States.— Naumburg *v.* Hyatt, 24 Fed. 898, construing North Carolina statute.

A sale under a junior attachment will not affect the rights of the senior attaching creditor (Beck *v.* Brady, 7 La. Ann. 1; De Wolf *v.* Murphy, 11 R. I. 630; Caperton *v.* McCorkle, 5 Gratt. (Va.) 177); but the junior attaching creditor must protect himself by asserting his claim to the surplus at the sale under the first attachment (De Wolf *v.* Murphy, 11 R. I. 630), unless the prior attaching creditors join in the motion and the order of sale recognizes the prior attachment (McConnell *v.* Kaufman, 5 Wash. 686, 32 Pac. 782). In Barnard *v.* Fisher, 7 Mass. 71, it was held that the second attaching creditor should delay his proceedings in court until the suit in which the prior attachment had been made was concluded. See also Riordan *v.* Britton, 69 Tex. 198, 7 S. W. 50, 5 Am. St. Rep. 37, where it was held that the purchaser under a junior attachment was not a *bona fide* purchaser against one claiming under the prior attachment.

1. *Connecticut.*— Cole *v.* Wooster, 2 Conn. 203.

Kansas.— Tootle *v.* Cahn, 52 Kan. 73, 34 Pac. 401.

Massachusetts.— Peirce *v.* Partridge, 3 Metc. (Mass.) 44.

Missouri.— Barton *v.* Hunter, 59 Mo. App. 610; Burnham *v.* Blank, 49 Mo. App. 56.

Vermont.— Brandon Iron Co. *v.* Gleason, 24 Vt. 228; Murray *v.* Eldridge, 2 Vt. 388.

A prior attachment was postponed when the first creditor abandoned his attachment and accepted a deed of the attached property from defendant which was not delivered till after judgment on the second attachment suit. Cook *v.* Love, 33 Tex. 487. See also Hayford *v.* Rust, 81 Me. 97, 16 Atl. 372, where it was held that a failure to record an officer's deed given on the sale under a prior attachment judgment postponed the first attaching creditor to a subsequent attachment.

No postponement of a prior attachment was caused by a release of a portion of the attached property (Doggett, etc., Co. *v.* Wimer, 54 Mo. App. 125); by giving a check in payment of the attaching creditor's claim when the check is returned to the drawer on the former's learning of a subsequent attachment against the same property (Barton *v.* Hunter, 59 Mo. App. 610); by an agreement for a sale of the attached property, and payment of the proceeds to a clerk of court to hold subject to the rights of the parties (Cressy *v.* Katz-Nevens-Rees Mfg. Co., 91 Iowa 444, 59 N. W. 63); or by a fraudulent agreement by the prior attaching creditor not to bid at a sale of the attached real estate, since real estate was not sold at auction by the sheriff, but a portion was set off to the creditor (Spencer *v.* Champion, 13 Conn. 11).

2. See *supra*, XII, A, 2.

3. *Alabama.*— Bamberger *v.* Voorhees, 99 Ala. 292, 13 So. 305.

Arkansas.— Arkadelphia Lumber Co. *v.* McNutt, 68 Ark. 417, 59 S. W. 761, 82 Am. St. Rep. 299; Derrick *v.* Cole, 60 Ark. 394, 30 S. W. 760.

Connecticut.— Gates *v.* Bushnell, 9 Conn. 530.

Georgia.— Atlantic, etc., R. Co. *v.* Florida Constr. Co., 51 Ga. 241; Willis *v.* Parsons, 13 Ga. 335; McDougald *v.* Barnard, 3 Ga. 169.

Kentucky.— Kennon *v.* Ficklin, 6 B. Mon. (Ky.) 414, 44 Am. Dec. 776; Sewell *v.* Savage, 1 B. Mon. (Ky.) 260.

Louisiana.— Edson *v.* Freret, 11 La. Ann. 710; Harmon *v.* Juge Fils, 6 La. Ann. 768; Tufts *v.* Carradine, 3 La. Ann. 430; Grant *v.* Fiol, 17 La. 158; Scholefield *v.* Bradlee, 8 Mart. (La.) 495.

Maryland.— Western Nat. Bank *v.* National Union Bank, 91 Md. 613, 46 Atl. 960; Ohio Brass Co. *v.* Clark, 86 Md. 344, 37 Atl. 899; Wallace *v.* Forrest, 2 Harr. & M. (Md.) 261.

Nebraska.—Moore *v.* Fedewa, 13 Nebr. 379, 14 N. W. 170.

Tennessee.— Gilliland *v.* Cullum, 6 Lea (Tenn.) 521; Stone *v.* Abbott, 3 Baxt. (Tenn.) 319.

South Carolina.— Crocker *v.* Radcliffe, 3 Brev. (S. C.) 23; Robertson *v.* Forest, 2 Brev. (S. C.) 466; Crowninshield *v.* Strobel, 2 Brev. (S. C.) 80. *Contra*, Callahan *v.* Hallowell, 2 Bay (S. C.) 8.

Washington.— E. C. Meacham Arms Co. *v.* Strong, 3 Wash. Terr. 61, 13 Pac. 245.

United States.— Alder *v.* Roth, 2 McCrary (U. S.) 445, 5 Fed. 895 (construing Arkansas statute); Crigsby *v.* Love, 2 Cranch C. C. (U. S.) 413, 11 Fed. Cas. No. 5,827 (construing Virginia statute); Johnson *v.* Griffith, 2 Cranch C. C. (U. S.) 199, 13 Fed. Cas. No. 7,386.

The usual practice in equity is to allow attachment claims in the order in which they are levied. Ohio Brass Co. *v.* Clark, 86 Md. 344, 37 Atl. 899.

When the first attachment has been set aside the priority of junior attaching creditors is not governed by the date of the filing of their bills, but by the time when their re-

receives them coupled with a presumption of performance of official duty has led some courts to look to the time when the writ was placed in the officer's hands rather than to the time of levy.[4]

e. Pro Rata Sharing. Statutes providing for *pro rata* distribution among attaching creditors are of extremely rare occurrence,[5] but where there is express

spective attachments were levied. Bamberger *v.* Voorhees, 99 Ala. 292, 13 So. 305.

4. *Arkansas.*— Simon *v.* Adler-Goldman Commission Co., 56 Ark. 292, 19 S. W. 921.

Kansas.—Atchison, etc., R. Co. *v.* Schwarzschild, etc., Co., 58 Kan. 90, 48 Pac. 591, 62 Am. St. Rep. 604; Larabee *v.* Parks, 43 Kan. 436, 23 Pac. 598.

Kentucky.— Clay *v.* Scott, 7 B. Mon. (Ky.) 554; Kennon *v.* Ficklin, 6 B. Mon. (Ky.) 414, 44 Am. Dec. 776. See also Phelps *v.* Ratcliffe, 3 Bush (Ky.) 334, where the court presumed that the officer had first levied those attachments which first came to his hand.

Maryland.— May *v.* Buckhannon River Lumber Co., 70 Md. 448, 17 Atl. 274.

Missouri.— State *v.* Harrington, 28 Mo. App. 287.

New York.— Gillig *v.* George C. Treadwell Co., 148 N. Y. 177, 42 N. E. 590 [*reversing* 11 Misc. (N. Y.) 237, 32 N. Y. Suppl. 974, 66 N. Y. St. 459]; Van Camp *v.* Searle, 147 N. Y. 150, 41 N. E. 427, 70 N. Y. St. 878 [*modifying* 79 Hun (N. Y.) 134, 29 N. Y. Suppl. 757, 24 N. Y. Civ. Proc. 16]; Yale *v.* Matthews, 12 Abb. Pr. (N. Y.) 379, 20 How. Pr. (N. Y.) 430; Mechanics', etc., Bank *v.* Dakin, 33 How. Pr. (N. Y.) 316; Learned *v.* Vandenburgh, 7 How. Pr. (N. Y.) 379.

Pennsylvania.— Underhill *v.* McManus, 175 Pa. St. 39, 34 Atl. 308; Fourth St. Nat. Bank *v.* Hunter, 6 Pa. Co. Ct. 357, 46 Leg. Int. (Pa.) 56.

See 5 Cent. Dig. tit. "Attachment," § 538.

Delivery of writ to deputy sheriff.— It has been held that delivery of successive attachment writs to deputy sheriffs is the same as delivering them to the sheriff himself (State *v.* Harrington, 28 Mo. App. 287); but a writ first served by a deputy has been given priority over one previously placed in the hands of the sheriff (E. C. Meacham Arms Co. *v.* Strong, 3 Wash. Terr. 61, 13 Pac. 245).

Delivery of a copy of a writ of attachment to the sheriff is not equivalent to a delivery to him of the writ itself even though the original was retained by the judge. Niagara Grape Market Co. *v.* Wygant, 1 N. Y. App. Div. 588, 37 N. Y. Suppl. 486, 73 N. Y. St. 110.

Establishing priority.— An officer's return is evidence of the order in which he received and served writs (Thurston *v.* Huntington, 17 N. H. 438); and statements in the return are binding upon the officer and his privies (Jaffray's Appeal, 101 Pa. St. 583). Where the return is silent parol evidence is admissible to show the time of the levy (Brainard *v.* Bushnell, 11 Conn. 16), and where there is nothing in the return or on the face of the proceedings to show the time of service of two writs it may be presumed that they were served at the same time (Ginsberg *v.* Pohl, 35 Md. 505); but a levy made at twelve o'clock noon will be considered prior in point of time to an attachment made the same day where no particular time of service is specified (Fairfield *v.* Paine, 23 Me. 498, 41 Am. Dec. 357); and where two officers attached at almost the same time, an agreement to settle their dispute by a division of the property precluded them from afterward raising the question of priority (Lyman *v.* Dow, 25 Vt. 405).

5. *Colorado.*—*Pro rata* distribution is made among creditors whose attachments are returnable to the same term of court and among creditors who obtained judgment in civil actions in the same term to which writs of attachment are returnable (Brady *v.* Farwell, 8 Colo. 97, 5 Pac. 808); but a creditor is preferred who obtains judgment prior to the issue of an attachment writ, although at the same term (Brady *v.* Farwell, 8 Colo. 97, 5 Pac. 808), who has previously redeemed property from a prior attachment (Maloney *v.* Grimes, 1 Colo. 111), or, where individual property of partners is attached, who has a claim good against individual property, while his competitor has a claim which is good only against the partnership (Rouss *v.* Wallace, 10 Colo. App. 93, 50 Pac. 366). The circumstance that the attached property is sold under execution issued in one suit only will not prevent *pro rata* distribution. Claflin *v.* Doggett, 3 Colo. 413. But see Baum *v.* Gosline, 4 McCrary (U. S.) 317, 15 Fed. 220, where it is held that the Colorado statute regarding *pro rata* distribution is inoperative because in that state attachments are not made returnable to any specified terms of court.

Delaware.— Property seized by attachment becomes liable for the claims of all other creditors of defendant who come in and make proof of their debts before the auditor (Plunkett *v.* Moore, 4 Harr. (Del.) 379); but the attaching creditor is entitled to a double share or dividend if such shall not exceed his debt (Del. Rev. Code (1893), c. 104, § 11), and therefore although, after the attaching creditor has been paid under an arrangement collateral to the attachment proceedings, the proceedings will not be arrested, another creditor will not be substituted in his stead, for that would entitle the substituted creditor to a double share (Stone *v.* Jones, 4 Harr. (Del.) 255).

Florida.— There was formerly no priority between successive attachments. If judgments were obtained at the same term the attaching creditors shared *pro rata* in the proceeds Post *v.* Carpenter, 3 Fla. 1), and judgments entered on the same rule-day were judgments obtained at the same term (Smith *v.* Bowden,

statutory provision for such distribution it is held that all creditors coming within

23 Fla. 150, 1 So. 314). The present statute regarding attachment liens reads that "levies upon the same property under successive attachments shall have precedence as liens in the order in which they are made." Fla. Rev. Stat. (1892), § 1651.

Illinois.— Two or more creditors beginning attachment suits which are returnable to the same term of court share *pro rata*, although judgments are obtained at different terms (Pollack *v.* Slack, 92 Ill. 221; Jones *v.* Jones, 16 Ill. 117; Warren *v.* Iscarian Community, 16 Ill. 114), even where the action is commenced within ten days of the term (Mechanics' Sav. Inst. *v.* Givens, 82 Ill. 157); and all creditors who obtain judgments in any sort of suit at the term when the attachment is returnable or at the term when judgment is obtained in the attachment suit share *pro rata* (Pollack *v.* Slack, 92 Ill. 221; McCoy *v.* Schnellbacker, 2 Ill. App. 582), without regard to the court in which the proceedings were instituted (MacVeagh *v.* Roysten, 172 Ill. 515, 50 N. E. 153 [*affirming* 71 Ill. App. 617]). The right to share *pro rata* is not lost by levying an attachment on real estate and then suspending the levy, but where two judgments are recovered for the same debt, the amount of one only can be used in estimating the creditor's *pro rata* share in the proceeds of attached property. Everingham *v.* National City Bank, 124 Ill. 527, 17 N. E. 26 [*affirming* 25 Ill. App. 637]. No *pro rata* distribution is made where the other suits are continued, although the attachment suit is also continued (Jones *v.* Jones, 16 Ill. 117; Rucker *v.* Fuller, 11 Ill. 223); where superior diligence on the part of one creditor secures property of the debtor (MacVeagh *v.* Roysten, 172 Ill. 515, 50 N. E. 153 [*affirming* 71 Ill. App. 617]; Pierson *v.* Robb, 4 Ill. 139); where the first attachment suit is not prosecuted to judgment (Paltzer *v.* National Bank, 145 Ill. 177, 34 N. E. 54 [*affirming* 41 Ill. App. 443]); where a judgment by confession is obtained, for that is not a suit commenced by summons, capias, or attachment (Brewster *v.* Riley, 19 Ill. App. 581); where a third person sues the first attaching creditor, and makes out a good title to the attached property (Locke *v.* Duncan, 53 Ill. App. 373); where the second attaching creditor acquires the debtor's right to the attached property and these two rights merge (Donk *v.* Alexander, 117 Ill. 330, 7 N. E. 672); or where a mortgage intervenes between the two attachments (Jones *v.* Jones, 16 Ill. 117).

Indiana.— Other creditors may file their claims in an attachment suit and after costs have been paid all the creditors are entitled to share in the proceeds in proportion to the amount of their several claims. Compton *v.* Crone, 58 Ind. 106; Shirk *v.* Wilson, 13 Ind. 129; Henderson *v.* Bliss, 8 Ind. 100; Gibson *v.* Stevens, 3 McLean (U. S.) 551, 10 Fed. Cas. No. 5,401 [*reversed*, on another point, in 8 How. (U. S.) 384, 12 L. ed. 1123]. Claims may be filed under the original attachment at any time while the same is pending (Henderson *v.* Bliss, 8 Ind. 100); even though the claim upon which the attachment proceeding was commenced has been satisfied (Ziegenhager *v.* Doe, 1 Ind. 296); or is based upon a decree for alimony in favor of the wife of attachment defendant (Farr *v.* Buckner, 32 Ind. 382); and there is no final adjustment until all pending claims have been settled by judgment and a sale of the property ordered (Lexington, etc., R. Co. *v.* Ford Plate Glass Co., 84 Ind. 516 [*distinguishing* Cooper *v.* Metzger, 74 Ind. 544]). Where there is anything in the record indicating that the creditor filing a complaint, affidavit, and undertaking intends to file the same under the original proceeding, he will be held to become a party to the original action (Ryan *v.* Burkam, 42 Ind. 507), and no new summons need be issued against defendant (Schmidt *v.* Colley, 29 Ind. 120); for the original writ is sufficient (Taylor *v.* Elliott, 51 Ind. 375). Although a creditor omitting to file his claim under the original proceedings cannot acquire a prior lien against the property (Fee *v.* Moore, 74 Ind. 319), the execution of a bond by the attachment defendant for the release of the attached property has been held not to preclude subsequently applying creditors (Taylor *v.* Elliott, 51 Ind. 375; Rugg *v.* Johnson, 13 Ind. 437. *Contra*, Scott *v.* McDonald, 27 Ind. 33, where the attachment of a steamboat had been released by giving bond under section 661 of the code, and it was held that other creditors could not subsequently file their claims in the suit).

New Jersey.—An attachment operates as a lien on the property of defendant within the county in favor of all attaching creditors who come in under the attachment proceedings (Phœnix Iron Co. *v.* New York Wrought Iron R. Chair Co., 27 N. J. L. 484) before defendant has entered an appearance (Devlan *v.* Wells, 65 N. J. L. 213, 17 Atl. 467; Blatchford *v.* Conover, 40 N. J. Eq. 205, 1 Atl. 16, 7 Atl. 354), even though defendant dies before the other creditors enter their rule to be admitted (Smith *v.* Warden, 35 N. J. L. 346); but before other creditors apply the original attaching creditor may discontinue the suit if he acts in good faith (Duffin *v.* Wolf, 21 N. J. L. 475) and the discontinuance is effected by motion in open court, and not by a secret agreement (Cummins *v.* Blair, 18 N. J. L. 151). Although misstatement of the amount of an applying creditor's claim does not prevent him from obtaining judgment for a larger amount, because there is no requirement that such creditor should state the amount of his claim (Hanness *v.* Smith, 21 N. J. L. 495), the validity of the claims filed may be contested by other creditors (Stewart *v.* Walters, 38 N. J. L. 274); but an attaching creditor was allowed to share *pro rata* with other creditors in the distribution of the proceeds of the attached property, although he had collateral security for his claim (Benedict *v.* Benedict, 15 N. J. Eq.

provisions of the act are entitled to share equally in the proceeds of the attached property.[6]

d. Postponement of Prior Attachment — (1) *Basis of Junior Creditor's Right to Attack.* As a mere stranger having no interest in an attachment suit cannot contest the validity of the attachment, a subsequently attaching creditor must show that his attachment is valid[7] and that a binding levy was made on

150), and an attachment by one creditor does not bar a subsequent attachment by another creditor against the same defendant, and in the same county (Duffin *v.* Wolf, 21 N. J. L. 475; Brown *v.* Bissett, 21 N. J. L. 46 [*overruling* Cummins *v.* Blair, 18 N. J. L. 151]. *Compare* Brundred *v.* Del Hoyo, 20 N. J. L. 328). But see Blatchford *v.* Conover, 40 N. J. Eq. 205, 1 Atl. 16, 7 Atl. 354, where after an attachment was made other creditors came in by filing claims, and defendant subsequently opened up a default against himself and had judgment in the original attachment suit reversed. It was held that a grantee from defendant who received his deed after the levy of the original attachment prevailed over the rights of the applying creditors because their liens only dated from the time when judgment was entered on their claims.

Procedure by subsequent creditors.— If after creditors have filed their claims in an attachment the defendant appears and gives bond, the creditors must file declarations and their claim will be contested; but if the trial results in favor of the creditors they may recover costs although their judgment be for less than fifty dollars. Reed *v.* Chegaray, 20 N. J. L. 616.

Pro rata distribution was made when attachments were abandoned, and all the creditors accepted a trust fund, arising from a sale of the attached property (Claiborne *v.* Stewart, 4 Baxt. (Tenn.) 206), and where several attachments issued on a ground not controverted but the record showed no right to an attachment in any of the attaching creditors (Bright *v.* Blakemore, 9 Ky. L. Rep. 56). See also Stamper *v.* Hibbs, 94 Ky. 358, 15 Ky. L. Rep. 174, 22 S. W. 607, where it was held that when a debtor in failing circumstances makes a conveyance which is constructively fraudulent, all his creditors share *pro rata* in his property by statute, but where a creditor sues out an attachment on the ground of a fraudulent conveyance and establishes actual fraud he has a prior lien, and other creditors have subordinate liens dating from the time of filing their petition.

6. *Colorado.*— Brady *v.* Farwell, 8 Colo. 97, 5 Pac. 808; Claflin *v.* Doggett, 3 Colo. 413; Rouss *v.* Wallace, 10 Colo. App. 93, 50 Pac. 366.

Delaware.— Plunkett *v.* Moore, 4 Harr. (Del.) 379.

Florida.— Smith *v.* Bowden, 23 Fla. 150, 1 So. 314; Post *v.* Carpenter, 3 Fla. 1.

Illinois.— Donk *v.* Alexander, 117 Ill. 330, 7 N. E. 672; Smith *v.* Clinton Bridge Co., 13 Ill. App. 572.

Indiana.— Shirk *v.* Wilson, 13 Ind. 129.

New Jersey.— Duffin *v.* Wolf, 21 N. J. L. 475; Cummins *v.* Blair, 18 N. J. L. 151.

Canada.— Darling *v.* Smith, 10 Ont. Pr. 360, where, however, the creditor who levied the attachment was entitled to have the costs of issuing and executing the attachment paid to him before the proceeds were distributed among the other creditors.

7. Hamilton-Brown Shoe Co. *v.* Mercer, 84 Iowa 537, 51 N. E. 415, 35 Am. St. Rep. 331; Ladenburg *v.* Commercial Bank, 2 N. Y. App. Div. 477, 37 N. Y. Suppl. 1085, 74 N. Y. St. 267; Selser Bros. Co. *v.* Potter Produce Co., 77 Hun (N. Y.) 313, 28 N. Y. Suppl. 428, 59 N. Y. St. 826; Hodgman *v.* Barker, 17 N. Y. Suppl. 911, 43 N. Y. St. 797 [*affirming* 60 Hun (N. Y.) 156, 14 N. Y. Suppl. 574, 38 N. Y. St. 578, 20 N. Y. Civ. Proc. 341]; Williams *v.* Waddell, 5 N. Y. Civ. Proc. 191; Bradley *v.* Interstate Land, etc., Co., 12 S. D. 28, 80 N. W. 141.

The position of a subsequently attaching creditor is one of attack and not of defense, and he must set up his claim in some affirmative shape so that it may be met and controverted before he can ask to have brought under consideration the claim of another with which he may have no concern. Ward *v.* Howard, 12 Ohio St. 158. To same effect see Shea *v.* Johnson, 101 Cal. 455, 35 Pac. 1023, where it is held that a complaint by a subsequently attaching creditor must set out facts from which the nature of his alleged lien can be determined, and must state that his claim is a just one. *Compare* Parker *v.* Perkins, 53 N. H. 607, where the subsequently attaching creditor was let in to defend the prior attachment suit on giving bond according to the state practice, and it was held that he must establish the validity of his own claim before attacking the claim for which the prior attachment was brought. See also Taylor *v.* Frost, 2 How. Pr. (N. Y.) 214, for form of petition by an intervener seeking to be deemed an attaching creditor.

Where attachments are equally defective the second creditor has no standing to attack a prior attachment. Ladenburg *v.* Commercial Bank, 148 N. Y. 202, 42 N. E. 587; Central Nat. Bank *v.* Ft. Ann Woolen Co., 143 N. Y. 624, 37 N. E. 827, 60 N. Y. St. 873 [*affirming* 57 N. Y. St. 316]; Corn Exch. Bank *v.* Marckwald, 57 N. Y. Suppl. 458, 28 N. Y. Civ. Proc. 412; Williams *v.* Kulla, 11 N. Y. St. 283.

Sufficiency of proof.— The existence of a valid junior attachment may be established by affidavit, but an affidavit is insufficient when it is based on information and belief (Knudson *v.* Matuska, etc., Furniture Co., 7 N. Y. Civ. Proc. 86, 1 How. Pr. N. S. (N. Y.) 152), especially when no excuse is

the same property that was seized under the prior writ[8] before he acquires any standing in court to raise the objections open to him.

(II) *Grounds For Postponement.*[9] Although mere irregularities in a prior attachment which defendant has not taken advantage of will not postpone it to the claims of subsequently attaching creditors,[10] a defect which takes away the

given for not obtaining affidavits based upon personal knowledge (National Broadway Bank *v.* Barker, 128 N. Y. 603, 27 N. E. 1029, 38 N. Y. St. 920 [*affirming* 14 N. Y. Suppl. 529, 38 N. Y. St. 597, 20 N. Y. Civ. Proc. 338]; Hodgman *v.* Barker, 128 N. Y. 601, 27 N. E. 1029, 40 N. Y. St. 773 [*affirming* 60 Hun (N. Y.) 156, 14 N. Y. Suppl. 574, 38 N. Y. St. 578, 20 N. Y. Civ. Proc. 341]), or where the sources of his information are not alleged by affiant (Everitt *v.* Everitt Mfg. Co., 11 N. Y. Suppl. 508, 33 N. Y. St. 996). *Compare* Pitts *v.* Scribner, 19 N. Y. Suppl. 519, 46 N. Y. St. 726, where it is held that a sufficient *prima facie* showing of interest is made out by a subsequently attaching creditor if he annexes a copy of the warrant of the subsequent attachment to the moving affidavit, although the complaint, affidavits, and undertaking on which the attachment is alleged to have been issued are not presented.

Only prima facie proof of the debt of the junior attaching creditor is necessary to entitle him to intervene in the prior attachment suit. H. B. Claflin Co. *v.* Feibelman, 44 La. Ann. 518, 10 So. 862.

8. Dayton *v.* McElwee Mfg. Co., 19 N. Y. Suppl. 46, 46 N. Y. St. 139, 22 N. Y. Civ. Proc. 227; Sill Stove Works *v.* Scott, 62 N. Y. App. Div. 566, 71 N. Y. Suppl. 181; Ladenburg *v.* Commercial Bank, 2 N. Y. App. Div. 477, 37 N. Y. Suppl. 1085, 74 N. Y. St. 267; Tim *v.* Smith, 3 N. Y. Civ. Proc. 347, 65 How. Pr. (N. Y.) 199; Knudson *v.* Matuska, etc., Furniture Co., 7 N. Y. Civ. Proc. 86, 1 How. Pr. N. S. (N. Y.) 152; Bradley *v.* Interstate Land, etc., Co., 12 S. D. 28, 80 N. W. 141. *Compare* Scharff *v.* Chaffe, 68 Miss. 641, 9 So. 897, where on appeal from the denial of a motion by junior attaching creditor to quash a prior levy, the record did not show how or when the writ of the second attaching creditor was levied, and it was held that judgment denying the motion must be affirmed.

9. **A change of venue in an attachment suit would not postpone** a prior to a subsequent attachment. Laird *v.* Dickerson, 40 Iowa 665.

10. *Arkansas.*— Davis *v.* H. B. Claflin Co., 63 Ark. 157, 38 S. W. 662, 1117, 41 S. W. 996, 58 Am. St. Rep. 102, 35 L. R. A. 776; Baker *v.* Ayers, 58 Ark. 524, 25 S. W. 834; Caruth-Byrnes Hardware Co. *v.* Deere, 53 Ark. 140, 13 S. W. 517, 7 L. R. A. 405; Sannoner *v.* Jacobson, 47 Ark. 31, 14 S. W. 458.

California.— Fridenberg *v.* Pierson, 18 Cal. 152, 79 Am. Dec. 162.

Kansas.— Standard Implement Co. *v.* Lansing Wagon Works, 58 Kan. 125, 48 Pac. 638; Henderson *v.* Stetter, 31 Kan. 56, 2 Pac. 849; Wichita Nat. Bank *v.* Wichita Produce Co., 8 Kan. App. 40, 54 Pac. 11.

Louisiana.— Augusta Bank *v.* Jaudon, 9 La. Ann. 8.

Mississippi.— Jones *v.* Moody, 59 Miss. 327.

Nebraska.— Rudolf *v.* McDonald, 6 Nebr. 163.

New Hampshire.— Reynolds *v.* Damrell, 19 N. H. 394.

New York.—Van Camp *v.* Searle, 147 N. Y. 150, 41 N. E. 427, 70 N. Y. St. 878; Jacobs *v.* Hogan, 15 Hun (N. Y.) 197; Ketchum *v.* Ketchum, 1 Abb. Pr. N. S. (N. Y.) 157; Isham *v.* Ketchum, 46 Barb. (N. Y.) 43; Matter of Griswold, 13 Barb. (N. Y.) 412.

North Carolina.— German Looking Glass Plate Co. *v.* Asheville Furniture, etc., Co., 126 N. C. 888, 36 S. E. 199.

Ohio.—Ward *v.* Howard, 12 Ohio St. 158; Harrison *v.* King, 9 Ohio St. 388.

South Carolina.— Ferguson *v.* Gilbert, 17 S. C. 26; Lindau *v.* Arnold, 4 Strobh. (S. C.) 290.

Texas.— Nenney *v.* Schluter, 62 Tex. 327; Joseph Peters Furniture Co. *v.* Dickey, 2 Tex. Unrep. Cas. 237.

Irregularities insufficient to postpone.— A prior attachment cannot be defeated at the instance of a junior attaching creditor on account of irregularity in the attachment bond (Austin *v.* Goodbar Shoe Co., 60 Ark. 444, 30 S. W. 888; Fridenberg *v.* Pierson, 18 Cal. 152, 79 Am. Dec. 162; Van Arsdale *v.* Krum, 9 Mo. 397) or service of summons on defendant (Darby *v.* Shannon, 19 S. C. 526); on account of defects in the affidavit (Fridenberg *v.* Pierson, 18 Cal. 152, 79 Am. Dec. 162; Goodbar *v.* Sulphur Springs City Nat. Bank, 78 Tex. 461, 14 S. W. 851. But see Rome Bank *v.* Haselton, 15 Lea (Tenn.) 216, where it was held that the failure of the prior attaching creditor to take oath that the debtor had fraudulently transferred his property was a fatal defect and could be taken advantage of by a subsequently attaching creditor); or because the affidavit was false when there has been no collusion between the prior attaching creditor and the debtor (Mallette *v.* Ft. Worth Pharmacy Co., 21 Tex. Civ. App. 267, 51 S. W. 859), or the attaching creditor honestly believed that the allegations in the affidavit were true, and had probable ground for such belief (Orr, etc., Shoe Co. *v.* Harris, 82 Tex. 273, 18 S. W. 308). See also Putney *v.* Wolberg, 127 Ala. 124, 28 So. 741 (where it was held that a subsequently attaching creditor could not enjoin a prior attachment because no statutory grounds for it existed); Rice *v.* Wolff, 65 Wis. 1, 26 N. W. 181 (where it was held that a subsequently attaching creditor could not in a bill in equity filed several months after the seizure of the property deny the existence of grounds for a prior attachment).

After judgment in an attachment suit a

jurisdiction of the court and renders the proceeding void will do so;[11] and it has been held that a second attaching creditor may secure priority by showing that the earlier attachment was fraudulent,[12] or was based on an invalid[13] claim.

subsequently attaching creditor cannot take advantage of irregularities in the proceedings. Leppel *v.* Beck, 2 Colo. App. 390, 31 Pac. 185; Harrison *v.* Shaffer, 60 Kan. 176, 55 Pac. 881.

Waiver of exemption.—Where an attachment defendant had a right to claim exemption against a first attachment, but not against one subsequently levied, and he waived his right of exemption as to the first attachment, it was held that the lien of the first was superior to that of the second. Wallace *v.* Swan, 6 Dak. 220, 50 N. W. 624.

11. *Arkansas.*— Sannoner *v.* Jacobson, 47 Ark. 31, 14 S. W. 458.

California.— McEldowney *v.* Madden, 124 Cal. 108, 56 Pac. 783.

Kansas.— Standard Implement Co. *v.* Lansing Wagon Works, 58 Kan. 125, 48 Pac. 638; Wichita Nat. Bank *v.* Wichita Produce Co., 8 Kan. App. 40, 54 Pac. 11.

New York.— Van Camp *v.* Searle, 147 N. Y. 150, 41 N. E. 427, 70 N. Y. St. 878; Jacobs *v.* Hogan, 85 N. Y. 243.

South Carolina.— Ferguson *v.* Gilbert, 17 S. C. 26. *Compare* Gardner *v.* Hust, 2 Rich. (S. C.) 601. where it was held that an illegal and void service could not be waived by defendant to the prejudice of subsequently attaching creditors.

Invalid attachments.— An attachment will be postponed when it is based on a claim for which the law does not provide the remedy of attachment (Rice *v.* Dorrian, 57 Ark. 541, 22 S. W. 213; Ward *v.* Howard, 12 Ohio St. 158); where the writ, contrary to statutory provisions, was issued before the main action was commenced (Seibert *v.* Switzer, 35 Ohio St. 661); where the suit by attachment was brought without plaintiff's knowledge (Caruth-Byrnes Hardware Co. *v.* Deere, 53 Ark. 140, 13 S. W. 517, 7 L. R. A. 405); or where an attachment is based on grounds known to be false, although as between the attaching creditor and defendant the truth of the alleged grounds is immaterial (Kollette *v.* Seibel, 7 Tex. Civ. App. 260, 26 S. W. 863. *Contra*, Glaser *v.* Ft. Smith First Nat. Bank, 62 Ark. 171, 34 S. W. 1061, 35 L. R. A. 765).

Jurisdiction obtained by consent of parties does not relate back and a second attachment levied before a consent which gives the court jurisdiction over a prior attachment will constitute a first lien on the property. Shaw *v.* Carrick, 6 Ky. L. Rep. 653.

Omitting the name of the defendant whose property is attached from an attachment bill is a defect which will postpone the lien of the attachment to that of another creditor whose levy was subsequently made. Lillard *v.* Porter, 2 Head (Tenn.) 176. And see Lorie *v.* Abernathy, 63 Mo. App. 249, where it was held that a slight error in the name of defendant was sufficient to postpone a prior to a junior attachment.

12. *Alabama.*— Rice *v.* Less, 105 Ala. 298, 16 So. 719.

California.— Coghill *v.* Marks, 29 Cal. 673; Speyer *v.* Ihmels, 21 Cal. 280, 81 Am. Dec. 157; Fridenberg *v.* Pierson, 18 Cal. 152, 79 Am. Dec. 162.

Georgia.— Smith *v.* Gettinger, 3 Ga. 140.

Kentucky.— Flowers *v.* Miller, 13 Ky. L. Rep. 250, 16 S. W. 705; Reisert *v.* Vancleve, 9 Ky. L. Rep. 401. *Compare* Meyer *v.* Ruff, 13 Ky. L. Rep. 254, 16 S. W. 84, where filing a *lis pendens* was held not to give priority to an invalid attachment. And see Owensboro Deposit Bank *v.* Smith, 22 Ky. L. Rep. 808, 58 S. W. 792; Simmons Hardware Co. *v.* Whitaker, 16 Ky. L. Rep. 32, which hold that fraudulent collusion between a debtor and creditor for the purpose of giving the creditor a preference does not entitle a junior attaching creditor to priority, but that his only remedy is to have the prior attachment declared to be a general assignment for the purpose of creditors under the Kentucky statute.

Michigan.— Hale *v.* Chandler, 3 Mich. 531.

Mississippi.— Henderson *v.* Thornton, 37 Miss. 448, 75 Am. Dec. 70.

Nebraska.— Deere *v.* Eagle Mfg. Co., 49 Nebr. 385, 68 N. W. 504.

Missouri.— Freedman *v.* Holberg, 89 Mo. App. 340.

Montana.—Butte First Nat. Bank *v.* Boyce, 15 Mont. 162, 38 Pac. 829, where, however, the proof offered by the subsequently attaching creditor was held insufficient.

Texas.— Cook *v.* Pollard, 70 Tex. 723, 8 S. W. 512; Nenney *v.* Schluter, 62 Tex. 327; Interstate Nat. Bank *v.* Stuart. (Tex. Civ. App. 1896) 39 S. W. 963; Dalsheimer *v.* Morris, 8 Tex. Civ. App. 268, 28 S. W. 240; Joseph Peters Furniture Co. *v.* Dickey, 2 Tex. Unrep. Cas. 237. *Compare* Freiberg *v.* Freiberg, (Tex. 1892) 19 S. W. 791. And see Heidenheimer *v.* Johnson, 76 Tex. 200, 13 S. W. 46, where the evidence offered by the subsequently attaching creditors was held sufficient to show fraud.

The invalidity of plaintiff's claim need not be alleged by a subsequently attaching creditor when he seeks to have the prior attachment postponed because it is fraudulent and collusive. Martin Clothing Co. *v.* Page, 1 Tex. Civ. App. 537, 21 S. W. 702.

Joint property.—Where separate attachment suits are brought against two persons individually and both are levied on property owned jointly by the two attachment defendants, the question of fraud in either attachment cannot be raised, because the creditors are attaching different estates. Pond *v.* Skidmore, 40 Conn. 213.

13. *Alabama.*— Henderson *v.* J. B. Brown Co., 125 Ala. 566, 28 So. 79.

California.— Briody *v.* Conro, 42 Cal. 135; Speyer *v.* Ihmels, 21 Cal. 280, 81 Am. Dec. 157.

Connecticut.— Norton *v.* Hickok, 25 Conn. 356.

So, where the junior creditor shows that the prior attachment was based on an immature claim[14] it has been held that this will postpone the prior lien.

(III) *Procedure*—(A) *By Petition or Motion.* Although the details of

Massachusetts.—Baird *v.* Williams, 19 Pick. (Mass.) 381; Pierce *v.* Jackson, 6 Mass. 242 (although defendant consented to judgment). *Compare* Moors *v.* Ladenburg, 178 Mass. 272, 59 N. E. 676, where it was held that a subsequent payment of the senior creditor's claim did not authorize intervention on the ground that his claim was not justly due.

New York.— Smith *v.* Union Milk Co., 70 Hun (N. Y.) 348, 24 N. Y. Suppl. 79, 53 N. Y. St. 891. But see Johnson *v.* Hardwood Door, etc., Co., 79 Hun (N. Y.) 407, 29 N. Y. Suppl. 797, 61 N. Y. St. 502, where it was held that a second attaching creditor could not move to vacate a prior attachment on the ground that it was based on a claim void by the laws of defendants' domicile, because such grounds involve the merits of the action.

South Carolina.—Walker *v.* Roberts, 4 Rich. (S. C.) 561.

Texas.— Bateman *v.* Ramsey, 74 Tex. 589, 12 S. W. 235.

Insolvency of the debtor need not be alleged by a subsequently attaching creditor who seeks to intervene in a prior attachment on the ground that plaintiff's demand is fictitious. Johnson *v.* Heidenheimer, 65 Tex. 263. But see, *contra,* Grabenheimer *v.* Rindskoff, 64 Tex. 49, which is distinguished on the ground that the contest for priority was between partnership and individual creditors.

Evidence of validity of claim.— A prior attaching creditor may prove the validity of his claim against a subsequent creditor who has been let in to defend the suit by a confession of defendant (Strong *v.* Wheeler, 5 Pick. (Mass.) 410), even though such confession is made after the defense has been undertaken by the subsequently attaching creditor (Lambert *v.* Craig, 12 Pick. (Mass.) 199).

It is not a ground for postponing a prior attachment that the debtor consents to a judgment against himself for a *bona fide* debt (Shea *v.* Johnson, 101 Cal. 455, 35 Pac. 1023; Eastman *v.* Eveleth, 4 Metc. (Mass.) 137; Goodbar *v.* Sulphur Springs City Nat. Bank, 78 Tex. 461, 14 S. W. 851. See also Schloss *v.* State Bank, 4 Wash. 726, 31 Pac. 23), even though the creditor pays a money consideration for such consent (Doggett, etc., Co. *v.* Wimer, 54 Mo. App. 125; Adler *v.* Anderson, 42 Mo. App. 189); that plaintiff paid defendant cash for withdrawing a plea in abatement traversing the grounds of attachment (Meridian First Nat. Bank *v.* Cochran, 71 Miss. 175, 14 So. 439); that a colorable assignment of a just cause of action has been made to enable the assignee to sue in a certain state (Hadden *v.* Dooley, 92 Fed. 274, 63 U. S. App. 173, 34 C. C. A. 338, 93 Fed. 728, 35 C. C. A. 554 [*reversing* 84 Fed. 80], construing New York statute); or that defendant is notoriously insolvent (Harrison *v.* Harwood, 31 Tex. 650).

The entire claim was postponed to a second attaching creditor when the first creditor joined a fraudulent with an honest claim (Fairfield *v.* Baldwin, 12 Pick. (Mass.) 388; Craig *v.* California Vineyard Co., 30 Oreg. 43, 46 Pac. 421; Freiberg *v.* Freiberg, 74 Tex. 122, 11 S. W. 1123; Harding *v.* Harding, 25 Vt. 487); where demands were added to the claim originally sued (Fairbanks *v.* Stanley, 18 Me. 296; Clark *v.* Foxcroft, 7 Me. 348); and where judgment by default was taken for the whole claim without deducting payments, for the judgment was void *in toto* (Peirce *v.* Partridge, 3 Metc. (Mass.) 44). *Compare* Laighton *v.* Lord, 29 N. H. 237, where it is held that any alteration of a writ to the prejudice of the rights of subsequently attaching creditors will dissolve the attachment as against them.

The entire attachment will not fail because postponed claims were included in the attachment suit (Schneider *v.* Roe, (Tex. Civ. App. 1894) 25 S. W. 58); or because the suit was brought for a greater amount than the sum actually due, the mistake being an honest one (Coghill *v.* Marks, 29 Cal. 673; Mendes *v.* Freiters, 16 Nev. 388); and a lack of consideration for part of the claim sued for will postpone that part only to a subsequent attachment (Ayres *v.* Husted, 15 Conn. 504).

14. *Illinois.*— Schilling *v.* Deane, 36 Ill. App. 513.

Massachusetts.— Baird *v.* Williams, 19 Pick. (Mass.) 381.

Michigan.— Hinchman *v.* Town, 10 Mich. 508.

Nebraska.— Deere *v.* Eagle Mfg. Co., 49 Nebr. 385, 68 N. W. 504.

South Carolina.— Walker *v.* Roberts, 4 Rich. (S. C.) 561.

Contra, Shakman *v.* Schwartz, 89 Wis. 72, 61 N. W. 309.

Compare Hadden *v.* Dooley, 92 Fed. 274, 63 U. S. App. 173, 34 C. C. A. 338, 93 Fed. 728, 35 C. C. A. 554 [*reversing* 84 Fed. 80], construing New York statute, where the action was on renewal notes given for a previous *bona fide* indebtedness, and it was held that since the debtor had not taken advantage of the technical defense that the notes were not yet due subsequently attaching creditors could not defeat the prior attachment on this ground.

Where special grounds were necessary to justify an attachment upon immature claims, a subsequently attaching creditor was allowed to intervene and traverse the existence of the special grounds necessary to authorize the first attachment. Davis *v.* H. B. Claflin Co., 63 Ark. 157, 38 S. W. 662, 1117, 41 S. W. 996, 58 Am. St. Rep. 102, 35 L. R. A. 776.

Where mature and immature claims are joined by the first attaching creditor by reason of an innocent mistake he has priority

the proceedings by which a junior attaching creditor may attack a previous attachment vary according to state statutes, the two modes in general use are for the second creditor to file a petition of intervention in the original suit[15] or to

to the extent of the matured claims (Hinchman *v.* Town, 10 Mich. 508); but not where the claims are joined in bad faith and with full knowledge of all the circumstances (Peiffer *v.* Wheeler, 76 Hun (N. Y.) 280, 27 N. Y. Suppl. 771, 59 N. Y. St. 106). See also Page *v.* Jewett, 46 N. H. 441, where it was held that taking judgment in a prior attachment suit for a claim which was not due when the suit was begun would dissolve the entire attachment as against a subsequently attaching creditor, unless it was shown affirmatively that the error was the result of mistake.

15. *Arkansas.*— Davis *v.* H. B. Claflin Co., 63 Ark. 157, 38 S. W. 662, 1117, 41 S. W. 996, 58 Am. St. Rep. 102, 35 L. R. A. 776; Caruth-Byrnes Hardware Co. *v.* Deere, 53 Ark. 140, 13 S. W. 517, 7 L. R. A. 405; Sannoner *v.* Jacobson, 47 Ark. 31, 14 S. W. 458.

California.— McEldowney *v.* Madden, 124 Cal. 108, 56 Pac. 783; Kimball *v.* Richardson-Kimball Co., 111 Cal. 386, 43 Pac. 1111 [*distinguishing* Horn *v.* Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569]; Coghill *v.* Marks, 29 Cal. 673.

Kansas.— Standard Implement Co. *v.* Lansing Wagon Works, 58 Kan. 125, 48 Pac. 638; Wichita Nat. Bank *v.* Wichita Produce Co., 8 Kan. App. 40, 54 Pac. 11.

Kentucky.—Back *v.* Weston, 12 Ky. L. Rep. 797.

Maine.— Turner *v.* Norris, 35 Me. 112. *Compare* Willard *v.* Whitney, 49 Me. 235, where the intervention was effected through an officer who represented the junior attaching creditors.

Massachusetts.— Moors *v.* Ladenburg, 178 Mass. 272, 59 N. E. 676. *Compare* Putnam *v.* Bixby, 6 Gray (Mass.) 528, where the second attachment suit was brought before a justice of the peace and it was held that the junior attaching creditor could not file a petition to dispute the validity of a prior attachment pending in a higher court.

Nebraska.— Deere *v.* Eagle Mfg. Co., 49 Nebr. 385, 68 N. W. 504.

Texas.— Bateman *v.* Ramsey, 74 Tex. 589, 12 S. W. 235; Cook *v.* Pollard, 70 Tex. 723, 8 S. W. 512; Nenney *v.* Schluter, 62 Tex. 327; Joseph Peters Furniture Co. *v.* Dickey, 2 Tex. Unrep. Cas. 237.

West Virginia.—Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791; Pendleton *v.* Smith, 1 W. Va. 16 (where the suit of the second creditor was pending in another county but levy had been made in the county where the first suit was instituted).

The right of intervention is specially guaranteed by statute in some states, but in the absence of a prescribed mode of procedure it must be recognized that the attachment is a proceeding ancillary to the principal action. With this principal action strangers to it have no concern. In the attachment, however, strangers having an interest in the property or a lien thereon may be vitally interested, and they may be permitted in a proper manner to assert their claim to the property affected by the attachment itself. Deere *v.* Eagle Mfg. Co., 49 Nebr. 385, 68 N. W. 504.

Parties to intervention.— On intervention by an attaching creditor to vacate a judgment in a prior attachment suit on the ground of fraud all subsequently attaching creditors have been held to be necessary parties. Cook *v.* Pollard, 70 Tex. 723, 8 S. W. 512.

Time for intervention.— The subsequently attaching creditor must file his petition for intervention while both attachment suits are pending. Smart *v.* Smart, 64 Me. 317.

The practice of letting a junior attaching creditor defend the prior attachment suit prevails to a limited extent (Jump *v.* McClurg, 35 Mo. 193, 86 Am. Dec. 146; Harding *v.* Harding, 25 Vt. 487; McCluny *v.* Jackson, 6 Gratt. (Va.) 96; Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791. *Contra,* Hale *v.* Chandler, 3 Mich. 531; Goble *v.* Howard, 12 Ohio St. 165; Ward *v.* Howard, 12 Ohio St. 158), as when it is shown that defendant himself will not appear and defend (Lytle *v.* Lytle, 37 Ind. 281) and that there is a valid defense (U. S. Express Co. *v.* Lucas, 36 Ind. 361), or in another state upon condition that the attaching creditor gives security to pay costs if plaintiff prevail (Buckman *v.* Buckman, 4 N. H. 319). *Compare* a remark of Allen, J., in McCluny *v.* Jackson, 6 Gratt. (Va.) 96, 105, that a defense to an attachment suit "may be made without a personal appearance; and I can perceive no good reason why a third person claiming a right to have his debt satisfied out of the attached property, should not be permitted to make it, either in the name of the debtor or in his own name." It has been held, however, that this is not an absolute right, but one which lies within the discretion of the court (Reynolds *v.* Damrell, 19 N. H. 394); that the subsequently attaching creditor can only raise substantial objections (Clough *v.* Curtis, 62 N. H. 409; Kimball *v.* Wellington, 20 N. H. 439); and that the leave granted by the court in such cases does not confer a right to review (Pike *v.* Pike, 24 N. H. 384). But see Wallace *v.* Berry, 51 Vt. 602, where it was held that the attaching creditor could make defenses to defeat fraud on the part of previous attachments which the debtor himself would not be allowed to raise.

The time for pleading which is allowed to a subsequently attaching creditor who comes in and defends a prior attachment is the same as that allowed to defendant himself. Jump *v.* McClurg, 35 Mo. 193, 86 Am. Dec. 146.

Defenses open to creditors who are let in to defend.— It has been held that after the petition of a junior attaching creditor to be allowed to defend a prior suit had been granted he could set up the statute of limitations as a defense. Sawyer *v.* Sawyer, 74

move to vacate the earlier attachment;[16] and such a motion may be made at any time before the proceeds are turned over to the prior attaching creditor.[17] Where the subsequently attaching creditor is denied the right to intervene[18] or to move for discharge,[19] resort can be had to equity to enforce his rights against the prior attaching creditor.[20]

Me. 579. And in Miller *v.* White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791, a second attaching creditor who intervened in the prior suit was allowed to file a plea in abatement denying the grounds on which the prior attachment was issued. See also Lee *v.* Lamprey, 43 N. H. 13, for a discussion of the admissibility of evidence offered in defense by a subsequently attaching creditor.

In Massachusetts by statute a subsequently attaching creditor is allowed to defend the attachment suit on any ground which defeats the cause of action, but he is precluded from taking advantage of technical defenses (Baird *v.* Williams, 19 Pick. (Mass.) 381), and in case his defense fails, the subsequent creditor will be liable for costs (Whitwell *v.* Burnside, 1 Metc. (Mass.) 39), unless a judgment for costs is entered against the original defendant (Guild *v.* Guild, 2 Metc. (Mass.) 229); but the intervening creditor will not be liable for interest accruing on plaintiff's claim during a delay which was caused by attachment defendant (Guild *v.* Guild, 2 Metc. (Mass.) 229). *Compare* Adams *v.* Paige, 7 Pick. (Mass.) 542, where it was held that the right of a subsequently attaching creditor to intervene does not prevent him from asserting his rights in a separate action at common law.

The Missouri statute authorizing the court to determine controversies between attaching creditors has been held to limit the power of the court to a determination of controversies relating to the priority, good faith, and effect of different attachments as they relate to the property attached, and not to permit it to determine all controversies that may arise between different attachment creditors growing out of the manner of the creation of the debts or claims on which the attachments are based. Stephenson *v.* Parker Stationery Co., 142 Mo. 13, 43 S. W. 380.

Burden of proof.— Where attachments had been levied on land in separate suits against a husband and wife individually, and there was a contest as to whether the land belonged to the husband or to the wife, it was held that the burden was on the second attaching creditor to show that the property belonged to the defendant in his suit. Allen *v.* Loring, 37 Iowa 595.

16. *Georgia.*—Smith *v.* Gettinger, 3 Ga. 140.

Kansas.— Standard Implement Co. *v.* Lansing Wagon Works, 58 Kan. 125, 48 Pac. 638; Dolan *v.* Topping, 51 Kan. 321, 32 Pac. 1120; Barton *v.* Hanauer, 4 Kan. App. 531, 44 Pac. 1007.

Mississippi.— Henderson *v.* Thornton, 37 Miss. 448, 75 Am. Dec. 70.

New York.— Jacobs *v.* Hogan, 85 N. Y. 243.

Ohio.— Harrison *v.* King, 9 Ohio St. 388; Putnam *v.* Loeb, 2 Ohio Cir. Ct. 110.

Wisconsin. — Hawes *v.* Clement, 64 Wis. 152, 25 N. W. 21.

Canada.— Montreal Bank *v.* Burnham, 1 U. C. Q. B. 131.

But see Chase *v.* Wyeth, 17 N. H. 486, where it was held that the rights of attaching creditor to priority could not be determined on motion to amend the judgment in one attachment suit.

Not an absolute right.— It has been held that a proceeding to determine priority of successive attachment liens cannot be claimed as an absolute right, but that the matter is addressed to the discretion of the equity side of the court. Espenhain *v.* Meyer, 74 Wis. 379, 43 N. W. 157.

In the absence of any motion by a party to the suit it has been held that a court may fix the priority of different attaching creditors and distribute the funds accordingly. Clinton First Nat. Bank *v.* Brenneisen, 97 Mo. 145, 10 S. W. 884.

Notice of the motion must be given to all interested parties. Dixey *v.* Pollock, 8 Cal. 570; Chandler *v.* Mullanphy, 7 Ill. 464. See also State *v.* Hickman, 150 Mo. 626, 51 S. W. 680, where it was held that in a suit by subsequently attaching creditors to establish the priority of their lien the court could not decide that prior attaching creditors, not parties to the suit, had lost their lien.

Form of judgment.—Where a subsequently attaching creditor succeeds in having his claim preferred to that of the earlier attachment the judgment should not set aside the first attachment entirely, but should only postpone it to the subsequent one. Speyer *v.* Ihmels, 21 Cal. 280, 81 Am. Dec. 157.

17. Woodmansee *v.* Rogers, 82 N. Y. 88, 59 How. Pr. (N. Y.) 402 [*affirming* 20 Hun (N. Y.) 285, 58 How. Pr. (N. Y.) 439].

Time for motion.—A motion of a junior attaching creditor to defeat a prior attachment on account of defects must be made before judgment in the prior attachment suit. Rudolf *v.* McDonald, 6 Nebr. 163.

Appeals.—While an appeal will lie from the decision of the circuit court on a motion to determine the priority of attaching creditors (Lane *v.* White, 64 Mo. App. 191), a creditor must have obtained final judgment in his attachment suit to be entitled to take an appeal (Sutton *v.* Stevens, 41 Mo. App. 42).

18. Cartwright *v.* Bamberger, 90 Ala. 405, 8 So. 264; Gasquet *v.* Johnson, 1 La. 425; Lewis *v.* Harwood, 28 Minn. 428, 10 N. W. 586; Fayetteville Bank *v.* Spurling, 52 N. C. 398. *Compare* Converse *v.* Steamer Lucy Robinson, 15 La. Ann. 433.

19. Whipple *v.* Cass, 8 Iowa 126; *Ex p.* Perry Stove Co., 43 S. C. 176, 20 S. E. 980.

20. Putney *v.* Wolberg, 127 Ala. 124, 28 So. 741; Henderson *v.* J. B. Brown Co., 125

(B) *In What Tribunal.* Ordinarily the court which has jurisdiction over the earliest attachment writ decides questions of priority,[21] and state law governs[22] even though the suit is pending in a federal court;[23] but as the rights of rival attaching creditors must be passed upon by the court, a sheriff who assumes to distribute the proceeds in his hands does so at his peril.[24]

3. BETWEEN ATTACHMENTS AND JUDGMENTS. When judgments become liens[25] on the property of a defendant, either by mere entry or by docketing or by levy under the judgment execution,[26] before the levy of an attachment writ judgment creditors will prevail over attaching creditors;[27] but where another creditor levies

Ala. 566, 28 So. 79; Rice *v.* Less, 105 Ala. 298, 16 So. 719; Whipple *v.* Cass, 8 Iowa 126.

21. Sutton *v.* Stevens, 41 Mo. App. 42; Espenhain *v.* Meyer, 74 Wis. 379, 43 N. W. 157. In St. Louis State Bank *v.* Steinberg, 44 Mo. App. 401, it was held that where a subsequent attachment had been instituted in a justice's court it must be removed to the court of record where the earlier attachment suit was pending before the latter court had any jurisdiction to apply the proceeds of the property to the satisfaction of the claim sued upon before the justice.

22. McGregor *v.* Barker, 12 La. Ann. 289.

23. Bankers', etc., Tel. Co. *v.* Chicago Carpet Co., 28 Fed. 398 (suit removed t federal court); Bates *v.* Days, 5 McCrary (U. S.) 342, 17 Fed. 167 (suit begun in federal court).

24. Howard *v.* Clark, 43 Mo. 344; Schneider *v.* Sears, 13 Oreg. 69, 8 Pac. 841.

Protection of officer.— Where a subsequently attaching creditor has appeared to contest a prior attachment and judgment has been rendered against him, the officer is justified in applying the property as the judgment directs and his conduct in so doing cannot be questioned in a subsequent proceeding. Wallace *v.* Berry, 51 Vt. 602. In Philbrick *v.* Shaw, 63 N. H. 81, it was held that a deputy sheriff was not bound to defend an action brought against the sheriff to determine a controversy between two attaching creditors, but that the creditor who had executed a bond of indemnity to the sheriff was the sole defendant in interest.

25. **For time when judgment becomes a lien** see JUDGMENTS.

26. **Necessity for actual levy of execution.** — Mere delivery of an execution to the sheriff will not entitle the judgment creditor to priority over a subsequently attaching creditor (Robertson *v.* Lawton, 91 Hun (N. Y.) 67, 36 N. Y. Suppl. 175, 71 N. Y. St. 87); but an attachment levied before the execution levy has priority (Moore *v.* Fitz, 15 Ind. 43; Eddy *v.* Weaver, 37 Kan. 540, 15 Pac. 492; Field *v.* Milburn, 9 Mo. 492; R. Wallace, etc., Mfg. Co. *v.* Sharick, 15 Wash. 643, 47 Pac. 20), because after the attachment is levied an execution cannot be levied on the same property even though it issues from a court of coördinate jurisdiction (Metzner *v.* Graham, 57 Mo. 404). It has been held, however, that an execution of older tests will prevail, although levied subsequently to the attachment writ. Peck *v.* Robinson, 3 Head (Tenn.) 437. *Compare* Rice *v.* Walinszius, 12 Pa. Super. Ct. 329, where the lien created by placing a writ of attachment in the sheriff's hands was held not to be disturbed by subsequently lodging a writ of fieri facias for the sale of the property with the same officer.

Custody of property.— Where the sheriff failed to take possession under the execution, the lien of the judgment is waived against a subsequent attachment. Hanson *v.* Taper Sleeve Pulley Incorporation, 72 Iowa 622, 34 N. W. 448. See also Burrows *v.* Wright, 19 Vt. 510, where it was held that an officer levying attachment writs and an execution on property was entitled to retain possession of the property, although the executions issued on judgments in the attachment suits were subsequently delivered to another officer.

Determining prior levy.— A sheriff's return on a fieri facias that the levy thereon was made subject to a former seizure of the same property under an attachment writ is conclusive on the execution creditor (Prather *v.* Chase, 3 Brewst. (Pa.) 206); but where there was an agreement that the sheriff should indorse an execution as first coming to his hands, the attaching creditor cannot claim priority because the sheriff levied the execution subject to the attachment levy (Connolley *v.* Eisman, 22 Ky. L. Rep. 1247, 60 S. W. 372).

27. *Illinois.* — Hanchett *v.* Ives, 133 Ill. 332, 24 N. E. 396 [*reversing* 33 Ill. App. 471].

Iowa.— Harshberger *v.* Harshberger, 26 Iowa 503, decree for alimony.

Missouri.— Slattery *v.* Jones, 96 Mo. 216, 8 S. W. 554, 9 Am. St. Rep. 344, where a judgment was held to be a lien on land which had been fraudulently conveyed by defendant.

New Jersey.—Reeves *v.* Johnson, 12 N. J. L. 29.

Virginia.— Charron *v.* Boswell. 18 Gratt. (Va.) 216; Puryear *v.* Taylor, 12 Gratt. (Va.) 401.

Canada.— Hall *v.* Kissock, 11 U. C. Q. B. 9 (judgment by confession); Moody *v.* Bull, 7 U. C. C. P. 15; Robinson *v.* Bergin, 10 Ont. Pr. 127; Caird *v.* Fitzell, 2 Ont. Pr. 262.

See 5 Cent. Dig. tit. "Attachment," § 554.

Invalid judgment.— Where a judgment by confession is invalid for want of compliance with statutory requirements the judgment creditor will be postponed to a subsequently attaching creditor without regard to the *bona fides* of the debt for which judgment was confessed (Puget Sound Nat. Bank *v.* Levy, 10 Wash. 499, 39 Pac. 142, 45 Am. St. Rep. 803); but mere irregularities in an earlier execution will not entitle a subsequently attaching creditor to priority (Alexander *v.* Alexander, 2 Chest. Co. Rep. (Pa.) 401).

an attachment before the judgment becomes a lien he will ordinarily prevail without regard to the time when judgment is obtained in the attachment suit.[28]

XIII. CUSTODY AND DISPOSITION OF PROPERTY.

A. In General. Goods when properly attached are strictly in the custody of the law[29] and an attachment creditor has no interest or property in or right to

28. *Alabama.*— Baldwin *v.* Leftwich, 12 Ala. 838; Pond *v.* Griffin, 1 Ala. 678.

California.—Weinreich *v.* Hensley, 121 Cal. 647, 54 Pac. 254.

Florida.— Zinn *v.* Dzialynski, 14 Fla. 187, holding "preëxisting liens" referred to liens existing prior to the levy of the attachment.

Hawaii.— Holmes *v.* Soper, 6 Hawaii 564.

Kentucky.— Bourne *v.* Hocker, 11 B. Mon. (Ky.) 23 (where execution was in hands of sheriff before attachment was levied); Hackley *v.* Swigert, 5 B. Mon. (Ky.) 86, 41 Am. Dec. 256; Wallace *v.* Hanley, 4 J. J. Marsh. (Ky.) 622.

Louisiana.— Carrol *v.* McDonogh, 10 Mart. (La.) 609.

Mississippi.—Redus *v.* Wofford, 4 Sm. & M. (Miss.) 579.

Missouri.— Ensworth *v.* King, 50 Mo. 477.

Montana.— Sklower *v.* Abbott, 19 Mont. 228, 47 Pac. 901.

New Hampshire.— Haven *v.* Libbey, Smith (N. H.) 109.

New Jersey.—Jones *v.* Manganese Iron Ore Co., (N. J. 1885) 3 Atl. 517.

New York.— Van Loan *v.* Kline, 10 Johns. (N. Y.) 129.

North Carolina.— McMillan *v.* Parsons, 52 N. C. 163; Harbin *v.* Carson, 20 N. C. 431.

Oklahoma.— Burnham *v.* Dickson, 5 Okla. 112, 47 Pac. 1059.

Pennsylvania.—Schacklett's Appeal, 14 Pa. St. 326; Warner's Appeal, 13 Wkly. Notes Cas. (Pa.) 505 (execution issued subsequently to attachment levy although on same day); Thielens *v.* White, 13 Wkly. Notes Cas. (Pa.) 194.

Tennessee.—Tappan *v.* Harrison, 2 Humphr. (Tenn.) 172, although summons was served in suit without attachment before attachment was levied.

See 5 Cent. Dig. tit. "Attachment," § 554.

Where fraudulently conveyed property is attached by a creditor of the grantor the attaching creditor will prevail over one who subsequently files a bill in equity to have the conveyance set aside, although a decree is obtained before judgment in the attachment suit. McClellan *v.* Solomon, 23 Fla. 437, 2 So. 825, 11 Am. St. Rep. 381; McKinney *v.* Farmers' Nat. Bank, 104 Ill. 180.

In Georgia a contest for priority between attaching creditors and other creditors is determined by the time when they obtain judgments irrespective of the time when the attachment was levied. Kilgo *v.* Castleberry, 38 Ga. 512, 95 Am. Dec. 406; Erwin *v.* Moore, 15 Ga. 361; Willis *v.* Parsons, 13 Ga. 335; Lichton *v.* McDougald, 5 Ga. 176; McDougald *v.* Barnard, 3 Ga. 169. This doctrine led to the anomaly that fraudulent collusion on the part of the debtor enabled him to prefer a creditor by splitting up his demand into small notes, and thus enabling him to obtain judgment first, although his suit was instituted subsequently to the attachment suit (Andrews *v.* Kaufmans, 60 Ga. 669), and was modified by a statute providing that the suit without attachment must not have been begun subsequently to the attachment suit (Silvey *v.* Phœnix Ins. Co., 94 Ga. 609, 21 S. E. 607, where it is held that a suit without attachment begun on the same day the attachment writ is levied, and first prosecuted to judgment, will prevail over the attachment lien).

In the province of Ontario a person commencing suit against an absconding debtor previous to the suing out of a writ of attachment against him could formerly proceed to judgment, and his execution was entitled to be satisfied first out of the assets seized under the writ (Daniel *v.* Fitzell, 17 U. C. Q. B. 369; Bank of British North America *v.* Jarvis, 1 U. C. Q. B. 182; Hughes *v.* Field, 9 Ont. Pr. 127); but process must have been actually served on the debtor, and a judgment by confession was unavailing (Upper Canada Bank *v.* Glass, 21 U. C. Q. B. 39; Bird *v.* Folger, 17 U. C. Q. B. 536). It had to be shown that process was served before the writ of attachment was levied (Daniel *v.* Fitzell, 17 U. C. Q. B. 369), and the court had power in its discretion to pay the costs of the attaching creditor before satisfying the execution entitled to priority (Hughes *v.* Field, 9 Ont. Pr. 127). But this has been altered by the creditors' relief act of 1880 (cited as "The Creditors' Relief Act," R. S. O. 1887, c. 65), which provides for *pro rata* distribution in such cases. Macfie *v.* Pearson, 8 Ont. 745.

Divorce proceedings.—An attaching creditor will prevail over the claims of a wife suing for divorce when the attachment is levied before the institution of the divorce suit (Jennings *v.* Montague, 2 Gratt. (Va.) 350); and when the attachment is levied before a decree is made in the divorce suit (Spencer *v.* Spencer, 9 R. I. 150).

The Pennsylvania statute authorizing the guardians of the poor to seize the property of an absconding husband and apply it to the support of his wife and children was not intended to interfere with the rights of creditors, and therefore an attaching creditor may seize the property even after trustees have been appointed to hold the property for the benefit of the wife and children. Thomas *v.* McCready, 5 Serg. & R. (Pa.) 387.

29. *Alabama.*— Dollins *v.* Lindsey, 89 Ala. 217, 7 So. 234.

Kansas.— Missouri Pac. R. Co. *v.* Love, 61 Kan. 433, 59 Pac. 1072; Kingman First Nat. Bank *v.* Gerson, 50 Kan. 582, 32 Pac. 905.

possession of the attached goods, by reason of the levy, and cannot maintain an action in his own name for enforcement thereof; his only remedy being against the officer.[30]

B. Rights and Duties of Attaching Officer — 1. Duty to Take and Keep — Abandonment — a. Rule Stated. In order to preserve an attachment when made, the officer must, either by himself or by his agent, retain his control over, and the power of taking immediate possession of, the attached property, in all those cases in which the property is capable of being taken into actual possession, unless it is released in some mode prescribed by statute.[31] If he does not do this the attachment will be regarded as abandoned and dissolved,[32] and if the sheriff or his appointed keeper thus abandons the possession of the property and it comes

Kentucky.— Stemmons *v.* King, 8 B. Mon. (Ky.) 559.

Maryland.— Thomson *v.* Baltimore, etc., Steam Co., 33 Md. 312.

New Jersey.— Hunt *v.* Field, 9 N. J. Eq. 36, 57 Am. Dec. 365.

North Carolina.— McLean *v.* Douglass, 28 N. C. 233.

Oregon.— Gerdes *v.* Sears, 13 Oreg. 358, 10 Pac. 631.

30. *Arkansas.*—Atkins *v.* Swope, 38 Ark. 528.

Indiana.— Dufour *v.* Anderson, 95 Ind. 302.

Kentucky.— Heathman *v.* Million, 17 Ky. L. Rep. 421, 31 S. W. 473, holding that an attaching creditor, by the mere levy of his attachment on land, does not become entitled to the possession of the land or to the rents and profits, and cannot exclude from possession the party rightfully entitled thereto.

Michigan.— Blanchard *v.* Brown, 42 Mich. 46, 3 N. W. 246; Vanneter *v.* Crossman, 39 Mich. 610.

Nevada.— Foulks *v.* Pegg, 6 Nev. 136.

New Hampshire.— Goddard *v.* Perkins, 9 N. H. 488.

New Jersey.—Austin *v.* Wade, 3 N. J. L. 551.

North Carolina.— Mitchell *v.* Sims, 124 N. C. 411, 32 S. E. 735.

See also *infra*, XIII, B, 2, a.

31. Release of property on security see *infra*, XIII, E.

32. *Alabama.*— Joseph *v.* Henderson, 95 Ala. 213, 10 So. 843; Scarborough *v.* Malone, 67 Ala. 570.

Arkansas.— Stout *v.* Brown, 64 Ark. 96, 40 S. W. 701; Cotton *v.* Atkinson, 53 Ark. 98, 13 S. W. 415; Farris *v.* State, 33 Ark. 70; Jones *v.* Buzzard, 2 Ark. 415.

California.— Scherr *v.* Little, 60 Cal. 614.

Colorado.— Collins *v.* Burns, 16 Colo. 7, 26 Pac. 145.

Connecticut.— Mills *v.* Camp, 14 Conn. 219, 36 Am. Dec. 488; Taintor *v.* Williams, 7 Conn. 271.

Georgia.— Forbes *v.* Morel, R. M. Charlt. (Ga.) 23.

Idaho.— Roth *v.* Duvall, 1 Ida. 149.

Illinois.— People *v.* Cameron, 7 Ill. 468; Hardin *v.* Sisson, 36 Ill. App. 383.

Iowa.— Rowley *v.* Painter, 69 Iowa 432, 29 N. W. 401; Littleton *v.* Wyman, 69 Iowa 248, 28 N. W. 582; Cresswell *v.* Burt, 61 Iowa 590, 16 N. W. 730; Wadsworth *v.* Walliker, 45 Iowa 395, 24 Am. Rep. 788.

Kansas.— Gardner *v.* Anthony Nat. Bank, 57 Kan. 619, 47 Pac. 516; Throop *v.* Maiden, 52 Kan. 258, 34 Pac. 801.

Louisiana.— Gusman *v.* De Poret, 33 La. Ann. 333; Scott *v.* Davis, 26 La. Ann. 688; Frazier *v.* Willcox, 4 Rob. (La.) 517.

Maine.— Thompson *v.* Baker, 74 Me. 48; Franklin Bank *v.* Small, 26 Me. 136; Lovejoy *v.* Hutchins, 23 Me. 272; Humphreys *v.* Cobb, 22 Me. 380; Waterhouse *v.* Smith, 22 Me. 337; Kimball *v.* Davis, 19 Me. 310; Nichols *v.* Patten, 18 Me. 231, 36 Am. Dec. 713; Walker *v.* Foxcroft, 2 Me. 270; Twombly *v.* Hunewell, 2 Me. 221.

Maryland.— Corner *v.* Mackintosh, 48 Md. 374; Cromwell *v.* Owings, 7 Harr. & J. (Md.) 55.

Massachusetts.— Boynton *v.* Warren, 99 Mass. 172; Foster *v.* Clark, 19 Pick. (Mass.) 329; Hemmenway *v.* Wheeler, 4 Pick. (Mass.) 408, 25 Am. Dec. 411; Bagley *v.* White, 4 Pick. (Mass.) 395, 16 Am. Dec. 353; Cooper *v.* Mowry, 16 Mass. 5; Bridge *v.* Wyman, 14 Mass. 190; Phillips *v.* Bridge, 11 Mass. 242; Sewall *v.* Mattoon, 9 Mass. 535; Blake *v.* Shaw, 7 Mass. 505.

Michigan.— Terry *v.* Metevier, 104 Mich. 50, 62 N. W. 164; Rosenthal *v.* Dickerman, 98 Mich. 208, 57 N. W. 112, 37 Am. St. Rep. 535, 22 L. R. A. 693; Fletcher *v.* Aldrich, 81 Mich. 186, 45 N. W. 641; Fletcher *v.* Morrell, 78 Mich. 176, 44 N. W. 133; Vanneter *v.* Crossman, 39 Mich. 610; Grover *v.* Buck, 34 Mich. 519.

Missouri.—Metzner *v.* Graham, 66 Mo. 653; Little *v.* Seymour, 6 Mo. 166; Russell *v.* Major, 29 Mo. App. 167.

Nevada.— Moresi *v.* Swift, 15 Nev. 215; Newman *v.* Kane, 9 Nev. 234.

New Hampshire.— Houston *v.* Blake, 43 N. H. 115; Chadbourne *v.* Sumner, 16 N. H. 129, 41 Am. Dec. 720; Chapman *v.* Bellows, Smith (N. H.) 127.

New York.— Dodge *v.* Porter, 13 Abb. Pr. (N. Y.) 253.

North Carolina.— Roberts *v.* Scales, 23 N. C. 88.

Oregon.— Gerdes *v.* Sears, 13 Oreg. 358, 10 Pac. 631.

Pennsylvania.— McDevitt *v.* Kepple, 9 Pa. Dist. 581, 24 Pa. Co. Ct. 133, 31 Pittsb. Leg. J. N. S. (Pa.) 43.

South Dakota.— Jones Lumber, etc., Co. *v.* Faris, 6 S. D. 112, 60 N. W. 403, 55 Am. St. Rep. 814; Griswold *v.* Sundback, 4 S. D. 441, 57 N. W. 339.

into the possession of an adverse claimant the lien created by the attachment is lost.[33]

b. Nature of Taking and Possession — (I) *Control of Circumstances and Nature of Property* — (A) *In General.* What act, what species of possession, and what degree of vigilance will constitute legal custody is often a question of

Tennessee.— Pennebaker *v.* Tomlinson, 1 Tenn. Ch. 111.

Texas.— Rice *v.* Miller, 70 Tex. 613, 8 S. W. 317, 8 Am. St. Rep. 630; Donald *v.* Carpenter, 8 Tex. Civ. App. 321, 27 S. W. 1053.

Vermont.— Fay *v.* Munson, 40 Vt. 468; Briggs *v.* Taylor, 35 Vt. 57; Austin *v.* Burlington, 34 Vt. 506; Nutt *v.* Wheeler, 30 Vt. 436, 73 Am. Dec. 316; Blake *v.* Hatch, 25 Vt. 555; Bowman *v.* Barnard, 24 Vt. 355; Whitney *v.* Ladd, 10 Vt. 165; Adams *v.* Abbott, 2 Vt. 383.

United States.— Livingston *v.* Smith, 5 Pet. (U. S.) 90, 8 L. ed. 57 (construing New Jersey statute); Indiana *v.* Baldwin, 10 Biss. (U. S.) 165, 6 Fed. 30, 20 Fed. Cas. No. 11,750*a*, 27 Int. Rev. Rec. 130, 11 Reporter 627 (construing Indiana statute).

See 5 Cent. Dig. tit. "Attachment," § 600.

Necessity of taking possession to valid levy see *supra*, X, H, 1, b, (I), (B).

Officer is not an insurer, and is not responsible beyond reasonable watchfulness, caution, and the employment of proper means to security, but he should be held to greater care than owners usually take of their property, because goods so held are more liable to be molested than if not under seizure. Fletcher *v.* Aldrich, 81 Mich. 186, 45 N. W. 641. See also Cresswell *v.* Burt, 61 Iowa 590, 16 N. W. 730.

The element of expense cannot be considered by the officer in relation to his duty to preserve and keep attached property. Sewall *v.* Mattoon, 9 Mass. 535; Newman *v.* Kane, 9 Nev. 234. Nor will mere inconvenience in the removal of property excuse the officer from his liability. Chadbourne *v.* Sumner, 16 N. H. 129, 41 Am. Dec. 720.

Threshing grain.— If it is necessary for the preservation of grain and straw which has been attached that it be threshed it is the duty of the attaching officer to thresh the same. Briggs *v.* Taylor, 35 Vt. 57.

After discontinuance of an attachment proceeding the officer holds the property until notified, or until he learns that the suit has been discontinued. Vanneter *v.* Crossman, 39 Mich. 610.

After judgment an officer is not bound to deliver goods attached to the judgment creditor that he may levy his execution on them, for the officer is accountable to the debtor no less than to the creditor. Blake *v.* Shaw, 7 Mass. 505.

Seizure of replevied property on junior writ. — Where a sheriff seizes property under a junior attachment taking it from the possession of the sureties on the replevin bond in the first attachment, thereby discharging them from their liability on the bond, it is his duty to keep the property safe so that it may be forthcoming to answer the first writ which constitutes the prior lien. Scarborough *v.* Malone, 67 Ala. 570.

Levy by constable — Turning property over to sheriff.— Under Ala. Civ. Code, § 2956, providing that, in case of an attachment issued by a justice of the peace for an amount exceeding his jurisdiction, and not more than the amount of the penalty of the constable's bond, the justice may direct that it be executed by the constable, who shall return the same to the court to which it is returnable; section 2958, providing for the sale of property levied on by order of the court, and that the proceeds of the sale shall be retained by the sheriff; and section 2959, authorizing the sheriff to sell property under certain conditions without an order of the court — property levied on by a constable, and delivered to the sheriff, is in the latter's possession as sheriff, and not as mere bailee of the constable, although the statute does not expressly direct the constable to turn the property over to the sheriff. Joseph *v.* Henderson, 95 Ala. 213, 10 So. 843.

Permitting reasonable use by debtor.— Where, from motives of compassion for the debtor's family, articles of necessity, such as household furniture without which the family cannot subsist, are used by them by permission of the officer, the attachment may continue in force notwithstanding. Train *v.* Wellington, 12 Mass. 495. But on the other hand it is held that in such cases there should be a keeper immediately representing the attaching officer, who should be in possession and control of the property, and that the use should be under the immediate supervision of such keeper. Jones Lumber, etc., Co. *v.* Faris, 6 S. D. 112, 60 N. W. 403, 55 Am. St. Rep. 814 [*citing* Bagley *v.* White, 4 Pick. (Mass.) 395, 16 Am. Dec. 353; Baldwin *v.* Jackson, 12 Mass. 131, the former case being almost directly in point]. See also Donald *v.* Carpenter, 8 Tex. Civ. App. 321, 27 S. W. 1053, where it was held that after a levy upon animals on a range the owner was still in control for the purpose of attending to the stock and, if negligent in this regard, neither the officer nor plaintiff in attachment was liable for the resulting damage, although the original writ might be void.

33. Sanderson *v.* Edwards, 16 Pick. (Mass.) 144; Carrington *v.* Smith, 8 Pick. (Mass.) 419; Bagley *v.* White, 4 Pick. (Mass.) 395, 16 Am. Dec. 353 (where it was held that leaving goods attached in a store where other goods of the same debtor were under a keeper appointed by another officer, without taking the key or appointing a keeper, will not secure the goods against a subsequent attachment).

difficulty, depending upon a variety of circumstances, having respect to the nature and situation of the property and the purposes for which custody and vigilance are required.[34]

(B) *Articles of Bulk.* Where an officer makes a constructive levy upon property, which by reason of its bulk or for other cause cannot be immediately removed, he does not thereby deprive himself of the right to regain actual possession of the attached property whenever necessary for its preservation. His liability to have such property forthcoming that it may be taken on execution is the same as if it had been taken into his actual possession.[35] The property is regarded as constructively in his possession and he must use ordinary care and diligence for its preservation and safe-keeping.[36]

(II) *Continuous Presence.* The continued presence with the property attached of an attaching officer, by himself or agent, is not necessary. It is sufficient if he exercise due diligence to prevent its going out of his control.[37]

(III) *Delivery to Keeper, Servant, or Agent.*[38] An attaching officer need not retain personal possession of the attached property, but may deliver it to a keeper, servant, or agent, whose possession will be regarded as the possession of the officer.[39]

34. Sanderson *v.* Edwards, 16 Pick. (Mass.) 144; Hemmenway *v.* Wheeler, 14 Pick. (Mass.) 408, 25 Am. Dec. 411; Roberts *v.* Scales, 23 N. C. 88 (holding that the rule requiring the officer to take immediate possession is subject to the proviso that the delay to remove the property is only for a reasonable time and is then accounted for by the state of the property, as, for example, that it was a growing crop, an article in the course of being manufactured, or the like).

Abandonment question of fact.— Whether there has been in any given case an abandonment of an existing attachment is ordinarily a question of fact to be submitted to the jury with proper instructions. Com. *v.* Brigham, 123 Mass. 248.

Confusion of goods.— If an officer mixes goods attached by him with other goods of the same kind previously attached by another officer, on a writ against the same defendant, so that the former goods cannot be identified, the lien of the last attachment is lost. Gordon *v.* Jenney, 16 Mass. 465.

35. Wentworth *v.* Sawyer, 76 Me. 434; Higgins *v.* Drennan, 157 Mass. 384, 32 N. E. 354 (holding that, on attachment of bulky or irremovable property under Mass. Pub. Stat. c. 161, § 69, the officer, after having deposited a copy of the writ and return with the clerk, has nothing further to do till execution); Shephard *v.* Butterfield, 4 Cush. (Mass.) 425, 50 Am. Dec. 796; Fay *v.* Munson, 40 Vt. 468; McKormsby *v.* Morris, 29 Vt. 417.

36. Shephard *v.* Butterfield, 4 Cush. (Mass.) 425, 50 Am. Dec. 796; Fay *v.* Munson, 40 Vt. 468; Smith *v.* Church, 27 Vt. 168. *Compare* Hubbell *v.* Root, 2 Allen (Mass.) 185, where it was held that under such an attachment the officer is not responsible as if the property were in his actual custody, and that if, without his knowledge or consent, the property is removed so that it cannot be found to be taken on execution, he is not liable.

Liability of officer for care of property constructively attached.— Where an officer attached bales of hay lying near a railroad depot by leaving a copy of the writ and return in the town-clerk's office, and did not take personal possession of the same or put any one in charge thereof, and the hay was not forthcoming to be applied on an execution, it was held that he did not use due care and diligence in the custody and preservation of the same. Fay *v.* Munson, 40 Vt. 468.

37. Mills *v.* Camp, 14 Conn. 219, 36 Am. Dec. 488. See also Fettyplace *v.* Dutch, 13 Pick. (Mass.) 388, 23 Am. Dec. 688 (holding that where a keeper of wood and lumber on a wharf left his wharf on Sunday morning, fastening the gates as usual on such days, and returned in the afternoon the attachment was not dissolved); Wolf *v.* Taylor, 68 Tex. 660, 5 S. W. 855.

Wrongful dispossession of the officer does not have the effect of releasing the attachment lien (Clow *v.* Gilbert, 54 Ill. App. 134; Butterfield *v.* Clemence, 10 Cush. (Mass.) 269; Beech *v.* Abbott, 6 Vt. 586), and it is not necessary, in order to maintain a lien, that the keeper should be at all times able to resist fraud or violence in retaining his actual possession (Harriman *v.* Gray, 108 Mass. 229, holding that the temporary exclusion of a keeper by fraud or violence raises no presumption of abandonment).

38. Delivery to receiptor or bailee see *infra*, XIII, C.

39. *Colorado.*— Flanagan *v.* Newman, 5 Colo. App. 245, 38 Pac. 431.

Illinois.— Hanchett *v.* Ives, 33 Ill. App. 471.

Kentucky.— Howell *v.* Commercial Bank, 5 Bush (Ky.) 93.

Louisiana.— Myers *v.* Myers, 8 La. Ann. 369, 58 Am. Dec. 689. See also Dick *v.* Bailey, 2 La. Ann. 974, 46 Am. Dec. 561. The right of plaintiff in attachment to follow attached property into the hands of third persons, he having acquired rights from

(iv) *Delivery to Claimant.* Where a third party claims to be the owner of attached goods, the officer may in his discretion release the same to him; but he does so at his peril, and the burden is upon him to establish that such property did not belong to attachment defendant.[40]

(v) *Return to Debtor.* If the attaching officer, or any person to whom he may deliver the goods for safe-keeping, permits them to return to the possession of the debtor, the attachment is, with respect to other creditors, *ipso facto* dissolved;[41] and it has been held that if the dissolution of an attachment is effected by the delivery of the property by the officer into the possession of the debtor, the attachment cannot be revived by a redelivery by the debtor to the officer.[42]

c. Place of Custody — (i) *In General.* Where property is taken under attachment it is immaterial in what place it is kept by the officer.[43]

(ii) *Removal From State.* The removal by the attaching officer or his bailee of attached goods from the state in which the attachment issued will not discharge the attaching officer's special property therein.[44]

the owner after the attachment, depends upon the reality of the sheriff's possession under the attachment, and if plaintiff in attachment was himself the keeper and suffered the property to be taken out of his possession and carried to a distant parish, where it was sold, without any steps being taken to regain the possession, he cannot disturb the title of the purchaser. Whann *v.* Hufty, 12 La. Ann. 280.

Maine.— Eastman *v.* Avery, 23 Me. 248; Gower *v.* Stevens, 19 Me. 92, 36 Am. Dec. 737.

Massachusetts.— Train *v.* Wellington, 12 Mass. 495; Baldwin *v.* Jackson, 12 Mass. 131.

Ohio.— Root *v.* Columbia, etc., R. Co., 45 Ohio St. 222, 12 N. E. 812.

Texas.— Wolf *v.* Taylor, 68 Tex. 660, 5 S. W. 855.

Vermont.— Marshall *v.* Town, 28 Vt. 14.

See 5 Cent. Dig. tit. "Attachment," § 603.

Delegation of authority by keeper.— A keeper appointed by an attaching officer is not authorized to delegate his authority to a third person, even though the written authority given him is directed to himself "or bearer." Connor *v.* Parker, 114 Mass. 331.

Refusal of responsibility by keeper.— Attached property placed by the officer, by permission, upon the premises of one who refuses to assume any responsibility concerning it, is still in the possession and custody of the officer. Marshall *v.* Town, 28 Vt. 14.

40. Wadsworth *v.* Walliker, 45 Iowa 395, 24 Am. Rep. 788.

41. *Connecticut.*— Taintor *v.* Williams, 7 Conn. 271; Burrows *v.* Stoddard, 3 Conn. 431.

Maine.— Pillsbury *v.* Small, 19 Me. 435; Gower *v.* Stevens, 19 Me. 92, 36 Am. Dec. 737.

Massachusetts.— Robinson *v.* Mansfield, 13 Pick. (Mass.) 139. See also Boynton *v.* Warren, 99 Mass. 172, where the evidence was held sufficient to warrant a finding that the attachment was abandoned.

New Hampshire.— Houston *v.* Blake, 43 N. H. 115; Dunklee *v.* Fales, 5 N. H. 527.

Ohio.— Root *v.* Columbia, etc., R. Co., 45 Ohio St. 222, 12 N. E. 812.

Vermont.— Whitney *v.* Ladd, 10 Vt. 165; Pomroy *v.* Kingsley, 1 Tyler (Vt.) 294. See also Soule *v.* Austin, 35 Vt. 515.

A bona fide mortgagee of personal property, which at the time of the execution of the mortgage was in the possession of the mortgagor, will hold it against a previous attachment if he had no notice that the attachment was still subsisting. Carpenter *v.* Cummings, 40 N. H. 158.

Agreement of parties.— An attachment creditor waives his lien by allowing a debtor to take charge of attached property, under an agreement to make quarterly payments, with the proviso that if any other creditor should undertake to subject the property it should revert to the original attaching creditor. Such an agreement is a fraud upon other creditors. Morton *v.* Allen, 5 Ky. L. Rep. 601. Where a steamboat was attached, but by agreement between plaintiff and the master the boat was to proceed on its voyage to be delivered to the sheriff upon its return, it was held that the lien was not extinguished as between the parties to the suit. Conn *v.* Caldwell, 6 Ill. 531. An officer having attached cattle of a debtor allowed them to remain in the debtor's possession upon the understanding between himself and the debtor that the attachment should still subsist, and it was held that the attachment was not thereby dissolved as against the debtor or any one having notice of these facts. Cooper *v.* Newman, 45 N. H. 339.

42. Gower *v.* Stevens, 19 Me. 92, 36 Am. Dec. 737.

43. Carter *v.* Clark, 28 Conn. 512 (a case of an attachment made by a person specially deputed); Lewis *v.* Morse, 20 Conn. 211.

Taking possession of defendant's premises. — If an officer takes exclusive possession of defendant's building for the purpose of keeping attached goods therein, this will not avoid the attachment, although the act may be a trespass. Newton *v.* Adams, 4 Vt. 437.

44. Brownell *v.* Manchester, 1 Pick. (Mass.) 232 (where it was said that there seemed to be no difference as to the authority of the officer over the goods, between carrying them just over the line of an adjoining state, and carrying them into another county; for

d. Extent of Officer's Interest — (I) *In General.* An officer has only such special interest in attached property in his possession as the lien of the attachment creates,[45] and it is measured by the amount necessary to pay the debt for which the property has been attached.[46]

(II) *Effect of Close of Official Term.* It is the duty of the officer levying an attachment to keep the property and have it forthcoming on demand, although not demanded until after the close of his official term.[47]

(III) *Property Jointly Owned.* Where personal property owned by tenants in common is attached in a suit against one of them, the officer is entitled to the possession and control of the whole,[48] but although the whole may be seized, yet it is only an undivided interest which can be held and sold. The officer has no power to make a division, either with or without the consent of the cotenant, or to attach a specific parcel as the property of the debtor.[49]

e. Payment Into Court. The attaching officer may pay into court[50] money, the proceeds of attached property, or itself attached, and when so paid into court it is still subject to the lien of attachment to the same extent and effect as if retained in the hands of the attaching officer.[51]

f. Examination of Books and Papers. It has been held that an attaching officer is not bound to permit parties whose books and papers are in his custody by virtue of a levy under a writ of attachment to examine them;[52]

he has as much authority in the one place as he has in the other); Utley *v.* Smith, 7 Vt. 154, 29 Am. Dec. 152. See also Dick *v.* Bailey, 2 La. Ann. 974, 46 Am. Dec. 561, where, although approving the decision in Brownell *v.* Manchester, 1 Pick. (Mass.) 232, it was held, that where the sheriff removed the attached property from the state for an unlawful purpose, he became, by such abuse of his authority and violation of his official duty, a trespasser *ab initio*, and the property became subject to the claims of other creditors.

45. Rents and profits of attached property have been held not to be subject to the lien of the attachment. Kothman *v.* Markson, 34 Kan. 542, 9 Pac. 218; Moore *v.* Simpson, 5 Litt. (Ky.) 49; Richardson *v.* Kimball, 28 Me. 463; McLaughlin *v.* Park City Bank, 22 Utah 473, 63 Pac. 589, 54 L. R. A. 343. See also Fitzgerald *v.* Blake, 28 How. Pr. (N. Y.) 109, where the court ordered the rent from real property which had been attached to be applied on encumbrances upon the property, plaintiff's security appearing to be sufficient without it. But see Stockton *v.* Hyde, 5 La. Ann. 300, where it was held that the sheriff holds property seized under attachment for the benefit of whom it may concern; that if the attaching creditor succeeds, the rents and profits during the attachment belong to him to the extent of his claim; and that if not paid to the sheriff he may recover them in a direct action against the tenant.

46. *Arkansas.*— Jetton *v.* Tobey, 62 Ark. 84, 34 S. W. 531.

Maine.— Walker *v.* Foxcroft, 2 Me. 270.

Massachusetts.— Farrington *v.* Edgerley, 13 Allen (Mass.) 453.

Minnesota.— Wheaton *v.* Thompson, 20 Minn. 196.

Missouri.— Kerr *v.* Drew, 90 Mo. 147, 2 S. W. 136.

New Hampshire.— Holt *v.* Burbank, 47 N. H. 164.

Vermont.— Blodgett *v.* Adams, 24 Vt. 23.

47. Sagely *v.* Livermore, 45 Cal. 613; Baker *v.* Baldwin, 48 Conn. 131; Smith *v.* Bodfish, 33 Me. 136; Morton *v.* White, 16 Me. 53.

The removal of a sheriff from office does not affect the rule. Tukey *v.* Smith, 18 Me. 125, 36 Am. Dec. 704.

48. Sharp *v.* Johnson, 38 Oreg. 246, 63 Pac. 485.

49. Bernal *v.* Hovious, 17 Cal. 541, 79 Am. Dec. 147; Gaar *v.* Hurd, 92 Ill. 315; Reed *v.* Howard, 2 Metc. (Mass.) 36; Walker *v.* Fitts, 24 Pick. (Mass.) 191; Eldridge *v.* Lancy, 17 Pick. (Mass.) 352. See also *supra*, X, H, 2, b, (I).

50. Payment without order of court.— Where a sheriff is garnished in respect to money officially held by him, if he pays it to the clerk of the court, although without an order of court, this is a payment into court under the provision of the statute that in the case of money attached in the hands of officers of court, "it must be paid into court, to abide the result of the suit, unless the court otherwise direct." Warren *v.* Matthews, 96 Ala. 183, 11 So. 285.

When court will not direct payment.— Under N. Y. Code, § 232, which directed the sheriff to keep the attached property, or its proceeds, and section 237, which directed him to satisfy the judgment, if any, out of it, the court would not order him to pay the proceeds into court at the instance of one of the defendants who held a prior execution against the other, in which the sheriff levied on the same property before the attachment, unless the sheriff or his sureties were irresponsible. Dodge *v.* Porter, 13 Abb. Pr. (N. Y.) 253.

51. Kendallville First Nat. Bank *v.* Stanley, 4 Ind. App. 213, 30 N. E. 799; Shaffer *v.* Raymond, 1 Phila. (Pa.) 91, 7 Leg. Int. (Pa.) 166.

52. McCartan *v.* Van Syckel, 10 Bosw. (N. Y.) 694.

but while he is not bound to permit such an examination an order of court may be obtained for that purpose.[53]

2. ACTION FOR VIOLATION OF POSSESSION — a. Who May Sue. Possession of attached property vests in the officer until the property is disposed of and his title is not only sufficient to support an action for a violation of such possession,[54] but the right of action lies with him exclusively and the attaching creditor, as a rule, acquires no such interest in the attached property as to give him a right of action for a violation of the officer's possession.[55]

b. Form of Action — (I) *REPLEVIN, TRESPASS, OR TROVER.* The form of

53. Bleier *v.* Davidson, 20 Abb. N. Cas. (N. Y.) 207 note; Brooke *v.* Foster, 20 Abb. N. Cas. (N. Y.) 200 [*disapproving* Garden *v.* Sabey, 10 N. Y. Wkly. Dig. 33, where it was held that the sheriff should allow no one to examine books attached by him, except defendant, his assignee, or agent].

For form of order permitting an attaching creditor to examine books and papers of the debtor relative to the attached property see Brooke *v.* Foster, 20 Abb. N. Cas. (N. Y.) 200.

54. Paul *v.* Hoss, 28 La. Ann. 852.

Ground of officer's right of action.—An officer who has attached property can only maintain an action for it upon the ground of his liability to the attaching creditor, or to the owner for its return to him. Collins *v.* Smith, 16 Vt. 9.

Action in another state.— The special title of the officer is sufficient to permit him to assert his title in another state to which the property has been taken, and it is held that such an action by the officer cannot be considered as an attempt to execute the process of attachment of the state in which the attachment issues within the borders of the state where the action for possession by the sheriff is prosecuted. Rhoads *v.* Woods, 41 Barb. (N. Y.) 471.

Conversion — Demand.—Where attached hay was left with defendant, whose servant destroyed the same by feeding it to cattle, it was held that in an action by the officer against the servant for the conversion of the hay a demand for its return was not necessary, the property having been destroyed by defendant's own wrongful act. Davis *v.* Leary, 177 Mass. 526, 59 N. E. 191.

Where possession violated by fellow deputy. — Where a deputy sheriff's possession is violated by another deputy of the same sheriff, the former may maintain an action either against the sheriff (Walker *v.* Foxcroft, 2 Me. 270) or against such other deputy (Gordon *v.* Jenney, 16 Mass. 465).

Effect of release at instance of creditor.— A sheriff who released a levy of attachment at the instance of the attaching creditor cannot recover for the conversion of the attached property from the person who afterward obtains possession of it. Dickey *v.* Bates, 13 Misc. (N. Y.) 489, 35 N. Y. Suppl. 525, 70 N. Y. St. 136. See also Muir *v.* Orear, 87 Mo. App. 38.

Void process.— The right of an officer to bring action for goods levied upon by him depends upon his special property and liability over, and if the process is void he acquires no title and cannot be permitted to maintain an action for the recovery of the property or its value. Clark *v.* Norton, 6 Minn. 412.

55. *Connecticut.*— Bowler *v.* Eldridge, 18 Conn. 1; Huntley *v.* Bacon, 15 Conn. 267.

Indiana.—Dufour *v.* Anderson, 95 Ind. 302.

Maine.— Nichols *v.* Patten, 18 Me. 231, 36 Am. Dec. 713.

Massachusetts.— Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202; Brownell *v.* Manchester, 1 Pick. (Mass.) 232; Gordon *v.* Jenney, 16 Mass. 465.

Missouri.— A constable acquires such special property in the goods seized by him under a valid writ of attachment as will enable him to maintain replevin against any one except the true owner, if such owner is not the defendant in the attachment. Carroll *v.* Frank, 28 Mo. App. 69.

Nevada.— Foulks *v.* Pegg, 6 Nev. 136.

New Hampshire.— Baker *v.* Beers, 64 N. H. 102, 6 Atl. 35.

Ohio.— Schaeffer *v.* Marienthal, 17 Ohio St. 183.

Vermont.— Collins *v.* Smith, 16 Vt. 9. See also Roberts *v.* Carpenter, 53 Vt. 678; Adams *v.* Fox, 17 Vt. 361; Weeks *v.* Martin, 16 Vt. 237.

Wisconsin.— Whitney *v.* Brunette, 3 Wis. 621.

See also *supra*, XIII, A.

In New York, under Code Civ. Proc. § 708, subs. 3, which gives double damages "at the suit of the party aggrieved," the attaching creditor may sue for a wilful withholding from the sheriff of the property attached, where it does not appear that the sheriff afterward regained possession. Scott *v.* Morgan, 94 N. Y. 508.

Joint action by sheriff and attaching creditor.—Where personal property held by a sheriff under a writ of attachment is taken by a stranger, the attaching creditors cannot, by virtue of their rights in the attachment suit, maintain a joint action with the sheriff to recover damages for such taking. Schaeffer *v.* Marienthal, 17 Ohio St. 183.

Suit by creditor as bailee of sheriff.—Where a sheriff by virtue of an attachment seized goods and delivered them to plaintiff in attachment to be taken out of the district and sold, it was held that, although the delivery to plaintiff was irregular, yet he might maintain trover against a wrong-doer, who took the

action maintained by an attaching officer for a violation of the possession of the attached property may be either replevin, trespass, or trover.[56]

(II) *Contempt Proceedings.* A stranger to a pending suit may be proceeded against as for contempt for interfering with property attached therein.[57]

c. Defenses — Evidence. In an action for the conversion by defendant to his own use of property alleged to have been held by plaintiff officer under an attachment, any evidence is admissible which tends directly to show that the averment of this fact is not true.[58]

d. Damages. In an action by an attaching officer for the violation of his possession of the property attached the value of the goods is the measure of damages.[59] If, however, the attaching creditor has failed to perfect his lien by taking out execution within the statutory period only nominal damages can be recovered by the officer.[60] Where there has been no conversion by defendant to his own use, the measure of damages is the injury caused by the removal, not the value of the property.[61]

C. Delivery to Receiptor or Bailee — 1. Origin and Nature of Receipts. The practice of delivering attached property to a receiptor or bailee for safe-

goods out of his possession. Kentucky Bank *v.* Shier, 4 Rich. (S. C.) 233. See also Mussey *v.* Perkins, 36 Vt. 690, 86 Am. Dec. 688.

The executor of a deputy sheriff may maintain trover for the conversion by a stranger of property attached on mesne process by his testator. Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202.

56. *Louisiana.*— Paul *v.* Hoss, 28 La. Ann. 852, trespass for disturbing possession of sheriff. See also Dick *v.* Bailey, 2 La. Ann. 974, 46 Am. Dec. 561.

Maine.— Nichols *v.* Patten, 18 Me. 231, 36 Am. Dec. 713.

Massachusetts.— Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202; Brownell *v.* Manchester, 1 Pick. (Mass.) 232; Gates *v.* Gates, 15 Mass. 310; Gibbs *v.* Chase, 10 Mass. 125; Warren *v.* Leland, 9 Mass. 265; Perley *v.* Foster, 9 Mass. 112; Ludden *v.* Leavitt, 9 Mass. 104, 6 Am. Dec. 45; Ladd *v.* North, 2 Mass. 514.

New Hampshire.—Johnson *v.* Grand Trunk R. Co., 44 N. H. 626; Lathrop *v.* Blake, 23 N. H. 46.

Vermont.— Blodgett *v.* Adams, 24 Vt. 23; Whitney *v.* Ladd, 10 Vt. 165; Stanton *v.* Hodges, 6 Vt. 64; Lowry *v.* Walker, 4 Vt. 76, 5 Vt. 181.

Wisconsin.— Whitney *v.* Brunette, 3 Wis. 621.

See 5 Cent. Dig. tit. "Attachment," § 605.

Proof of delivery of execution to officer — Parol evidence.— In trover by a sheriff for property attached, parol evidence is admissible to show the delivery of the execution to him and the time of that delivery in order to hold the property subject to the attachment, although the officer made no minute on it of the time of serving it as directed by statute. Lowry *v.* Walker, 5 Vt. 181.

Proof of fraudulent conveyance by defendant.— In trover by a sheriff for property attached, proof of a fraudulent purchase by defendant of the goods in question from the debtor is admissible as explaining his acts in intermeddling with the property. Lowry *v.* Walker, 5 Vt. 181.

57. *Ex p.* Stickney, 40 Ala. 160.

58. Want of ownership or interest in defendant in attachment.— Evidence that the property did not in fact belong to defendant in the attachment and that he had no attachable interest therein is admissible. Hannon *v.* Bramley, 65 Conn. 193, 32 Atl. 336.

Informality or irregularity in the attachment proceedings may be set up in defense to an action by the attaching officer for a violation of his possession. Marshall *v.* Marshall, 2 Houst. (Del.) 125.

Failure to levy execution after destruction of property.— In trover by the officer against the servant of defendant in the attachment, for destroying hay levied upon by feeding it to cattle, it is no defense to say that the attachment had been lost because no attempt had been made to levy an execution within thirty days from the rendition of the judgment, the property having been destroyed before the judgment was rendered. The right to sue was perfected by the mere issue of the execution and placing it in the attaching officer's hands for service before the expiration of thirty days after entry of judgment. Davis *v.* Leary, 177 Mass. 526, 59 N. E. 191.

59. Fletcher *v.* Cole, 26 Vt. 170; Fisher *v.* Cobb, 6 Vt. 622. See also Sinclair *v.* Tarbox, 2 N. H. 135.

New York — Double damages.—Under N. Y. Code Civ. Proc. § 708, subs. 3, providing that one wilfully concealing or withholding attached property from a sheriff shall be liable to double damages "at the suit of the party aggrieved," injury can only be shown by a return of the process unsatisfied, so as to entitle attachment creditor to such damages. Scott *v.* Morgan, 94 N. Y. 508.

60. Goodrich *v.* Church, 20 Vt. 187.

61. Sinclair *v.* Tarbox, 2 N. H. 135.

Evidence as to quantum of damages.— Evidence is admissible in trover by a sheriff for property attached as to the *quantum* of damages, although it consist of facts occurring after the commencement of the action. Lowry *v.* Walker, 5 Vt. 181.

keeping is coeval with the practice of making attachments. It is, in its nature, a simple deposit, a delivery of the property to be kept by the depositary, without compensation, until called for by the attaching officer. In general a simple receipt, admitting that the articles enumerated have been delivered by the officer to the receiptor for safe-keeping, to be returned on demand, is sufficient evidence of the attachment and bailment.[62]

2. Power of Officer to Take Receipt — a. In General. An attaching officer may in his discretion and at his own risk deliver attached property to a bailee or receiptor for safe-keeping. The law, however, does not require him to take a receipt for such property, and his taking one is not strictly an official act.[63]

62. Dayton *v.* Merritt, 33 Conn. 184; Fowler *v.* Bishop, 31 Conn. 560; Savage *v.* Robinson, 93 Me. 262, 44 Atl. 926; Foss *v.* Norris, 70 Me. 117; Jewett *v.* Dockray, 34 Me. 45; Fowles *v.* Pindar, 19 Me. 420; Clark *v.* Clough, 3 Me. 357; Durgin *v.* Gage, 40 N. H. 302; Phelps *v.* Gilchrist, 28 N. H. 266; Runlett *v.* Bell, 5 N. H. 433; Soule *v.* Austin, 35 Vt. 515; Austin *v.* Burlington, 34 Vt. 506; Dewey *v.* Fay, 34 Vt. 138; Brown *v.* Gleed, 33 Vt. 147; Sibley *v.* Story, 8 Vt. 15.

Treated as a contract.—A receipt for attached property is treated as a contract, in that it is made conclusive evidence of the attachment of such property as is described therein, and the receiptor cannot be allowed to prove the contrary. Brown *v.* Gleed, 33 Vt. 147. See also Soule *v.* Austin, 35 Vt. 515. The delivery by an officer of goods under an attachment is sufficient consideration for the contract of a receiptor, making him responsible thereby for the amount of the debt and damages claimed in the writ (Savage *v.* Robinson, 93 Me. 262, 44 Atl. 926. See also Foss *v.* Norris, 70 Me. 117), and a written promise to pay to plaintiff in the attachment the amount which may be recovered therein, in consideration of the delivery by the officer to the promisor of the property attached, may be enforced by the promisee, although the contract was made without the request or knowledge of attachment defendant, the attached property did not belong to him, was not in his possession, and perished before the recovery of judgment in the action. Hayes *v.* Kyle, 8 Allen (Mass.) 300.

The legal meaning of the contract is that the receiptor shall have the property attached forthcoming upon the demand made for the same by the officer, to respond to the execution that may issue upon the judgment obtained in the suit in which the property is attached. Dewey *v.* Fay, 34 Vt. 138.

Contingent in effect.—A receipt given to an officer for property attached, although absolute in its terms, is contingent by operation of law. The officer can recover upon it only on the ground of his accountability for the property, either to the attaching creditor or to the owner; and where this accountability has ceased he has no right to recover, and it makes no difference whether the receipt is under seal or not. Dayton *v.* Merritt, 33 Conn. 184. See also Fowler *v.* Bishop, 31 Conn. 560.

Favored by law.— The contract of suretyship contained in an officer's receipt is favored in law, and is an essential and mitigating incident of the system of attachment on mesne process. Fowler *v.* Bishop, 31 Conn. 560.

Liability to general owner.— A bailee of goods attached, while he remains liable to the officer on his receipt, is not liable to the general owner. Perley *v.* Brown, 18 N. H. 404. But if the officer places such receipt in the hands of creditor's attorney to be prosecuted for his benefit it is an equitable assignment of the contract for which his liability to the creditor forms a sufficient consideration. Clark *v.* Clough, 3 Me. 357.

The taking of a promissory note is regarded as no different in principle from taking a receipt, which is in no wise inconsistent with, even if not a part of, the officer's duty. Foster *v.* Clark, 19 Pick. (Mass.) 329.

Relation between officer and receiptor.— A receiptor is not regarded as the mere servant of the officer, but his undertaking is a security for the debt to the extent of the value of the property. So long as the receiptor retains possession the officer may reclaim it for the purpose of sale to satisfy the execution, because he is not satisfied with the responsibility of the receiptor, or with a view to restoring it to the owner; but the receiptor, if he choose, may lawfully restore the property to the debtor and permit him to dispose of it, and thereby deprive himself of the power to return it according to the terms of his engagement. In such case, upon a lawful demand by the officer, he becomes entitled to recover the value of the property from the receiptor. Kendallville First Nat. Bank *v.* Stanley, 4 Ind. App. 213, 30 N. W. 799; Norris *v.* Bridgham, 14 Me. 429; Clark *v.* Morse, 10 N. H. 236; Odiorne *v.* Colley, 2 N. H. 66, 9 Am. Dec. 39; Gilbert *v.* Crandall, 34 Vt. 188.

The authority of a bailee for safe-keeping is subordinate to that of the officer, and he can neither sell nor loan the goods. Odiorne *v.* Colley, 2 N. H. 66, 9 Am. Dec. 39.

63. *Connecticut.*— Jordan *v.* Gallup, 16 Conn. 536.

Maine.— Moulton *v.* Chadborne, 31 Me. 152; Franklin Bank *v.* Small, 24 Me. 52.

New Hampshire.—Lovell *v.* Sabin, 15 N. H. 29; Runlett *v.* Bell, 5 N. H. 433; Porter *v.* Tarlton, Smith (N. H.) 372. But see Batchelder *v.* Putnam, 54 N. H. 84, 20 Am. Rep. 115, where it was held that an officer is not

b. Effect of Direction and Approval by Creditor. Where the attaching creditor, or his attorney, consents to the officer's taking a receipt for the attached property, and approves of the receiptor, the officer is relieved from all liability for losses not occasioned by his neglect or misfeasance.[64]

3. Who May Be Receiptor. Any person *sui juris* whether plaintiff,[65] defendant,[66] claimant,[67] or an indifferent person,[68] may receipt for attached property.

4. Form and Requisites of Receipt.[69] A receipt being nothing more than the

only justified in delivering attached property to a responsible receiptor but is bound to accept one if offered.

New York.— Harvey *v.* Lane, 12 Wend. (N. Y.) 563.

Vermont.— Batchelder *v.* Frank, 49 Vt. 90; Austin *v.* Burlington, 34 Vt. 506; Gilbert *v.* Crandall, 34 Vt. 188; Sibley *v.* Story, 8 Vt. 15.

Receipting assimilated to bailing.—A sheriff is authorized to take a receipt, and where the property is receipted the case has been assimilated to the case of bail. Lovell *v.* Sabin, 15 N. H. 29.

Necessity of retaining control.—When an officer attaches goods and takes a receipt for the redelivery of them on demand, or payment therefor, and leaves them without removal, in order to preserve the attachment he must retain control of the property in himself or by his servant, or have the power of taking immediate possession, and if the possession is abandoned the attachment is dissolved. Weston *v.* Dorr, 25 Me. 176, 43 Am. Dec. 259. See also *supra*, XIII, B, 1, a.

64. *Iowa.*— Citizens' Nat. Bank *v.* Loomis, 100 Iowa 266, 69 N. W. 443, 62 Am. St. Rep. 571.

Maine.— Jewett *v.* Dockray, 34 Me. 45; Allen *v.* Doyle, 33 Me. 420; Rice *v.* Wilkins, 21 Me. 558.

Massachusetts.—Donham *v.* Wild, 19 Pick. (Mass.) 520, 31 Am. Dec. 161.

New Hampshire.— Eastman *v.* Judkins, 59 N. H. 576; Porter *v.* Tarlton, Smith (N. H.) 372.

Vermont.—See Austin *v.* Burlington, 34 Vt. 506; Gilbert *v.* Crandall, 34 Vt. 188.

United States.— Pierce *v.* Strickland, 2 Story (U. S.) 292, 19 Fed. Cas. No. 11,147, construing Maine statute.

Extent of exoneration.—An officer taking receiptors will be responsible for their default, although they be taken with the consent and even at the request of the attaching creditor's attorney, provided the latter exercises no choice in their selection. Austin *v.* Burlington, 34 Vt. 506. The creditor's approval of the receiptor does not exonerate the officer from an effort to find the property, that it may be sold on the execution, or from the duty of bringing a suit upon the receipt. Allen *v.* Doyle, 33 Me. 420. It only exempts the attaching officer for losses not occasioned by his neglect or misfeasance. Pierce *v.* Strickland, 2 Story (U. S.) 292, 19 Fed. Cas. No. 11,147, construing Maine statute.

65. Tomlinson *v.* Collins, 20 Conn. 364; Utley *v.* Smith, 7 Vt. 154, 29 Am. Dec. 152. *Contra*, Mahon *v.* Kennedy, 87 Wis. 50, 57 N. W. 1108 [*citing* Drake Attachm. § 290].

66. Purdy *v.* Woolson-Spice Co., 15 Ky. L. Rep. 367; Burkhardt *v.* Maddox Co., 9 Ky. L. Rep. 442; Tyler *v.* Winslow, 46 Me. 348; Carr *v.* Farley, 12 Me. 328; Woodman *v.* Trafton, 7 Me. 178; Aliger *v.* Keeler, 8 Hun (N. Y.) 125. But see Root *v.* Columbia, etc., R. Co., 45 Ohio St. 222, 12 N. E. 812 [*citing* Drake Attachm. § 292*a*].

Effect of receipt by debtor.—An attachment of personal property is not dissolved by a receipt given by the debtor and the retention of the possession by him, even as against a *bona fide* purchaser without notice. Carr *v.* Farley, 12 Me. 328; Woodman *v.* Trafton, 7 Me. 178.

Use by debtor of receipted property.— Me. Rev. Stat. (1841), c. 114, § 37, which authorized the debtor to receipt for attached property, did not prohibit a reasonable use of the property by him, but he was liable to the sheriff for any loss or diminution of value occasioned by his negligence. Tyler *v.* Winslow, 46 Me. 348.

Right of debtor to compensation.— In Aliger *v.* Keeler, 8 Hun (N. Y.) 125, it was held that where a constable committed attached property to defendant's custody to hold as receiptor, the latter acquired a valid lien upon the property for his just and lawful charges.

67. Kingsbury *v.* Sargent, 83 Me. 230, 22 Atl. 105, holding that where an officer with a writ against one person attached personal property claimed by another, the latter was under no duress, and that a receipt signed by him to obtain a release of the property from the officer's custody could not be avoided for duress.

68. Wheeler *v.* Nichols, 32 Me. 233.

Wife of debtor as receiptor.— Under Mass. Gen. Stat. c. 108, § 3, a wife may receipt for property of her husband which has been attached. Farrington *v.* Edgerley, 13 Allen (Mass.) 453.

69. For forms of receipts, set out in whole or in part, see the following cases:

Connecticut.— Alsop *v.* White, 45 Conn. 499; Peters *v.* Stewart, 45 Conn. 103, 29 Am. Rep. 663.

Maine.— Ross *v.* Libby, 92 Me. 34, 42 Atl. 230; Hunter *v.* Peaks, 74 Me. 363; Foss *v.* Norris, 70 Me. 117; Torrey *v.* Otis, 67 Me. 573; Perry *v.* Somerby, 57 Me. 552; Potter *v.* Sewall, 54 Me. 142; Moulton *v.* Chapin, 28 Me. 505; Humphreys *v.* Cobb, 22 Me. 380; Shaw *v.* Laughton, 20 Me. 266.

Massachusetts.— Nims *v.* Spurr, 138 Mass. 209; Lewis *v.* Webber, 116 Mass. 450; Moore *v.* Fargo, 112 Mass. 254; Shumway *v.* Carpenter, 13 Allen (Mass.) 68; Hayes *v.* Kyle, 8 Allen (Mass.) 300; Parker *v.* Warren, 2

written evidence of the contract of bailment entered into by the officer and receiptor, its form is a matter of voluntary agreement between them, and the rights and liabilities of the parties to it must be determined by a fair construction of the writing itself.[70] It should, however, specify the articles attached.[71]

5. Effect of Receipt — a. Upon Attachment Lien. The acceptance by an officer of a receipt for attached property does not as a rule affect the attachment lien, but the goods are regarded as still under the officer's control, and he may reclaim them at pleasure.[72] Where, however, the receipt is in the alternative to pay a fixed sum or redeliver the property, the receiptor has the right to elect which he will do, and the attachment is dissolved.[73]

b. Upon Valuation of Property. The valuation fixed by the receiptor and officer is conclusive as between themselves, whether such valuation be more or less than the actual value of the property; and parol evidence is not admissible to show that the value is different from that expressed in the receipt, in an action by the officer against the receiptor.[74]

Allen (Mass.) 187; Burt *v.* Perkins, 9 Gray (Mass.) 317; Butterfield *v.* Converse, 10 Cush. (Mass.) 317; Hodskin *v.* Cox, 7 Cush. (Mass.) 471; Wentworth *v.* Leonard, 4 Cush. (Mass.) 414; Jones *v.* Richardson, 10 Metc. (Mass.) 481; Dewey *v.* Field, 4 Metc. (Mass.) 381, 38 Am. Dec. 376.

Minnesota.— Mason *v.* Aldrich, 36 Minn. 283, 30 N. W. 884.

New Hampshire.— Holt *v.* Burbank, 47 N. H. 164; Haynes *v.* Tenney, 45 N. H. 183; Waitt *v.* Thompson, 43 N. H. 161, 80 Am. Dec. 136; Clement *v.* Little, 42 N. H. 563; Durgin *v.* Gage, 40 N. H. 302; Hill *v.* Wiggin, 31 N. H. 292; Phelps *v.* Gilchrist, 30 N. H. 171; Phelps *v.* Gilchrist, 28 N. H. 266; Scott *v.* Whittemore, 27 N. H. 309; Stevens *v.* Eames, 22 N. H. 568; Bruce *v.* Pettengill, 12 N. H. 341; Whitney *v.* Farwell, 10 N. H. 9; Morrison *v.* Blodgett, 8 N. H. 238, 29 Am. Dec. 653; Drown *v.* Smith, 3 N. H. 299.

Rhode Island.— Hartshorn *v.* Ives, 4 R. I. 471; Anthony *v.* Comstock, 1 R. I. 454.

Vermont.— Roberts *v.* Carpenter, 53 Vt. 678; Brown *v.* Gleed, 33 Vt. 147; Bowman *v.* Conant, 31 Vt. 479; Frost *v.* Kellogg, 23 Vt. 308; Pettes *v.* Marsh, 15 Vt. 454, 40 Am. Dec. 689; Kelly *v.* Dexter, 15 Vt. 310; Sibley *v.* Story, 8 Vt. 15.

Wisconsin.— Main *v.* Bell, 27 Wis. 517.

70. Humphreys *v.* Cobb, 22 Me. 380; Sanborn *v.* Buswell, 51 N. H. 573; Bruce *v.* Pettengill, 12 N. H. 341.

Where there is a palpable mistake in the wording of a receipt it may be corrected by the court, and that meaning given it which was plainly intended by the parties. Marion *v.* Faxon, 20 Conn. 486.

71. Clement *v.* Little, 42 N. H. 563; Bruce *v.* Pettengill, 12 N. H. 341; Ide *v.* Fassett, 45 Vt. 68.

That the receipt is more specific than the return in its description of property attached is no valid objection thereto. Clement *v.* Little, 42 N. H. 563.

Illustration.—Where plaintiff attached ten swarms of bees, and defendant receipted them, but no mention was made in the receipt or in the attachment of the hives in which they were, it was held that defendant was not liable for the hives under his receipt. Ide *v.* Fassett, 45 Vt. 68.

72. Perry *v.* Somerby, 57 Me. 552; Collins *v.* Brigham, 11 N. H. 420; McKormsby *v.* Morris, 29 Vt. 417; Rood *v.* Scott, 5 Vt. 263; Dudley *v.* Lamoille County Nat. Bank, 14 Fed. 217 (construing Vermont statute). But see Stanley *v.* Drinkwater, 43 Me. 468, where it was held that where a vessel was attached, and the officer took a receipt therefor, the attachment was thereby dissolved.

Receipt by nominal plaintiff.—A receipt for attached property given to the officer by the nominal plaintiff and another will not discharge or release the officer from his liability to have the property forthcoming when demanded on execution, if the suit was commenced and prosecuted for the benefit of a third party. McKormsby *v.* Morris, 29 Vt. 417.

73. Mitchell *v.* Gooch, 60 Me. 110; Harmon *v.* Moore, 59 Me. 428; Waterman *v.* Treat, 49 Me. 309, 77 Am. Dec. 261; Waterhouse *v.* Bird, 37 Me. 326.

74. *Connecticut.*— Enscoe *v.* Dunn, 44 Conn. 93, 26 Am. Rep. 430; Stevens *v.* Stevens, 39 Conn. 474; Jones *v.* Gilbert, 13 Conn. 507.

Maine.— Smith *v.* Mitchell, 31 Me. 287.

Massachusetts.— Jones *v.* Richardson, 10 Metc. (Mass.) 481; Wakefield *v.* Stedman, 12 Pick. (Mass.) 562.

New Hampshire.— Healey *v.* Hutchinson, 66 N. H. 316, 20 Atl. 332; Remick *v.* Atkinson, 11 N. H. 256, 35 Am. Dec. 493; Drown *v.* Smith, 3 N. H. 299.

Rhode Island.— Anthony *v.* Comstock, 1 R. I. 454.

Vermont.— Bowley *v.* Angire, 49 Vt. 41; Parsons *v.* Strong, 13 Vt. 235.

See 5 Cent. Dig. tit. "Attachment," § 612.

Action for injury to property — Effect of valuation.— Where the receiptor of property delivers it up in an injured condition and is sued by the officer for the injury, the receipt is only *prima facie* evidence of the value of the property, and parol evidence is admissible to show its true value. Bancroft *v.* Parker, 13 Pick. (Mass.) 192.

c. Upon Right of Receiptor to Assert Title or Lien — (I) *In General.* In an action upon a simple accountable receipt, in which there is a mere promise to redeliver the property to the attaching officer, with no direct admission of defendant's title, the receiptor may, in defense, assert his own title to, or lien on, the property, or that of another to whom he has returned it.[75]

(II) *Estoppel* — (A) *In Action on Receipt.* A receiptor may, however, estop himself to deny, in an action on his receipt, the debtor's title to the attached property. Thus, after an express admission of such title, with a promise to return the goods, or pay the judgment, not to exceed the stipulated valuation of the property;[76] after conduct on the part of the receiptor, who himself owns, or has a lien upon, the goods which induces the officer to believe that they belong to the debtor;[77] where the contract is a mere substitute for the security by attachment, and is, in effect, but an agreement to indemnify the officer for not making an attachment;[78] or where, although the property was not in fact attachable, the officer is still liable, either to plaintiff, defendant, or the true owner,[79] the receiptor is estopped to deny the title of the debtor.

75. *Connecticut.*— Dayton *v.* Merritt, 33 Conn. 184; Jones *v.* Gilbert, 13 Conn. 507. See also Parks *v.* Sheldon, 36 Conn. 466, 4 Am. Rep. 95.

Maine.— Wilson *v.* Ladd, 49 Me. 73; Penobscot Boom Corp. *v.* Wilkins, 27 Me. 345; Lathrop *v.* Cook, 14 Me. 414, 31 Am. Dec. 62; Fisher *v.* Bartlett, 8 Me. 122, 22 Am. Dec. 225. See also Sawyer *v.* Mason, 19 Me. 49.

Massachusetts.— Lewis *v.* Webber, 116 Mass. 450; Burt *v.* Perkins, 9 Gray (Mass.) 317; Townsend *v.* Newell, 14 Pick. (Mass.) 332; Learned *v.* Bryant, 13 Mass. 224.

New Hampshire.— Whittredge *v.* Maxam, 68 N. H. 323, 44 Atl. 491; Healey *v.* Hutchinson, 66 N. H. 316, 20 Atl. 332; Tucker *v.* Adams, 63 N. H. 361; Barron *v.* Cobleigh, 11 N. H. 557, 35 Am. Dec. 505; Webster *v.* Harper, 7 N. H. 594. See also Scott *v.* Whittemore, 27 N. H. 309.

Vermont.— Halbert *v.* Soule, 57 Vt. 358; Adams *v.* Fox, 17 Vt. 361.

Contra, Cornell *v.* Dakin, 38 N. Y. 253; People *v.* Reeder, 25 N. Y. 302; Dezell *v.* Odell, 3 Hill (N. Y.) 215, 38 Am. Dec. 628; Burrall *v.* Acker, 23 Wend. (N. Y.) 606, 35 Am. Dec. 582.

See 5 Cent. Dig. tit. "Attachment," § 620.

Reservation of right to assert lien.—Where goods were attached in the hands of one who had a lien on them, who receipted therefor, under an agreement that he should continue to retain for his lien, and afterward they were attached at his own suit, and he receipted for them, still asserting his lien, it was held that his lien was not discharged. Townsend *v.* Newell, 14 Pick. (Mass.) 332. See also Wilson *v.* Ladd, 49 Me. 73.

Assertion of partnership title.— Where a sheriff attaching partnership goods as the property of a member of the firm takes a receipt for them from another member and leaves them in possession of the firm, the paramount partnership title is a defense in an action on the receipt. Tucker *v.* Adams, 63 N. H. 361.

Assertion of title in mortgagee — Demand. — A receiptor for property attached cannot justify non-delivery thereof on demand, by showing that the same was mortgaged, if the mortgagee has made no demand upon him for the property. Scott *v.* Whittemore, 27 N. H. 309.

Burden of proof.— In an action by an attaching officer against a receiptor the burden of proof that the property did not belong to the person as whose it was attached is upon defendant. Burt *v.* Perkins, 9 Gray (Mass.) 317.

76. Drew *v.* Livermore, 40 Me. 266; Penobscot Boom Corp. *v.* Wilkins, 27 Me. 345; Bacon *v.* Daniels, 116 Mass. 474; Bursley *v.* Hamilton, 15 Pick. (Mass.) 40, 25 Am. Dec. 433.

In an action on a receipt under seal, where the receiptor agreed that the goods attached as the property of defendant were defendant's property, and that on demand he would return them to the attaching officer, or pay him the amount of the debt and costs recovered in the suit, evidence that some of the goods were not the property of defendant at the time of the attachment, and that the others were not attachable was held inadmissible in defense. Bacon *v.* Daniels, 116 Mass. 474.

77. Sawyer *v.* Mason, 19 Me. 49; Dewey *v.* Field, 4 Metc. (Mass.) 381, 38 Am. Dec. 376; Easton *v.* Goodwin, 22 Minn. 426; Clement *v.* Little, 42 N. H. 563.

Admission of ownership by defendant receiptor.—Where goods were levied on as the property of defendant who gave a receipt for them to the sheriff admitting they were his, and that they were of a certain value, it was held that the sheriff having acted on the faith of such receipt, defendant was estopped to deny that he had no leviable interest in the property. Easton *v.* Goodwin, 22 Minn. 426.

78. Staples *v.* Fillmore, 43 Conn. 510; Lewis *v.* Webber, 116 Mass. 450; Thayer *v.* Hunt, 2 Allen (Mass.) 449; Mason *v.* Aldrich, 36 Minn. 283, 30 N. W. 884. See also Spear *v.* Hill, 54 N. H. 87.

79. Clark *v.* Gaylord, 24 Conn. 484; Harris *v.* Morse, 49 Me. 432, 77 Am. Dec. 269; Smith *v.* Cudworth, 24 Pick. (Mass.) 196.

(B) *In Action by Receiptor For Wrongful Attachment.* A receiptor is not estopped to set up title to attached property in himself, in an action brought by him for the wrongful attachment.[80]

6. Rights, Duties, and Liabilities of Receiptor — a. In General. A receiptor's liability upon his undertaking is dependent upon its terms,[81] but it may be stated generally that such liability is limited by that of the attaching officer; and when that is discharged the receiptor can no longer be held.[82]

b. Conversion of Property. The receiptor of attached property is treated as only the temporary bailee thereof, and is liable at any time to be called to account, if guilty of converting the property by any abuse, wrongful use, or refusal to deliver on demand;[83] but mere negligence or non-feasance of the receiptor in

80. Edmunds *v.* Hill, 133 Mass. 445; Robinson *v.* Mansfield, 13 Pick. (Mass.) 139; Johns *v.* Church, 12 Pick. (Mass.) 557, 23 Am. Dec. 651; Morse *v.* Hurd, 17 N. H. 246.

81. Waterman *v.* Treat, 49 Me. 309, 77 Am. Dec. 261; Mason *v.* Aldrich, 36 Minn. 283, 30 N. W. 884.

Where several receipts are given at the same time, by the same receiptor for the same property, attached on several different writs, whether they are to be regarded as one contract, or as each standing upon its own ground, as if it were the sole receipt given, will depend upon the language of the contracts and the intent of the party signing them. Enscoe *v.* Dunn, 44 Conn. 93, 26 Am. Rep. 430; Haynes *v.* Tenney, 45 N. H. 183.

Liability on attachment subsequent to receipt.— One who has receipted for the redelivery of property or the payment of a sum of money is not liable on the receipt for an attachment of the same property, returned upon a new writ on the next day, antedated so as to correspond with the receipt, although at the time the receipt was given, it was expected that the new writ would issue upon which the property was to be attached. Waterman *v.* Treat, 49 Me. 309, 77 Am. Dec. 261. See also French *v.* Watkins, Smith (N. H.) 49.

82. *Connecticut.*— Pond *v.* Cummins, 50 Conn. 372; Dayton *v.* Merritt, 33 Conn. 184; Fowler *v.* Bishop, 31 Conn. 560; Cole *v.* Wooster, 2 Conn. 203.

Maine.— Shepherd *v.* Hall, 77 Me. 569, 1 Atl. 696; Torrey *v.* Otis, 67 Me. 573; Mitchell *v.* Gooch, 60 Me. 110; Harmon *v.* Moore, 59 Me. 428; Plaisted *v.* Hoar, 45 Me. 380; Moulton *v.* Chapin, 28 Me. 505; Sawyer *v.* Mason, 19 Me. 49. *Compare* Farnham *v.* Gilman, 24 Me. 250, where an attorney, to whom a demand had been intrusted for the purpose of receiving or securing the amount due, authorized an officer, who might receive a writ thereon, to take the receipt of a certain individual for the goods which the former directed to be attached, and it was held that the fact that by such proceeding the officer was discharged from his liability for not retaining possession did not release those who had given the receipt.

Massachusetts.—Shumway *v.* Carpenter, 13 Allen (Mass.) 68; Parker *v.* Warren, 2 Allen (Mass.) 187; Colwell *v.* Richards, 9 Gray (Mass.) 374; Butterfield *v.* Converse, 10 Cush. (Mass.) 317; Webster *v.* Coffin, 14 Mass. 196.

New Hampshire.— Richardson *v.* Bailey, 69 N. H. 384, 41 Atl. 263, 76 Am. St. Rep. 176; Holt *v.* Burbank, 47 N. H. 164; Hill *v.* Wiggin, 31 N. H. 292.

Vermont.— Roberts *v.* Carpenter, 53 Vt. 678; Ide *v.* Fassett, 45 Vt. 68; Frost *v.* Kellogg, 23 Vt. 308; Allen *v.* Carty, 19 Vt. 65.

Wisconsin.— Bell *v.* Shafer, 58 Wis. 223, 16 N. W. 628; Main *v.* Bell, 27 Wis. 517.

See 5 Cent. Dig. tit. "Attachment," § 614.

Where attached property has perished without the officer's fault he is not liable, nor is a receiptor of such property liable on his receipt, when it has perished without his fault. Ide *v.* Fassett, 45 Vt. 68.

Liability on receipt for partnership property.—A receiptor for property belonging to a firm, attached for the debt of one of the partners, cannot be charged by the sheriff, if he suffered it to remain in possession of the partners, since the sheriff could not take the property and was under no liability to the owners. Hill *v.* Wiggin, 31 N. H. 292.

Liability under void attachment.—A receiptor of goods unlawfully attached, who has redelivered them to the debtor, is not liable therefor on his receipt, stipulating to pay a certain amount or redeliver the property. Harmon *v.* Moore, 59 Me. 428.

83. Baker *v.* Fuller, 21 Pick. (Mass.) 318 (where the goods were delivered to an adverse claimant); Cross *v.* Brown, 41 N. H. 283; Scott *v.* Whittemore, 27 N. H. 309; Stevens *v.* Eames, 22 N. H. 568; Clark *v.* Morse, 10 N. H. 236 (sale of property notwithstanding title passed thereby).

Allowing attachment of receipted goods.— Where a receiptor of property attached in a suit in Massachusetts, having taken the property to his residence in a neighboring state, there pointed it out to an officer, and permitted it to be attached and taken from him on a writ sued out by plaintiff in the first action, returnable to the courts of the latter state, it was held that the receiptor was not liable in trover to defendant on plaintiff's abandoning the suit in Massachusetts. The second attachment being legal and rightful, the act of defendant in pointing out the property to the officer and permitting him to attach and take it was not wrongful and did not amount to a conversion for which the ac-

respect to the care of the property, whereby it becomes damaged, is not equivalent to a conversion.[84]

e. Indemnity or Reimbursement of Receiptor. A receiptor cannot claim reimbursement for money paid out by him on an execution against an attachment debtor where the execution has already been satisfied by an extent on the debtor's lands;[85] but where he has received a bond to indemnify him for having given a receipt to an officer for attached goods, he is damnified by an attachment of his property in a suit on his receipt, and may thereupon bring an action on his bond.[86]

d. Redelivery of Property — (I) *In General* — (A) *Duty to Redeliver on Demand.* The attaching officer has a right, at any time, to reclaim the attached property, either from his bailee or from defendant,[87] if the bailee has allowed it to go back into the latter's possession;[88] and it is the duty of the bailee or receiptor, upon demand, to redeliver the identical property.[89]

(B) *Right to Redeliver Before Demand.* One who signs a receipt for goods

tion would lie. Chase *v.* Andrews, 6 Cush. (Mass.) 114.

Purchase by receiptor.—A receiptor of attached goods may purchase them from the debtor after delivery to the latter and will succeed to all his rights. Weston *v.* Dorr, 25 Me. 176, 43 Am. Dec. 259.

Waiver by sheriff.— If the sheriff to whom a receipt for property is given assent to the conversion of the same by the receiptor to pay the receiptor's debt he thereby waives his claim upon the receipt. Stevens *v.* Eames, 22 N. H. 568.

84. Tinker *v.* Morrill, 39 Vt. 477, 94 Am. Dec. 345.

85. Woodward *v.* Munson, 126 Mass. 102.

86. Otis *v.* Blake, 6 Mass. 336.

87. **Reclamation from third person.**— If property be attached and receipted, and has passed from the receiptor's hands into the possession of another person, who knows of the attachment and gives the receiptor a bond to indemnify him against the receipt, the officer has the right to take the property out of such person's hands at any time during the pendency of the attachment. Briggs *v.* Mason, 31 Vt. 433.

88. *Connecticut.*— Parks *v.* Sheldon, 36 Conn. 466, 4 Am. Rep. 95.

Indiana.— Kendallville First Nat. Bank *v.* Stanley, 4 Ind. App. 213, 30 N. E. 799.

Maine.— Bangs *v.* Beacham, 68 Me. 425; Carr *v.* Farley, 12 Me. 328.

Massachusetts.— Bond *v.* Padelford, 13 Mass. 394.

New Hampshire.— Phelps *v.* Gilchrist, 30 N. H. 171.

Vermont.— Gilbert *v.* Crandall, 34 Vt. 188; Kelly *v.* Dexter, 15 Vt. 310; Rood *v.* Scott, 5 Vt. 263; Pierson *v.* Hovey, 1 D. Chipm. (Vt.) 51.

89. *Connecticut.*— Doolan *v.* Wilson, 73 Conn. 446, 47 Atl. 653; Fitch *v.* Chapman, 28 Conn. 257.

Maine.— Bangs *v.* Beacham, 68 Me. 425; Bicknell *v.* Lewis, 49 Me. 91; Gilmore *v.* McNeil, 46 Me. 532.

Massachusetts.— Jenney *v.* Rodman, 16 Mass. 464.

New Hampshire.— Holt *v.* Burbank, 47 N. H. 164; Phelps *v.* Gilchrist, 30 N. H. 171, 28 N. H. 266; Scott *v.* Whittemore, 27 N. H. 309; Drown *v.* Smith, 3 N. H. 299.

Ohio.— Bassett *v.* Baker, Wright (Ohio) 237. But see Pugh *v.* Calloway, 10 Ohio St. 488.

Vermont.— Polley *v.* Hazard, 70 Vt. 220, 40 Atl. 36; Brown *v.* Gleed, 33 Vt. 147; Paul *v.* Burton, 32 Vt. 148; Bowman *v.* Conant, 31 Vt. 479; Sewell *v.* Sowles, 13 Vt. 171; Page *v.* Thrall, 11 Vt. 230; Catlin *v.* Lowrey, 1 D. Chipm. (Vt.) 396.

Wisconsin.— Single *v.* Barnard, 29 Wis. 463.

Where an aggregate value is affixed to the property receipted for the receiptors are bound on demand to return the articles attached without exception. Bicknell *v.* Lewis, 49 Me. 91. See also Gilmore *v.* McNeil, 46 Me. 532; Drown *v.* Smith, 3 N. H. 299.

After expiration of attachment lien.— Where property attached has been delivered by the officer to a receiptor on his promise to redeliver it on demand, and the lien of the attachment has expired, the receiptor is still bound to deliver the property on demand to the officer, unless he is himself the owner of it, has already delivered it to the owner, or has authority from the latter to hold possession of the same. Fitch *v.* Chapman, 28 Conn. 257.

Sufficiency of offer to deliver.— Certain cumbrous articles of machinery were attached by an officer in a shop where they were used, and bailed to defendant with the understanding that such use should continue. In trover for the property it appeared that the officer, in the street and near the shop, demanded the articles of defendant who offered to go at once to the shop and deliver them, but the officer failed to go there or to designate another place of delivery. It was held that the shop was the proper place for delivery and that there was no proof of a conversion. Durgin *v.* Gage, 40 N. H. 302.

Effect of discharge of officer.— If the attaching officer's liability has been discharged the bailee will be accountable for the goods to some other party, and is not bound to deliver them to the officer, or to account for them to him in any other way. Holt *v.* Burbank, 47 N. H. 164.

attached, agreeing to redeliver them to the attaching officer, or his order, on demand, cannot discharge himself by an offer to redeliver them before demand, unless expressly authorized so to do by the terms of his receipt,[90] but in case of a second attachment upon the receipted property, he may return the property to the custody of the officer, if he is unwilling to incur any further responsibility by reason of such attachment.[91]

(11) *To Debtor.* When property attached is receipted for and redelivered to the debtor the receiptor is liable therefor to the officer, whether by the receipt and redelivery he becomes a bailee and servant of the officer to keep the goods as in the custody of the law, or an original contractor, bound at his peril to have the goods forthcoming according to the terms of the receipt.[92]

7. Release and Discharge of Receiptor — a. Who May Release. As a rule, the attaching officer[93] may release the receiptor from liability, but where he has made an equitable assignment of the receipt to the creditor he is no longer competent to do so.[94] So too the attaching creditor may release the receiptor from liability by releasing his judgment against the debtor; but it has been said that he cannot do so while he retains such judgment, and has taken the necessary steps to perfect his lien under his attachment.[95]

b. What Matters Will Release or Discharge — (1) *Death of Live Stock.* Where live stock which has been attached and receipted for dies without the receiptor's fault, before the time limited for its delivery, he is released from liability.[96]

90. Rowland *v.* Cooper, 16 Gray (Mass.) 53.

91. Whitney *v.* Farwell, 10 N. H. 9.

92. Thayer *v.* Hunt, 2 Allen (Mass.) 449; Baker *v.* Warren, 6 Gray (Mass.) 527; Wentworth *v.* Leonard, 4 Cush. (Mass.) 414; Pollard *v.* Graves, 23 Pick. (Mass.) 86; Waitt *v.* Thompson, 43 N. H. 161, 80 Am. Dec. 136; Whitney *v.* Farwell, 10 N. H. 9; Webster *v.* Harper, 7 N. H. 594; Swett *v.* Horn, Smith (N. H.) 429; Flanagan *v.* Hoyt, 36 Vt. 565, 86 Am. Dec. 675; Soule *v.* Austin, 35 Vt. 515.

The law recognizes the receiptor's right to redeliver to the debtor, and then considers his receipt as in effect a contract to pay the demand upon which the property was attached, as he is in such case liable only to that extent. If plaintiff fails to recover a judgment, the receiptor is discharged. Whitney *v.* Farwell, 10 N. H. 9. See also Webster *v.* Harper, 7 N. H. 594.

Effect on attachment lien —As between the officer and the debtor, an attachment is not dissolved by taking a receipt and allowing the property to pass back into the hands of the debtor; as to third persons, without notice, the attachment is dissolved. Mitchell *v.* Gooch, 60 Me. 110; Small *v.* Hutchins, 19 Me. 255; Robinson *v.* Mansfield, 13 Pick. (Mass.) 139; Buzzell *v.* Hardy, 58 N. H. 331; Rowe *v.* Page, 54 N. H. 190; Whitney *v.* Farwell, 10 N. H. 9; Dunklee *v.* Fales, 5 N. H. 527; Swett *v.* Horn, Smith (N. H.) 429; Soule *v.* Austin, 35 Vt. 515.

Badge of fraud.—Where plaintiff receiptor delivered the property to a minor son of defendant to keep and care for, and the son immediately put them back upon the farm of the father visibly in the same situation as they were when attached, it was held that this constituted a badge of fraud in relation to a subsequent creditor of the father and would be conclusive evidence of fraud, unless explained by most satisfactory reasons. Burrows *v.* Stoddard, 3 Conn. 160.

Competency of receiptor as witness.— Where personal property was attached by a deputy sheriff, and at the request of defendant a third person receipted therefor, who agreed to indemnify the officer against the consequences of intrusting the property to him, and the property was delivered by the receiptor to defendant, it was held that the receiptor was interested in the event of the suit, and was therefore incompetent as a witness for defendant. Pollard *v.* Graves, 23 Pick. (Mass.) 86.

93. Release by sheriff of receiptor to deputy.—Where personal property was attached by a deputy sheriff, and, at the request of defendant, a third person receipted therefor and agreed to indemnify the officer against the consequences of intrusting the property to him, the property was delivered by the receiptor to defendant and the sheriff released the receiptor and discharged the attachment, it was held that the receiptor was not made a competent witness in the suit thereby, for the lien of the attachment having been discharged by the redelivery of the property to defendant, the receiptor became personally responsible on his obligation to the deputy sheriff, which responsibility the release of the sheriff did not affect. Pollard *v.* Graves, 23 Pick. (Mass.) 86 [*distinguishing* Baker *v.* Fuller, 21 Pick. (Mass.) 318, on the ground that in the latter case the property had been delivered by the deputy sheriff to defendant for safe-keeping only, and the attachment had not been discharged].

94. Jewett *v.* Dockray, 34 Me. 45.

95. Torrey *v.* Otis, 67 Me. 573.

96. Shaw *v.* Laughton, 20 Me. 266; Cross *v.* Brown, 41 N. H. 283.

(II) *Discharge of Officer.* Where the officer's liability for attached property has been discharged, the receiptor is not bound to deliver it to him or to account to him therefor in any way.[97]

(III) *Dissolution of Attachment.* Upon the dissolution of the attachment the receiptor is relieved of his liability, if the attached property has gone back into the hands of the owner.[98]

(IV) *Execution Against Body of Debtor.* The liability of a receiptor for goods attached which have not been delivered up by him upon seasonable demand is not discharged by the subsequent commitment of the debtor on the execution.[99]

(V) *Forbearance to Enforce Receipt.* An agreement between plaintiff and defendant in an action in which the property has been attached and receipted for to the officer by a third person, that plaintiff shall not enforce the receipt until after a specified time, and a forbearance to enforce it accordingly, will not discharge the receiptor from his liability to the officer, although the agreement is made without his consent or authority.[1]

(VI) *Increase of Liability.* A receiptor of attached property is not discharged from liability upon his receipt by any proceedings in the action in which the receipt is given which do not increase his liability or modify, to his prejudice, his contract, as expressed in the receipt.[2]

(VII) *Insolvency or Bankruptcy of Debtor.* Where an attachment has been dissolved by the insolvency or bankruptcy of the debtor a receiptor for the attached property is discharged from liability upon his undertaking, if the property has gone back into the hands of the debtor, or if he delivers it to the assignee,[3] unless there is an order of court continuing the attachment for the benefit of the latter.[4]

97. See *supra*, XIII, C, 6, a. *Compare* Fitch *v.* Chapman, 28 Conn. 257.

98. Hayward *v.* George, 13 Allen (Mass.) 66; Berry *v.* Flanders, 69 N. H. 626, 45 Atl. 591.

99. Twining *v.* Foot, 5 Cush. (Mass.) 512, where the receiptor was held liable, although the debtor was taken on execution, and suit brought and judgment recovered thereon by the creditor against the debtor and his surety, for an escape, on a bond given by them for the prison limits. See also Bailey *v.* Jewett, 14 Mass. 155; Lyman *v.* Lyman, 11 Mass. 317; Winch *v.* Wright, Smith (N. H.) 175.

Commitment before reasonable time for delivery.— But in Jameson *v.* Ware, 6 Vt. 610, it was held that if after demand and before a reasonable time for delivery the debtor be committed on the execution and no alias is taken out the receiptor is excused from any delivery on that demand.

1. Ives *v.* Hamlin, 5 Cush. (Mass.) 534.

2. Stevens *v.* Bailey, 58 N. H. 564, where it was held that the receiptor was not discharged because the action was not entered on the return-day of the writ, it being subsequently entered on leave, and the receiptor being in no way prejudiced.

Amendment of writ.— The amendment of an action originally brought against two, by striking out the name of one of them, does not tend to increase the liability of the receiptor and will not discharge him from his responsibility. Smith *v.* Brown, 14 N. H. 67. See also Miller *v.* Clark, 8 Pick. (Mass.) 412, where the amendment was by filing a new count for the same cause of action contained in the original writ, and it was held that this did not discharge the receiptor.

3. *Connecticut.*— See Fowler *v.* Bishop, 31 Conn. 560.

Maine.— Mitchell *v.* Gooch, 60 Me. 110.

Massachusetts.— Wright *v.* Morley, 150 Mass. 513, 23 N. E. 232; Wright *v.* Dawson, 147 Mass. 384, 18 N. E. 1, 9 Am. St. Rep. 724; Lewis *v.* Webber, 116 Mass. 450; Shumway *v.* Carpenter, 13 Allen (Mass.) 68; Butterfield *v.* Converse, 10 Cush. (Mass.) 317; Andrews *v.* Southwick, 13 Metc. (Mass.) 535; Sprague *v.* Wheatland, 3 Metc. (Mass.) 416.

New Hampshire.—Whittredge *v.* Maxan, 68 N. H. 323, 44 Atl. 491. See also Batchelder *v.* Putnam, 54 N. H. 84, 20 Am. Rep. 115. *Compare* Lamprey *v.* Leavitt, 20 N. H. 544; Towle *v.* Robinson, 15 N. H. 408; Smith *v.* Brown, 14 N. H. 67.

Vermont.— Polley *v.* Hazard, 70 Vt. 220, 40 Atl. 36.

See, generally, BANKRUPTCY; INSOLVENCY.

Effect of fraud.—Where a debtor's goods have been attached and delivered to a receiptor prior to the debtor's discharge in bankruptcy, which, on being pleaded in bar of the suit, is declared void for fraud, the receiptor is liable to the officer on the receipt for the goods. Ives *v.* Sturgis, 12 Metc. (Mass.) 462.

Rights of trustee.—The purpose of the Connecticut act of 1860 (Conn. Gen. Stat. (1888) § 524) was to provide for the delivery to the trustee of the property actually taken, and that only, or its actual value, not to transfer to him any rights of the attaching creditor. Therefore a receiptor is not liable except so far as the property or its value has come into his hands. Fowler *v.* Bishop, 31 Conn. 560.

4. Parker *v.* Warren, 2 Allen (Mass.) 187.

(VIII) *PAYMENT OF JUDGMENT.* The payment of the judgment obtained in the action discharges a receiptor from liability upon his undertaking.[5]

(IX) *REDELIVERY OF PROPERTY TO OFFICER.* The redelivery of the receipted property to the officer, upon demand, discharges the receiptor from liability.[6]

(X) *SALE BY CONSENT OF PARTIES.* A sale of attached property by mutual consent of the officer, the attaching creditor, debtor, and receiptor, is an implied rescission of the contract evidenced by the receipt.[7]

(XI) *SUBSEQUENT ATTACHMENT.* A receiptor is discharged by the officer's taking the property into his own hands on a second attachment,[8] or by the levy of a subsequent attachment and sale upon execution, at the instance of plaintiff, or his attorney, after the first attachment.[9]

8. ACTION TO PROTECT POSSESSION. Although it has been held to the contrary,[10] the weight of authority is to the effect that a receiptor has such a special property in the goods receipted for by him that he may maintain an action against a person unlawfully interfering with his possession,[11] or that of his agent or servant.[12] Such an action may also be brought by the attaching officer.[13]

9. ACTION ON RECEIPT — a. In Whose Name Brought. An action against a receiptor of attached property for failure to redeliver on demand or to pay the stipulated amount should ordinarily be brought by the officer to whom the receipt was given,[14] or in his name for the benefit of the creditor or owner;[15] but where a receipt is taken by a deputy he may himself sue,[16] or suit may be brought by

5. Prescott *v.* Perkins, 16 N. H. 305; Paddock *v.* Palmer, 19 Vt. 581.

Payment pending suit on receipt.— Payment of the judgment by the debtor pending the action on the receipt cannot be set up in bar. Such payment is properly considered in the question of damages, but beyond that can have no legitimate effect to defeat a cause of action existing at its commencement. Stewart *v.* Platts, 20 N. H. 476.

Relief in equity.—Where a judgment is obtained against one who has given a receipt for attached property for the full amount of the creditor's claim, equity will relieve him from payment on the judgment of such amounts as may have been paid by the attachment defendant prior to its rendition. Paddock *v.* Palmer, 19 Vt. 581.

6. Bicknell *v.* Lewis, 49 Me. 91; Hartshorn *v.* Ives, 4 R. I. 471.

7. Kelly *v.* Dexter, 15 Vt. 310, where such a sale was held to discharge the receiptors from liability, notwithstanding it might have been made under the direction of the receiptors and operated for their benefit and the avails of the sale were paid into their hands.

8. Young *v.* Walker, 12 N. H. 502; Webster *v.* Harper, 7 N. H. 594; Rood *v.* Scott, 5 Vt. 263.

9. Beach *v.* Abbott, 4 Vt. 605. See also Rider *v.* Sheldon, 56 Vt. 459. *Compare* Mason *v.* Whipple, 32 Vt. 554.

10. Warren *v.* Leland, 9 Mass. 265; Perley *v.* Foster, 9 Mass. 112; Ludden *v.* Leavitt, 9 Mass. 104, 6 Am. Dec. 45.

11. Peters *v.* Stewart, 45 Conn. 103, 29 Am. Rep. 663; Whitney *v.* Farwell, 10 N. H. 9; Poole *v.* Symonds, 1 N. H. 289, 8 Am. Dec. 71. See also Bowman *v.* Gove, 11 N. H. 265.

12. Burrows *v.* Stoddard, 3 Conn. 160.

13. Carr *v.* Farley, 12 Me. 328; Houston *v.* Blake, 43 N. H. 115.

Property retained by debtor upon given security.— If property attached is allowed to remain in the possession of the debtor on security being given under the Maine statute of 1821, c. 60, § 34 (providing for the retention by the debtor of horses, neat cattle, etc., which have been attached, upon his giving security to the attaching officer) and they are afterward attached by another officer on another writ and removed, the owner cannot, either as bailee of the first attaching officer or as receiptor to him for the property, support an action of replevin for the property against the second attaching officer or his bailee. The first attaching officer may maintain a suit for the removal if prejudiced thereby. Brown *v.* Crockett, 22 Me. 537.

14. Smith *v.* Wadleigh, 18 Me. 95; Parker *v.* Warren, 2 Allen (Mass.) 187; Whittier *v.* Smith, 11 Mass. 211; Maxfield *v.* Scott, 17 Vt. 634.

A person specially authorized to serve a writ, who serves the same by attaching property and delivers the property to a receiptor, may maintain an action upon the receipt against such receiptor in his own name, if the receiptor, after due demand by a legal officer, refuse to deliver the property to be disposed of upon the execution. Maxfield *v.* Scott, 17 Vt. 634.

An officer who is not accountable for attached property, either to the owner or to the attaching creditor, cannot maintain an action for breach of the written agreement to return the property to him to be sold on execution. Pond *v.* Cummins, 50 Conn. 372.

15. Hapgood *v.* Fisher, 30 Me. 502; Moore *v.* Fargo, 112 Mass. 254. See also Davis *v.* Maloney, 79 Me. 110, 8 Atl. 350.

16. Bradbury *v.* Taylor, 8 Me. 130; West *v.* Thompson, 27 Vt. 613; Spencer *v.* Williams, 2 Vt. 209, 19 Am. Dec. 711.

After expiration of official term.—Where a

his principal.[17] The attaching creditor acquires no such interest in the property as to give him a right of action against the receiptor.[18]

b. Form of Action. If the officer's liability for the goods continues, and the bailee refuses to deliver them on demand, or has converted them before demand, he is liable to the officer in assumpsit on his undertaking to keep the goods and deliver them on demand, or in trover for the conversion.[19] An action on the case will also lie against a receiptor for failure to redeliver the attached property.[20]

c. Demand — (I) *Necessity of* — (A) *Upon Receiptor.* The necessity of a demand upon the receiptor for the redelivery of attached property, in order to fix his liability to the officer, is dependent upon the terms of the undertaking. Where the contract is simply to return the property upon demand,[21] a demand is a condition precedent to a right of action;[22] but where the promise is in the alternative, to redeliver on demand, or, if no demand be made, to do so within a specified time — usually within the life of the execution that may issue — no demand is necessary after the expiration of such period.[23] A demand is unnecessary where the receiptor has put it out of his power to return the property.[24]

(B) *Upon Attaching Officer.* The liability of the receiptor being measured by that of the officer,[25] a failure on the part of the officer holding the execution to make due demand upon the attaching officer, whereby he is released from liability, will discharge the receiptor.[26]

deputy sheriff bailed goods that he had attached, the sheriff's term of office and, of course, that of the deputy, expired before judgment was recovered, and the new sheriff seasonably demanded the goods of the deputy, it was held that he, being liable to the attaching creditor, might maintain an action for the property against the bailee. Bradbury *v.* Taylor, 8 Me. 130.

17. Smith *v.* Wadleigh, 18 Me. 95; Baker *v.* Fuller, 21 Pick. (Mass.) 318; Sibley *v.* Story, 8 Vt. 15; Spencer *v.* Williams, 2 Vt. 209, 19 Am. Dec. 711.

18. Meshew *v.* Gould, 30 La. Ann. 163. See also *supra*, XIII, A; XIII, B, 2, a.

But by action in the name of the attaching officer, the creditor can enforce payment by the receiptor on a receipt for the delivery of property attached, although the officer's liability in making the attachment has been discharged. Hapgood *v.* Fisher, 30 Me. 502.

19. Holt *v.* Burbank, 47 N. H. 164; Stevens *v.* Eames, 22 N. H. 568; Webb *v.* Steele, 13 N. H. 230; Cargill *v.* Webb, 10 N. H. 199; Tinker *v.* Morrill, 39 Vt. 477, 94 Am. Dec. 345; Brown *v.* Gleed, 33 Vt. 147; West *v.* Thompson, 27 Vt. 613; Pettes *v.* Marsh, 15 Vt. 454, 40 Am. Dec. 689; Sibley *v.* Story, 8 Vt. 15.

Trover will lie against the receiptor of property attached, whether action be brought by the sheriff, to whom the receipt is given, or in his name, for the benefit of those whose rights are to be affected. Stevens *v.* Eames, 22 N. H. 568. But trover cannot be sustained by an attaching officer against the receiptors of attached property where the property becomes materially damaged or lessened in value through their negligence merely, such negligence not being regarded as equivalent to a conversion. Tinker *v.* Morrill, 39 Vt. 477, 94 Am. Dec. 345.

20. Baker *v.* Fuller, 21 Pick. (Mass.) 318.

21. Duty to deliver upon demand.—When demand is made the receiptor's liability to the officer is absolute and the right of action of the officer is immediate and irrespective of the question whether the property will be needed for the payment of the debt. Parks *v.* Sheldon, 36 Conn. 466, 4 Am. Rep. 95; Foss *v.* Norris, 70 Me. 117; Hill *v.* Wiggin, 31 N. H. 292.

Waiver.—After a demand by an officer for property receipted for, an offer by him to receive it upon terms which are not complied with, is not a waiver of his previous demand. Scott *v.* Whittemore, 27 N. H. 309.

22. Buel *v.* Metcalf, Kirby (Conn.) 40; Hinckley *v.* Bridgham, 46 Me. 450; Bicknell *v.* Hill, 33 Me. 297; Fowles *v.* Pindar, 19 Me. 420; Knap *v.* Sprague, 9 Mass. 258, 6 Am. Dec. 64; Ide *v.* Fassett, 45 Vt. 68; Tinker *v.* Morrill, 39 Vt. 477, 94 Am. Dec. 345; Carpenter *v.* Snell, 37 Vt. 255; Dewey *v.* Fay, 34 Vt. 138; Jameson *v.* Ware, 6 Vt. 610; Strong *v.* Hoyt, 2 Tyler (Vt.) 208.

23. Durgin *v.* Barker, (Me. 1886) 5 Atl. 261; Hunter *v.* Peaks, 74 Me. 363; Low *v.* Dunham, 61 Me. 566; Shaw *v.* Laughton, 20 Me. 266; Parker *v.* Warren, 2 Allen (Mass.) 187; Hodskin *v.* Cox, 7 Cush. (Mass.) 471; Wentworth *v.* Leonard, 4 Cush. (Mass.) 414.

24. Parker *v.* Warren, 2 Allen (Mass.) 187; Webster *v.* Coffin, 14 Mass. 196; Stevens *v.* Eames, 22 N. H. 568. But see Bicknell *v.* Hill, 33 Me. 297, where it was held that the fact that the receiptor was unable to redeliver the property would not relieve the officer of the duty to make demand. *Compare* Gilmore *v.* McNeil, 46 Me. 532, where it was held that a demand upon a receiptor, which under other circumstances would be insufficient, will be sufficient, when he has disposed of the property, and thus prevented himself from complying with a demand properly made. See also Farnham *v.* Gilman, 24 Me. 250.

25. See *supra*, XIII, C, 6, a.

26. Shepherd *v.* Hall, 77 Me. 569, 1 Atl. 696; Hapgood *v.* Hill, 20 Me. 372. See also

(II) *Sufficiency*[27]—(A) *In General.* A "legal demand" means a demand properly made as to form, time, and place, by a person lawfully authorized, and may be made before or after judgment in the suit in which the property has been attached.[28]

(B) *By Whom Made.* A demand on a receiptor for the redelivery of attached property is regularly made by the officer to whom the receipt was given, or by his duly authorized agent;[29] but it may be made by any officer holding the execution and receipt, upon showing his authority,[30] and offering to return the receipt upon the redelivery of the property.[31]

(C) *Upon Whom Made.* A personal demand should be made upon the receiptor himself,[32] or, if he be dead, upon his personal representative,[33] although an unsuccessful demand made upon the wife of a receiptor, at his dwelling-house, during his absence from the state, has been held sufficient to charge him.[34] In the case of joint receiptors a demand upon one will be sufficient to charge all, in an action *ex contractu*,[35] but not in an action *ex delicto*.[36]

(D) *Time of Demand.* A demand may be made upon a receiptor for the return of attached property at any time within the life of the attachment lien. If not made within the statutory time within which execution must issue in order to the preservation of the lien, the receiptor is discharged upon the return of the property into the hands of the owner.[37]

Allen *v.* Carty, 19 Vt. 65, where it was held that if the execution is delivered to another officer and the property is demanded of the attaching officer in season to charge him, it is not necessary that it should also be demanded of the receiptor within thirty days after judgment.

Effect of equitable assignment.—Where an officer takes a receipt for property he has attached, and returns it with the writ to the attorney, who after judgment delivers the execution and receipt to another officer who makes demand upon the receiptor within thirty days after judgment, this will be sufficient to hold the receiptor without any demand upon the officer who attached the property. Cross *v.* Brown, 41 N. H. 283.

27. For forms of demand on receiptors for attached property see Phelps *v.* Gilchrist. 28 N. H. 266, 30 N. H. 171.

28. Foss *v.* Norris, 70 Me. 117.

Reasonable demand.— The legal construction of a contract to deliver property on demand is that a reasonable demand is to be made. Higgins *v.* Emmons, 5 Conn. 76, 13 Am. Dec. 41.

Sufficiency of demand on officer.—As maturing the attaching officer's right of action against a receiptor, a demand of property attached, in whatever words made, upon the attaching officer, is sufficient if it inform him that the sheriff having the execution desires to obtain it from him. Hapgood *v.* Hill, 20 Me. 372.

29. Demand by deputy.—It is no valid objection to a demand for the return of attached property in the hands of a receiptor, that the sheriff's deputy called upon the receiptor to redeliver the article or, in default thereof, to pay according to his alternative stipulation. Foss *v.* Norris, 70 Me. 117.

30. Showing of authority.— Where an officer has attached property and delivered it to a receiptor, another officer on making demand upon the receiptor for such property must state by what authority he makes it. Phelps *v.* Gilchrist, 28 N. H. 266. See also Walbridge *v.* Smith, Brayt. (Vt.) 173.

Waiver.— Where an attaching officer takes a receipt for the return of the property to "his order," the authority of another officer to whom he has given the receipt and execution, to demand the property of the receiptor, if not questioned at the time of the demand, may be considered as admitted. Moore *v.* Fargo, 112 Mass. 254. See also Phelps *v.* Gilchrist, 28 N. H. 266.

31. Davis *v.* Maloney, 79 Me. 110, 8 Atl. 350; Hinckley *v.* Bridgham, 46 Me. 450; Bradbury *v.* Taylor, 8 Me. 130; Moore *v.* Fargo, 112 Mass. 254; Phelps *v.* Gilchrist, 28 N. H. 266; Stewart *v.* Platts, 20 N. H. 476; Davis *v.* Miller, 1 Vt. 9; Walbridge *v.* Smith, Brayt. (Vt.) 173.

32. Sanborn *v.* Buswell, 51 N. H. 573; Phelps *v.* Gilchrist, 28 N. H. 266.

33. Carpenter *v.* Snell, 37 Vt. 255.

34. Mason *v.* Briggs, 16 Mass. 453. See also Moore *v.* Fargo, 112 Mass. 254, where, however, the court refused to determine the question whether the demand upon the wife was sufficient — the receiptor, at the time, being himself upon the farm — since the point was not raised at the trial.

35. Griswold *v.* Plumb, 13 Mass. 298.

36. White *v.* Demary, 2 N. H. 546.

37. *Connecticut.*— Jones *v.* Gilbert, 13 Conn. 507; Higgins *v.* Emmons, 5 Conn. 76, 13 Am. Dec. 41; Parsons *v.* Phillips, 1 Root (Conn.) 481; Buel *v.* Metcalf, Kirby (Conn.) 40.

Maine.— Fowles *v.* Pindar, 19 Me. 420.

Massachusetts.— Knap *v.* Sprague, 9 Mass. 258, 6 Am. Dec. 64.

New Hampshire.— Stewart *v.* Platts, 20 N. H. 476.

Vermont.— Carpenter *v.* Snell, 37 Vt. 255; Dewey *v.* Fay, 34 Vt. 138; Strong *v.* Hoyt, 2 Tyler (Vt.) 208.

Computation of time.— In computing the time within which demand must be made

(E) *Place of Demand.* The receiptor's dwelling-house has been held to be the proper place at which to make demand,[38] and if made elsewhere he is entitled to a reasonable time within which to make delivery.[39] The demand need not of necessity be made at the place where the property must be received.[40]

d. Declaration or Complaint. A declaration or complaint on a receipt taken by an officer for property attached on mesne process should contain sufficient averments to show the attachment, the preservation of the attachment lien, and a sufficient demand upon the receiptor, where such demand is necessary to fix his liability, together with his neglect or refusal to redeliver the property.[41] It need not set out the writ and after proceedings,[42] that the officer who served the original writ was therein commanded to attach any certain amount,[43] or that judgment or execution had been obtained against attachment defendant.[44]

e. Defenses and Estoppel — (I) *In General.* A receiptor to an officer in attachment can avoid liability only by showing that the officer is free of all liability to the debtor, or owner of the property, as well as to the attaching creditor.[45]

(II) *Amendment of Writ.* The amendment of the writ upon which property has been attached is not a defense in an action against the receiptor for such property, unless it has the effect of increasing his liability.[46]

(III) *Application of Goods on Debt.* It is no defense to an action on a receipt that the receiptor was the attaching creditor, and that the goods have been applied to the debt.[47]

upon execution in order to the preservation of the attachment lien, the day upon which judgment is recovered is to be excluded. Thus, where judgment was recovered on April 16, it was held that a demand of the property bailed was seasonable where it was made on May 16 following. Stewart *v.* Platts, 20 N. H. 476.

38. Gilmore *v.* McNeil, 46 Me. 532; Remick *v.* Atkinson, 11 N. H. 256, 35 Am. Dec. 493.

Leaving a written demand for the property at a receiptor's house is not sufficient evidence, either of a breach of the receiptor's contract, or of a conversion of the property. Phelps *v.* Gilchrist, 28 N. H. 266. See also Sanborn *v.* Buswell, 51 N. H. 573.

39. Gilmore *v.* McNeil, 46 Me. 532.

40. Facts showing reasonable demand.— In Higgins *v.* Emmons, 5 Conn. 76, 13 Am. Dec. 41, where the demand was made at a place other than the dwelling-house of the receiptor, it was held that any facts which show a demand to be reasonable prove necessarily that it was made at the proper place.

41. Jones *v.* Gilbert, 13 Conn. 507; Baker *v.* Fuller, 21 Pick. (Mass.) 318; Cooper *v.* Cree, 4 Vt. 289.

Assignment of breach.—Where the declaration stated the promise on the part of defendant in the receipt to be a promise to deliver the goods to plaintiff, or some other proper officer, and the breach assigned was the neglect of defendant to deliver them to plaintiff, and the declaration showed that the execution for the satisfaction of which the goods were taken was in fact in plaintiff's hands, it was held that the assignment was sufficient especially after verdict. Jones *v.* Gilbert, 13 Conn. 507. Where the promise stated was to deliver the goods or pay the damages, and the breach assigned was that defendant neglected to deliver and pay, it was held that it was well assigned. Jones *v.* Gilbert, 13 Conn. 507.

Averment of demand.—Where goods attached by a deputy sheriff, having been deposited in the hands of a keeper to be forthcoming on demand, were subsequently delivered by the keeper to the assignee of the debtor, who had a right to them subject only to a prior attachment, and the sheriff, after the expiration of thirty days from the rendition of judgment, brought an action against the keeper for the goods, it was held that the declaration should aver that a demand of the goods had been made upon the execution of the attaching creditor within thirty days. Baker *v.* Fuller, 21 Pick. (Mass.) 318.

42. Lowry *v.* Cady, 4 Vt. 504, 24 Am. Dec. 628.

43. Jones *v.* Gilbert, 13 Conn. 507.

44. Farnham *v.* Cram, 15 Me. 79. See also Jameson *v.* Paddock, 14 Vt. 491.

45. Ross *v.* Libby, 92 Me. 34, 42 Atl. 230; Wright *v.* Dawson, 147 Mass. 384, 18 N. E. 1, 9 Am. St. Rep. 724; Lewis *v.* Webber, 116 Mass. 450; Shumway *v.* Carpenter, 13 Allen (Mass.) 68; Butterfield *v.* Converse, 10 Cush. (Mass.) 317; Andrews *v.* Southwick, 13 Metc. (Mass.) 535; Grant *v.* Lyman, 4 Metc. (Mass.) 470; Sprague *v.* Wheatland, 3 Metc. (Mass.) 416; Denny *v.* Willard, 11 Pick. (Mass.) 519, 22 Am. Dec. 389; Learned *v.* Bryant, 13 Mass. 224; Whitney *v.* Farwell, 10 N. H. 9; Webster *v.* Harper, 7 N. H. 594; Harvey *v.* Lane, 12 Wend. (N. Y.) 563. See also Wentworth *v.* Leonard, 4 Cush. (Mass.) 414.

46. Hunter *v.* Peaks, 74 Me. 363; Miller *v.* Clark, 8 Pick. (Mass.) 412. See also Smith *v.* Brown, 14 N. H. 67.

47. Whittier *v.* Smith, 11 Mass. 211, where the application was made by means of an

(iv) *Death of Debtor.* Unless his estate has been represented insolvent in the probate court, the death of the debtor more than thirty days after judgment in the suit in which the attachment was made is no defense to an action brought by an attaching officer against a receiptor upon his receipt for the attached property.[48]

(v) *Denial of Attachment and Receipt of Goods — Estoppel.* The receiptor of attached property is estopped by his receipt to set up in defense to an action against him on his undertaking the insufficiency of the attachment,[49] or to deny his receipt of all the goods set forth in the contract.[50]

(vi) *Error in Names of Parties.* It is no defense to an action by an officer on a receipt given to him for property attached that the name of one of the parties was miscalled in the receipt, where it appears that the error was due to the carelessness of the receiptor.[51]

(vii) *Excessive Levy.* It is no defense to an action by an officer on a receipt that he has attached property to an amount greater than the writ directed.[52]

(viii) *Exemption of Property.* The fact that the property receipted for was exempt from attachment is no defense in an action on the receipt,[53] unless the debtor's possession has not been disturbed, or the property has returned to his hands.[54]

(ix) *Failure to Levy Execution.* Where the levy of an execution upon attached property has been prevented by the refusal of the receiptor to deliver up the property he is estopped to set up such omission as a defense to his liability upon the receipt.[55]

(x) *Fraud on Receiptor.* Actual fraud practised on a receiptor of attached property is a good defense to an action on his receipt.[56]

(xi) *Insufficiency of Return.* In an action against the receiptor for the value of goods attached on mesne process, he cannot defend on the ground of the insufficiency of the officer's return as to the description of the property attached.[57]

(xii) *Invalidity of Judgment.* The receiptors of property attached cannot impeach the judgment rendered in the suit against attachment defendant.[58]

execution issued in a subsequent suit, the first having been abandoned.

48. Hapgood *v.* Fisher, 30 Me. 502.

49. *Connecticut.*— Enscoe *v.* Dunn, 44 Conn. 93, 26 Am. Rep. 430.

Maine.— Drew *v.* Livermore, 40 Me. 266.

Massachusetts.— Bridge *v.* Wyman, 14 Mass. 190; Lyman *v.* Lyman, 11 Mass. 317; Jewett *v.* Torrey, 11 Mass. 219.

New Hampshire.— Hill *v.* Wiggin, 31 N. H. 292; Webb *v.* Steele, 13 N. H. 230; Bruce *v.* Pettengill, 12 N. H. 341; Morrison *v.* Blodgett, 8 N. H. 238, 29 Am. Dec. 653.

Rhode Island.— Anthony *v.* Comstock, 1 R. I. 454.

Vermont.— Bowley *v.* Angire, 49 Vt. 41; Lowry *v.* Cady, 4 Vt. 504, 24 Am. Dec. 628; Spencer *v.* Williams, 2 Vt. 209, 19 Am. Dec. 711.

Nominal attachment.—Where an officer making a nominal attachment takes a third person as receiptor and returns an attachment upon the writ, such receiptor cannot contest the attachment or set up a want of consideration. Morrison *v.* Blodgett, 8 N. H. 238, 29 Am. Dec. 653.

Estoppel to deny lien.—A defendant in attachment who regains possession by giving to the officer a receipt, in which he covenants to keep and redeliver the property, cannot thereafter deny the existence of the attachment lien. Alsop *v.* White, 45 Conn. 499.

50. Bowley *v.* Angire, 49 Vt. 41; Allen *v.* Butler, 9 Vt. 122.

51. Hunter *v.* Peaks, 74 Me. 363.

52. Hunter *v.* Peaks, 74 Me. 363.

53. Smith *v.* Cudworth, 24 Pick. (Mass.) 196.

54. Thayer *v.* Hunt, 2 Allen (Mass.) 449; Stone *v.* Sleeper, 59 N. H. 205; Main *v.* Bell, 27 Wis. 517.

55. Parks *v.* Sheldon, 36 Conn. 466, 4 Am. Rep. 95; Batchelder *v.* Putnam, 54 N. H. 84, 20 Am. Rep. 115.

56. Marion *v.* Faxon, 20 Conn. 486; Kingsbury *v.* Sargent, 83 Me. 230, 22 Atl. 105; Potter *v.* Sewall, 54 Me. 142, in all of which cases, however, it was held that no actual fraud upon the receiptor was shown.

Mistake.— It is no defense in an action by an officer on a receipt for attached property that one of the receiptors supposed the suit was against Robert C. Wood, the son, when it was really against Robert C. Wood, the father, and an amendment of the writ by leave of court by adding the word "senior" to defendant's name was held not to discharge the receiptors. Hunter *v.* Peaks, 74 Me. 363.

57. Thompson *v.* Smiley, 50 Me. 67.

58. Ross *v.* Libby, 92 Me. 34, 42 Atl. 230; Drew *v.* Livermore, 40 Me. 266; Brown *v.*

(XIII) *QUALIFICATION OF OFFICER.* It is no defense to an action on a receipt to show that the attaching officer was not properly qualified, unless it appears that the suit is prosecuted solely for his benefit, and not for the benefit of the creditor in the suit upon which the attachment was made.[59]

(XIV) *SET-OFF OF DEBTOR AGAINST CREDITOR.* It is no defense in an action on a receipt for attached goods that defendant in the attachment suit has recovered judgment against the attachment creditor sufficient to satisfy the claim on which the goods were attached. Whatever the debtor's rights may be in such a case, the receiptor is not to be considered his agent, and cannot undertake to exercise them.[60]

(XV) *TENDER.* Where a specific valuation is affixed to each article attached the tender of the agreed amount by the receiptor is a good defense to an action on his receipt.[61]

f. Evidence and Burden of Proof. A receiptor will ordinarily be presumed to have done his duty in the care of the property and the burden of proof in an action on the receipt will rest upon plaintiff to show such a condition as will operate as a breach of the undertaking,[62] by such evidence as is competent, by reason of the relation and duties of the parties, according to the general rules of evidence.[63] Plaintiff's right to recover must depend upon the tenor of the receipt, and therefore where the receipt is lost and its contents are not shown, judgment must be rendered for defendant.[64] Defendant cannot, by parol evidence, alter or vary the terms of a written receipt,[65] but evidence on his behalf to show a release from liability is admissible.[66]

Atwell, 31 Me. 351; Holcomb *v.* C. N. Nelson Lumber Co., 39 Minn. 342, 40 N. W. 340; Clifford *v.* Plumer, 45 N. H. 269. *Compare* Bean *v.* Ayers, 70 Me. 421, where it was held that the fact that the judgment rendered was utterly void might be set up in defense to an action on the receipt. But see Crosby *v.* Leavitt, 4 Allen (Mass.) 410, where it was held that a judgment rendered against the estate of a person who had died pending a personal action against him, on summons served on an administrator appointed by a judgment of probate, while acting without jurisdiction, would not authorize an action upon an accountable receipt to the officer for the property attached on the writ.

59. Taylor *v.* Nichols, 29 Vt. 104.

60. Jenney *v.* Rodman, 16 Mass. 464.

61. Bicknell *v.* Lewis, 49 Me. 91.

62. **Misfeasance — Destruction of property.** — Plaintiff has the burden of showing that the property was destroyed through the misfeasance of the receiptor. Cross *v.* Brown, 41 N. H. 283, where the receiptor defended on the ground that the horses receipted for were dead at the time of the demand upon him, and it was held that the burden of showing the cause of their death was not upon him.

63. **Proof of attachment.** — The receipt itself is appropriate and proper evidence to prove the attachment and it is not necessary to produce the writ and the officer's return thereon. Potter *v.* Sewall, 54 Me. 142; Stimson *v.* Ward, 47 Vt. 624; Lowry *v.* Cady, 4 Vt. 504, 24 Am. Dec. 628.

Proof of demand. — In a suit by an officer upon a receipt given him for property attached, the officer's return upon the execution that he seasonably made a demand upon the receiptor is not an act required in his official duty and therefore is not evidence of a demand. Bicknell *v.* Hill, 33 Me. 297; Green *v.* Holmes [*cited* in Davis *v.* Miller, 1 Vt. 9, 12]. But the written acknowledgment of a receiptor upon the receipt, admitting a demand upon him at a certain date, is sufficient evidence thereof. Cargill *v.* Webb, 10 N. H. 199. See also Fowles *v.* Pindar, 19 Me. 420, where it was held that an admission of the receiptors on the back of the receipt of a "due and legal demand" was not sufficient proof of the continuance of the lien upon the property, or that the demand was made within thirty days from the rendition of judgment.

Proof of issue of execution. — Return. — The return of the officer upon the execution issued upon the judgment recovered in the suit in which the attachment was made is admissible in evidence to show the timely issue of the execution and an attempted levy on the property. Parker *v.* Warren, 2 Allen (Mass.) 187, where the officer was allowed to amend his return so as to make it show the necessary facts, and introduce it as so amended in evidence, after he had rested his case.

64. Taylor *v.* Rhodes, 26 Vt. 57, where it was held that the expression "we being receiptors" in a written admission of a demand and refusal to deliver the goods in controversy was evidence only of the fact that a receipt had been given.

65. Potter *v.* Sewall, 54 Me. 142; Curtis *v.* Wakefield, 15 Pick. (Mass.) 437; Wakefield *v.* Stedman, 12 Pick. (Mass.) 562.

66. **Declarations of creditor** to show that he has agreed upon the discharge of the receiptor are admissible. Pike *v.* Wiggin, 8 N. H. 356.

g. Measure of Damages — (I) *In General.* The measure of damages in an action on a receipt is the value of the goods receipted for, or the stipulated sum agreed to be paid in case of default.[67] Interest is recoverable from the time of demand.[68]

(II) *When Part of Goods Seized Under Superior Title.* In New Hampshire, where a part of the goods have been seized by one having a superior claim thereto, the measure of damages in an action against the receiptor for failure to return the balance of the attached goods is the difference between the value of those taken by him claiming the superior title, and the value stated in the receipt, without regard to the actual value of the goods withheld by the receiptor;[69] but where the goods retained by the receiptor, being the property of the debtor, are worth more than the sum stated in the receipt, and the debt secured by the attachment is greater than the same sum, that sum is the measure of damages for the receiptor's neglect to redeliver the debtor's property to the sheriff on demand.[70] In Vermont, in such a case, damages are to be determined by assuming the value of the whole property receipted to be the same specified in the receipt, and ascertaining the just proportion, at that assumed value, which the property retained by the receiptor would bear to the property for which he is not liable.[71]

(III) *When Property Is Returned to Debtor.* When the receiptor allows the property attached to remain in the possession of the debtor, the ordinary rule of damages in an action by the officer is the amount of the judgment and interest, and his fees and poundage, if the value of the property exceeds that amount; but if the value of the property stated in the receipt be less than the amount of the judgment, the costs, and fees, then the rule of damages is the value of the property as fixed in the receipt.[72] Where, however, the action is still pending against the debtor, upon the refusal of the receiptor to deliver the property attached, the officer may recover of him the full value of the property with interest from the time of demand made.[73]

D. Release by Direction of Parties. An attaching officer is justified in releasing from custody the attached property where the parties so direct.[74] The

Competency of debtor as witness.—A debtor whose property is attached and who has again obtained possession of it, with the consent of the person to whom it has been intrusted by the attaching officer, is not under the common law a competent witness for defendant in an action brought by the officer against such bailee for not delivering the property. Davis *v.* Miller, 1 Vt. 9. *Compare* Fitch *v.* Chapman, 28 Conn. 257, where the attachment debtor was held a competent witness to show a sale by him to the receiptor previous to the attachment.

67. Ross *v.* Libby, 92 Me. 34, 42 Atl. 230; Hunter *v.* Peaks, 74 Me. 363; Sawyer *v.* Mason, 19 Me. 49; Cross *v.* Brown, 41 N. H. 283; Bissell *v.* Huntington, 2 N. H. 142; Anthony *v.* Comstock, 1 R. I. 454; Catlin *v.* Lowrey, 1 D. Chipm. (Vt.) 396.

Nominal damages.— If there was a good cause of action against a receiptor at the time of the commencement of a suit upon his receipt, but this is lost by a failure to preserve the attachment lien, by judgment for defendant and a return of the goods to him, or by reason of a seizure of the goods under a paramount title, nominal damages may nevertheless be recovered. Moulton *v.* Chapin, 28 Me. 505; Farnham *v.* Cram, 15 Me. 79; Norris *v.* Bridgham, 14 Me. 429; Webb *v.* Steele, 13 N. H. 230.

Valuation of specific articles.—Where property attached by a sheriff was delivered to a person for safe-keeping, each article being separately valued in the receipt given by the bailee, and the agent of the bailee had sold a portion of them, and tendered the residue to the sheriff who refused to accept them, it was held that plaintiff was entitled to recover only the estimated value of the articles sold. Remick *v.* Atkinson, 11 N. H. 256, 35 Am. Dec. 493.

68. Lamprey *v.* Leavitt, 20 N. H. 544. See also Evans *v.* Beckwith, 37 Vt. 285, where, by an arrangement of the parties in interest, certain attached goods were sold and delivered to the purchaser, who receipted to the officer for them, it being agreed that he should not be called on for the price until the question of ownership was decided, and it was held that he was not liable for interest on the price before payment became due and was demanded.

69. Healey *v.* Hutchinson, 66 N. H. 316, 20 Atl. 332.

70. Spear *v.* Hill, 52 N. H. 323.

71. Allen *v.* Carty, 19 Vt. 65.

72. Clement *v.* Little, 42 N. H. 563; Cross *v.* Brown, 41 N. H. 283.

73. Clement *v.* Little, 42 N. H. 563.

74. Melhop *v.* Seaton, 77 Iowa 151, 41 N. W. 600.

direction of the creditor or his attorney has also been held to justify the attaching officer in making such a release.[75]

E. Release on Security —**1. Discretion of Officer Independently of Statute.** Independently of statutory authority it is held that an attaching officer may, in his discretion, release attached property upon such security as he may deem sufficient.[76]

2. Bail. When the practice of requiring special bail was in vogue defendant might discharge an attachment by appearing and entering special bail to the action;[77] but the office of the process of attachment was to enforce defendant's appearance, for which purpose defendant was required to surrender himself into custody or file special bail.[78] The modern statutes governing attachments do not,

75. Smith *v.* Robinson, 64 Cal. 387, 1 Pac. 353; Cole *v.* Edwards, 52 Nebr. 711, 72 N. W. 1045.

76. *California.*— Hathaway *v.* Brady, 26 Cal. 581.

Colorado.— Solomon *v.* Saly, 6 Colo. App. 170, 40 Pac. 150.

Georgia.— Notwithstanding the non-existence of a statute authorizing the execution by an agent of a forthcoming bond for property levied on by attachment a bond so given will be upheld. Gilmer *v.* Allen, 9 Ga. 208.

Louisiana.— Medd *v.* Downing, 4 La. Ann. 34.

Massachusetts.— Foster *v.* Clark, 19 Pick. (Mass.) 329.

Vermont.—Gassett *v.* Sargeant, 26 Vt. 424.

Delivery to creditor.— An officer may deliver property attached to the creditor for safe-keeping, and take its value in money as security during the pendency of the suit, and the debtor cannot complain. Gassett *v.* Sargeant, 26 Vt. 424.

Money deposited with a sheriff to release an attachment is regarded as in the custody of the law. Hathaway *v.* Brady, 26 Cal. 581.

77. *Georgia.*— Reid *v.* Moore, 12 Ga. 368, under the Georgia act of 1799, permitting defendant in attachment to replevy by appearing and putting in special bail, or by giving bond to the officer, conditioned for appearance and to abide by and perform the judgment of the court.

Maryland.— Walters *v.* Munroe, 17 Md. 501; Wilson *v.* Starr, 1 Harr. & J. (Md.) 490.

New Jersey.— Dickerson *v.* Simms, 1 N. J. L. 230.

Ohio.— Eagan *v.* Lumsden, 2 Disn. (Ohio) 168.

South Carolina.— Crosslin *v.* Reed, 2 McMull. (S. C.) 10; Fife *v.* Clarke, 3 McCord (S. C.) 347; Williams *v.* Haselden, 10 Rich. (S. C.) 55.

Tennessee.— Boyd *v.* Buckingham, 10 Humphr. (Tenn.) 433; Gillaspie *v.* Clark, 1 Overt. (Tenn.) 2.

Virginia.— Smith *v.* Pearce, 6 Munf. (Va.) 585.

Common bail after discharge under insolvent laws.— A defendant discharged under the insolvent laws of Pennsylvania may appear in the District of Columbia and discharge an attachment upon giving common bail. Davis *v.* Marshall, 1 Cranch C. C. (U. S.) 173, 7 Fed. Cas. No. 3,641.

A corporation cannot be held to special bail, and therefore it may appear to a capias ad respondendum which under the statute issues with the attachment, without bail, and thus dissolve the attachment, the object of which is to compel an appearance. Nicholl *v.* Savannah Steamship Co., 2 Cranch C. C. (U. S.) 211, 18 Fed. Cas. No. 10,225.

Foreign attachment is but a process by which to commence a personal action and it seizes property to compel an appearance. It can be dissolved upon entering bail and when dissolved the judgment is *in personam.* Albany City Ins. Co. *v.* Whitney, 70 Pa. St. 248.

78. Ferguson *v.* Ryder, 2 Ohio St. 493, under the statute relating to attachments against absconding debtors, holding that defendant must elect to have his property remain in custody, file special bail, or surrender himself before he could regularly plead. So in Alabama it was held, under the act of 1870, replevy of attached property could be effected only by giving special bail to the action as though defendant were taken under capias ad respondendum. Cummins *v.* Gray, 4 Stew. & P. (Ala.) 397. See *infra,* XVI, B, 2.

Time to put in bail.— In Smith *v.* Pearce, 6 Munf. (Va.) 585, it was held that in an attachment against an absconding debtor defendant may put in special bail at the term when the attachment is returned and before judgment rendered, although he has been previously defaulted. And in Williams *v.* Haselden, 10 Rich. (S. C.) 55, it was held that defendant against whom, at the expiration of the usual rule to appear and plead, an interlocutory order for judgment has been entered, may, by putting in special bail to the action, before the next term after the entry of the order, entitle himself to an order to have the attachment dissolved and for leave to plead.

Under Md. Stat. (1715), c. 40, it was held that defendant had a right to come in at any time during the term at which the attachment was returnable, by giving bail and appearance under the capias to dissolve the attachment and plead to the action (Walters *v.* Munroe, 17 Md. 501), and a defendant in foreign attachment was held to have the whole of the second term to put in special bail to dissolve an attachment (Blaney *v.* Randel, 3 Harr. (Del.) 546). But under the Maryland statute of 1834, providing that an attachment against a non-resident should not

however, contemplate the mere enforcement of appearance,[79] and special bail and imprisonment for debt are now generally abolished, but the release of attached property and the dissolution and discharge of the attachment is effected by statutory bonds, substituted for special bail.[80]

3. Effect of Appearance as Discharge of Attachment. Where defendant may discharge an attachment by the entry of special bail,[81] the mere abolition of special bail is held to leave the law in such condition that appearance alone is sufficient to discharge the attachment.[82] Where, however, the attachment is not merely for the enforcement of appearance, under the modern statutes, which require the giving of a particular bond in order to effect the dissolution of an attachment, or the release of the property, appearance and pleading to the action will not discharge the attachment,[83] notwithstanding special bail to the action is not required.[84]

4. Forthcoming, Replevy, or Dissolution Bonds — a. In General. Under the various statutes there are usually two ways, by either of which defendant in attachment may secure to himself possession of the property seized: (1) by the execution of a forthcoming or delivery bond, conditioned for the forthcoming of the property to respond to the judgment, or for the payment of the penalty of the bond to be discharged by the satisfaction of such judgment, or by the payment of the value of the property; (2) by the execution of a bond for the discharge of the attachment conditioned for, and binding the obligors to, the payment of the judgment which may be recovered against defendant in the action.[85]

be dissolved unless defendant execute a bond, etc., it was held that this provision simply required the additional security of defendant's bond, but did not extend the time within which he must appear and did not permit him to appear at the second term and have judgment by default set aside and the attachment dissolved upon giving bond. Walters *v.* Munroe, 17 Md. 501.

79. See *supra*, II, B.

80. See Dunn *v.* Crocker, 22 Ind. 324 (where it was said that the attachment law at that time was much broader than formerly; that it authorized such proceedings against resident defendants in certain cases, and thus brought into existence a great number of causes where defendant actually appeared to the attachment suit); Lambden *v.* Bowie, 2 Md. 334; Boyd *v.* Buckingham, 10 Humphr. (Tenn.) 433.

A delivery bond is not special bail. Ramsey *v.* Coolbaugh, 13 Iowa 164. And in Indiana defendant, under the statute, might have executed a redelivery bond or he might have had an attachment discharged by executing an undertaking to the effect that he would appear in the action and perform the judgment of the court, and the two bonds were held distinct, so that one could not by averment be brought under the statute providing for the other. Smith *v.* Scott, 86 Ind. 346.

81. See *supra*, XIII, E, 2.

82. Garrett *v.* Tinnen, 7 How. (Miss.) 465. But later in Mississippi a forthcoming bond was required instead of the old bail-bond, to enable defendant to retain possession of the property and have it forthcoming to satisfy any judgment that might be rendered, under a statute which was enacted for the purpose of rendering efficient the process of attachment which had been reduced to little or no value by reason of the abolition of bail upon civil process. Gray *v.* Perkins, 12 Sm. & M. (Miss.) 622.

83. Martin *v.* Dryden, 6 Ill. 187; Conn *v.* Caldwell, 6 Ill. 531; Lambden *v.* Bowie, 2 Md. 334. If defendant appears and pleads without giving security to release the property, the lien is not discharged, judgment for plaintiff binds the property (Littell *v.* Scranton Gas, etc., Co., 42 Pa. St. 500), and such judgment authorizes a sale of the property attached (Davis *v.* Megroz, 55 N. J. L. 427, 26 Atl. 1009).

A bond to appear and answer in the suit is not sufficient to entitle defendant to a release of attachment. He must give bond either that the property be forthcoming, or conditioned to pay any judgment recovered in the suit. People *v.* Cameron, 7 Ill. 468.

Effect of bond as appearance see *infra*, XIII, E, 4, f, (II).

84. Lambden *v.* Bowie, 2 Md. 334.

85. See under such statutes the following cases:

Alabama.— Troy *v.* Rogers, 116 Ala. 255, 22 So. 486, 67 Am. St. Rep. 110; Cordaman *v.* Malone, 63 Ala. 556; Dunlap *v.* Clements, 18 Ala. 778.

Arkansas.— Ferguson *v.* Glidewell, 48 Ark. 195, 2 S. W. 711.

California.— Mullaly *v.* Townsend, (Cal. 1900) 61 Pac. 950; Rosenthal *v.* Perkins, 123 Cal. 240, 55 Pac. 804.

Colorado.— Stevenson *v.* Palmer, 14 Colo. 565, 24 Pac. 5, 20 Am. St. Rep. 295; Edwards *v.* Pomeroy, 8 Colo. App. 254, 6 Pac. 829.

Georgia.— Craig *v.* Herring, 80 Ga. 709, 6 S. E. 283; Clary *v.* Haines, 61 Ga. 520; Ford *v.* Perkerson, 59 Ga. 359; Camp *v.* Cahn, 53 Ga. 558; Nagle *v.* Lumpkin, 48 Ga. 521.

b. Consideration. The release of the attached property has been held to

Illinois.— Hill *v.* Harding, 93 Ill. 77, bond or recognizance to pay judgment.

Indiana.— Smith *v.* Scott, 86 Ind. 346.

Iowa.— State *v.* McGlothlin, 61 Iowa 312, 16 N. W. 137; Ramsey *v.* Coolbaugh, 13 Iowa 164.

Kansas.— McKinsey *v.* Purcell, 28 Kan. 446; Fisher *v.* Haxtun, 26 Kan. 155.

Kentucky.— Thompson *v.* Arnett, (Ky. 1901) 64 S. W. 735; Bell *v.* Western River Imp., etc., Co., 3 Metc. (Ky.) 558.

Louisiana.— McCloskey *v.* Wingfield, 32 La. Ann. 38.

Maine.— Foss *v.* Norris, 70 Me. 117.

Maryland.— McAllister *v.* Eichengreen, 34 Md. 54.

Massachusetts.— Russia Cement Co. *v.* Le Page Co., 174 Mass. 349, 55 N. E. 70.

Michigan.— Goebel *v.* Stevenson, 35 Mich. 172.

Mississippi.— Phillips *v.* Harvey, 50 Miss. 489.

Missouri.— Williams *v.* Coleman, 49 Mo. 325; Jones *v.* Jones, 38 Mo. 429.

Nebraska.— Cortelyou *v.* Maben, 40 Nebr. 512, 59 N. W. 94.

Nevada.— Lightle *v.* Berning, 15 Nev. 389.

New Jersey.— Gray *v.* Sharp, 62 N. J. L. 102, 40 Atl. 771; Heckscher *v.* Trotter, 48 N. J. L. 419, 5 Atl. 581; Stanley *v.* Chamberlain, 43 N. J. L. 102.

New Mexico.— Wagner *v.* Romero, 3 N. M. 131, 3 Pac. 50.

New York.— Christal *v.* Kelly, 88 N. Y. 285; Bildersee *v.* Aden, 62 Barb. (N. Y.) 175.

Ohio.— Jayne *v.* Platt, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. Rep. 810; King *v.* Snow, 2 Disn. (Ohio) 73.

Oregon.— Drake *v.* Sworts, 24 Oreg. 198, 33 Pac. 563; Bunneman *v.* Wagner, 16 Oreg. 433, 18 Pac. 841, 8 Am. St. Rep. 306; Duncan *v.* Thomas, 1 Oreg. 314.

Rhode Island.— Wilson *v.* Donnelly, 19 R. I. 113, 31 Atl. 966. Defendant may give a bond conditioned under two provisions of the statute, to pay the judgment and to surrender and return the goods to the officer, and thus make the bond both a bail-bond and a delivery bond. Easton *v.* Ormsby, 18 R. I. 309, 27 Atl. 216.

South Carolina.— Sullivan *v.* Williams, 43 S. C. 489, 21 S. E. 642; Metts *v.* Piedmont, etc., L. Ins. Co., 17 S. C. 120.

Tennessee.— Bond, payable to plaintiff, in double the amount of his demand, or at defendant's option, in double the amount of the value of the property, conditioned to pay the debt, etc., in case defendant is cast in the suit. Casey, etc., Mfg. Co. *v.* Weatherley, 97 Tenn. 297, 37 S. W. 6; Muhling *v.* Ganeman, 4 Baxt. (Tenn.) 88; Upton *v.* Philips, 11 Heisk. (Tenn.) 215; Stephens *v.* Greene County Iron Co., 11 Heisk. (Tenn.) 71. A bond conditioned for the delivery of property, in a penalty of double the value of the property, falls within the second class of bonds mentioned in the statute. Ward *v.* Kent, 6 Lea (Tenn.) 128; Kuhn *v.* Spellacy, 3 Lea (Tenn.) 278. The court cannot, after execution of such bond, appoint a receiver to take charge of and sell the property. Phillips-Butorff Mfg. Co. *v.* Williams, (Tenn. 1900) 63 S. W. 185. And while defendant in attachment has the option to execute either one of the two bonds mentioned, it is held to be the better practice for the clerk to take the bond either in one form or the other, and not to insert both conditions. Richards *v.* Craig, 8 Baxt. (Tenn.) 457.

Texas.—Replevy bond at defendant's option in double the amount of plaintiff's debt, or for the value of the property conditioned to satisfy the judgment if defendant should be condemned in the action or to pay the estimated value of the property. Kildare Lumber Co. *v.* Atlanta Bank, 91 Tex. 95, 41 S. W. 64; Carothers *v.* Wilkerson, 2 Tex. App. Civ. Cas. § 353.

Canada.— Supersedeas to attachment on execution of bond in double the amount of the debt sworn to. Heather *v.* Wallace, 4 U. C. Q. B. O. S. 131. See also Clark *v.* Mallery, 3 U. C. Q. B. O. S. 157.

For whole or part of property.— Defendant may give a redelivery bond for the whole or a part of the property attached (Keith *v.* Moore, 3 Ohio Cir. Ct. 432, 2 Ohio Cir. Dec. 245); or he may apply for the discharge of the attachment as to the whole or a part of the property (Ellsworth *v.* Scott, 3 Abb. N. Cas. (N. Y.) 9).

Substitution of bond for money.— Money deposited in court under a stipulation to abide the issue to discharge an attachment cannot be withdrawn and a bond substituted therefor. U. S. *v.* Hutton, 26 Fed. Cas. No. 15,435, 25 Int. Rev. Rec. 305, 8 Reporter 37. To same effect see State *v.* Young, 40 La. Ann. 203, 3 So. 722.

Duty of officer.— If an officer after having attached property is tendered the proper statutory security he is bound to surrender the property, and inasmuch as it is his imperative duty to do so the performance of such duty cannot be a breach of his official bond, if he performs it honestly and with due diligence to protect the rights of plaintiff. Wheeler *v.* McDill, 51 Wis. 356, 8 N. W. 169. See also Kohn *v.* Hinshaw, 17 Oreg. 308, 20 Pac. 629, where it was held that the word "may" in section 154 of Hill's code, providing that the sheriff "may" deliver property attached to defendant on his giving a bond, etc., is equivalent to the word "must," and when a sufficient undertaking is tendered to the sheriff under said section it is his duty to accept it and to release the property to the obligor.

Perishable goods or goods expensive to keep.— Articles attached which are liable to perish, to waste, or to be greatly reduced in value by keeping, or which cannot be kept without great expense, may be restored to the debtor, upon his giving bond to account for the appraised value thereof. Snow *v.* Cun-

constitute a sufficient consideration for an undertaking or bond executed to obtain such release.[86]

c. Time to Execute. A statute which provides for a bond to secure the judgment that may be recovered in the action and which allows the bond to be given at any time before final judgment must be construed to contemplate a bond given while the suit is in the stage which will admit of a prosecution to such final judgment.[87]

d. Form and Sufficiency[88] — (I) *In General.* The statute controls the form

ningham, 36 Me. 161; Mason *v.* Whipple, 31 Vt. 473.

Real estate.— A forthcoming bond cannot be taken to release an attachment on real estate. Barton *v.* Continental Oil Co., 5 Colo. App. 341, 38 Pac. 432.

Bond in separate suits.— Where defendant in two separate suits appears to give bond, regularly he should give a separate bond in each suit. Hanness *v.* Smith, 22 N. J. L. 332, where the bond, under the circumstances of the case, was considered valid. In Walton *v.* Daly, 17 Hun (N. Y.) 601, however, it was held that under the provisions of the code there was no authority for accepting one undertaking in two actions for the purpose of discharging the attachment issued in each action. But in Irvin *v.* Howard, 37 Ga. 18, it was held that where several attachments were levied and but one bond given to replevy the property, judgment could be rendered against defendant and his sureties for the amount of the judgment in each case. See also Irish *v.* Wright, 12 Rob. (La.) 563. And under certain statutes which make the property of an insolvent debtor a fund available to all his creditors who may come in and prove their claims, a bond to discharge the attachment stands as security for all such creditors. Gray *v.* Sharp, 62 N. J. L. 102, 40 Atl. 771; Stanley *v.* Chamberlain, 43 N. J. L. 102; Pearce *v.* Hitchcock, 2 N. Y. 388.

In chancery.— Where personal property is attached under a bill in chancery, a defendant may replevy by giving the statutory bond. Richards *v.* Craig, 8 Baxt. (Tenn.) 457.

Construction.— Recitals in a statutory undertaking, conditioned for the redelivery of attached property, have the same effect and ought to be construed in the same way as bonds containing similar recitals, and are to be given the same construction as other writings obligatory. McMillan *v.* Dana, 18 Cal. 339. But such a bond should be construed and enforced according to the language used, because a mistake on the part of the person executing the bond as to its legal effect cannot avail to avoid that construction of the instrument which the rules of law, as applied to the language used, requires. Moorman *v.* Collier, 32 Iowa 138; McCormack *v.* Henderson, 10 Ky. L. Rep. 541.

86. Foss *v.* Norris, 70 Me. 117; Lightle *v.* Berning, 15 Nev. 389; Bildersee *v.* Aden, 62 Barb. (N. Y.) 175. See also XIII, E, 4, d, (I), note 89.

87. Woodward *v.* Witascheck, 38 Kan. 760, 17 Pac. 658. See also Cole *v.* Smith, 83 Iowa 579, 50 N. W. 54; Spencer *v.* Rogers Locomotive Works, 13 Abb. Pr. (N. Y.) 180.

After return-day of writ.— The statute in Illinois contemplates the execution of a forthcoming bond at any time before final judgment, and such bond may be taken after the return-day of the writ and returned into court after the first day of the term at which the writ is returnable. Smith *v.* Packard, 98 Fed. 793, 39 C. C. A. 294.

After discharge in bankruptcy and special judgment for plaintiff.— An attachment made four months before proceedings under the bankruptcy act cannot be dissolved by a bond under the statute to secure such judgment as may be rendered against defendant after he has pleaded his discharge and a special judgment has been ordered for plaintiff to be enforced against the attached property. Johnson *v.* Collins, 117 Mass. 343.

Error to federal circuit court.— In Russia Cement Co. *v.* Le Page Co., 174 Mass. 349, 55 N. E. 70, it was held that a judgment by a circuit court of the United States in favor of plaintiff, which is superseded by proceedings in error in the circuit court of appeals, and by such court held erroneous and in accordance with its mandate set aside by the circuit court, is not a final judgment in the action within the meaning of the attachment statute which terminates the right of defendant to dissolve an attachment therein; that a bond given by defendant for that purpose after the entry of such judgment and during the pendency of the proceedings in error is operative to discharge the attachment and constitutes a valid obligation.

88. For forms of bonds or undertakings, in whole or in substance, for the release or forthcoming of attached property, or for the discharge of the attachment see the following cases:

California.— Mullally *v.* Townsend, 119 Cal. 47, 50 Pac. 1066; Curiac *v.* Packard, 29 Cal. 194; McMillan *v.* Dana, 18 Cal. 339.

Colorado.— Klippel *v.* Oppenstein, 8 Colo. App. 187, 45 Pac. 224.

Indiana.— Wright *v.* Manns, 111 Ind. 422, 12 N. E. 160; Urbanski *v.* Manns, 87 Ind. 585; Smith *v.* Scott, 86 Ind. 346; Taylor *v.* Elliott, 51 Ind. 375; Moore *v.* Jackson, 35 Ind. 360; Dunn *v.* Crocker, 22 Ind. 324.

Iowa.— Ripley *v.* Gear, 58 Iowa 460, 12 N. W. 480; Budd *v.* Durall, 36 Iowa 315.

Maine.— Savage *v.* Robinson, 93 Me. 262, 44 Atl. 926; Bradstreet *v.* Ingalls, 84 Me. 276, 24 Atl. 858.

Massachusetts.— Caldwell *v.* Healey, 121

and sufficiency of a bond given thereunder for the release of attached property, and a substantial non-compliance with the statute will invalidate the bond, at least for the purposes of the particular statutory remedy thereon,[89] or for the purpose of accomplishing the release of the property or the discharge of the attachment.[90]

(II) *Substantial Sufficiency — Imperfect Recital or Clerical Error.* An imperfect recital of preliminary facts, the suit being accurately described and the condition stated with substantial accuracy, or a mere clerical mistake, as by the transposition or substitution of the names of the parties, will not invalidate the bond.[91] Substantial compliance with the statute is all that is required.[92]

Mass. 549; Campbell *v.* Brown, 121 Mass. 516 (dissolution bond, by one of two joint defendants to pay judgment which plaintiff may recover); Richards *v.* Storer, 114 Mass. 101; Donnell *v.* Manson, 109 Mass. 576; Leonard *v.* Speidel, 104 Mass. 356.

Mississippi.— Forbes *v.* Navra, 63 Miss. 1.

Nebraska.— Cooper *v.* Davis Mill Co., 48 Nebr. 420, 67 N. W. 178; Dewey *v.* Kavanaugh, 45 Nebr. 233, 63 N. W. 396.

New York.— Coleman *v.* Bean, 1 Abb. Dec. (N. Y.) 394, 3 Keyes (N. Y.) 94, 14 Abb. Pr. (N. Y.) 38, 32 How. Pr. (N. Y.) 370; Gilmore *v.* Crowell, 67 Barb. (N. Y.) 62; Cockroft *v.* Claflin, 64 Barb. (N. Y.) 464; Phillips *v.* Wright, 5 Sandf. (N. Y.) 342.

Ohio.— Jayne *v.* Platt, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. Rep. 810; Rutledge *v.* Corbin, 10 Ohio St. 478.

Rhode Island.— Easton *v.* Ormsby, 18 R. I. 309, 27 Atl. 216.

Vermont.— Mason *v.* Whipple, 31 Vt. 473.

89. Cobb *v.* Thompson, 87 Ala. 381, 6 So. 373 [*citing* Irvin *v.* Eldridge, 1 Wash. (Va.) 161; Adler *v.* Green, 18 W. Va. 201]; Collins *v.* Burns, 16 Colo. 7, 26 Pac. 145; Barry *v.* Sinclair, 61 N. C. 7.

Condition.—The bond must express the condition required by the statute. Lowenstein *v.* McCadden, 54 Ark. 13, 14 S. W. 1095; Moody *v.* Morgan, 25 Ga. 381; Allerton *v.* Eldridge, 56 Iowa 709, 10 N. W. 252; Morange *v.* Edwards, 1 E. D. Smith (N. Y.) 414.

Consideration.— Release of attached property is sufficient consideration for the bond, if any is necessary, and no consideration need be inserted therein. Bildersee *v.* Aden, 62 Barb. (N. Y.) 175. See also Lightle *v.* Berning, 15 Nev. 389.

Matters admitted by execution of bond need not be recited. Thus where the statute permits defendant, or other person in whose possession the property is found and attached, to give a forthcoming bond, a bond is sufficient although it does not show that the property was found in the possession of the obligor. Hoshaw *v.* Gullett, 53 Mo. 208.

Revenue stamp.— A bond to discharge an attachment does not require a stamp under the revenue laws. Sampson *v.* Barnard, 98 Mass. 359; Bowers *v.* Beck, 2 Nev. 139.

90. **A bond to appear** will not release the attachment, where the statute requires a bond that the property be forthcoming or conditioned to pay the judgment to be recovered. People *v.* Cameron, 7 Ill. 468.

91. Hewes *v.* Cooper, 115 Mass. 42; Leonard *v.* Speidel, 104 Mass. 356; Hudson *v.* Lamar, 74 Mo. App. 238, which last case held that it is immaterial that the real owner of the property is designated as the surety and the surety is designated as the principal, as the bond is the bond of each and both are equally bound.

Mistaken recital as to court.—A misrecital as to the court in which the action is pending will not relieve the sureties from their obligation on a bond for the release of attached property. Ripley *v.* Gear, 58 Iowa 460, 12 N. W. 480.

Mistaken recital as to process levied.— The validity of a forthcoming bond, under Ala. Code (1886), § 2523, is not affected by the fact that it erroneously recites the levy of an execution, when the levy in question was that of an attachment, where it shows on its face that it was given for the forthcoming of certain property "levied on," and claimed as exempt, identifying the contest respecting the pendency of which it was given, and showing that the obligors bound themselves to the forthcoming of particular property involved in such contest. Troy *v.* Rogers, 116 Ala. 255, 22 So. 486, 67 Am. St. Rep. 110.

Misnomer.—It is error to quash a forthcoming bond on motion, simply because the name of the obligee therein has been misspelled, or so written as to make it doubtful as to the person intended. Ambach *v.* Armstrong, 29 W. Va. 744, 3 S. E. 44 [*citing* State *v.* Halida, 28 W. Va. 499].

92. Hoshaw *v.* Gullett, 53 Mo. 208.

Surplusage will not defeat the effect of an instrument as a statutory bond. A bond conditioned to perform the judgment in the action "touching the attachment herein," was held to be in effect a good statutory bond, and the words above quoted not being in the statute were regarded as surplusage. Endress *v.* Ent, 18 Kan. 236.

Language expressing what the law implies. — It is no material departure from the statute permitting defendant to enter into a recognizance to pay the judgment, with sureties, that the condition is that the principal, the defendant in attachment, as well as the sureties, shall pay whatever judgment may be rendered in the attachment case, as this expresses no more than what is legally implied. Eimer *v.* Richards, 25 Ill. 289.

Instrument must furnish evidence of inadvertence.— Where a bond is bad as a statutory obligation the suggestion that the omis-

(III) *VALIDITY AS COMMON-LAW OBLIGATION.*[93] A voluntary obligation for the release of attached property is a valid common-law obligation,[94] and although an undertaking may be defective as a statutory bond or for the purposes of the statutory remedy, yet if voluntarily entered into and supported by sufficient consideration it is good as a common-law obligation and may be enforced as such.[95]

(IV) *EXECUTION — WHO MAY MAKE.* Who may execute a bond for the redelivery of attached property is usually fixed by the statutory provisions relating to such bond, which provisions often contemplate the giving of a bond by defendant, his attorney, or agent, or even by a stranger or person in whose possession the property may be found.[96] An undertaking signed by the surety

sion of a statutory word was inadvertent is not tenable where there is nothing in the instrument to support such an inference, and a statement in the beginning of the bond that defendant desired to discharge the attachment on giving security, according to a particular section of a statute, designating the page, will not avoid the difficulty where no authorized edition of code or statute contains any provision for the giving of security at the page and section mentioned. Edwards *v.* Pomeroy, 8 Colo. 254, 6 Pac. 829.

93. For forms of undertakings in whole or in part, held valid as common-law obligations, see Turner *v.* Armstrong, 9 Ill. App. 24; Garretson *v.* Reeder, 23 Iowa 21; Lightle *v.* Berning, 15 Nev. 389; Shelden *v.* Sharpless, 2 Ohio Dec. (Reprint) 1, 1 West. L. Month. 42.

94. Palmer *v.* Vance, 13 Cal. 553; Turner *v.* Armstrong, 9 Ill. App. 24.

95. *Alabama.*— Adler *v.* Potter, 57 Ala. 571; Russell *v.* Locke, 57 Ala. 420; Sewall *v.* Franklin, 2 Port. (Ala.) 493.

California.— Gardner *v.* Donnelly, 86 Cal. 367, 24 Pac. 1072 (holding that where property is released under a forthcoming bond which is more onerous than the statute requires the bond is nevertheless binding as a common-law obligation); Smith *v.* Fargo, 57 Cal. 157; Curiac *v.* Packard, 29 Cal. 194; Palmer *v.* Vance, 13 Cal. 553 (holding that the obligors are liable to the extent of the penalty although it is not in double the amount of plaintiff's claim as required by the statute).

Illinois.— Purcell *v.* Steele, 12 Ill. 93; Turner *v.* Armstrong, 9 Ill. App. 24.

Indiana.— Dunn *v.* Crocker, 22 Ind. 324.

Iowa.— Garretson *v.* Reeder, 23 Iowa 21; Sheppard *v.* Collins, 12 Iowa 570.

Kansas.— Johnson *v.* Weatherwax, 9 Kan. 75.

Massachusetts.— Central Mills Co. *v.* Stewart, 133 Mass. 461; Campbell *v.* Brown, 121 Mass. 516. A bond to dissolve an attachment, if duly executed and accepted by the creditor, is not invalid for not containing the condition required by statute, obliging the sureties to pay the special judgment provided for in another section, in order to meet a case of bankruptcy on the part of defendant. Smith *v.* Meegan, 122 Mass. 6; Mosher *v.* Murphy, 121 Mass. 276.

Minnesota.— Johnson *v.* Dun, 75 Minn. 533, 78 N. W. 98.

Missouri.— Williams *v.* Coleman, 49 Mo. 325.

Nevada.— Lightle *v.* Berning, 15 Nev. 389.

Ohio.— Shelden *v.* Sharpless, 2 Ohio Dec. (Reprint) 1, 1 West. L. Month. 42.

Pennsylvania.— Wright *v.* Keyes, 103 Pa. St. 567.

Rhode Island.— Easton *v.* Ormsby, 18 R. I. 309, 27 Atl. 216.

South Carolina.— Sullivan *v.* Williams, 43 S. C. 489, 21 S. E. 642.

Tennessee.— Phillips-Buttorff Mfg. Co. *v.* Williams, (Tenn. 1900) 63 S. W. 185.

Texas.— Colorado City Nat. Bank *v.* Lester, 73 Tex. 542, 11 S. W. 626, holding that if the property is replevied under a bond which is in a sum less than the law requires, the obligors are nevertheless liable to the extent of the value of the property in an action on the bond.

But see Moody *v.* Morgan, 25 Ga. 381 (where the surety moved to be discharged from a bond "for the amount of the judgment and all costs that he may recover in said case in the event said boat is not delivered on the day of sale," and the action of the trial court in overruling the motion was reversed, because the statutory bond which the officer was required to take was for the payment to plaintiff of the amount of the judgment and costs that he might recover absolutely, without any condition, whereas the obligation taken was for the forthcoming of the property on the day of sale); Morange *v.* Edwards, 1 E. D. Smith (N. Y.) 414 (where it was held that a bond to discharge an attachment in the marine court, under the statute then prevailing, not conditioned for the appearance of defendant or for the production of the attached property, to answer an execution, but for the payment by the obligee of any judgment which might be obtained in the action, was unauthorized by law and void; that it was not a voluntary undertaking, but was taken *colore officii*).

Construction according to intent of statute. —Although a bond is not strictly an undertaking such as is contemplated by the statute, in an action on the bond it will be construed in the same manner as a bond under the statute and will be read in the light thereof and interpreted according to the meaning and intention of the parties. Heynemann *v.* Eder, 17 Cal. 433.

96. One of two defendants.— If a defendant desires to release his own property only

alone has been held to be the act of defendant under the statute requiring defendant to give an undertaking for the discharge of the attachment.[97]

(v) *Obligee in Bond.* Whether the officer levying an attachment or plaintiff in attachment should be named as the obligee in a bond to discharge the attachment, or to have the property forthcoming, depends entirely upon the statute. The bond must conform to the statutory requirement in this regard, else it will be bad as a statutory bond, notwithstanding if voluntarily entered into it may be good as a common-law undertaking.[98]

from attachment and escape liability for the judgment that may be rendered against his co-defendant he may give a bond simply to secure such judgment as may be recovered against himself. Central Mills Co. *v.* Stewart, 133 Mass. 461. But upon the attachment of the effects of each of two joint debtors it is held that bail will not be received if one only could discharge his separate goods. Magee *v.* Callan, 4 Cranch C. C. (U. S.) 251, 16 Fed. Cas. No. 8,942.

Defendant, agent, or attorney.— Cummins *v.* Gray, 4 Stew. & P. (Ala.) 397, construed the particular statute to permit goods taken in attachment for sums exceeding the jurisdiction of justices of the peace to be replevied only by defendant in attachment, his attorney, agent, or factor.

Joint owner.— Under Mass. Rev. Stat. c. 90, §§ 73, 74, an officer who has attached joint property in an action against one of two tenants in common is required to deliver the property to the other part owner, upon his request, and upon his giving to the officer a sufficient bond to restore the same, or pay the appraised value thereof, or to satisfy any judgment that might be recovered in the suit in which said property is attached. Reed *v.* Howard, 2 Metc. (Mass.) 36.

Stranger.— Replevy under statute by stranger in the absence of defendant, the former acting for the benefit and becoming the bailee of the latter to whom the property must be delivered upon demand. Rhodes *v.* Smith, 66 Ala. 174; Kirk *v.* Morris, 40 Ala. 225; Kinney *v.* Mallory, 3 Ala. 626.

Where two or more strangers offer to replevy goods taken under an attachment the sheriff necessarily has a discretion in choosing between them but should in every instance consult the interest of defendant. Kirk *v.* Morris, 40 Ala. 225.

Discharge of attachment.— A stranger to the suit cannot procure the discharge of the attachment, although he has an interest in the attached property, but an order discharging the attachment upon motion of the stranger is voidable only and discharges plaintiff's lien until it is vacated. Kling *v.* Childs, 30 Minn. 366, 15 N. W. 673.

Ratification of unauthorized act of agent.— One sued on an undertaking for the release of an attachment may be liable by reason of his ratification of the unauthorized act of an agent in executing the bond, and a parol ratification will bind defendant, although the instrument was executed under seal where the seal was not necessary. Lynch *v.* Smyth, 25 Colo. 103, 54 Pac. 634.

97. Smith *v.* U. S. Express Co., 135 Ill. 279, 25 N. E. 525.

98. *Alabama.*— Agnew *v.* Leath, 63 Ala. 345 (under the statute requiring a replevy bond to run to plaintiff, the court indicating that the bond may be good as a common-law undertaking); Sewall *v.* Franklin, 2 Port. (Ala.) 493; Adkins *v.* Allen, 1 Stew. (Ala.) 130 (both holding that a replevy bond conditioned for the return of the property, or for the payment of such judgment as should be rendered, should run to the officer).

Colorado.— Stevenson *v.* Palmer, 14 Colo. 565, 24 Pac. 5, 20 Am. St. Rep. 295, under statute requiring a bond to deliver property to the officer or to pay its value, to run to plaintiff.

Iowa.— Delivery bond payable to plaintiff in attachment. Jones *v.* Peasley, 3 Greene (Iowa) 52.

Kansas.— Johnson *v.* Weatherwax, 9 Kan. 75, holding that a forthcoming bond running to the officer instead of to plaintiff, as required by the statute, cannot be supported as a statutory bond, but may be good nevertheless as a common-law obligation.

Michigan.— Forrest *v.* O'Donnell, 42 Mich. 556, 4 N. W. 259, forthcoming bond to officer.

Mississippi.— Phillips *v.* Harvey, 50 Miss. 489, under statute requiring replevy bond, conditioned to have the property forthcoming, or in default thereof to pay and satisfy the judgment to the extent of the value of the property, to be payable to plaintiff.

Nebraska.— Dewey *v.* Kavanaugh, 45 Nebr. 233, 63 N. W. 396, forthcoming bond to plaintiff, conditioned to have forthcoming the property or its appraised value to answer the judgment of the court.

New York.— Morange *v.* Edwards, 1 E. D. Smith (N. Y.) 414, under statute requiring a bond to discharge an attachment in the marine court, to be payable to the officer.

Bond payable to assignee of claim.—A bond by a debtor under a statute relating to absconding, concealed, and non-resident debtors is good, although payable to the assignee on the demand in suit, he having instituted the proceeding by attachment in his own name. Besley *v.* Palmer, 1 Hill (N. Y.) 482.

Bail-bond.— Where the statute authorizes the defendant to replevy by giving a bail-bond, without prescribing that the bond shall be payable to the sheriff, as a bail-bond must be payable to the sheriff, a bond under the statute, payable to plaintiff, conditioned for the appearance of defendant, is not sufficient to entitle the latter to appear and plead to the action. Barry *v.* Sinclair, 61 N. C. 7.

e. Approval of Bond — Order of Discharge — (i) *In General.* The statutes which fix the method of obtaining the release of attached property also fix the manner in which the bond for that purpose shall be approved. Thus the officer is authorized or required to relinquish possession of the attached property upon the execution of a bond to be approved by him,[99] or the discharge of the attachment is procured by the execution of a bond, to be approved by the court or judge, upon which an order of discharge or dissolution is entered.[1] If the bond is not approved as required by the statute it is not a stat-

Defect cured by pleading.—Where an undertaking was defective because not made payable to plaintiff, and a copy of the instrument was set out and made a part of the complaint, it was held under the statute in Indiana that the defect was cured. Moore *v.* Jackson, 35 Ind. 360.

99. Dewey *v.* Kavanaugh, 45 Nebr. 233, 63 N. W. 396 (holding that a forthcoming bond must be approved by such officer and that the clerk is not authorized under the statute to perform this function); Cortelyou *v.* Maben, 40 Nebr. 512, 59 N. W. 94 (holding that while a forthcoming bond must be approved by the officer such approval need not be indorsed on the bond); Phillips *v.* Harvey, 50 Miss. 489 (forthcoming bond); Upton *v.* Philips, 11 Heisk. (Tenn.) 215 (replevy bond, payable to plaintiff, conditioned to pay the debt, etc., or the value of the property, etc.).

Before or after return — By sheriff or clerk.—Where nothing appears but that the bond was taken by the clerk the court will presume that the writ had been returned to his office, or the return-day of the writ had not arrived. Morrison *v.* Alphin, 23 Ark. 136.

Acceptance by sheriff who is plaintiff.—Where a constable executes an attachment and the sheriff, who is plaintiff, accepts the bond given to discharge the attachment, this will not vitiate it, defendant having received the property; and such acceptance is not against the rule prohibiting an officer from executing process in his own case. Forbes *v.* Navra, 63 Miss. 1.

Number of sureties.— Under a statute requiring a bond for the release of attached property to be executed by such sureties as may be approved by the officer a bond executed by one surety is sufficient. Ward *v.* Whitney, 8 N. Y. 442.

Qualification of surety for benefit of sheriff. — Where the particular qualification of a surety is for the benefit of the sheriff, as that the surety shall be a freeholder, the liability of the sureties on the release bond taken by the sheriff is not affected by the fact that a cosurety is not a freeholder. Gibbs *v.* Johnson, 63 Mich. 671, 30 N. W. 343.

Remedy on bond as indicating qualification of sureties.— A statute giving to the creditor a remedy by scire facias or debt on a bond to release an attachment, either of which would be imperfect if the sureties were nonresidents, it was held that they must be residents of the state. Choate *v.* Stark, 18 N. H. 131.

1. *California.*— See Rosenthal *v.* Perkins, 123 Cal. 240, 55 Pac. 804; Gardner *v.* Donnelly, 86 Cal. 367, 24 Pac. 1072; McMillan *v.* Dana, 18 Cal. 339.

Kentucky.— Louisville City R. Co. *v.* Masonic Sav. Bank, 12 Bush (Ky.) 416.

Louisiana.—McCloskey *v.* Wingfield, 32 La. Ann. 38. When a judge has granted an order authorizing defendant to release writs of attachment and sequestration on bond, which order has not been executed, he may order the suspension of its execution until hearing of the parties, when he discovers reason to believe that it was improvidently granted. Lallande *v.* Crandell, 38 La. Ann. 192.

Massachusetts.— See Sampson *v.* Barnard, 98 Mass. 359. Under Mass. Pub. Stat. (1882), c. 161, §§ 122, 126, a bond to dissolve an attachment was to be approved by plaintiff, his attorney, a master in chancery, a justice of a court of record, a police justice, a municipal court, or commissioner of insolvency when the attachment was made within the jurisdiction of such justice or commissioner. It was held that the bond to dissolve an attachment may be approved by plaintiff or his attorney after the obligor has called upon a magistrate and has failed to secure his approval of the bond. Daley *v.* Carney, 117 Mass. 288.

Minnesota.— Rachelman *v.* Skinner, 46 Minn. 196, 48 N. W. 776. The judge may excuse compliance with the rule of court requiring a bond to be acknowledged by the sureties, and an order discharging an attachment is appealable. Gale *v.* Seifert, 39 Minn. 171, 39 N. W. 69.

New York.—Lawlor *v.* Magnolia Metal Co., 2 N. Y. App. Div. 552, 38 N. Y. Suppl. 36, 74 N. Y. St. 465, 3 N. Y. Annot. Cas. 100; Bliss *v.* Molter, 8 Abb. N. Cas. (N. Y.) 241, 58 How. Pr. (N. Y.) 112.

Oregon.— See Duncan *v.* Thomas, 1 Oreg. 314.

South Carolina.— Sullivan *v.* Williams, 43 S. C. 489, 21 S. E. 642.

In term-time or vacation.— Under some statutes the bond is to be approved by the court in term-time, or if in vacation and before return, by the sheriff, or if in vacation and after return, by the clerk. See Budd *v.* Durall, 36 Iowa 315; Hartwell *v.* Smith, 15 Ohio St. 200; Shelden *v.* Sharpless, 2 Ohio Dec. (Reprint) 1, 1 West. L. Month. 42.

If a written application for the approval of the bond is required it is not necessary that such application should be signed by the parties. Com. *v.* Costello, 120 Mass. 358.

The order discharging an attachment should

utory bond,[2] although the obligors may bind themselves by entering into a voluntary undertaking, without the procurement of a discharge by order of court,[3] and they may be bound as at common law in the absence of approval, as required by statute.[4]

(11) *Substitution or Addition of Sureties.* It has been held that for the purpose of substitution courts of general jurisdiction have complete power to require change of sureties in a delivery bond,[5] and the court may compel defendant to furnish further sureties upon a bond to discharge the attachment.[6]

f. Effect — (1) *On Lien of Attachment* — (A) *Forthcoming Bonds.* A bond conditioned for the forthcoming or delivery of the property to satisfy any judgment that may be rendered does not affect or discharge the attachment,[7] or withdraw the property from the custody of the law so as to destroy the lien of the attachment, but the lien is preserved as if the property remained in the care

state whether it applies to the whole or a part of the property, and if to a part, what part. Ellsworth *v.* Scott, 3 Abb. N. Cas. (N. Y.) 9. Where the statute provides for the dissolution of an attachment, upon the approval and filing of a particular bond, the dissolution is effected by such approval and filing without any order of the court. O'Hare *v.* Downing, 130 Mass. 16.

Amount.— The law fixes the amount of the penalty of the bond. McCloskey *v.* Wingfield, 32 La. Ann. 38 (holding that it is the duty of the court to fix the bond with reference to the value of the property to be released). The court has no power to discharge an attachment upon nominal security, the statute requiring such security to be in double the amount of plaintiff's claim, or if the claim be greater than the value of the property, in double the amount of the appraised value of the property. Foley *v.* Virtue, 8 Abb. Pr. N. S. (N. Y.) 407. And the court may require the undertaking, which is in a penalty equal to plaintiff's demand, to be increased so as to secure interest and costs, in the event plaintiff shall obtain a judgment, the statute requiring an undertaking to discharge an attachment to provide that defendant will pay plaintiff the amount of any judgment which may be recovered, not exceeding the sum specified in the undertaking, with interest, etc. Morewood *v.* Curtis, 13 N. Y. Civ. Proc. 218. But where the undertaking is for the total amount claimed by plaintiff, the court is not bound to increase such amount in the absence of evidence showing that plaintiff would be prejudiced by its refusal to do so. Waeber *v.* Talbot, 81 Hun (N. Y.) 595, 31 N. Y. Suppl. 37, 63 N. Y. St. 426.

Waiver of right to justify sureties.—Under the statute in New York plaintiff had a right within a certain time after notice of filing of the undertaking, to give notice to the sheriff that he excepted to the sufficiency of the sureties, whereupon the sheriff could retain possession until objections were waived or the undertaking approved. It was held that plaintiff's attorney could not verbally consent to the entry of an order discharging the attachment, so as to waive plaintiff's right to require the sureties to justify. Moses *v.* Waterbury Button Co., 15 Abb. Pr. N. S. (N. Y.) 205, 46 How. Pr. (N. Y.) 528.

Affidavit of justification.— The rule excluding from consideration affidavits taken before the attorney of the party in the action applies to the affidavits of justification of sureties on a bond to discharge an attachment. Such affidavits are made in the action within the above rule. Bliss *v.* Molter, 8 Abb. N. Cas. (N. Y.) 241, 58 How. Pr. (N. Y.) 112.

2. Louisville City R. Co. *v.* Masonic Sav. Bank, 12 Bush (Ky.) 416 (holding that such a bond cannot be enforced by rule of court); Fogel *v.* Dussault, 141 Mass. 154, 7 N. E. 17; Dewey *v.* Kavanaugh, 45 Nebr. 233, 63 N. W. 396; Shelden *v.* Sharpless, 2 Ohio Dec. (Reprint) 1, 1 West. L. Month. 42.

3. Cockroft *v.* Claflin, 64 Barb. (N. Y.) 464 [*affirmed* in 53 N. Y. 618]; Sullivan *v.* Williams, 43 S. C. 489, 21 S. E. 642. In New Jersey the statute provides that the attachment debtor, on giving bond with surety to protect attachment creditors and entering his appearance to their actions, may on order of a court or judge thereof, in term-time or vacation, if it appear just to do so, have the attachment released, but liability of the obligors on such a bond does not depend upon the action of the court or judge in setting aside or refusing to set aside the lien of the attachment. Gray *v.* Sharp, 62 N. J. L. 102, 40 Atl. 771.

4. Williams *v.* Coleman, 49 Mo. 325; Shelden *v.* Sharpless, 2 Ohio Dec. (Reprint) 1, 1 West. L. Month. 42.

5. Ramsey *v.* Coolbaugh, 13 Iowa 164, as to the power of the state court, upon granting an application for removal of the cause to the federal court, to require a new delivery bond in lieu of that given in the state court and to discharge the sureties thereon.

6. See McCloskey *v.* Wingfield, 32 La. Ann. 38; Jewett *v.* Crane, 35 Barb. (N. Y.) 208.

Insolvency of surety.— The court has no power to order additional sureties where one of the sureties becomes insolvent. Dudley *v.* Goodrich, 16 How. Pr. (N. Y.) 189.

7. Dewey *v.* Kavanaugh, 45 Nebr. 233, 63 N. W. 396; Hilton *v.* Ross, 9 Nebr. 406. 2 N. W. 862.

of the officer.[8] The bond serves merely to insure the safe-keeping and faithful return of the property and substitutes the responsibility of the obligors in this respect for that of the officer.[9]

(B) *Bond to Secure Judgment.* A bond under the statute for the discharge of an attachment, not merely to have the property forthcoming, but conditioned to perform the judgment which may be rendered, dissolves the attachment and discharges the property from the custody of the law.[10]

8. *Alabama.*— Scarborough *v.* Malone, 67 Ala. 570; Cordaman *v.* Malone, 63 Ala. 556; Rives *v.* Wilborne, 6 Ala. 45; McRae *v.* McLean, 3 Port. (Ala.) 138.

Arkansas.— Adams *v.* Jacoway, 34 Ark. 542.

California.— Low *v.* Adams, 6 Cal. 277.

Colorado.— Stevenson *v.* Palmer, 14 Colo. 565, 24 Pac. 5, 20 Am. St. Rep. 295; Edwards *v.* Pomeroy, 8 Colo. 254, 6 Pac. 829. But see Nichols *v.* Chittenden, 14 Colo. App. 49, 59 Pac. 954.

Indiana.— Wright *v.* Manns, 111 Ind. 422, 12 N. E. 160; Gass *v.* Williams, 46 Ind. 253; Dunn *v.* Crocker, 22 Ind. 324.

Kansas.— McKinney *v.* Purcell, 28 Kan. 446; Tyler *v.* Safford, 24 Kan. 580.

Kentucky.— Bell *v.* Western River Imp., etc., Co., 3 Metc. (Ky.) 558; Kane *v.* Pilcher, 7 B. Mon. (Ky.) 651; Bell *v.* Pearce, 1 B. Mon. (Ky.) 73; Hobson *v.* Hall, 10 Ky. L. Rep. 635; Franklin *v.* Fry, 9 Ky. L. Rep. 358.

Maine.— Woodman *v.* Trafton, 7 Me. 178.

Mississippi.—Montague *v.* Gaddis, 37 Miss. 453; Gray *v.* Perkins, 12 Sm. & M. (Miss.) 622.

Missouri.— Evans *v.* King, 7 Mo. 411; Hudson *v.* Lamar, 74 Mo. App. 238; Fleming *v.* Clark, 22 Mo. App. 218. A purchaser with notice of the lien takes subject thereto. Labeaume *v.* Sweeney, 21 Mo. 166.

Nebraska.—Dewey *v.* Kavanaugh, 45 Nebr. 233, 63 N. W. 396.

New Mexico.— Holzman *v.* Martinez, 2 N. M. 271.

New York.—Sterling *v.* Welcome, 20 Wend. (N. Y.) 238.

Oregon.— Dickson *v.* Back, 32 Oreg. 217, 51 Pac. 727; Drake *v.* Sworts, 24 Oreg. 198, 33 Pac. 563; Kohn *v.* Hinshaw, 17 Oreg. 308, 20 Pac. 629; Duncan *v.* Thomas, 1 Oreg. 314.

Virginia.—Magill *v.* Sauer, 20 Gratt. (Va.) 540.

United States.— Smith *v.* Packard, 98 Fed. 793, 39 C. C. A. 294 (construing Illinois statute); Correy *v.* Lake, Deady (U. S.) 469, 6 Fed. Cas. No. 3,253 (construing Oregon statute).

See 5 Cent. Dig. tit. "Attachment," § 931.

Contra.—In Iowa a bond under the statute, conditioned for the return of the property or its value, was held to release the property from custody and take the place of the attachment lien. Austin *v.* Burgett, 10 Iowa 302; Jones *v.* Peasley, 3 Greene (Iowa) 52. And so under a statute providing for the procurement of the discharge of an attachment by the execution of such a bond the effect of the bond is to discharge the attachment. See Rosenthal *v.* Perkins, 123 Cal. 240, 55 Pac. 804; Mullally *v.* Townsend, 119 Cal. 47, 50 Pac. 1066; Metrovich *v.* Jovovich, 58 Cal. 341; Schuyler *v.* Sylvester, 28 N. J. L. 487; Vreeland *v.* Bruen, 21 N. J. L. 214.

Property so released is subject to disposition under the lien, although after surrender it is seized under another attachment. Gray *v.* Perkins, 12 Sm. & M. (Miss.) 622. But if, in the meantime, it is removed beyond the jurisdiction of the officer who issues the attachment and is there seized on another attachment it is held that the lien is destroyed. Sterling *v.* Welcome, 20 Wend. (N. Y.) 238.

9. Wright *v.* Manns, 111 Ind. 422, 12 N. E. 160. See also Smith *v.* Packard, 98 Fed. 793, 39 C. C. A. 294, construing Illinois statute.

Discharge by payment of value or judgment.— This is true, although the obligors may discharge themselves in the alternative, by returning the property or by paying its full value, not exceeding the amount of the judgment and costs in the action. Adams *v.* Jacoway, 34 Ark. 542; Stevenson *v.* Palmer, 14 Colo. 565, 24 Pac. 5, 20 Am. St. Rep. 295; Gass *v.* Williams, 46 Ind. 253; Gray *v.* Perkins, 12 Sm. & M. (Miss.) 622.

10. *Arkansas*— Ferguson *v.* Glidewell, 48 Ark. 195, 2 S. W. 711.

Connecticut.—Birdsall *v.* Wheeler, 58 Conn. 429, 20 Atl. 607; Perry *v.* Post, 45 Conn. 354.

Georgia.—Reynolds *v.* Jordan, 19 Ga. 436; Richmond County Inferior Ct. *v.* Barr, Dudley (Ga.) 32.

Illinois.— Hill *v.* Harding, 93 Ill. 77, recognizance to pay judgment.

Indian Territory.— Sanger *v.* Hibbard, 2 Indian Terr. 547, 53 S. W. 330.

Kentucky.— Thompson *v.* Arnett, (Ky. 1901) 64 S. W. 735; Inman *v.* Strattan, 4 Bush (Ky.) 445; Hazelrigg *v.* Donaldson, 2 Metc. (Ky.) 445; Hobson *v.* Hall, 10 Ky. L. Rep. 635 [*affirmed* in (Ky. 1890) 14 S. W. 958]; McCormack *v.* Henderson, 10 Ky. L. Rep. 541. The court loses jurisdiction over the property. Bell *v.* Western River Imp., etc., Co., 3 Metc. (Ky.) 558.

Louisiana.— In Love *v.* Voorhies, 13 La. Ann. 549, defendant gave a bond under the statute, conditioned to "satisfy such judgment, to the value of the property attached, as may be rendered against him," etc., and it was held that although it might be different if the attachment is quashed by judicial order, the mere bonding of the property released only the seizure. But under a Mississippi statute which permitted a defendant in attachment brought for a debt not due to give a bond to pay the debt at maturity, after

(II) *APPEARANCE.* As in the case of the entry of special bail,[11] where attachment defendant gives a bond for the dissolution or discharge of the attachment, or for the performance of the judgment, it operates as an appearance, so that thereafter the action proceeds *in personam*, and a personal judgment is rendered as in ordinary cases.[12] So, too, it has been held that the giving of a replevy

such bond the creditor cannot proceed to judgment. Church *v.* Henry, 17 La. 70.

Maryland.— McAllister *v.* Eichengreen, 34 Md. 54.

Minnesota.— Rachelman *v.* Skinner, 46 Minn. 196, 48 N. W. 776.

Mississippi.— Forbes *v.* Navra, 63 Miss. 1.

Nevada.— Bowers *v.* Beck, 2 Nev. 139.

New Jersey.—See Gray *v.* Sharp, 62 N. J. L. 102, 40 Atl. 771; Schuyler *v.* Sylvester, 28 N. J. L. 487. Under the New Jersey act, of 1820, making an attachment a lien on property attached from the time of issuing the same, it was held proper upon the appearance and entry of special bail in foreign attachment to enter a rule dissolving the attachment, inserting therein a clause "saving all liens created by statute." Anonymous, 10 N. J. L. 60.

New York.— McCombs *v.* Allen, 82 N. Y. 114. But in Lawlor *v.* Magnolia Metal Co., 2 N. Y. App. Div. 552, 38 N. Y. Suppl. 36, 74 N. Y. St. 465, 3 N. Y. Annot. Cas. 100, the court in distinguishing between the vacation of an attachment and the discharge of an attachment by giving an undertaking under the statute said that the effect of a judgment vacating an attachment is an adjudication that the property is illegally seized, while if the attachment is discharged by the giving of an undertaking the attachment still lives, the undertaking being substituted in the place of the levy.

North Dakota.—A bond conditioned to pay the judgment destroys the writ. Fox *v.* Mackenzie, 1 N. D. 298, 47 N. W. 386.

Ohio.— Jayne *v.* Platt, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. Rep. 810; Myers *v.* Smith, 29 Ohio St. 120.

Oregon.—Drake *v.* Sworts, 24 Oreg. 198, 33 Pac. 563; Bunneman *v.* Wagner, 16 Oreg. 433, 18 Pac. 841, 8 Am. St. Rep. 306; Duncan *v.* Thomas, 1 Oreg. 314.

Rhode Island.— Easton *v.* Ormsby, 18 R. I. 309, 27 Atl. 216.

South Dakota.—Wyman *v.* Hallock, 4 S. D. 469, 57 N. W. 197; McLaughlin *v.* Wheeler, 1 S. D. 497, 47 N. W. 816.

Tennessee.— Bond payable to plaintiff, in double the amount of plaintiff's demand, or at defendant's option, in double the amount of the valne of the property attached, conditioned to pay the debt, etc., in case defendant is cast in the suit, releases the property from the lien and deprives the court of control. Casey, etc., Mfg. Co. *v.* Weatherley, 97 Tenn. 297, 37 S. W. 6; Barry *v.* Frayser, 10 Heisk. (Tenn.) 206; Cheatham *v.* Galloway, 7 Heisk. (Tenn.) 678. Defendant upon executing such a bond can sell and dispose of the property without violating any obligation assumed in law to the parties concerned in the cause. Jones *v.* Stewart, (Tenn. Ch. 1900) 61 S. W. 105.

Texas.—Shirley *v.* Byrnes, 34 Tex. 625. So a replevy bond, conditioned to satisfy the judgment or pay the value of the property, was held to discharge the attachment absolutely. Carothers *v.* Wilkerson, 2 Tex. App. Civ. Cas. § 353. But see Kildare Lumber Co. *v.* Atlanta Bank, 91 Tex. 95, 41 S. W. 64.

Wisconsin.— Dierolf *v.* Winterfield, 24 Wis. 143.

Undertaking to prevent levy.— The giving of an undertaking to prevent the levy of an attachment under the statute which contemplates that the sheriff may have commenced the execution of the writ not only prevents him from making any further levy, but also prevents him from keeping any property already attached, and releases any levy already made. Preston *v.* Hood, 64 Cal. 405, 1 Pac. 487.

11. Garrett *v.* Tinnen, 7 How. (Miss.) 465; Williams *v.* Haselden, 10 Rich. (S. C.) 55.

12. *Illinois.*— Sharpe *v.* Morgan, 144 Ill. 382, 33 N. E. 22; People *v.* Cameron, 7 Ill. 468; Hughes *v.* Foreman, 78 Ill. App. 460. But in determining the question whether the suit shall proceed when the defendant is in bankruptcy, the proceeding is to be treated as an attachment suit. Hill *v.* Harding, 93 Ill. 77.

Georgia.— Hendrix *v.* Cawthorn, 71 Ga. 742; Reid *v.* Moore, 12 Ga. 368. A replevy bond conditioned that defendant shall appear and perform the judgment binds him not only to appear, but also to pay such judgment as may be rendered against him. Cole *v.* Reilly, 28 Ga. 431; Reynolds *v.* Jordan, 19 Ga. 436.

Kentucky.— Harper *v.* Bell, 2 Bibb (Ky.) 221; McCormack *v.* Henderson, 10 Ky. L. Rep. 541.

Louisiana.— When defendant appears by agent and bonds the property the bond will be considered as representing his principal, so as to bind him to comply with the conditions of the bond to defend the suit or abide by the judgment that may be rendered, and it is not necessary to appoint an attorney to represent the absent defendant. Kendall *v.* Brown, 7 La. Ann. 668.

Minnesota.— Rachelman *v.* Skinner, 46 Minn. 196, 48 N. W. 776.

Missouri.— Payne *v.* Snell, 3 Mo. 409.

Oregon.— Bunneman *v.* Wagner, 16 Oreg. 433, 18 Pac. 841, 8 Am. St. Rep. 306.

Pennsylvania.—Borden *v.* American Surety Co., 159 Pa. St. 465, 33 Wkly. Notes Cas. (Pa.) 502, 28 Atl. 301; Albany City Ins. Co. *v.* Whitney, 70 Pa. St. 248.

South Carolina.— Harrison *v.* Casey, 1 Brev. (S. C.) 390.

Texas.— Shirley *v.* Byrnes, 34 Tex. 625; Kennedy *v.* Morrison, 31 Tex. 207.

bond[13] or a bond conditioned to have the property forthcoming[14] is sufficient to operate as an appearance.

(III) *Upon Right to Question Attachment.* A bond for the redelivery or forthcoming of the property or which does not dissolve or discharge the attachment will not prevent defendant from moving thereafter to discharge the same.[15] So where the bond, without judicial order to quash it, operates only to release the seizure, defendant is not precluded by such bond from moving to dismiss,[16] and a replevy bond does not preclude defendant from traversing the truth of the grounds of attachment,[17] or from moving to dismiss the attachment.[18] A dissolution or discharge bond, or a bond conditioned to perform the judgment, operates to discharge the attachment altogether, rendering immaterial the validity of the grounds thereof[19] and making the obligors unconditionally liable.[20] The giving of such a bond is held to constitute a waiver on the part of attachment defendant of his right to move for a dissolution of the attachment thereafter,

United States.— Barry *v.* Foyles, 1 Pet. (U. S.) 311, 7 L. ed. 157, construing Maryland statute.

Advertisement.—Where the attachment is dissolved by the giving of a bond to abide the final judgment the proceeding need not be advertised. Buice *v.* Lowman Gold, etc., Min. Co., 64 Ga. 769; Camp *v.* Cahn, 53 Ga. 558; Reynolds *v.* Jordan, 19 Ga. 436; Richmond County Inferior Ct. *v.* Barr, Dudley (Ga.) 32.

Waiver of time allowed for appearing.— By giving a release bond defendant waives the time allowed for appearing and answering in cases of notice by publication. Shields *v.* Barden, 6 Ark. 459.

Void attachment.— In Planters' Loan, etc., Bank *v.* Berry, 91 Ga. 264, 18 S. E. 137, it was held that a bond given to dissolve an attachment on property of a national bank seized before final judgment is void under U. S. Rev. Stat. § 5242, and therefore is not such an appearance as to render a judgment on the bond valid.

13. Peebles *v.* Weir, 60 Ala. 432 (holding that the execution of such a bond is sufficient to sustain a judgment by default, although the levy of the attachment is void); Richard *v.* Mooney, 39 Miss. 357.

14. Chastain *v.* Armstrong, 85 Ala. 215, 3 So. 788; Brenner *v.* Moyer, 98 Pa. St. 274 (holding that upon the execution of a bond which was conditioned for the surrender of the property in the event of the recovery of judgment, the proceeding became a mere personal action).

15. *Iowa.*— Allerton *v.* Eldridge, 56 Iowa 709, 10 N. W. 252.

Nebraska.— Wilson *v.* Shepherd, 15 Nebr. 15, 16 N. W. 826; Hilton *v.* Ross, 9 Nebr. 406, 2 N. W. 862.

New Mexico.— Holzman *v.* Martinez, 2 N. M. 271.

Pennsylvania.— Dienelt *v.* Aronia Fabric Co., 2 Pa. Co. Ct. 206, where the bond given by attachment defendant was conditioned for the payment of the debt and costs, or for the return of the property.

United States.— Correy *v.* Lake, Deady (U. S.) 469, 6 Fed. Cas. No. 3,253, construing Oregon statute.

Where the delivery bond discharges the attachment a motion thereafter is nugatory. Austin *v.* Burgett, 10 Iowa 302.

Motion to quash levy.— By executing a forthcoming bond defendant admits the validity of a levy and is estopped to move to quash it. Fenner *v.* Boutte, 72 Miss. 271, 16 So. 259.

16. Love *v.* Voorhies, 13 La. Ann. 549, where it appears the statute provided for a bond conditioned that defendant would satisfy the judgment to the value of the property attached. See also Edwards *v.* Prather, 22 La. Ann. 334; Avet *v.* Albo, 21 La. Ann. 349; Brinegar *v.* Griffin, 2 La. Ann. 154; Myers *v.* Perry, 1 La. Ann. 372; Pailhes *v.* Roux, 14 La. 82; Baker *v.* Hunt, 1 Mart. (La.) 193.

17. Perryman *v.* Pope, 94 Ga. 672, 21 S. E. 715; Brumby *v.* Rickoff, 94 Ga. 429, 21 S. E. 232; Montague *v.* Gaddis, 37 Miss. 453 (where the bond did not operate to discharge the lien).

Necessity to prove joint ownership.— In Swift *v.* Tatner, 89 Ga. 660, 15 S. E. 842, 32 Am. St. Rep. 101, it was held that in order to obtain a verdict against all the defendants in an attachment, sued out against several as joint owners, plaintiff must establish the joint ownership as alleged, notwithstanding defendants have replevied the vessel after its seizure; that the right to replevy being given by statute, irrespective of the ownership of the parties, the replevin was no admission by them of plaintiff's demand or of their ownership.

18. Walter *v.* Kierstead, 74 Ga. 18 (holding, however, that defendant after replevying the property can move to dismiss a void attachment, but not an irregular or erroneous one); Bruce *v.* Conyers, 54 Ga. 678 (which involved a motion on the ground of a defective affidavit, and where it appeared that the remedy was available although ordinarily a replevy bond dissolved the attachment, there being no other way but by giving the bond for defendant to retain the possession of the property).

19. Sanger *v.* Hibbard, 2 Indian Terr. 547, 53 S. W. 330; McCormack *v.* Henderson, 10 Ky. L. Rep. 541.

20. See *infra*, XIII, E, 4, b, (II), (B), (2), (b).

or of traversing the grounds thereof, the case standing as if no attachment had been issued.[21]

(IV) *Upon Right of Possession*—(A) *In General.* After the execution of a bond for the release of attached property defendant is entitled to possession of the property.[22]

21. *Arkansas.*— Ferguson *v.* Glidewell, 48 Ark. 195, 2 S. W. 711 [*distinguishing* earlier cases in Arkansas under provisions before the code, for which see Ward *v.* Carlton, 26 Ark. 662 (where the bond was conditioned that defendant would appear and answer plaintiff's demand and pay and abide the judgment of the court, and defendant was allowed to controvert the truth of the affidavit, because under the statute then existing defendant could not otherwise obtain immediate possession of the property but by the execution of such a bond); Childress *v.* Fowler, 9 Ark. 159; Delano *v.* Kennedy, 5 Ark. 457]. In Morrison *v.* Alphin, 23 Ark. 136, it was held that after a bond to discharge the attachment there is no levy to quash, and a motion for that purpose made upon the ground that the property is not liable to attachment is demurrable.

Illinois.— Hill *v.* Harding, 93 Ill. 77.

Kentucky.— Inman *v.* Strattan, 4 Bush (Ky.) 445; Bromly *v.* Vinson, 9 Ky. L. Rep. 401.

Michigan.— Paddock *v.* Matthews, 3 Mich. 18. But a bond conditioned to release attached property, to pay any judgment that might be rendered, or to have the property ready to satisfy it, was held not a recognition of the title of defendants, and could have no force as a ratification of an unauthorized purchase by another. Woods *v.* Robertson, 31 Mich. 64. And in a proceeding to enforce the lien a bond conditioned to pay such sum as may be found to be a lien on the property, not to pay any judgment that may be rendered against the principal, is not a waiver of defects in the service of the writ. Reynolds *v.* Marquette Cir. Judge, 125 Mich. 445, 84 N. W. 628.

Minnesota.— Rachelman *v.* Skinner, 46 Minn. 196, 48 N. W. 776.

North Dakota.— Fox *v.* Mackenzie, 1 N. D. 298, 47 N. W. 386.

South Dakota.—Wyman *v.* Hallock, 4 S. D. 469, 57 N. W. 197; McLaughlin *v.* Wheeler, 1 S. D. 497, 47 N. W. 816.

Tennessee.—Where a non-resident defendant in attachment gives a bond for the payment of the debt, he cannot prevent a decree by showing that he did not have title to the property. Stephens *v.* Greene County Iron Co., 11 Heisk. (Tenn.) 71.

United States.— Barry *v.* Foyles, 1 Pet. (U. S.) 311, 7 L. ed. 157 (construing Maryland statute); Wolf *v.* Cook, 40 Fed. 432 (construing Wisconsin statute).

Contra.— In several jurisdictions a bond to discharge or dissolve an attachment does not prevent defendant from attacking it for such irregularity as would have been sufficient to avoid it in the absence of a bond.

California.— Winters *v.* Pearson, 72 Cal. 553, 14 Pac. 304, where the statute provided for the procurement of an order discharging the attachment upon executing a prescribed undertaking, and the court said that the right to move thereafter to discharge the writ was expressly given by statute.

Indiana.—Carson *v.* The Steam Boat Talma, 3 Ind. 194; Root *v.* Monroe, 5 Blackf. (Ind.) 594.

New York.— Claflin *v.* Baere, 57 How. Pr. (N. Y.) 78; Garbutt *v.* Hanff, 15 Abb. Pr. (N. Y.) 189, in which latter case it appeared that the statute provided that defendant might move in all cases for a discharge of the attachment. But see Bildersee *v.* Aden, 62 Barb. (N. Y.) 175. In Dusseldorf *v.* Redlich, 16 Hun (N. Y.) 624, it was held that the execution of such a bond did not operate as a waiver of the right to have the plaintiff in attachment give increased security thereupon.

Ohio.— Egan *v.* Lumsden, 2 Disn. (Ohio) 168; Ross *v.* Miller Merchant Tailoring Co., 7 Ohio Cir. Ct. 51; Saxton *v.* Plymire, 3 Ohio Cir. Ct. 209 (holding that the statute which allowed a motion to discharge an attachment generally applied to fortheoming as well as discharge bonds). *Compare* Jayne *v.* Platt, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. Rep. 810.

Pennsylvania.— Fernau *v.* Butcher, 113 Pa. St. 292, 6 Atl. 67.

South Carolina.—Bates *v.* Killian, 17 S. C. 553.

Texas.—See Kildare Lumber Co. *v.* Atlanta Bank, 91 Tex. 95, 41 S. W. 64; Hall *v.* Miller, 21 Tex. Civ. App. 336, 51 S. W. 36.

United States.— Lehman *v.* Berdin, 5 Dill. (U. S.) 340, 15 Fed. Cas. No. 8,215, 7 Am. L. Rec. 310, 7 Centr. L. J. 269, 6 Reporter 611, construing Arkansas statute.

22. Stevenson *v.* Palmer, 14 Colo. 565, 24 Pac. 5, 20 Am. St. Rep. 295.

Payment of fees and charges.— Where a defendant whose live stock has been attached filed a proper delivery bond which was accepted, he was entitled to possession without payment of charges already incurred for keeping. Milburn *v.* Marlow, 4 Greene (Iowa) 17. In New York where an attachment is discharged by the giving of an undertaking which does not provide in terms for the payment of the sheriff's fees, defendant must pay them before he is entitled to a return of the property. Lawlor *v.* Magnolia Metal Co., 2 N. Y. App. Div. 552, 38 N. Y. Suppl. 36, 74 N. Y. St. 465, 3 N. Y. Annot. Cas. 100; Union Square Bank *v.* Reichman, 3 N. Y. Annot. Cas. 103 note. But it seems that if the fees are provided for in the undertaking defendant is entitled to a return of the property without their payment. Lawlor *v.* Magnolia Metal Co., 2 N. Y. App. Div. 552, 38 N. Y. Suppl. 36, 74 N. Y. St. 465, 3 N. Y. Annot. Cas. 100.

(B) *Duty and Necessity to Redeliver to Defendant.* When a bond in conformity with the statute is executed by defendant it is the duty of the officer levying the attachment to deliver to the former the property so levied upon,[23] and it is held that the bond is inoperative and that no liability attaches to the sureties unless the property is redelivered into the hands of defendant or his agent.[24]

g. Appeal, Supersedeas, or Stay Bonds. In the absence of statutory provision it is held that an appeal undertaking cannot be given the force of a forthcoming bond or be permitted to otherwise alter the status of the attached property,[25] the lien of the attachment, or the liability of the obligors on a delivery bond;[26] but, on the other hand, it has been held that a supersedeas bond which must be given to secure whatever judgment is rendered in a court of error is a substitute for plaintiff's security by attachment or by bond given by defendant to dissolve an attachment.[27]

The order discharging an attachment should state whether it applies to the whole or a part of the property, and if the latter, to what part, but it need not ordinarily contain directions as to the manner of redelivery. Ellsworth *v.* Scott, 3 Abb. N. Cas. (N. Y.) 9.

23. Rogers *v.* Moore, 40 Ga. 386.

Return to place of removal.— An officer who has attached chattels and removed them for safe-keeping is not bound, on receiving the bond provided for in the statute, to return them to the place from whence he removed them. Clark *v.* Wilson, 14 R. I. 13.

Subsequent attachment of property surrendered to sheriff.— Where all creditors attaching during the pendency of the first suit acquire an interest in the forthcoming bond, the sureties on such bond are not liable for the value of the goods not surrendered to the sheriff when subsequent creditors only attach the property actually surrendered to him. Rutledge *v.* Corbin, 10 Ohio St. 478.

24. Williamson *v.* Blattan, 9 Cal. 500; Eddy *v.* Moore, 23 Kan. 113 (holding that the fact of the release of the property and its seizure and sale on an execution does not change the rule); Couse *v.* Phelps, 12 Kan. 353; McGonigle *v.* Gordon, 11 Kan. 167; Cortelyou *v.* Maben, 40 Nebr. 512, 59 N. W. 94 (holding that if a forthcoming bond is objected to, the sureties are not estopped to show that the principal never received the property, that a physical redelivery is not necessary, and that if the officer points out the property and offers to surrender it, it is sufficient).

Release from attachment, not from officer. — On the other hand, where the practice under the statute requires an order discharging the attachment upon the execution of the proper bond, it is held that if the condition of the undertaking is for the release of the property from the attachment and not from the possession of the officer, the condition is complied with by an order discharging the attachment, and it is immaterial whether the property was redelivered to defendant or not. Gardner *v.* Donnelly, 86 Cal. 367, 24 Pac. 1072; McMillan *v.* Dana, 18 Cal. 339. See also Adler *v.* Baltzer, 54 N. Y. Super. Ct. 514.

25. Collins *v.* Burns, 16 Colo. 7, 26 Pac. 145. In Spencer *v.* Rogers Locomotive Works, 13 Abb. Pr. (N. Y.) 180, upon holding that, after judgment for plaintiff, defendant has no right to have the property released upon giving an undertaking, even though the proceedings have been stayed by an appeal, it was said that there was no such thing known in law as the redelivery of property levied upon when an appeal stays further proceedings upon the levy.

26. State *v.* McGlothlin, 61 Iowa 312, 16 N. W. 137 (holding that where a delivery bond is given for the release of attached property, judgment is rendered against attachment defendant, and he appeals and gives a supersedeas bond with the same sureties as in the delivery bond, the sureties are liable on both bonds, but their total liability cannot exceed the amount for which the principal is in default upon the judgment rendered against him); Williams *v.* Robison, 21 Iowa 498. See also Chrisman *v.* Jones, 34 Ark. 73. In Magill *v.* Sauer, 20 Gratt. (Va.) 540, it was held that a discharge of the lien of an attachment could only be accomplished by giving a bond in conformity to the provision of the statute for that purpose to perform the judgment or decree of the court: that the condition of an appeal-bond that appellant shall perform and satisfy the decree of the court "should the same be confirmed, or the appeal and supersedeas be dismissed," does not discharge the lien of the attachment. In this case the decree was reversed and the cause remanded for further proceedings, and it was held that the appeal-bond had discharged its functions.

27. Russia Cement Co. *v.* Le Page Co., 174 Mass. 349, 358, 55 N. E. 70, where it was held, however, that if the amount of such a bond is to be fixed upon the theory that the security which defendant already has is to continue and that the supersedeas bond is merely to supplement such security, the supersedeas bond is not a substitute for the attachment or previous security, and does not dissolve the attachment or discharge the previous dissolution bond. This was under a construction of a federal court rule, requiring, in relation to supersedeas bonds, that "such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree; . . . but in all suits where the property in controversy neces-

h. Liability and Discharge of Obligors — (i) *In General.* The liability of obligors on a bond to release attached property depends upon the purpose of the bond and the nature of the condition thereof. If the bond is for the payment of the judgment so that defendant in attachment cannot move independently of the bond for a dissolution, the obligors are liable for the judgment irrespective of what is done with the attachment.[28] If, however, the bond merely takes the place of the property, without affecting the attachment, then the subsequent dissolution of the attachment discharges the obligors on the bond.[29]

(ii) *Conditions Precedent to Breach* — (a) *Delivery by Officer to Defendant.* Where it is the duty of the officer to deliver to defendant in attachment the property released by bond, a failure so to deliver will discharge the sureties on the bond.[30]

(b) *Judgment Requiring Satisfaction* — (1) In General. There must be a disposition of the cause requiring payment of judgment, some claim adjusted for the satisfaction of which the property is required, or some order of court under which the production of the property becomes a duty, before liability under a forthcoming or dissolution bond can arise.[31]

sarily follows the event of the suit, . . . or where the property is in the custody of the marshal; . . . or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property," as applied to supersedeas bonds upon the allowance of a writ of error to a circuit court by the circuit court of appeals, upon a judgment in the former for the recovery of money, secured by an attachment and by a dissolution bond.

Certiorari by defendant to review a justice's judgment in attachment, and a statutory bond for the payment of any judgment that may be rendered in the circuit court, dissolves the attachment (Vanderhoof *v.* Prendergast, 94 Mich. 18, 53 N. W. 792), and an appeal-bond conditioned substantially as a certiorari bond releases the property from the lien of attachment (Bushey *v.* Raths, 45 Mich. 181, 7 N. W. 802).

28. See *infra*, XIII, E, 4, h, (II), (B).

Where a bond is given for the performance of the judgment of the court and defendant in attachment waived objection to an order erroneously requiring the property to be produced, under which order he produced the property and allowed it to be sold as a mode of paying the judgment, the sureties on the bond cannot complain. McCormack *v.* Henderson, 10 Ky. L. Rep. 541.

29. Fernau *v.* Butcher, 113 Pa. St. 292, 6 Atl. 67; Kildare Lumber Co. *v.* Atlanta Bank, 91 Tex. 95, 41 S. W. 64.

Effect on right to question attachment see *supra*, XIII, E, 4, f, (III).

30. See *supra*, XIII, E, 4, f, (IV), (B).

31. *Arkansas.*—Adams *v.* Jacoway, 34 Ark. 542.

Kentucky.— Hansford *v.* Perrin, 6 B. Mon. (Ky.) 595; Combs *v.* Trimble, 7 Ky. L. Rep. 517; Thixton *v.* Goff, 5 Ky. L. Rep. 765.

Louisiana.— Dorr *v.* Kershaw, 18 La. 57. Judgment that the attachment be quashed and release bond annulled is a judgment in favor of the surety. Love *v.* McComas, 14 La. Ann. 201.

Massachusetts.— O. Sheldon Co. *v.* Cooke, 177 Mass. 441, 59 N. E. 77 (holding that where a bond is conditioned for the recovery of judgment, plaintiff must obtain judgment); Smith *v.* Jewell, 14 Gray (Mass.) 222.

Pennsylvania.— Borden *v.* American Surety Co., 2 Pa. Dist. 245, holding that where a foreign attachment is dissolved by entering bond after default judgment, the giving of a bond rendered such judgment a nullity, and liability on the bond could not accrue until a personal judgment was rendered.

Tennessee.— Morning *v.* Alexander, 10 Heisk. (Tenn.) 606.

Conditioned to deliver if ordered on particular date.— Where the undertaking was for the delivery of property levied on "if so ordered by the court on the 16th of August, 1878," it was held that the object of the agreement was to secure the return of the property when it should be needed to satisfy any attachment which might be rendered in the cause, and that the fact that the judgment was rendered on a day subsequent to that named in the agreement is unimportant. Turner *v.* Armstrong, 9 Ill. App. 24.

Where other creditors may apply, under the statute, and have their claims adjusted, a bond, although conditioned for the return of the goods should judgment be rendered for plaintiff, is for the benefit of all such creditors and will be construed to refer to any plaintiff who, as applying creditor, has filed a declaration and recovered judgment. Hanness *v.* Smith, 22 N. J. L. 332.

Bond to pay debt at maturity.— In Church *v.* Henry, 17 La. 70, it was held, construing a Mississippi statute which authorized the giving of a bond to pay the debt at maturity, that after the execution of such bond the creditor could not proceed to judgment; that the dismissal of the suit did not avoid the bond, but that action could be brought thereon in case the debt be not paid at maturity.

(2) Character of Judgment — (a) In General. The judgment to secure the performance or satisfaction of which a bond is executed is ordinarily the final judgment under which plaintiff is entitled to be paid or defendant to be discharged.[32]

(b) Personal Judgment and Direction as to Attachment. Whether there must be a judgment or direction as to the attachment depends upon the condition of the bond. On the one hand a mere personal judgment is held insufficient upon which to predicate the breach of a bond to have the property forthcoming, or pay its value to the extent of any judgment which may be rendered,[33] and a condition to return the property if so directed renders an order of court for such delivery necessary.[34] On the other hand, if the redelivery bond releases the property

Nunc pro tunc entry of judgment.— A dissolution bond, conditioned for the payment of final judgment, is not rendered invalid by the fact that the final judgment is rendered *nunc pro tunc* as of a previous term. Russia Cement Co. *v.* Le Page Co., 174 Mass. 349, 55 N. E. 70.

32. See Russia Cement Co. *v.* Le Page Co., 174 Mass. 349, 55 N. E. 70; Fogel *v.* Dussault, 141 Mass. 154, 7 N. E. 17; Poteet *v.* Boyd, 10 Mo. 160; Pritz *v.* Drake, 6 Ohio Dec. (Reprint) 1127, 10 Am. L. Rec. 565; and *supra*, XIII, E, 4, g.

Removal of a cause from a state to the federal court after the execution of a delivery bond does not so change or enlarge the liability of the sureties as to discharge them. The undertaking to have the property forthcoming to answer "the judgment of the court in said suit" does not mean the court in which the action was then pending, alone, but the court having jurisdiction which finally renders judgment. Ramsey *v.* Coolbaugh, 13 Iowa 164.

A reference, by rule of court, to arbitration, by consent of parties, is not a discharge of the sureties on a dissolution bond, as after such rule the cause remains in court subject to its power, and a judgment must be entered by the court. Seavey *v.* Beckler, 132 Mass. 203.

Judgment for plaintiff less damages on defendant's counter-claim.—Where, after execution of a delivery bond, defendant files a counter-claim for damages for wrongful attachment, and the jury assess damages therefor, but find plaintiff's claim to be just and render a verdict for him less defendant's damages, the property will not be discharged from the attachment, as the scope and spirit of the attachment laws appear to deny any dissolution of attachment after a trial and finding that plaintiff is entitled to judgment. Cole *v.* Smith, 83 Iowa 579, 50 N. W. 54.

Appeal by plaintiff without excepting to discharge.—Where defendant has judgment, the attachment is dissolved, the sureties discharged, and plaintiff appeals generally, without excepting to the order discharging the sureties, it is held that their liability is ended, notwithstanding plaintiff recovers on his appeal, especially where, upon the faith of their discharge, the sureties had given up indemnity furnished them by defendant. Barton *v.* Thompson, 66 Iowa 526, 24 N. W. 25.

Order quashing writ set aside.— Where an order quashing a writ of attachment was set aside at the same term it was held the surety on a forthcoming bond was not discharged. Hubbard *v.* Moss, 65 Mo. 647.

Non prosequitur set aside.— Under a bond conditioned to return the property if judgment is given for plaintiff, where judgment of *non prosequitur* ordered in the original suit was subsequently set aside and plaintiff finally recovered judgment the sureties were bound. Stanley *v.* Chamberlain, 43 N. J. L. 102. But in California it was held, construing the statute, that the sureties on a bond to discharge the attachment were relieved from liability, notwithstanding a judgment of nonsuit was set aside and plaintiff finally recovered judgment in the action. Hamilton *v.* Bell, 123 Cal. 93, 55 Pac. 758.

After vacation of original judgment.— In Massachusetts a bond given to dissolve an attachment does not bind the obligors to satisfy a judgment rendered after the original judgment has been vacated upon petition, under the statute which provides that no attachment made, or bail taken, shall be liable to satisfy such judgment, another provision of which requires a bond covering all that the original security covers before the first judgment is vacated. Dresser *v.* Cutter, 161 Mass. 301, 37 N. E. 176; Bush *v.* Hovey, 124 Mass. 217.

33. A judgment for sale of the property is necessary (Adams *v.* Jacoway, 34 Ark. 542; Wright *v.* Manns, 111 Ind. 422, 12 N. E. 160; Smith *v.* Scott, 86 Ind. 346; Fisher *v.* Haxtun, 26 Kan. 155); and where on the faith of a mere personal judgment against defendant the sureties on the delivery bond surrender any indemnity held by them, the subsequent entry *nunc pro tunc* of a judgment for the sale of the property will not revive their liability (Wright *v.* Manns, 111 Ind. 422, 12 N. E. 160). See also King *v.* Snow, 2 Disn. (Ohio) 73.

34. Brotherton *v.* Thomson, 11 Mo. 94.

Sufficiency of order.— The time and place to be fixed by the court in a judgment for the redelivery of property held by defendant under a forthcoming bond should be reasonable, and the court should not prescribe an impossible delivery as to time and place in order to compel a forfeiture of the bond. Dunlap *v.* Dillard, 77 Va. 847. In Wagner *v.* Romero, 3 N. M. 131, 3 Pac. 50, it was held that an

from the custody of the law or definitely fixes the liability of the surety, there need be no order of sale,[35] and the judgment need not recite that the attachment is affirmed;[36] and a bond conditioned to pay the judgment, which dissolves the attachment, renders the obligors unconditionally liable for the payment of any personal judgment that may be rendered against defendant in the action.[37]

(3) AGAINST WHOM — (a) IN GENERAL. A judgment against one other than the party named in a bond, for the satisfaction of the judgment against whom the bond is executed, is not sufficient to fix the liability on the sureties on the bond.[38]

(b) AGAINST ONE OF SEVERAL DEFENDANTS — aa. *In General.* The obligors are liable on a bond for the discharge of an attachment, conditioned for the payment of the judgment which may be recovered against defendants, although judgment is recovered against a part of the defendants only.[39]

bb. *Bond by One of Several Defendants.* Where the property of one of two defendants is seized, a dissolution bond which binds the owner to pay the final judgment in the action will render the obligors liable not only for a judgment against both

order to deliver the property "at Las Vegas, New Mexico, at the court-house of San Miguel county," followed by an amendment on the original order, "it is furtner considered that the property attached in this cause be forthwith delivered to the sheriff of San Miguel county, and that the same be sold," sufficiently complied with the provisions of the statute. But it has also been held that where such bond is given the order of the court directing defendant to deliver the property need not specify any place of delivery. Weed *v.* Dills, 34 Mo. 483.

35. Garretson *v.* Reeder, 23 Iowa 21 (where the bond was conditioned to indemnify against all damages and expenses and the delivery of the property when ordered or an equivalent thereof in money); Waynant *v.* Dodson, 12 Iowa 22; Guay *v.* Andrews, 8 La. Ann. 141.

36. New Haven Lumber Co. *v.* Raymond, 76 Iowa 225, 40 N. W. 820.

Conditioned to deliver if attachment is not dissolved.— If a bond be conditioned for redelivery if plaintiff recover judgment and the attachment be not dissolved, the obligors are not liable unless the attachment be not dissolved. Creswell *v.* Woodside, 8 Colo. App. 514, 46 Pac. 842.

37. Ferguson *v.* Glidewell, 48 Ark. 195, 2 S. W. 711; Inman *v.* Strattan, 4 Bush (Ky.) 445; Brashears *v.* Webb, 19 Ky. L. Rep. 1324, 43 S. W. 417; Bowers *v.* Beck, 2 Nev. 139; Wyman *v.* Hallock, 4 S. D. 469, 57 N. W. 197. See also Lepretre *v.* Barthet, 25 La. Ann. 124; Love *v.* Voorhies, 13 La. Ann. 549.

Condition for recovery against assignee as garnishee.—An attachment was sued out after an assignment, levied upon the property, and the assignee summoned as garnishee. To obtain a surrender of property to himself the assignee executed a bond conditioned that if plaintiff in attachment should fail to sustain the attachment suit, or if he should sustain "his said suit so commenced by attachment" and obtain judgment against the assignee as garnishee, and the assignee should pay the amount of such judgment, the obligation should be void. A clause was added that by the term "judgment" was meant final judgment, and that the assignee would, in fulfilment of the condition, pay any judgment which might be rendered in the "attachment suit aforesaid" against the assignor, or against the assignee as garnishee. It was held that the contingency provided for in the condition was a failure on the part of the assignee to pay such judgment in the attachment suit as would reach the property attached, or in other words a judgment against himself and not merely a general judgment against defendant in the attachment suit. Hardcastle *v.* Hickman, 26 Mo. 475.

38. Caldwell *v.* Healey, 121 Mass. 549 (where property was attached in the hands of trustees, and a bond was given conditioned for payment of any judgment which plaintiffs shall recover "against or from the said . . . trustees," and a judgment was recovered against defendant, but the trustees were discharged. In an action on the bond, plaintiffs contended that the words "against or from the said . . . trustees" were senseless, and should be rejected as surplusage, but it was held that no recovery could be had upon the bond); Dale *v.* Heffner, 4 Baxt. (Tenn.) 217. See also *infra*, XIII, E, 4, h, (III), (D); XIII, E, 4, h, (III), (F).

Judgment not against obligors in form is sufficient to bind them to the extent of the judgment in favor of plaintiff, on a bond conditioned for the payment of such judgment as shall be rendered in plaintiff's favor against the obligors. Hunter *v.* McCraw, 32 Ala. 518.

39. Heynemann *v.* Eder, 17 Cal. 433; Gilmore *v.* Crowell, 67 Barb. (N. Y.) 62; Inbusch *v.* Farwell, 1 Black (U. S.) 566, 17 L. ed. 188.

On appeal by one defendant.—Where an attachment is issued against several defendants, judgment is rendered in favor of plaintiff against all, and, on appeal by one, judgment is rendered in his favor but against the other defendants by default, the right to sue on the appeal-bond becomes perfect. Pritz *v.* Drake, 6 Ohio Dec. (Reprint) 1127, 10 Am. L. Rec. 565.

defendants, but for judgment against the defendant alone who was not the owner of the property.[40]

(c) *Execution.* Where plaintiff obtains judgment and execution is issued and returned unsatisfied, the condition of the undertaking to discharge the attachment[41] or to have the property forthcoming to abide the final order of the court[42] is broken and the liability of the sureties attaches. Where special judgment against property released on a forthcoming bond is required, special execution demanding the sale of the property is necessary.[43] Where the bond is con-

Bond to prevent levy.— Sureties on a bond to prevent the levy of an attachment in a suit against several are liable, although judgment is rendered against one only. McCutcheon *v.* Weston, 65 Cal. 37, 2 Pac. 727.

40. Way *v.* Murphy, 168 Mass. 472, 47 N. E. 500; Prior *v.* Pye, 164 Mass. 316, 41 N. E. 353. But where the property of one was attached and he gave a dissolution bond for the payment of the amount of plaintiff's recovery, which bond referred to the action as being against two defendants, it was held that the liability on the bond did not extend to a judgment recovered against the other defendant alone. Eveleth *v.* Burnham, 108 Mass. 374.

Where one of two joint owners of attached property gives a bond for the dissolution of the attachment, and judgment is recovered against the other by default, but the one who gives the bond successfully defends as to himself, the condition of the bond being to pay the judgment recovered by plaintiff, an action may be maintained against the obligors on the bond. Campbell *v.* Brown, 121 Mass. 516.

Where distinct causes of action against two defendants are joined under statutory authority in separate counts, and one of them gives a bond to dissolve an attachment on his property, conditioned to pay the amount that plaintiff should recover, the liability of the obligors does not extend to a separate judgment against the other defendant. Walker *v.* Dresser, 110 Mass. 350.

Discontinuance.— In Dalton *v.* Barnard, 150 Mass. 473, 23 N. E. 218, it was held that discontinuance as to one of several defendants in attachment would not discharge a dissolution bond given by them jointly. And in Inbusch *v.* Farwell, 1 Black (U. S.) 566, 17 L. ed. 188, it was held that sureties on a bond to dissolve an attachment in a suit against partners could recover from the firm the amount paid by them on such bond, although the suit had been discontinued against some of the partners for want of jurisdiction. But in Andre *v.* Fitzhugh, 18 Mich. 93, and Harris *v.* Taylor, 3 Sneed (Tenn.) 536, 67 Am. Dec. 576, it was held that a discontinuance as to some of the defendants would discharge the sureties from liability on a bond given to prevent the removal of the property. And so it is held in Massachusetts that where plaintiff discontinues as to one of the defendants and summons in a new defendant without notice to the surety, the surety is discharged (Tucker *v.* White, 5 Allen (Mass.) 322), although defendant as to whom the action was discontinued was not a party to the bond (Richards *v.* Storer, 114 Mass. 101).

41. Jewett *v.* Crane, 35 Barb. (N. Y.) 208.

The usual mode of showing satisfaction of judgment where the bond is conditioned to satisfy such judgment as may be rendered is by the return of the officer on the execution. Huntress *v.* Burbank, 111 Mass. 213.

Delayed execution.— Sureties are not discharged by delayed execution, the liability being fixed by the judgment. Duer *v.* Morrill, 20 Ill. App. 355. And stay of execution by consent of the parties to the suit will not discharge the sureties. Preston *v.* Hood, 64 Cal. 405, 1 Pac. 487. See also Seawell *v.* Cohn, 2 Nev. 308.

42. Collins *v.* Mitchell, 3 Fla. 4. See also Stewart *v.* Lacoume, 30 La. Ann. 157.

Sufficiency of return.— A return showing that the officer could not, after diligent search and inquiry, find the principal or any of his property is sufficient to justify recourse to the release bond. McCloskey *v.* Wingfield, 32 La. Ann. 38. And where the return shows "no property found after demand of the parties" a surety on a release bond will be liable, although his witnesses testified that he notified plaintiff and sheriff that the property was in the court's jurisdiction, requested its seizure, and informed the officer where it was, the return showing that the sheriff, notwithstanding the information, could not find the property. Walden *v.* Philips, 11 Rob. (La.) 123.

By statute it is sometimes provided that upon the discharge of an attachment under the release or redelivery bond, a remedy against the sureties is available only after execution returned unsatisfied against attachment defendant. Brownlee *v.* Riffenburg, 95 Cal. 447, 30 Pac. 587. Such provision does not require the issue of an execution against a defendant who has made an assignment under an insolvency act before suit on the bond (Rosenthal *v.* Perkins, 123 Cal. 240, 55 Pac. 804), and does not apply to a bond good only as a common-law obligation for the payment of the judgment, not conforming to the statute (Smith *v.* Fargo, 57 Cal. 157; Palmer *v.* Vance, 13 Cal. 553).

43. Wright *v.* Manns, 111 Ind. 422, 12 N. E. 160.

Security in the nature of special bail.— Where security given to replevy property attached is considered in the nature of special bail, it is held that a plea that capias ad satisfaciendum did not issue against defendant in attachment should prevail. Gillaspie

ditioned to pay the judgment, the liability of the sureties attaches upon the rendition of the judgment against defendant and the issue of execution is not a condition to the right to resort to the bond.[44]

(D) *Demand.* Where the undertaking is for the redelivery of property and expressly makes such delivery dependent upon demand, the obligee will have no right of action in the absence of a demand,[45] and sometimes the condition of the bond prescribed by the statute requires a demand of performance before a breach can be assigned.[46]

(III) *DISCHARGE*—(A) *Surrender of Property or Payment*—(1) IN GEN-

v. Clark, 1 Overt. (Tenn.) 2. But where the statute provides for the surrender of the property by the officer, upon the execution of a bond in double the value of the property, or in the penal sum of the amount of damages laid in the writ, conditioned that the bond shall be void if at any time after final judgment in the action, upon request therefor, the value of the property shall be paid, or the goods surrendered to the officer who shall be charged with the service of the execution issued upon the judgment, it is held that, in so far as the validity of the demand made by the officer for the return of the property is concerned, it is immaterial that no valid execution has been then issued on the judgment. Tucker *v.* Carr, 20 R. I. 477, 40 Atl. 1, 78 Am. St. Rep. 893.

44. *Arkansas.*— Lincoln *v.* Beebe, 11 Ark. 697.

Indian Territory.— McFadden *v.* Blocker, 2 Indian Terr. 260, 48 S. W. 1043.

Kansas.— Endress *v.* Ent, 18 Kan. 236, holding that satisfaction of the judgment is a matter of defense.

Kentucky.— Reid *v.* Farmers, etc., Tobacco Warehouse, 19 Ky. L. Rep. 1939, 44 S. W. 124.

Oklahoma.— Winton *v.* Myers, 8 Okla. 421, 58 Pac. 634.

45. Smith *v.* Jewell, 14 Gray (Mass.) 222, where the bond was for the delivery after judgment on demand. See also Foss *v.* Norris, 70 Me. 117, holding that where the officer delivers property upon a contract to pay a specified sum, or to redeliver it on demand, an action may be maintained on the contract either before or after rendition of judgment in the suit in which the property was attached, after a legal demand made for the redelivery, so long as he is under liability to the debtor or creditor for the property.

A surety upon a delivery bond, conditioned to deliver the property when and where the court may direct, is not entitled to have demand made upon him for delivery. Weed *v.* Dills, 34 Mo. 483.

46. Upon whom made.— Where a release bond is joint and several it is sufficient to make the demand upon the sureties alone, the principal not being sued on the bond. Mullally *v.* Townsend, 119 Cal. 47, 50 Pac. 1066. See also Smith *v.* Jewell, 14 Gray (Mass.) 222. But in Murray *v.* Ginsberg, 10 Colo. App. 63, 48 Pac. 968, it was held that demand must be made upon the principal defendant.

Coowner not joining in bond.— Where one of two joint owners of attached property gives a bond for the dissolution of the attachment, conditioned to pay the judgment which plaintiff may recover, and the defendant who gives the bond successfully defends as to himself, but judgment by default is taken against the other defendant, it is not necessary in order to maintain an action on the bond that execution should issue and demand be made on the defendant who did not join therein within thirty days after judgment was recovered against him. Campbell *v.* Brown, 121 Mass. 516.

Proper person to make demand.—Where the undertaking must be conditioned to deliver the attached property on demand to the proper officer, etc., the officer to whom the undertaking is given is the proper person to make the demand. Driggs *v.* Harrington, 2 Mont. 30. But if plaintiff recovers judgment and makes a demand for the return of the attached property under the condition of a bond that defendant will, on demand, redeliver such property, an action will lie on the bond without demand of the sheriff for the return of the property. Brownlee *v.* Riffenburg, 95 Cal. 447, 30 Pac. 587.

After removal of property from jurisdiction.— No demand is required for the redelivery of property which has been attached, where it has been removed from the jurisdiction by an insolvent defendant in the action who has left the jurisdiction. Driggs *v.* Harrington, 2 Mont. 30.

Levy of execution as sufficient demand.— Where, after the execution of a release bond conditioned to redeliver the property to the sheriff upon demand, the property is mortgaged, and after obtaining judgment plaintiff issues an execution, but the sheriff releases the levy and returns the execution unsatisfied, because the debtor and the mortgagee refuse to deliver the property, the levy of the execution is a sufficient demand. Mullaly *v.* Townsend, (Cal. 1900) 61 Pac. 950. See also Hammond *v.* Starr, 79 Cal. 556, 21 Pac. 971.

Refusal of payment — Immediate liability. —Where the undertaking for the release of an attachment is for defendant's payment of the judgment upon demand, the sureties being liable immediately on default of their principal under the statute, without demand or notice, plaintiff may sue them without waiting for the expiration of the day on which payment is demanded of, and refused by, defendant. Gardner *v.* Donnelly, 86 Cal. 367, 24 Pac. 1072.

ERAL. The obligors on a delivery bond may satisfy the condition thereof by delivering the property,[47] or if the condition is to perform the judgment and also to return the property if plaintiff should recover judgment,[48] or that defendant shall perform the judgment or the obligors will have the property or its value forthcoming,[49] it may be satisfied at the option of the obligors by the performance of either alternative condition, and payment or proper tender of the amount of plaintiff's demand and costs made by defendant will discharge the obligors on a bond given to discharge the attachment.[50]

(2) NECESSITY FOR REDELIVERY OR PAYMENT — (a) IN GENERAL. But a bond for the delivery up of property attached, in case of judgment against defendant, can be discharged after judgment against defendant, only by delivery of the property,[51] in whole,[52] and in the same condition as when surrendered to defendant;[53] or by the performance of the alternative condition to pay the debt

47. Guay *v.* Andrews, 8 La. Ann. 141; Reagan *v.* Kitchen, 3 Mart. (La.) 418.

48. Easton *v.* Ormsby, 18 R. I. 309, 27 Atl. 216, holding that such a bond under two separate sections of the statute might be satisfied by the performance of either condition.

49. Adams *v.* Jacoway, 34 Ark. 542; Kuhn *v.* Spellacy, 3 Lea (Tenn.) 278. The selection of the alternative lies with defendant and cannot be made by the court. Jones *v.* Stewart, (Tenn. Ch. 1900) 61 S. W. 105.

50. Curiac *v.* Packard, 29 Cal. 194, holding that for the purpose of discharging the surety it was not necessary that the tender should be kept good.

Tender of judgment by surety.— So the surety is discharged if he tenders the amount due under the judgment recovered against the principal in the bond if the obligee refuses to accept the tender. Hayes *v.* Josephi, 26 Cal. 535.

Defendant charged as trustee for plaintiff. —Where in an action on a dissolution bond it appeared that defendants had paid a certain amount on an execution issued upon a judgment rendered in favor of another party against plaintiffs wherein defendants were summoned as trustees, which action was begun after that by plaintiff on the dissolution bond, it was held that defendants in the last action were not chargeable with interest during the pendency of the suit in which they were charged as trustees of the plaintiff. Huntress *v.* Burbank, 111 Mass. 213.

Levy on sufficient property to satisfy judgment.— Where the levy of an attachment is discharged by bond to perform the judgment, plaintiff may look to the surety without issuing execution on the judgment; but if the execution is issued and levied on sufficient property to satisfy the judgment, the voluntary release of the lien by plaintiff will discharge the surety. Reid *v.* Farmers, etc., Tobacco Warehouse, 19 Ky. L. Rep. 1939, 44 S. W. 124.

51. *Alabama.*— Cooper *v.* Peck, 22 Ala. 406.

Arkansas.— Chapline *v.* Robertson, 44 Ark. 202, holding that such a bond can be satisfied only by delivery or offer to deliver the property by bringing it forward, pointing it out, and tendering it to the officer, and that to tell him where it is and to go and get it is not sufficient.

Colorado.— Edwards *v.* Pomeroy, 8 Colo. 254, 6 Pac. 829.

Iowa.— Jones *v.* Peasley, 3 Greene (Iowa) 52.

Oregon.— Norton *v.* Winter, 1 Oreg. 97.

Right to recover property to have it forthcoming.— If an attachment defendant holds the property under a forthcoming bond when it is seized on execution against him, he should replevy the property so as to be able to perform the conditions of the bond. Roberts *v.* Dunn, 71 Ill. 46. But as defendant alone is entitled to the possession the sureties cannot maintain replevin to recover the property if that right of possession is interfered with. Stevenson *v.* Palmer, 14 Colo. 565, 24 Pac. 5, 20 Am. St. Rep. 295.

Seizure under special execution.— If the property is seized and sold under a special execution issued and a judgment is recovered in the proceeding, the condition of a bond to have the property forthcoming for double the amount for which the warrant issued is satisfied, and the obligor in the bond has nothing to do with the question whether the property was subject to levy and sale. Hogan *v.* Shutler, 53 Ill. 487.

52. Metrovich *v.* Jovovich, 58 Cal. 341; Bland *v.* Creger, 13 B. Mon. (Ky.) 509.

Judgment by one of several creditors.— Where, under the statute, upon the execution of a forthcoming bond defendant retains possession of the property, to be redelivered if any of the creditors applying to have their claims adjusted recovers judgment, the condition is broken if any one of such creditors recovers judgment and the property is not returned; and it is no defense that enough of the goods attached was returned to and levied upon by the officer to whom a fieri facias had been issued upon such judgment. Hanness *v.* Bonnell, 23 N. J. L. 159.

Substituted property.— The condition of a forthcoming bond cannot be satisfied by a return of substituted property. Pearce *v.* Maguire, 17 R. I. 61, 20 Atl. 98.

53. Creswell *v.* Woodside, (Colo. App. 1900) 63 Pac. 330 [*reversing* 8 Colo. App. 514, 46 Pac. 842] (holding that the return of property in a depreciated condition will ren-

or value of the property.[54] If the bond is in discharge of the attachment, creating an unconditional obligation to pay a certain amount, the obligors can discharge themselves only by such payment when the necessary contingency arises.[55]

(b) WHERE CONDITION BECOMES ILLEGAL OR IMPOSSIBLE OF PERFORMANCE — aa. *In General.*— Where the condition of a forthcoming bond subsequently becomes illegal or impossible of performance the sureties are discharged from liability.[56]

bb. *Impossibility of Performance Through Act of Plaintiff.* Where plaintiff by his own act prevents the obligors from delivering the property and is thus himself the cause of the forfeiture, he cannot take advantage of it, and the obligors will be discharged to the extent that they are thus prevented from making delivery.[57]

(B) *Levy of Subsequent Attachment.* Where a delivery bond removes the

der the obligors liable for the amount of the depreciated value); Smith *v.* Packard, 98 Fed. 793, 39 C. C. A. 294 (holding that it is not error to exclude evidence in behalf of defendant to show the diminished value of the property since giving the bond, no offer being made to show that the depreciation was not caused by any act of negligence by the principals in the bond who had the custody of the property). See also Schuyler *v.* Sylvester, 28 N. J. L. 487. But see otherwise, Jones *v.* Jones, 38 Mo. 429.

Encumbrance after execution of bond.— Plaintiff in attachment is not bound to take the property burdened with a lien placed upon it after the release of the attachment. Mullaly *v.* Townsend, (Cal. 1900) 61 Pac. 950.

54. Edwards *v.* Pomeroy, 8 Colo. 254, 6 Pac. 829; Hanness *v.* Bonnell, 23 N. J. L. 159.

Property sold under prior execution.— In an action on a bond, conditioned that defendant should surrender the property or pay the debt if judgment should be recovered, it is no defense that the creditor gained nothing by the attachment and lost nothing by its dissolution, because the goods at the time of the attachment were in the custody of the sheriff under a levy on a prior execution on which they were sold. Com. *v.* Litzvitz, 14 Pa. Super. Ct. 278.

55. Perry *v.* Post, 45 Conn. 354, distinguishing the liability of an obligor on a receipt, in that he has the privilege of returning the property, while the obligor in a bond to discharge the attachment has no such privilege.

Acceptance of dividend from assignee.— Plaintiff in attachment does not lose his recourse against a bond given for the release of attached property by accepting a dividend from the assignee for the benefit of the creditors of defendant in attachment. Easton *v.* Ormsby, 18 R. I. 309, 27 Atl. 216.

Payment of execution for costs by sureties on a bond to dissolve an attachment is payment of the judgment *pro tanto* only and does not relieve them from liability to pay the remainder. Wood *v.* Mann, 125 Mass. 319.

Defendant in attachment charged as trustee of plaintiff.—Where, pending the original action, after bond given to dissolve the attachment, after verdict, and before judgment, defendant is summoned as trustee in an action brought against plaintiff, and charged as such upon default, this is no defense to an action by plaintiff in the first suit, on the bond to dissolve the attachment, it appearing that defendant has paid nothing in consequence of his having been charged as trustee in the action against plaintiff, although it would have been otherwise if defendant had paid such judgment against him as trustee and had caused the fact of such payment to be duly entered of record in the attachment suit according to the provisions of the statute, in which event plaintiff in attachment would be entitled to judgment against defendant for costs and such part of damages only as remained unpaid. Wood *v.* Mann, 125 Mass. 319.

56. See Jones *v.* Peasley, 3 Greene (Iowa) 52. But in Doggett *v.* Black, 40 Fed. 439, it was held that the accidental destruction of property by fire was no defense to an action on such a bond. In Woolfolk *v.* Ingram, 53 Ala. 11, it appears that there was a statute in that state providing that if property replevied under a bond making the obligors liable for its return or for payment of the judgment which might be recovered died or was destroyed without fault of the obligors, they might tender the value thereof in discharge of the bond.

Emancipation or death of slaves before forfeiture discharged the condition of a forthcoming bond. Glover *v.* Taylor, 41 Ala. 124; Phillipi *v.* Capell, 38 Ala. 575 [*citing* Falls *v.* Weissinger, 11 Ala. 801]. But where the bond was given to dissolve an attachment levied upon negroes it was held that the subsequent emancipation of the negroes did not release the obligors from liability to pay the amount of the judgment recovered. Irvin *v.* Howard, 37 Ga. 18. In Tennessee, under the statute providing for a bond which discharged the lien of attachment, but which might be satisfied by a delivery of the property, it was held that death or destruction of the property without fault of defendant was no defense to liability on the bond (Barry *v.* Frayser, 10 Heisk. (Tenn.) 206); but where the bond was not under the statute, but conditioned for the forthcoming of property, it was held that the death of slaves before forfeiture discharged the bond (Guthrie *v.* Brown, 10 Heisk. (Tenn.) 380. See also Green *v.* Lanier, 5 Heisk. (Tenn.) 662).

57. Dunlap *v.* Clements, 18 Ala. 778;

lien from the property and leaves it subject to future levies, the subsequent levies of attachments will not satisfy the conditions of the bond,[58] but if, after the execution thereof, the officer levies another attachment before a delivery is necessary to discharge the condition of the bond, such subsequent seizure will amount to a delivery and discharge the same.[59]

(c) *Requiring Further Sureties or Execution of New Bond.* The refusal to approve a dissolution bond until strengthened by the addition of another surety will not, after it is so strengthened and approved, exonerate the sureties who signed it originally;[60] and if a bond is canceled and the execution of another bond is ordered the sureties on the latter are liable, without reference to the former.[61]

(d) *Amendments.* Sureties on a forthcoming bond,[62] or bond conditioned to pay the judgment,[63] are not discharged by proper amendment of the attachment affidavit, or of the declaration or writ, the identity of the action not being changed.[64] So, too, such a bond is not discharged by an amendment in the name

Jæger *v.* Stœlting, 30 Ind. 341 (where, after release of the property, an execution in favor of a stranger to the attachment was levied thereupon by the consent and direction of attachment plaintiff, under which levy the property was taken and sold).

Sale under subsequent attachment.—Where attached goods released on a forthcoming bond are subsequently attached by another creditor and sold by consent of both attaching creditors, the surety in the forthcoming bond is discharged. Bell *v.* Pearce, 1 B. Mon. (Ky.) 73.

58. Jones *v.* Peasley, 3 Greene (Iowa) 52.

59. Scarborough *v.* Malone, 67 Ala. 570; Cordaman *v.* Malone, 63 Ala. 556 (holding that plaintiffs in the first attachment may have their remedy against the sheriff for his unauthorized act in taking the property under the junior attachment and possibly may maintain an action for money had and received against plaintiffs in that attachment); Schneider *v.* Wallingford, 4 Colo. App. 150, 34 Pac. 1109; Duncan *v.* Thomas, 1 Oreg. 314.

Levy by successor of first officer.— Where the second writ was levied by the successor of the officer who levied the first, it was held that the former would not be presumed to know that the property was in custody of the law, that it was the duty of defendant in the first attachment to replevy the property in such case, and that if he failed to do so the obligors on the bond were liable. Roberts *v.* Dunn, 71 Ill. 46.

60. Sampson *v.* Barnard, 98 Mass. 359. A motion to compel defendant to furnish further sureties is not an exception to the sufficiency of the sureties furnished; and the sureties on the bond are not released if in default of compliance with the rule judgment is rendered against defendant. Jewett *v.* Crane, 35 Barb. (N. Y.) 208.

61. McCloskey *v.* Wingfield, 32 La. Ann. 38, holding that the binding effect of a second bond is not impaired by the fact that the first had another surety and had been canceled on account of this insufficiency.

Bond to procure stay.— If in the progress of the cause the party may procure a stay for particular purposes upon such terms as in the discretion of the judge may seem just, a bond to procure the stay, reciting that it is executed to secure the judgment and release and discharge the sureties in the bond previously given to discharge the attachment, voluntarily entered into, is good as a common-law undertaking and will bind the sureties therein. Dennis *v.* Nelson, 55 Minn. 144, 56 N. W. 589.

62. Hobson *v.* Hall, 10 Ky. L. Rep. 635 [*affirmed* in (Ky. 1890) 14 S. W. 958], as to amendment of affidavit necessary to sustain the attachment, holding that the obligors cannot acquire a *bona fide* claim in the sense of the statutory provision that the amendment shall not affect previous *bona fide* claims.

63. Chapman *v.* Stuckey, 22 Ill. App. 31, as to an amendment introducing additional items of indebtedness which were included in the original declaration.

64. Russia Cement Co. *v.* Le Page Co., 174 Mass. 349, 55 N. E. 70; Driscoll *v.* Holt, 170 Mass. 262, 49 N. E. 309; Townsend Nat. Bank *v.* Jones, 151 Mass. 454, 24 N. E. 593 (holding that the change in the *ad damnum* of the writ will not discharge the surety on a dissolution bond); Doran *v.* Cohen, 147 Mass. 342, 17 N. E. 647; Cutter *v.* Richardson, 125 Mass. 72 (holding that the allowance of an amendment on a count to merely state the cause of action more in detail does not discharge such sureties); Jayne *v.* Platt, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. Rep. 810.

Amendment of one of two counts.— The amendment of one count in a writ did not discharge the surety from liability for the sum sued for in the other counts originally inserted in the writ, and not affected by the amendment. Warren *v.* Lord, 131 Mass. 560.

Alteration before entry of writ.— If the parties without the consent of the surety alter the return time of the writ from a date when there was no term of court so as to make it returnable to a proper date, and the dissolution bond recited that the writ was returnable on the first date, the surety is discharged. Simeon *v.* Cramm, 121 Mass. 492.

of a party,[65] by bringing in a defendant,[66] or, by substituting for plaintiff in attachment, his assignee, under an assignment for the benefit of creditors made after execution of the bond.[67]

(E) *Release of Indemnity.* The mere release by a surety of indemnity held by him before his liability has been discharged by a proper determination of the cause will not relieve him from liability,[68] but if, by reason of the conduct or representations of the obligee, the surety has surrendered such indemnity, he will be discharged from liability to the extent of the value of the indemnity so surrendered.[69]

(F) *Death of Defendant in Attachment.* Where the cause of action survives and the death of attachment defendant does not operate as a dissolution of the attachment, judgment against his personal representative will perfect the liability of the sureties on a forthcoming,[70] or dissolution bond;[71] but, on the other hand, it is held that where the death of defendant in attachment dissolves it, attachment plaintiff has no further claim on the property and cannot recover on the bond.[72]

(G) *Arrest on Execution.* The arrest of a debtor on execution in the principal action will not discharge the sureties upon a bond previously given for the dissolution of the attachment.[73]

65. **Distinction between substitution and amendment.**—Where a suit is brought against one in a wrong name, a bond is given to secure some action on his part, describing him by the same name, and there is no doubt of the identity, the bond is for the action of defendant, and the insertion of the true name by the court in the subsequent proceedings against the same individual is proper and the change cannot affect the liability of the obligors. But where the persons are actually distinct, a bond given for the conduct of one cannot by substitution of names in the proceedings be made to stand good for the action of the other. The test is the person had in view by the obligors in executing the bond. Adams *v.* Jacoway, 34 Ark. 542.

66. Christal *v.* Kelly, 88 N. Y. 285, where, after a bond conditioned to pay the judgment which should be rendered against defendant in favor of plaintiff, a member of the firm was made a party, it was held that the sureties were bound after judgment rendered against defendants, as the undertaking was substituted for the property and that would not have been affected by the amendment had the bond not been given.

67. Slosson *v.* Ferguson, 31 Minn. 448, 18 N. W. 281.

68. Hubbard *v.* Moss, 65 Mo. 647.

69. Rowley *v.* Jewett, 56 Iowa 492, 9 N. W. 353, holding that it is incumbent upon the surety to establish the extent to which he has been so discharged. See also Ramsey *v.* Coolbaugh, 13 Iowa 164.

70. Woolfolk *v.* Ingram, 53 Ala. 11.

71. Tapley *v.* Goodsell, 122 Mass. 176, holding that where defendant dies after verdict for plaintiff, a judgment *nunc pro tunc* as of the term when the verdict was rendered is sufficient, in the absence of fraud, to fix the liability of a surety on the bond given to dissolve the attachment.

Death of one joint defendant.—Where a bond to discharge an attachment is conditioned to pay the amount of the judgment which may be recovered against two defendants, it is not discharged by the death of one of the defendants, if the action continues and the cause of action survives against the survivor. Cockroft *v.* Claflin, 64 Barb. (N. Y.) 464 [*affirmed* in 53 N. Y. 618]. But in McCloskey *v.* Wingfield, 29 La. Ann. 141, it was held that a judgment against a commercial partnership binds the parties *in solido*; that after death of one of the partners no judgment could be rendered against the partnership without making his representative a party, and until such judgment the surety in the release bond is not liable.

Death after recognizance.— If a defendant in attachment dies after entering in open court into recognizance with sureties to dissolve an attachment, the proceeding thereafter is *in personam*, and if defendant dies before judgment and his administrator is brought in, failure to pay judgment rendered against the administrator is a breach of the recognizance. Sharpe *v.* Morgan, 144 Ill. 382, 33 N. E. 22.

72. Green *v.* Barker, 14 Conn. 431; Upham *v.* Dodge, 11 R. I. 621, in which latter case it is held that at common law the death of defendant would have abated the suit which would thereupon have been dismissed completely out of court, and that the statute went no farther than to prevent the dismissal and allow the action to proceed against the executor or administrator, as if it had been commenced against him. See also ABATEMENT AND REVIVAL, 1 Cyc. 53.

73. Moore *v.* Loring, 106 Mass. 455 (holding that plaintiff is not confined to his remedy upon the bond but has a right to the arrest of defendant upon the unsatisfied execution, and that when the recognizance is broken by defendant's failure to submit himself for examination the bond and recognizance are cumulative securities for the same debt); Murray *v.* Shearer, 7 Cush. (Mass.) 333.

(iv) *Concurrent Liability With That of Sureties on Appeal-Bond.* Although a defendant in an attachment appeals unsuccessfully, plaintiff may sue the sureties on the bond given to release the attached property without resorting to his remedy against the sureties on the appeal-bond, although the latter may be primarily liable.[74]

(v) *Enforcement of Liability* — (a) *Statutory Remedies* — (1) Scire Facias, Rule, Motion, or Entry of Judgment. Where the statute permits defendant to retain possession of attached property by entering into recognizance with sureties the remedy on the recognizance may be by scire facias as in other cases.[75] Under statutes of various states sureties on bonds for the release of attached property may be subjected by rule or motion;[76] upon the entry of judgment for plaintiff in the main action, which fixes the liability of the sureties in the bond, judgment is entered at once against the principal and sureties in the bond;[77] or upon failure to redeliver property after judgment against defendant, and a return by the officer of the bond forfeited on account of such failure, such return is given the force and effect of a judgment and authorizes the clerk to issue execution against all the obligors.[78]

(2) Compliance With Statute. Statutes authorizing summary remedies on

74. Chrisman *v.* Jones, 34 Ark. 73; Higgins *v.* Healy, 47 N. Y. Super. Ct. 207 [*affirmed* in 89 N. Y. 636].

75. See Sharpe *v.* Morgan, 144 Ill. 382, 33 N. E. 22.

On bond.— The statute gives the creditor a remedy by scire facias or debt against sureties on a bond for the release of an attachment. Choate *v.* Stark, 18 N. H. 131.

76. Hayman *v.* Hallam, 79 Ky. 389; McCormack *v.* Henderson, 10 Ky. L. Rep. 541; Bauer *v.* Antoine, 22 La. Ann. 145; Wallace *v.* Glover, 3 Rob. (La.) 411; Hoshaw *v.* Gullett, 53 Mo. 208; Thole *v.* Watson, 6 Mo. App. 591; Reilly *v.* Golding, 10 Wall. (U. S.) 56, 19 L. ed. 858 (construing Louisiana statute).

Rule before return-day.— A rule against a surety, if taken after the actual return of the execution against the principal, is regular, although taken before the return-day named in the execution. Doane *v.* New Orleans, etc., Tel. Co., 11 La. Ann. 504.

The chancellor may by rule require the obligors in a forthcoming bond to produce the property or decree against them the payment of its value, or he may remit the party to his remedy at law on the bond. Hansford *v.* Perrin, 6 B. Mon. (Ky.) 595; Page *v.* Long, 4 B. Mon. (Ky.) 121.

Statute prospective.— A statute giving a right to proceed on such bonds by motion is entirely prospective and applies only to bonds executed after the passage of the act. Thompson *v.* Smith, 8 Mo. 723.

Jurisdiction of justice with reference to penalty.—A justice of the peace has jurisdiction on such motion in an attachment commenced before him, although the penalty of the bond exceeds his jurisdiction in a direct suit upon the bond. McDowell *v.* Morgan, 33 Mo. 555.

77. *Arkansas.*— Fletcher *v.* Menken, 37 Ark. 206; Brugman *v.* McGuire, 32 Ark. 733. Before the statute it was held error to render such a judgment. Mizell *v.* McDonald, 25 Ark. 38; Cheek *v.* Pugh, 19 Ark. 574.

Georgia.— Craig *v.* Herring, 80 Ga. 709, 6 S. E. 283.

Iowa.— Barton *v.* Thompson, 66 Iowa 526, 24 N. W. 25; State *v.* McGlothlin, 61 Iowa 312, 16 N. W. 137.

Mississippi.— Forbes *v.* Navra, 63 Miss. 1, holding that if the verdict is for plaintiff on the trial of the issue in chief, it will be presumed that the court directed a proper judgment to be entered and that the failure to do so was occasioned by the clerical omission of the clerk, and that in such cases the judgment may be amended after the lapse of the term at which it was rendered so as to make it conform to that directed to be entered by the court.

Tennessee.— Richards *v.* Craig, 8 Baxt. (Tenn.) 457; Upton *v.* Philips, 11 Heisk. (Tenn.) 215; Barry *v.* Frayser, 10 Heisk. (Tenn.) 206. A judgment which purports to be rendered against defendant and his sureties on the delivery bond, and which is the only judgment in the case, is unauthorized. A judgment against sureties on such a bond rendered before judgment against defendant upon the main cause of action is void. Morning *v.* Alexander, 10 Heisk. (Tenn.) 606.

Texas.— Vogt *v.* Dorsey, 85 Tex. 90, 19 S. W. 1033; Shirley *v.* Byrnes, 34 Tex. 625. Where the court refuses to enter judgment against the sureties an appeal will lie. Kennedy *v.* Morrison, 31 Tex. 207.

Washington.— Rodolph *v.* Mayer, 1 Wash. Terr. 133.

United States.— Kuhn *v.* McMillan, 3 Dill. (U. S.) 372, 14 Fed. Cas. No. 7,945, 1 Centr. L. J. 46, construing Tennessee statute, and holding that a judgment entered without scire facias or notice is not void for want of notice, although the surety was a non-resident.

78. Woolfolk *v.* Ingram, 53 Ala. 11; Cooper *v.* Peck, 22 Ala. 406.

such bonds must be strictly complied with,[79] and there must be a substantial compliance with the requirements of the statute in respect of all things to be done in order to make the statutory remedy available.[80]

(B) *Cumulative Remedies.* An action on a bond for the forthcoming of property or discharge of attachment is not excluded by other and summary remedies provided for the enforcement of such liabilities.[81]

(C) *Defenses and Estoppel*—(1) IN GENERAL. Sureties cannot defeat a recovery against them by objections to proceedings in the attachment suit or on account of irregularities therein.[82] If the principals are bound, the sureties are

79. Woolfolk *v.* Ingram, 53 Ala. 11, holding, however, that a strict construction of the statute must not exclude cases within the legitimate meaning of the word and spirit thereof, and that under this qualification a statutory execution may issue against a surety on a forthcoming bond after judgment against the personal representative of the principal obligor who died pending suit, although the statute in general terms declared that execution must issue against the obligors.

The character of the bond upon which relief may be had by motion depends upon the statute, and if such relief can be had on a replevy bond described by the statute as one for the payment of a recovery and not for the production of the property, the remedy is not available on a bond conditioned alone for the forthcoming of property. Clary *v.* Haines, 61 Ga. 520.

80. Louisville City R. Co. *v.* Masonic Sav. Bank, 12 Bush (Ky.) 416. See also *supra*, XIII, E, 4, d.

Assessment of value.— Where attachment plaintiff does not demand an assessment of the property retained by defendant as provided by the statute, the bond cannot be enforced summarily in the same proceeding (Lowenstein *v.* McCadden, 54 Ark. 13, 14 S. W. 1095; Young *v.* Pickens, 45 Miss. 553; Richard *v.* Mooney, 39 Miss. 357), but the failure to assess such value will not preclude the court from issuing a writ of inquiry to make the assessment, to another jury, at the same term (Merrill *v.* Melchior, 30 Miss. 516).

Notice.— Judgment cannot be rendered on such motion (Roach *v.* Burnes, 33 Mo. 319) or rule (Thompson *v.* Arnett, (Ky. 1901) 64 S. W. 735) without notice; but it is held that it is unnecessary to show written notice of the order of delivery (Dodd *v.* Butler, 7 Mo. App. 583).

Trial by jury.— A rule against sureties on a bond for the release of attached property was, under the statute in Louisiana, to be tried summarily without a jury, unless defendant alleged under oath that the signature was not genuine and that judgment had been satisfied. Beal *v.* Alexander, 1 Rob. (La.) 277.

Appeal.—A rule against a surety on a bond to perform the judgment of the court to show cause why he should not be compelled to perform is not a final order upon which an appeal will lie to the court of appeals. Inman *v.* Strattan, 4 Bush (Ky.) 445.

81. *Alabama.*— Troy *v.* Rogers, 116 Ala. 255, 22 So. 486, 67 Am. St. Rep. 110; Adler *v.* Potter, 57 Ala. 571.

Arkansas.— Chapline *v.* Robertson, 44 Ark. 202.

Iowa.— State *v.* McGlothlin, 61 Iowa 312, 16 N. W. 137.

Kentucky.— Thompson *v.* Arnett, (Ky. 1901) 64 S. W. 735.

Missouri.— McDowell *v.* Morgan, 33 Mo. 555.

Scire facias is not the exclusive remedy. Debt will lie on a recognizance entered into in open court, although it is not signed by the parties. Eimer *v.* Richards, 25 Ill. 289.

82. *Illinois.*—Young *v.* Campbell, 10 Ill. 80. In an action on a recognizance the regularity of the attachment proceedings cannot be questioned. Eimer *v.* Richards, 25 Ill. 289.

Indiana.— Dunn *v.* Crocker, 22 Ind. 324.

Iowa.— New Haven Lumber Co. *v.* Raymond, 76 Iowa 225, 40 N. W. 820, failure to file delivery bond. So an appraisement upon the execution of a delivery bond is necessary only in order to determine the amount of delivery if the parties do not agree as to the value of the property. Woodward *v.* Adams, 9 Iowa 474.

Louisiana.— McRae *v.* Austin, 9 La. Ann. 361.

Massachusetts.—Where the court has power to permit a late entry of a writ of attachment on the consent of defendant without motion and order for that purpose, if such consent is given, a failure of plaintiff to enter the writ on the return-day will not operate to discharge the surety on a bond given by defendant to dissolve the attachment. Lee *v.* James, 150 Mass. 475, 23 N. E. 226.

Michigan.— Goebel *v.* Stevenson, 35 Mich. 172, as to irregularities in affidavit waived by defendant in the action who was personally served.

Minnesota.— Scanlan *v.* O'Brien, 21 Minn. 434, holding that under the statute requiring a bond with sureties, it is no defense on the part of the obligors that the bond is executed by all the obligors therein as principals, although plaintiff in the attachment might have complained of the officer for taking a bond without sureties.

New York.— Jewett *v.* Crane, 35 Barb. (N. Y.) 208. Sureties on a bond to discharge an attachment cannot defend upon the ground that the undertaking was not approved as required by the code, as the approval of such a bond is for the benefit of attachment plaintiff and the waiver of such approval can be injurious to no one but him. Bennett *v.*

likewise bound, and cannot it is held set up any defenses which are not available to their principals.[83]

(2) In Summary Proceedings. The statute providing a summary remedy against the obligors in a bond does not prohibit or impair the effect of any legal defense.[84]

(3) Estoppel by Recitals in Bond. Ordinarily the obligors in a forthcoming or discharge bond are concluded by the recitals made in the undertaking.[85]

(4) Denial of Levy. Sureties on a delivery bond cannot set up that a valid levy of the attachment was not made.[86]

(5) Denial of Liability of Property to Seizure. So the sureties on a bond for the release of attached property are generally estopped thereby to contest the liability of the property to seizure under the writ.[87]

Mulry, 6 Misc. (N. Y.) 304, 26 N. Y. Suppl. 790, 58 N. Y. St. 147.

Oregon.— Bunneman *v.* Wagner, 16 Oreg. 433, 18 Pac. 841, 8 Am. St. Rep. 306.

Rhode Island.— Wilson *v.* Donnelly, 19 R. I. 113, 31 Atl. 966, as to failure of officer to file forthcoming bond with the clerk.

Wisconsin.— Billingsley *v.* Harris, 79 Wis. 103, 48 N. W. 108.

United States.— Huff *v.* Hutchinson, 14 How. (U. S.) 586, 14 L. ed. 553, construing Wisconsin statute.

83. Fusz *v.* Trager, 39 La. Ann. 292, 1 So. 535; McCloskey *v.* Wingfield, 32 La. Ann. 38; Greenlaw *v.* Logan, 2 Lea (Tenn.) 185.

84. Dunlap *v.* Clements, 18 Ala. 778 (holding that a release or other legal discharge is as good against the bond as it is at common law, and the effect of every matter of defense not affected by the statute is to be ascertained by the common law); Hayman *v.* Hallam, 79 Ky. 389 (as to right to set up, in opposition to the rule to show cause why they should not perform their bond, facts which relieve them from liability); Quine *v.* Mayes, 2 Rob. (La.) 510.

Supersedeas to execution.— When a forthcoming bond is illegally return forfeited, the obligors may supersede and quash the summary execution issued upon such return, on petition by them. Cobb *v.* Thompson, 87 Ala. 381, 6 So. 373 (certiorari from the circuit court to a justice of the peace, defects in such case not being available on appeal from the judgment); Cordaman *v.* Malone, 63 Ala. 556; Dunlap *v.* Clements, 18 Ala. 778 (holding that the proceeding is substituted for audita querela); Anderson *v.* Rhea, 7 Ala. 104.

85. *California.*— Pierce *v.* Whiting, 63 Cal. 538.

Colorado.— Klippel *v.* Oppenstein, 8 Colo. App. 187, 45 Pac. 224.

Connecticut.—Birdsall *v.* Wheeler, 58 Conn. 429, 20 Atl. 607.

Illinois.— Crisman *v.* Matthews, 2 Ill. 148, 26 Am. Dec. 417.

Louisiana.— Price *v.* Kennedy, 16 La. Ann. 78.

New York.— Coleman *v.* Bean, 1 Abb. Dec. (N. Y.) 394, 3 Keyes (N. Y.) 94, 32 How. Pr. (N. Y.) 370 [*affirming* 14 Abb. Pr. (N. Y.) 38]; Higgins *v.* Healy, 47 N. Y. Super. Ct. 207 [*affirmed* in 89 N. Y. 636].

North Carolina.— Pearce *v.* Folb, 123 N. C. 239, 31 S. E. 475.

Issue and levy of attachment.— Although the statute authorizing attachments contemplates that the giving of an undertaking to discharge it shall be preceded by the issue of an attachment, an undertaking reciting that the attachment had issued, whereas in fact this was not true, but defendant procured the execution of the obligation, a recital in the undertaking precludes the obligors from showing that the obligation was given to avoid the issue and levy of the attachment. Coleman *v.* Bean, 1 Abb. Dec. (N. Y.) 394, 3 Keyes (N. Y.) 94, 32 How. Pr. (N. Y.) 370 [*affirming* 14 Abb. Pr. (N. Y.) 38]; Higgins *v.* Healy, 47 N. Y. Super. Ct. 207 [*affirmed* in 89 N. Y. 636]. See also O. Sheldon Co. *v.* Cooke, 177 Mass. 441, 59 N. E. 77.

86. *Alabama.*—Adler *v.* Potter, 57 Ala. 571.

California.— McMillan *v.* Dana, 18 Cal. 339.

Illinois.— The judgment directing the property attached to be sold is conclusive as to the fact that the attachment was actually levied. Crisman *v.* Matthews, 2 Ill. 148, 26 Am. Dec. 417.

Iowa.— The execution of a delivery bond is an admission that the goods have been attached. New Haven Lumber Co. *v.* Raymond, 76 Iowa 225, 40 N. W. 820.

Minnesota.— Scanlan *v.* O'Brien, 21 Minn. 434.

Mississippi.— Fenner *v.* Boutte, 72 Miss. 271, 16 So. 259.

North Carolina.— Pearce *v.* Folb, 123 N. C. 239, 31 S. E. 475, estoppel by recital of levy in bond.

87. Adler *v.* Potter, 57 Ala. 571; McMillan *v.* Dana, 18 Cal. 339 (where it was said, in an action on the bond, that whether the property was subject to attachment or not could not be tried in this collateral way); Hobson *v.* Hall, 10 Ky. L. Rep. 635 [*affirmed* in (Ky. 1890) 14 S. W. 958].

Want of title in defendant cannot be set up.

Alabama.— Sartin *v.* Weir, 3 Stew. & P. (Ala.) 421.

California.— Pierce *v.* Whiting, 63 Cal. 538.

Colorado.— The sureties cannot set up that at the time of the levy and the execution of the bond the property belonged to them and not to attachment defendant. Klippel *v.* Oppenstein, 8 Colo. App. 187, 45 Pac. 224.

(6) Inquiry Into Grounds of Attachment. In a proceeding to enforce liability on a bond for the release of attached property, the truth of the grounds of attachment cannot be inquired into.[88]

(7) Fraud or Mistake. A surety on a release bond is bound to ascertain his principal, and if by mistake he signs for one instead of for another he will not be allowed thus to defeat the levy and then set up his own act as a defense;[89] and so it has been held that the sureties cannot set up fraud on the part of the officer in inducing them to execute the bond.[90]

(8) As to Judgment in Original Action. In an action on a bond given for the release of attached property it cannot be shown that no valid judgment was rendered in the original suit.[91] The sureties are precluded by such judgment from inquiring into its correctness,[92] and if the judgment is valid as

Connecticut.—Birdsall *v.* Wheeler, 58 Conn. 429, 20 Atl. 607.

Illinois.— Gray *v.* MacLean, 17 Ill. 404.

Kentucky.—Hazelrigg *v.* Donaldson, 2 Metc. (Ky.) 445.

Michigan.— Dorr *v.* Clark, 7 Mich. 310, holding that it is no defense to the obligors that the property did not belong to attachment defendant, or that it was encumbered.

Tennessee.— Smyth *v.* Barbee, 9 Lea (Tenn.) 173.

But see Bauer *v.* Antoine, 22 La. Ann. 145; Quine *v.* Mayes, 2 Rob. (La.) 510, which cases held otherwise on a rule in the principal action, against the obligors, although in Beal *v.* Alexander, 1 Rob. (La.) 277, it is held that where property is attached in the hands of persons summoned as garnishees and they bond it, this operates as a dissolution of the attachment and the question of ownership of such property cannot afterward be considered. And in Iowa it is expressly provided (Iowa Code (1897), § 3911) that in an action on a forthcoming bond it shall be a sufficient defense that property at the time of the levy did not belong to the defendant against whom the attachment was issued. Ayres, etc., Co. *v.* Dorsey Produce Co., 101 Iowa 141, 70 N. W. 111, 63 Am. St. Rep. 376.

Exemption.— A judgment sustaining an attachment is conclusive until reversed or vacated and when sued on the forthcoming bond attachment defendant cannot avail himself of the fact that the property was exempt at the time of its seizure. Lane Implement Co. *v.* Lowder, (Okla. 1901) 65 Pac. 926.

88. Ferguson *v.* Glidewell, 48 Ark. 195, 2 S. W. 711; Bildersee *v.* Aden, 62 Barb. (N. Y.) 175. The court having refused to dissolve the attachment, such questions are settled against the sureties. Com. *v.* Sisler, 196 Pa. St. 147, 46 Atl. 420. But see Murphy *v.* Montandon, 2 Ida. 1048, 29 Pac. 851, 35 Am. St. Rep. 279 (holding that where an attachment was procured upon affidavit, stating that payment of plaintiff's debt had not been secured by mortgage, loan, etc., under the statute, the obligors in a bond given to release the attachment may resist an action against them thereon by showing the falsity of the affidavit, on the theory that without a true affidavit in compliance with the statute there was no jurisdiction to issue the writ); Quine *v.* Mayes, 2 Rob. (La.) 510 (holding that where a judgment is absolutely void, any one having the least interest in opposing its effect may have such nullity pronounced by applying this principle to the denial of the truth of the grounds of the attachment or the interest of defendant in the attached property).

Non-residence of attachment defendant cannot be disputed in an action against the sureties on a release bond. Haggart *v.* Morgan, 5 N. Y. 422, 55 Am. Dec. 350 [*affirming* 4 Sandf. (N. Y.) 198]; Higgins *v.* Healy, 47 N. Y. Super. Ct. 207 [*affirmed* in 89 N. Y. 636].

89. Doane *v.* New Orleans, etc., Tel. Co., 11 La. Ann. 504.

90. Misrepresentation as to character of bond.—Where a bond is conditioned for the performance of the judgment of the court, it is held that the liability of the obligors was not affected by the fact that the sheriff induced them to believe that it was a forthcoming bond. McCormack *v.* Henderson, 10 Ky. L. Rep. 541. See also Brand *v.* Craig, 84 Ga. 12, 10 S. E. 369.

Misrepresentation as to levy — Delivery bond.— But in Connell *v.* Scott, 5 Baxt. (Tenn.) 595, it was held that it being necessary to constitute a valid levy that the property be present and within the control of the officer, a levy made from a list of property and from information given by the debtor, but none of the property being present and within sight of the officer, was not valid and a bill may be maintained by the surety in the delivery bond to be released therefrom on the ground that his signature was obtained by the false representations of the officer as to the levy of the attachment.

91. Moore *v.* Mott, (Cal. 1893) 34 Pac. 345 (holding that the record of the attachment suit showing the recovery of judgment precludes a finding that judgment was not rendered); Fogel *v.* Dussault, 141 Mass. 154, 7 N. E. 17.

92. Reid *v.* Farmers, etc., Tobacco Warehouse, 19 Ky. L. Rep. 1939, 44 S. W. 124 (where it was held that it was no defense by the sureties on a bond conditioned to perform judgment that the judgment was by fraud or mistake for a larger amount than the pleadings authorized); Jayne *v.* Platt, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. Rep. 810 (holding that in the absence of fraud, collusion, or manifest mistake, the sureties will not be heard to question the correctness

against attachment defendant it will not avail the obligors that it contains other provisions, which although void, do not affect defendant.[93]

(9) Jurisdictional Objections. Where the objections on behalf of the surety on a bond to release attached property go to the jurisdiction of the court in the attachment suit to issue the attachment they are available to defeat liability on the bond.[94]

(v) *Parties* — (1) Plaintiff — (a) In General. Plaintiff in attachment to whom a bond is given may sue on it,[95] although where the bond is given to the officer as obligee proceedings for its enforcement are properly brought in his name.[96]

(b) Assignment — aa. *By Officer.* Where the bond given by attachment defendant is made to the officer as obligee the latter may assign it to plaintiff in the attachment.[97] Moreover, in the absence of a statutory modification of the rule

of such judgment or inquire into the action of the court, either on the preliminary motion or on final judgment).

Amount.— The sureties on a bond to discharge an attachment cannot set up objections to the amount of the judgment in the original action. Morange *v.* Edwards, 1 E. D. Smith (N. Y.) 414.

93. Provision in original judgment void as to sureties.— Where judgment cannot be rendered in the main suit against the sureties on the bond given for the release of attached property, a judgment so rendered is void only as to the sureties and not as to defendant, and in an action on the bond itself the mistake in the rendition of the judgment is not available as a defense to the sureties. Cheek *v.* Pugh, 19 Ark. 574.

94. *Georgia.*— English *v.* Reed, 97 Ga. 477, 25 S. E. 325, attachment procured without giving the statutory bond.

Idaho.— Murphy *v.* Montandon, 2 Ida. 1048, 28 Pac. 851, 35 Am. St. Rep. 279.

Louisiana.— Quine *v.* Mayes, 2 Rob. (La.) 510.

Maryland.— Clark *v.* Bryan, 16 Md. 171, that the record in an attachment case shows that attachment defendant was a non-resident and that judgment by default was given against him, although he was never summoned or otherwise had notice of the proceedings against him, and never appeared.

New York.— Cadwell *v.* Colgate, 7 Barb. (N. Y.) 253; Homan *v.* Brinckerhoff, 1 Den. (N. Y.) 184 (attachment procured without giving the statutory bond).

Wisconsin.— Shevlin *v.* Whelen, 41 Wis. 88.

United States.— Pacific Nat. Bank *v.* Mixter, 124 U. S. 721, 8 S. Ct. 718, 31 L. ed. 567, holding that if the attachment which the bond was given to dissolve is void, because under the law the property of a national bank was not attachable, the dissolution bond was void.

95. Plaintiff not in possession.— It is no ground to abate a suit on a bond to dissolve an attachment, brought by the party for whose benefit it was made, that the bond was in the custody of the clerk of the court when the suit was commenced. If plaintiff is the legal owner of the bond and can produce it at the trial, that is enough. Bowers *v.* Beck, 2 Nev. 139.

96. Young *v.* Campbell, 10 Ill. 80; Wagner *v.* Romero, 3 N. M. 131, 3 Pac. 50 (under the practice act); Wilson *v.* Donnelly, 19 R. I. 113, 31 Atl. 966.

By successor in office.— A bond to dissolve an attachment given to one as marshal and his successor in office may be sued in the name of the former after he has been succeeded in office by another. Huff *v.* Hutchinson, 14 How. (U. S.) 586, 14 L. ed. 553.

Indemnity to sheriff.— Where a party in interest in a forthcoming bond caused suit to be brought thereon in the name of the sheriff to whom the bond was executed he was required to indemnify the sheriff against all costs. Young *v.* Campbell, 9 Ill. 156.

97. Adkins *v.* Allen, 1 Stew. (Ala.) 130; Tooley *v.* Culbertson, 5 How. (Miss.) 267; Morange *v.* Edwards, 1 E. D. Smith (N. Y.) 414 (holding that such assignment may be without special authority). Where the statute expressly makes a forthcoming bond assignable and another section of the statute authorizes the party to give a bond for the payment of the judgment to be recovered, instead of a forthcoming bond, it is held that a bond for the payment of the judgment may be assigned to plaintiff in attachment. Carpenter *v.* Hoyt, 17 Ill. 529. And where, after a statute under which replevy can be effected only by special bail, an act provided that in case of an absconding debtor, replevy could be effected only by bond, conditioned to return the property or pay and satisfy the judgment, without describing a mode of proceeding upon such bond in case of forfeiture, it was held that the provisions of the first act relating to the procedure on bail-bonds applied to the last act, and that plaintiff in attachment might sue as assignee of the sheriff on a replevy bond under such last act. Sartin *v.* Weir, 3 Stew. & P. (Ala.) 421 [*cited* in Cummins *v.* Gray, 4 Stew. & P. (Ala.) 397].

Assignment as of right.— Plaintiff in attachment may require an assignment by the sheriff to him. Dorr *v.* Clark, 7 Mich. 310. And in Jones *v.* Jones, 38 Mo. 429, it was held that the sheriff has no right to institute proceedings on a forthcoming bond but must, under the order of the court, assign a bond to plaintiff in attachment.

Sufficiency of assignment.— The assignment is valid as signed by the sheriff, although

it has been held that the latter cannot sue on such bond, unless it has been so assigned.[98]

bb. *By Attachment Plaintiff.* An attaching plaintiff to whom a release bond is executed may assign it,[99] and where plaintiff as the real party in interest may sue on the bond made to the sheriff, his assignee may maintain an action on such a bond.[1]

(c) Real Party in Interest. Under statute, however, the real party in interest, or the party intended to be secured by the bond, may maintain an action on the bond in his own name, notwithstanding it is executed to the officer.[2]

(d) Joint and Several Parties. Where, upon the execution of a forthcoming bond, all creditors who attach during the pendency of the first suit acquire an interest in the bond, they are properly joined as parties plaintiff and may sue to enforce liability on the bond.[3] But where under the statute the bond is held for the benefit of all creditors and may be prosecuted by them jointly or by any one of them separately in respect to his separate demand, an action on the statutory bond conditioned to pay each creditor the amount due him may be maintained by a single creditor in his own name.[4]

not in his name of office. Dorr *v.* Clark, 7 Mich. 310.

98. Sartin *v.* Weir, 3 Stew. & P. (Ala.) 421; Forrest *v.* O'Donnell, 42 Mich. 556, 4 N. W. 259; McDowell *v.* Morgan, 33 Mo. 555 (where it appears that the statute required an assignment of a forthcoming bond).

Summary execution.— Under the statute which gives the officer's return of a forfeited bond the effect of a judgment upon which execution may issue against the obligors on the bond, an assignment of the bond to plaintiff is not necessary in order to entitle him to the issue of an execution on the return of the forfeited bond. Shute *v.* McMahon, 10 Ala. 76.

99. George *v.* Tate, 102 U. S. 564, 26 L. ed. 232.

Assignment of judgment by an instrument which does not mention the bond is held to be a mere assignment of the judgment, and will not authorize the assignee to maintain an action on the bond in his own name. Forrest *v.* O'Donnell, 42 Mich. 556, 4 N. W. 259.

Assignee for the benefit of creditors.— Where the release bond is in favor of attachment plaintiff, specifically named as obligee, conditioned that if "said plaintiff" recover judgment in the action, etc., such bond may pass to the assignee for the benefit of plaintiff's creditors and he may be substituted for the latter in an action on the bond. Slosson *v.* Ferguson, 31 Minn. 448, 18 N. W. 281.

1. Rowley *v.* Jewett, 56 Iowa 492, 9 N. W. 353. See also *infra*, XIII, E, 4, h, (v), (D), (1), (c).

2. Curiac *v.* Packard, 29 Cal. 194; Rowley *v.* Jewett, 56 Iowa 492, 9 N. W. 353; Moorman *v.* Collier, 32 Iowa 138; Sheppard *v.* Collins, 12 Iowa 570.

Bond not conforming to statute.— But where the statute requires a replevy bond payable to attachment plaintiff, a bond payable to the officer is not a statutory bond, and an action upon such bond can be prosecuted only as an action at common law. The action cannot be maintained in the name of attachment plaintiff, and as the statute which allows suits to be prosecuted in the name of the party really interested is confined to actions on contracts for the payment of money it has no application to a bond of this character. Agnew *v.* Leath, 63 Ala. 345.

3. Rutledge *v.* Corbin, 10 Ohio St. 478.

In Indiana, under the statute permitting several creditors to file their complaints and become parties to the original action, it was held that in a suit upon an undertaking given for the delivery of attached property to the sheriff all such creditors who had been adjudged entitled to participate in the proceeds of the property should be made parties plaintiff, or if they refused to join as such, the facts should be stated in the complaint and they should be made defendants. Moore *v.* Jackson, 35 Ind. 360.

In New Jersey the statute directed that in case of the breach of the condition of a forthcoming bond it should, on application of plaintiff or any applying creditor, be assigned to such person as the court should direct and be prosecuted for the benefit of plaintiff in attachment and such applying creditors. Whenever creditors come in, the bond is for their protection and can be prosecuted by any of them as well as by attachment plaintiff. It is not necessary that it should appear what creditors had applied to have their claims adjusted, as the appropriation of the amount recovered in the suit on the bond is a matter for a subsequent proceeding, on the application of the creditors entitled thereto. Hanness *v.* Bonnell, 23 N. J. L. 159; Hanness *v.* Smith, 22 N. J. L. 332.

Joint bond — Action by survivor.— An action on a bond to several obligees jointly is properly brought by the survivors after the death of some of them. Donnell *v.* Manson, 109 Mass. 576.

4. Pearce *v.* Hitchcock, 2 N. Y. 388 [*disapproving* Arnold *v.* Tallmadge, 19 Wend. (N. Y.) 527].

One bond in two distinct suits.— In Irish

(2) DEFENDANT. Plaintiff may sue any one or more of the obligors in a joint and several bond for the release of attached property.[5]

(E) *Pleading* — (1) DECLARATION OR COMPLAINT[6] — (a) CONDITION AND BREACH. The declaration or complaint in an action on such a bond should set out the condition of the bond,[7] and allege the facts which constitute a breach of such condition,[8] as that the attachment was released or discharged, where the consideration of the bond is such release or discharge,[9] the recovery of judgment in the attachment suit,[10] that the attachment was not dissolved,[11] the issue of execution,[12] or

v. Wright, 12 Rob. (La.) 563, it was held that where in two distinct suits the property is released on a single bond containing distinct obligations in favor of different obligees each obligee has a distinct remedy on the bond for the satisfaction of any judgment in his suit.

5. Wagner *v.* Romero, 3 N. M. 131, 3 Pac. 35, under statute making all joint contracts joint and several. See also Smith *v.* Packard, 98 Fed. 793, 39 C. C. A. 294; and, generally, PARTIES.

6. For forms of declaration or complaint see Huntress *v.* Burbank, 111 Mass. 213; Hanness *v.* Smith, 22 N. J. L. 332; Phillips *v.* Wright, 5 Sandf. (N. Y.) 342.

7. Albin *v.* Talbott, 46 Ill. 424, forthcoming bond.

Condition not prerequisite to liability.— A declaration on a bond given for the release of attached property need not set up any conditions, the existence of which are not necessary to fix liability of the obligors on the bond. Gray *v.* Sharp, 62 N. J. L. 102, 40 Atl. 771.

Variance on account of clerical error.— A dissolution bond may be declared on in form as it was intended to be written, and a variance occasioned by reason of a mere clerical error in the condition of the bond will not be material in such a case. Leonard *v.* Speidel, 104 Mass. 356.

8. **Sufficiency of allegation.**— A declaration on a forthcoming bond which alleges that defendants did not have the property forthcoming according to the condition of the bond, but wholly failed and refused to do so, sufficiently shows a breach of the condition. Young *v.* Campbell, 10 Ill. 80. And in an action upon an undertaking conditioned that defendant shall perform the judgment of the court in the attachment suit, the breach was held to be sufficiently pleaded by an averment of the rendition of judgment in favor of plaintiff against defendant in the attachment, the amount of the judgment, and the fact that it remained unpaid in whole or in part. Winton *v.* Myers, 8 Okla. 421, 58 Pac. 634.

Breach in words of condition.— A breach is sufficiently set forth if it is laid in the words of the condition of the bond. Hanness *v.* Smith, 22 N. J. L. 332.

Objection.— In an action on a bond to dissolve an attachment, objection that the declaration did not allege the breach of the bond should be taken by demurrer, and cannot be raised for the first time at the trial under a general denial. Huntress *v.* Burbank, 111 Mass. 213. But see the cases cited *infra*, next note.

Judgment on pleadings.— An action on a dissolution bond conditioned to satisfy judgment comes within the statute authorizing plaintiff to take judgment at the first day of the term, on filing an affidavit stating the true amount of defendant's indebtedness and the writing or account by which defendant is indebted, unless defendant has filed a verified plea containing a good defense (McAllister *v.* Eichengreen, 34 Md. 54); or authorizing judgment on the pleadings if the facts in the complaint are insufficiently denied or substantially admitted (Fitzgibbon *v.* Calvert, 39 Cal. 261); or authorizing judgment in an action on an instrument for the payment of money only, for the sum claimed in the complaint, upon striking out as frivolous a demurrer to the complaint (Coe *v.* Straus, 11 Wis. 72).

9. **Release or discharge of attachment.**— Williamson *v.* Blattan, 9 Cal. 500 (holding that the failure to make such allegation renders the complaint bad on general demurrer); Palmer *v.* Melvin, 6 Cal. 651. But see otherwise, Bennett *v.* Mulry, 6 Misc. (N. Y.) 304, 26 N. Y. Suppl. 790, 58 N. Y. St. 147, where such an allegation was regarded as an effort to anticipate a possible defense.

Complaint on bond to prevent levy.— In an action on an undertaking given to prevent levying an attachment, the complaint is defective if it does not aver that the sheriff did not complete the levy, or if it avers that the sheriff proceeded to levy, without showing that he went no farther. Coburn *v.* Pearson, 57 Cal. 306.

To open default judgment and discharge attachment.— If the bond is not given until after judgment by default in the action, and it is executed for the purpose of setting aside the default and to discharge the attachment, both the setting aside of the default and the discharge of the attachment should be alleged. Jenner *v.* Stroh, 52 Cal. 504.

10. Adams *v.* Jacoway, 34 Ark. 542; Creswell *v.* Woodside, 8 Colo. App. 518, 46 Pac. 842.

Bond to prevent levy.— In an action on a bond given to prevent levy, an averment that judgment was recovered, entered, and docketed is sufficient. McCutcheon *v.* Weston, 65 Cal. 37, 2 Pac. 727.

11. Creswell *v.* Woodside, 8 Colo. App. 514, 46 Pac. 842.

12. A special execution being a prerequisite to liability on a bond conditioned to deliver the property to the sheriff on demand, or

demand for redelivery or for payment,[13] where the liability under the bond is conditioned upon these things.

(b) Facts Concluded by Recitals in or Execution of Bond. In an action on an undertaking for the release of attached property, the complaint need not aver or set out facts which the obligor in the bond is estopped to deny by the recitals in the bond or by the execution of it.[14]

(c) To Recover For Diminution in Value. In an action on a redelivery bond to recover for diminution in value of property returned by defendant, an allegation that the property was injured by usage and neglect sufficiently charges that defendant was in fault.[15]

(2) Plea or Answer. In debt on a bond given to discharge an attachment the action is on the specialty, and a plea of *nil debet* is not appropriate,[16] and under a general denial only the material allegations of the complaint are put in issue and need be proved.[17]

upon failure so to do to pay the value of the property to the extent of any judgment which may be recovered, a complaint on such a bond must allege that such execution duly issued and a demand on the obligors by virtue thereof. Wright *v.* Manns, 111 Ind. 422, 12 N. E. 160.

13. Mullally *v.* Townsend, 119 Cal. 47, 50 Pac. 1066 (holding that under a statute providing for the release of an attachment on the execution of a bond conditioned to redeliver the property on demand, or to pay the value thereof on demand, an allegation that plaintiff demanded of defendants "that they pay the plaintiff the said judgment, and demanded of them the fulfillment of the obligation as expressed in said undertaking," was sufficient on demurrer to show that the demand was made as required by the statute, where the value of the property exceeded the amount of the judgment); Pierce *v.* Whiting, 63 Cal. 538; Murray *v.* Ginsberg, 10 Colo. App. 63, 48 Pac. 968.

14. Bowers *v.* Beck, 2 Nev. 139.

Issue of attachment.—It is not necessary to aver that the warrant of attachment duly issued. Coe *v.* Straus, 11 Wis. 72.

Facts which authorize the issue of the attachment need not be pleaded. McMillan *v.* Dana, 18 Cal. 339. The warrant is a judicial determination that the writ should issue. Cruyt *v.* Phillips, 16 How. Pr. (N. Y.) 120.

Non-residence of debtor.— It is not necessary for plaintiff to allege or prove the non-residence of the debtor where the bond is in form good at common law and independent of the statute. Kanouse *v.* Dormedy, 3 Den. (N. Y.) 567.

15. Creswell *v.* Woodside, 8 Colo. App. 514, 46 Pac. 842, upon the principle that for such diminution in value the obligors would be liable, and as the property was delivered to defendant upon the execution of the redelivery bond the presumption was that such possession continued, and therefore the allegation of damage from usage or neglect sufficiently charged that the usage and neglect was that of defendant.

16. Blydenburgh *v.* Carpenter, Lalor (N. Y.) 169, holding that *nil debet* was not an appropriate plea under the early statute in New York, which provided for the giving of a bond in discharge of an attachment to operate for the benefit of all creditors who might come in, and conditioned to pay the amount justly due and owing to each, provided it is established by proof on the trial that the debt was due and owing at the time plaintiff became an attaching creditor.

17. Bennett *v.* Mulry, 6 Misc. (N. Y.) 304, 26 N. Y. Suppl. 790, 58 N. Y. St. 147, holding that if, after an undertaking to discharge an attachment, its object is defeated, such fact, if it be a defense, must be set up in the answer. So if, upon separate answers, sureties might by plea and proof avail themselves of any invalidity of the judgment against the principal, they cannot do so under an answer which is a simple denial of the existence of the judgment. Fogel *v.* Dussault, 141 Mass. 154, 7 N. E. 17.

Instrument not sealed — Non est factum.— Objection to the introduction of the bond in evidence on the ground that it is not sealed will not be considered unless the execution of the instrument is denied in an answer under oath. State *v.* Chamberlin, 54 Mo. 338.

Sufficiency of pleas in bar.— In Iowa, where the defense that property levied upon did not belong to attachment defendant was available to the obligors on the bond given to discharge the property from the attachment or for its redelivery, it was held that defendants must show by their pleading in whom the title was, under the rule requiring a plea to be definite and specific, and further, because this is new matter introduced by defendants which requires them to tender an affirmative issue. Blatchley *v.* Adair, 5 Iowa 545. So in order to raise the defense that the attachment issued without the necessary accompanying bond, the surety should distinctly and unequivocally aver in his plea that no attachment bond had been executed before the issue and levy of the attachment. English *v.* Reed, 97 Ga. 477, 25 S. E. 325. But a plea in bar that the property after judgment was taken and sold under special execution is good without averment as to the liability of the property for levy and sale, because the obligors in the bond can have no concern with such question. Hogan *v.* Shutler, 53 Ill. 487.

(F) *Evidence* — (1) In General. Plaintiff in an action to enforce liability on a bond for the release of attached property should show the execution of such a bond as that under which he seeks to recover,[18] as well as a compliance with the conditions of the bond which are prerequisite to liability;[19] but in an action on a forthcoming or discharge bond which recites the attachment and levy it is not necessary to introduce in evidence the attachment,[20] or the judgment in attachment, when the fieri facias issued thereon, with a *nulla bona* return, and showing the amount of the judgment is introduced.[21]

(2) Value of Property or Interest. Where liability on the bond is confined to attachment defendant's interest in the property it will be presumed that such interest was the amount ordered to be attached by the writ.[22] So a recital

Notice of special matter with non est factum.— In an action on a dissolution bond the plea of *non est factum* with notice of special matter that an appeal had been taken and allowed to the supreme court was held not to show a defense, because there was no allegation that the appeal was still pending. Poteet *v.* Boyd, 10 Mo. 160.

18. Execution by one of several obligors.— Where the case stands as if originally brought against one only of the obligors on a joint and several forthcoming bond, proof of execution by the other obligors is not necessary. Smith *v.* Packard, 98 Fed. 793, 39 C. C. A. 294, as to such proof when a dismissal had been entered before trial as to all but one obligor.

Execution by agent — Pleading and proof. — Where the ultimate fact is pleaded that the instrument sued on was executed by defendant, evidence that another had acted under an antecedent authority on his behalf, or that he had subsequently ratified an unauthorized act in that respect, is competent to establish the ultimate fact of execution by defendant as alleged. Lynch *v.* Smyth, 25 Colo. 103, 54 Pac. 634.

Lost bond.—Where a bond has been properly filed and afterward lost, a copy preserved among plaintiff's papers may be admitted in evidence. Wagner *v.* Romero, 3 N. M. 131, 3 Pac. 50. And so an entry upon the appearance docket made by the court "bond to be substituted for attachment filed January 9, 1875," followed by the names of the obligors, may be given in evidence in an action on the lost undertaking, where a complete record of the action was not made. Chapman *v.* Seely, 8 Ohio Cir. Ct. 179, 4 Ohio Cir. Dec. 395.

Presumption.— An objection to the failure to show that a forthcoming bond has been filed will yield to the presumption that the officer did his duty in this respect. New Haven Lumber Co. *v.* Raymond, 76 Iowa 225, 40 N. W. 820, holding further that the statute as to the filing of a forthcoming bond was merely directory. So where the statute provided that a bond should be approved by the court or the judge, but that it might in vacation be executed in the presence of the sheriff having the writ in his hands, or after the return of the writ before the clerk, over an objection that it did not appear that the bond was executed or approved by the court or judge, it was held that as there was nothing in the record to show that the writ had not been returned, or that the clerk was not authorized to take and approve the bond, the appellate court would not presume that such facts did not exist. Budd *v.* Durall, 36 Iowa 315.

Parol evidence will not be admitted for the purpose of showing that a bond plainly coming under the provisions of one statute was designed to operate under the provisions of an entirely different one (Smith *v.* Scott, 86 Ind. 346), although such evidence is admissible to explain a mistake in the recital of a bond (Palmer *v.* Vance, 13 Cal. 553).

19. Variance.—Where it is alleged that defendant in an attachment suit died before judgment, that his administrator was made defendant, and judgment was rendered against such administrator, a transcript of the justice showing judgment against defendant in his individual capacity will not sustain the declaration. Butler *v.* Wilson, 10 Ark. 313.

20. Doyal *v.* Johns, 90 Ga. 188, 15 S. E. 776; Christal *v.* Kelly, 88 N. Y. 285.

21. Doyal *v.* Johns, 90 Ga. 188, 15 S. E. 776.

Necessity for judgment and execution see *supra*, XIII, E, 4, h, (II), (B); XIII, E, 4, h, (II), (C).

Justice's transcript.— In an action on a bond to release property on an attachment issued by a justice of the peace, the justice's transcript must show all legal prerequisites to the issue of the attachment in order to make such transcript competent evidence. Butler *v.* Wilson, 10 Ark. 313.

Proof of original claim.— Under an early statute in New York, in an action on a bond given to discharge a foreign attachment, the condition of which bond was to pay the attaching creditor the amount justly due and owing by the debtor at the time the former became an attaching creditor, on account of any sum so claimed and sworn to by him, the creditor was required to establish his demand in the same manner as in an action against the debtor. Oakley *v.* Aspinwall, 4 N. Y. 513; Thompson *v.* Dickerson, 12 Barb. (N. Y.) 108.

22. Birdsall *v.* Wheeler, 58 Conn. 429, 20 Atl. 607, where the statute relating to the execution of a bond for the dissolution of an attachment provided that when defendant in an action against an obligor shall claim that the interest of the principal in the bond at the time of the execution of the bond was of

in the bond of the value of property is evidence of such value against the obligors,[23] and it has been held that where the liability of the obligors is for the decrease in the value of goods between the date of their release and the date of their redelivery the sum for which the property is sold at sheriff's sale is conclusive of its value.[24]

(3) Effect of Official Return in Attachment Suit. The official return of the sheriff on the process in an attachment suit is evidence of his official acts as against both principal and surety in a forthcoming or dissolution bond.[25]

(G) *Measure of Recovery* — (1) In General. The measure of recovery on a bond for the release of attached property depends upon the terms and conditions of the instrument,[26] or of the statute by which such liability is fixed.[27]

(2) Amount of Judgment, Claim, or Value of Property. Thus a bond conditioned for the return of property in case judgment is rendered for plaintiff subjects the obligors to liability for the amount of the judgment with costs,[28] or the value of the property, if that is less than the amount of the judgment.[29]

less value than the amount ordered to be attached the burden of proving the actual value of such interest is on defendant.

Value found in action for conversion.— In an action for conversion, attachment of the property was dissolved by bond. Thereafter a portion of the property was returned to plaintiff, who subsequently recovered a judgment made up of amounts representing the value of the property returned, which was fixed, and damages to the property not returned, estimated at a particular sum. In an action on the bond to recover the value of the property not returned it was held that the report of the committee in the original suit was not admissible against the obligors, except for the purpose of showing the fact of judgment, and not for the purpose of showing the value of the property at the time of the attachment, because the report found the value at the time of the conversion only, which was four months before the attachment, and defendants in the action on the bond were not parties to the action for the conversion. Trubee *v.* Wheeler, 53 Conn. 458, 2 Atl. 319.

23. **Prima facie or conclusive.**— Recitals in the bond of value are *prima facie* evidence of such value. Weed *v.* Dills, 34 Mo. 483; Ward *v.* Kent, 6 Lea (Tenn.) 128. And it is held that a recital that the value of the property "does not exceed" the sum named, while conclusive against the assertion of a larger value, establishes no particular value. Smith *v.* Packard, 98 Fed. 793, 39 C. C. A. 294. But in Klippel *v.* Oppenstein, 8 Colo. App. 187, 45 Pac. 224, the recital of value was held to be conclusive.

24. Creswell *v.* Woodside, (Colo. App. 1900) 63 Pac. 330.

25. Dodd *v.* Butler, 7 Mo. App. 583, as to return on attachment. So the proper and legal mode of showing whether a judgment is satisfied in an action on a bond conditioned to pay the judgment is the return of the officer on the execution. Huntress *v.* Burbank, 111 Mass. 213.

Conclusive effect.— In an action against sureties on a delivery bond for failure after judgment to deliver the attached property, the officer's return of the failure to deliver, indorsed on a special execution, is conclusive and cannot be controverted by defendant. Chapline *v.* Robertson, 44 Ark. 202. But on a petition to supersede an execution issued against the petitioner as surety on a forfeited delivery bond, he may show that the sheriff's return that the bond was forfeited was false. Anderson *v.* Rhea, 7 Ala. 104.

26. Mason *v.* Whipple, 31 Vt. 473.

27. Dunlap *v.* Clements, 18 Ala. 778.

28. Dunlap *v.* Clements, 18 Ala. 778 (where the amount to be paid by the obligors when the bond is returned forfeited is fixed by the statute as the sum recovered in an attachment suit and the costs of that suit); Schuyler *v.* Sylvester, 28 N. J. L. 487 (holding that the lien of the writ while it remained on the property was only to the extent of the money due to plaintiff; that if the property had been rendered according to the condition of the bond, that is all which he could have made out of it, and that such amount, with costs, is therefore the measure of damages).

The whole of the penalty of the bond may be recovered if any part of the property is not delivered, notwithstanding a part of the property has been delivered. Bland *v.* Creager, 13 B. Mon. (Ky.) 509.

29. Turner *v.* Armstrong, 9 Ill. App. 24, under an instrument in which the party simply contracts to deliver specified property. So in Rhode Island, where the condition of a bond was that it should be void if the goods should be returned after judgment to satisfy the execution thereon, "or if" the judgment should be paid, and the statute under which the bond was given provided that the bond should be in double the value of the goods conditioned to be void if the goods be returned "unless" the judgment be paid, it was held that the value of the goods being less than the amount of the judgment the liability was only for the value of the goods. Pearce *v.* Maguire, 17 R. I. 61, 20 Atl. 98.

Bond not under statute.— In Adler *v.* Potter, 57 Ala. 571, it was held that a statutory bond imposed liability only for the amount of the judgment in the attachment suit; that this obligation resulted from the ex-

Where a bond to dissolve an attachment is conditioned to satisfy any judgment that may be recovered against defendant, the judgment recovered in the attachment suit fixes the amount to be paid under the bond,[30] up to the amount of the penalty of the bond.[31] But where the undertaking is conditioned for the payment of the value of the property, not exceeding a certain sum, the liability is limited to the value of the property and cannot be extended to the sum named, or to include the liability of defendant in the suit.[32]

(3) DETERMINATION OF VALUE. When the value of the property furnishes the rule of damages, the value is that at the time of the seizure under the attach-

press terms of the statute; that if the statute was silent in this respect the extent of the obligation would be the damages that plaintiff had sustained, that is, the value of the property, if that did not exceed the amount of the judgment, and where a bond is not valid under the statute, but only as a common-law obligation, the measure of recovery is the value of the property.

Debt or value of property.—Where, under the statute, defendant, at his option, may give a bond in double the amount of plaintiff's demand, or in double the value of the property, conditioned to pay the debt on the one hand, or the value of the property on the other, the judgment in the one case is for the penalty to be satisfied on payment of the debt, and in the other to be satisfied by the return of the property or the payment of its value. Kuhn *v.* Spellacy, 3 Lea (Tenn.) 278; Barry *v.* Frayser, 10 Heisk. (Tenn.) 206. But if the bond is in the penalty of double the debt, and is conditioned for the payment of the debt, or the value of the property in the alternative, the sureties are not entitled to have the judgment restricted to the value of the property but must pay the debt. Bond *v.* Greenwald, 4 Heisk. (Tenn.) 453.

Nominal damages.— In Hayman *v.* Hallam, 79 Ky. 389, it was held that the obligors in a forthcoming bond are liable for nominal damages only on failure to produce property attached which was not more than sufficient to satisfy prior liens upon it.

30. *California.*— March *v.* Barnet, 121 Cal. 419, 51 Pac. 20, 53 Pac. 933; Hammond *v.* Starr, 79 Cal. 556, 21 Pac. 971, in which latter case the measure is the amount of recovery with interest thereon to the date of judgment in the action on the bond.

Maryland.— McAllister *v.* Eichengreen, 34 Md. 54.

Massachusetts.— Murray *v.* Shearer, 7 Cush. (Mass.) 333.

Michigan.— Where a party may, at his option, execute a bond either for the payment of the judgment or for the production of the property to satisfy the execution and he chooses to execute the first kind, the obligors are liable for the full amount of the judgment, irrespective of the value of the property, and notwithstanding another section of the statute provides that in case of failure to perform the condition of any such bond, plaintiff shall be entitled to recover thereon the full value of the property attached, or so much thereof as shall be sufficient to satisfy the judgment. This last section provides the rule of damages for both kinds of bonds and the reference to the value of the property attached applies to the bond for the production of the property. Phansteihl *v.* Vanderhoof, 22 Mich. 296. And if the party execute a bond for the production of the property, or in default thereof, for payment of judgment, the measure of damages will be the amount of the judgment and not simply the appraised value of the goods seized. Goebel *v.* Stevenson, 35 Mich. 172.

Oklahoma.— Winton *v.* Myers, 8 Okla. 421, 58 Pac. 634.

31. Fetterman *v.* Hopkins, 5 Watts (Pa.) 539; Billingsley *v.* Harris, 79 Wis. 103, 48 N. W. 108, in which latter case it is held that where the bond is in a fixed penalty for payment of judgment, together with costs "not exceeding $250, with interest," this last clause is a limitation applicable to the costs only, and not to the liability of the obligors for the judgment.

Defendant's interest.— Under Conn. Gen. Stat. §§ 929–935, the obligation given to dissolve an attachment was conditioned to pay the actual value of defendant's interest, not exceeding the amount of the recognizance. Birdsall *v.* Wheeler, 58 Conn. 429, 20 Atl. 607.

32. Curtin *v.* Harvey, 120 Cal. 620, 52 Pac. 1077.

Sale of part of property.— In an action on a bond for the release of the property and discharge of the attachment, conditioned for the redelivery of the property, or the payment of the full value thereof, not exceeding a certain sum, if a portion of the attached property is levied upon and sold by the sheriff under an execution upon the judgment in the action, the measure of damages is the full value of the property attached, less the amount of the proceeds of the sale. Metrovich *v.* Jovovich, 58 Cal. 341.

Expenses previous to surrender.— Where under several writs a bond is executed for the payment of appraised value of the property and indemnity from all damages and costs "which may accrue to him, if such payment is not made to meet such executions," and only one of the suits results in judgment, which the sureties satisfy, they cannot be held liable for expenses incurred in keeping and appraising the property previous to surrender, under the terms of the instrument. Mason *v.* Whipple, 31 Vt. 473.

ment, or at the time at which the property should have been delivered under the condition of the bond,[33] or that which is fixed by the recitals of the bond itself.[34]

F. Sale and Disposition of Property or Proceeds — 1. Sale Before Judgment — a. In General. Ordinarily, in the absence of statute, an attachment is no justification to the officer in selling the property unless sold under execution issued upon judgment.[35]

b. Property Perishable, Depreciable, or Expensive to Keep. But under various statutory provisions after the levy of an attachment the court is authorized, in advance of final judgment, to order the sale of the property levied on when it is perishable,[36] or when, by reason of the expense of keeping it, or its

33. Adler *v.* Potter, 57 Ala. 571. Where the bond is conditioned that the property "should be forthcoming to abide the final order of the court," the measure of damages is the value of the property at the time of the return on the execution, when the liability of the sureties begins. Collins *v.* Mitchell, 3 Fla. 4.

Value at the time of giving bond.— In Connecticut, under a statute providing for a bond as a substitute for the property attached, conditioned to pay the judgment or the actual value of defendant's interest in the attached property, in assessing damages the value at the time the bond was given, and not at the time of judgment or demand, will control. Perry *v.* Post, 45 Conn. 354. See also Trubee *v.* Wheeler, 53 Conn. 458, 2 Atl. 319.

Assessment or finding of value.— Summary judgment entered against sureties must be for the value of the property as found by the court or jury trying the case. Fletcher *v.* Menken, 37 Ark. 206 (holding that the appraisal required by statute is for the purpose of enabling the officer to fix the amount of the bond); Young *v.* Pickens, 45 Miss. 553.

Depreciation in value.—Where the property when returned by defendant is of less value than when received by him, by reason of use or neglect on his part, plaintiff in the action may recover of the obligors the difference between the value at the time of the redelivery and at the time it was released from the attachment. Creswell *v.* Woodside, (Colo. App. 1900) 63 Pac. 330.

Finding on conflicting evidence.— A judgment based on a finding made on conflicting evidence as to the value of the attached property will not be revised. Curtin *v.* Harvey, 120 Cal. 620, 52 Pac. 1077.

34. See *supra*, XIII, E, 4, h, (v), (F), (2).

After sale of property as perishable.— Where the bond was conditioned that defendant should pay the debt, etc., or the value of the property, or should deliver the property when so ordered, and the court decreed a return and sale of the property pending the suit, because of its perishable nature, after the property had been used by defendant, it was held that the sureties were not liable for any difference between the amount realized at the sale and the valuation of the property fixed in the bond. Richards *v.* Craig, 8 Baxt. (Tenn.) 457.

35. Culver *v.* Rumsey, 6 Ill. App. 598; Crocker *v.* Baker, 18 Pick. (Mass.) 407; Rich *v.* Bell, 16 Mass. 294; Trowbridge *v.* Bullard, 81 Mich. 451, 45 N. W. 1012.

36. Work *v.* Kinney, (Ida. 1898) 51 Pac. 745; Donk *v.* Alexander, 117 Ill. 330, 7 N. E. 672; Davis *v.* Ainsworth, 14 How. Pr. (N. Y.) 346; Spradlin *v.* Bratton, 6 Lea (Tenn.) 685.

Before service of writ completed.— Property attached on mesne process may be sold before service of the writ is completed by the delivery of a copy to defendant. Marshall *v.* Town, 28 Vt. 14.

Effect of order of sale as consolidation.— Where two attachments were levied on the same property, and an order was taken to sell it as perishable property expensive to keep, this did not operate as a consolidation of the cases. Epstin *v.* Levenson, 79 Ga. 718, 4 S. E. 328.

Order after death of plaintiff.— An attachment proceeding does not abate on plaintiff's death (see Abatement and Revival, 1 Cyc. 53), but continues a pending cause, and an order for sale of the property as perishable may be made after plaintiff's death, and before the expiration of the time permitted defendants to show cause why the action shall not be revived. Buller *v.* Woods, 43 Mo. App. 494.

An attorney under a general employment may procure an order of sale of the property without any special direction by his clients, and the latter will be liable for his act in so doing. Vaughn *v.* Fisher, 32 Mo. App. 29. See, generally, Attorney and Client.

Where the trustees may sell the goods at a certain time, and that time has arrived, the court will not make an order for the sale of the goods as perishable. Henisler *v.* Friedman, 1 Phila. (Pa.) 290, 9 Leg. Int. (Pa.) 11, 5 Pa. L. J. Rep. 147, 4 Am. L. J. 355.

Action to enforce lien.— In proceedings to enforce a lien the property attached cannot be appraised and sold during the pendency of proceedings under the provision in the general attachment law in reference to the sale of goods liable to perish or waste, or which cannot be kept without great expense. Coburn *v.* Clark, 3 Allen (Mass.) 207, Bryan *v.* The Steamer Enterprise, 53 N. C. 260.

Encumbered property.— The statute in Massachusetts did not limit the right to sell to cases of unencumbered property. Jackson *v.* Colcord, 114 Mass. 60.

liability to great depreciation in value, the interests of the parties require that it be thus converted,[37] or the officer may sell such property when a proper case is made according to the requirements of the statute.[38]

c. Effect of Determination of Necessity of Sale. Ordinarily the correctness of an order for the sale of attached property before judgment, or determining the propriety of such sale will not be reviewed, nothing appearing affirmatively to impeach it, but the propriety thereof will be presumed.[39]

37. Dunn *v.* Salter, 1 Duv. (Ky.) 342; Miller *v.* McCrory, 3 Ky. L. Rep. 774 (in contest between attaching creditors and other lien-holders); Crocker *v.* Baker, 18 Pick. (Mass.) 407; Oniel *v.* Chew, 1 Dall. (Pa.) 379, 1 L. ed. 185; Martin *v.* Malseed, 1 Wkly. Notes Cas. (Pa.) 82 (stock of groceries of absconding defendant); McConnell *v.* Kaufman, 5 Wash. 686, 32 Pac. 782.

Interpretation of statute.— In order to authorize the sale of property as perishable, or to justify the resort to the statutory remedy, the property should come within the contemplation of the statute. The statutes, however, have not always been given the same construction in their application. Thus it is held that the term "perishable property" applies only to property which is necessarily subject to immediate decay (Newman *v.* Kane, 9 Nev. 234; Fisk *v.* Spring, 25 Hun (N. Y.) 367, 62 How. Pr. (N. Y.) 510) or which is, in its own nature, perishable, and not such as by extraordinary exposure may be liable to loss or destruction, if so situated that its safety can be provided for by the attaching officer (Oneida Nat. Bank *v.* Paldi, 2 Mich. N. P. 221). Thus lumber and shingles (Mosher *v.* Bay Cir. Judge, 108 Mich. 579, 66 N. W. 478), wines and liquors (Henisler *v.* Friedman, 1 Phila. (Pa.) 290, 9 Leg. Int. (Pa.) 11, 5 Pa. L. J. Rep. 147, 4 Am. L. J. 355), railroad cross-ties (Goodman *v.* Moss, 64 Miss. 303, 1 So. 241), a leasehold interest in land (Birmingham First Nat. Bank *v.* Consolidated Electric Light Co., 97 Ala. 465, 12 So. 71), and cotton ginned and baled (Weis *v.* Basket, 71 Miss. 771, 15 So. 659) are not perishable within the meaning of such statutes. But on the other hand it is held that the term "perishable" should receive a liberal rather than a narrow construction, and will embrace property, the keeping of which may render them of no value in the end to satisfy the claims, and in this sense any property subject to attachment may be ordered sold as perishable (McCreery *v.* Berney Nat. Bank, 116 Ala. 224, 22 So. 577, 67 Am. St. Rep. 105; Young *v.* Davis, 30 Ala. 213; Millard *v.* Hall, 24 Ala. 209); goods, the styles in which change every season, and which are liable to become hard and unsuitable for use, and moth-eaten and injured by dust and dirt (Schumann *v.* Davis, 13 N. Y. Suppl. 575, 34 N. Y. St. 698, 19 N. Y. Civ. Proc. 348, 26 Abb. N. Cas. (N. Y.) 125 [*disapproving* Fisk *v.* Spring, 25 Hun (N. Y.) 367, 62 How. Pr. (N. Y.) 510, *supra*]); live animals which are liable to perish, waste, or to be greatly reduced in value by keeping, or which cannot be kept but with great and disproportionate expense (Zimmerman *v.* Fischer, 13 N. Y. Civ. Proc. 224; Baker *v.* Baker, 28 Wkly. Notes Cas. (Pa.) 300; Southern R. Co. *v.* Sheppard, 42 S. C. 543, 20 S. E. 481); a horse and chaise (Anonymous, 18 N. J. L. 26). The statute sometimes expressly provides that "when any of the property taken in attachment shall consist of animals or perishable property" the court may order it to be sold. Crocker *v.* Baker, 18 Pick. (Mass.) 407; Mosher *v.* Bay Cir. Judge, 108 Mich. 579, 66 N. W. 478.

After error and supersedeas.— After writ of error and supersedeas from a final judgment dissolving an attachment and dismissing the suit have been perfected the property attached and still remaining in the sheriff's hands may be sold. The officer may sell the same and hold the proceeds to abide the judgment. State *v.* Hull, 37 Fla. 579, 20 So. 762.

38. **Appraisers may be appointed at request of party** to determine whether or not the property is perishable, liable to waste, etc. Kennedy *v.* Pike, 43 Me. 423; Crocker *v.* Baker, 18 Pick. (Mass.) 407.

Determination of freeholders.— Sometimes under the statute the sale takes place only on the sworn certificate of a certain number of freeholders as to the nature of the property and its danger to immediate waste or decay. Culver *v.* Dumsey, 6 Ill. App. 598; Kirby *v.* Coldwell, 26 Miss. 103.

For form of request for a sale of attached property see Eastman *v.* Eveleth, 4 Metc. (Mass.) 137.

39. McCreery *v.* Berney Nat. Bank, 116 Ala. 224, 22 So. 577, 67 Am. St. Rep. 105; Runner *v.* Scott, 150 Ind. 441, 50 N. E. 479; Dunn *v.* Salter, 1 Duv. (Ky.) 342.

Truth or falsity of affidavits.— Under the statute in Wisconsin, authorizing the court to sell the attached property when likely to perish or depreciate in value during the pendency of the action, an order of sale based on affidavits showing the requisite facts will not be set aside on motion made after the proceedings thereunder are practically concluded, whether the affidavits were true or false. Shakman *v.* Koch, 93 Wis. 595, 67 N. W. 925.

Conclusiveness of appraisement.— An appraisment of chattels is conclusive evidence, as against the parties to the suit, of the authority of the officer to sell, and of the value for which defendant in that suit may give security as a substitute for the property (Crocker *v.* Baker, 18 Pick. (Mass.) 407), but it is not competent evidence of the value of the chattels as against a party

d. Nature and Effect of Sale. The object of the statutes providing for the sale of attached property *in limine* or before final judgment is not to alter the rights of the parties, but to substitute in the possession of the court or officer imperishable money requiring no expense to keep, for perishable property or property expensive to keep.[40]

2. After Replevy or Dissolution of Attachment. An order of sale of attached property after it has been replevied or the attachment dissolved is improper.[41]

3. Sale by Consent. A sale of attached property may be made by the officer by consent of the parties interested.[42] The sale will be the official act of the officer and the proceeds are held under the attachment, in the place of the property.[43]

whose property could not lawfully be attached in the suit, who has no part in the appointment of the appraisers, and who does not claim title under either of the original parties (Adams *v.* Wheeler, 97 Mass. 67).

40. *Louisiana.*— State *v.* Judge Twenty-first Judicial Dist., 37 La. Ann. 253.

Maryland.— Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303; O'Brien *v.* Norris, 16 Md. 122, 77 Am. Dec. 284.

Massachusetts.— First Ward Nat. Bank *v.* Thomas, 125 Mass. 278; Appleton *v.* Bancroft, 10 Metc. (Mass.) 231; Crocker *v.* Baker, 18 Pick. (Mass.) 407.

Missouri.— Franke *v.* Eby, 50 Mo. App. 579.

Texas.— Pace *v.* Smith, 57 Tex. 555, holding that the proceeds should be retained by the clerk of court until the attachment is disposed of.

Vermont.— Richmond *v.* Collamer, 38 Vt. 68.

Right to give bond.—The proceeds take the place of the property and continue subject to the right of defendant to have it delivered to him on giving bond, unless he has waived the right by an agreement that the proceeds shall remain in hands of the sheriff, subject to the rights of the attaching creditors, until the further order of the court. State *v.* Judge Civil Dist. Ct., 44 La. Ann. 87, 10 So. 405; State *v.* Young, 40 La. Ann. 203, 3 So. 722; State *v.* Judge Twenty-first Judicial Dist., 37 La. Ann. 253. See also Pollard *v.* Baker, 101 Mass. 259.

Effect upon other liens.— The sale does not interfere with prior liens, and the sheriff is not liable to the prior attaching creditor for failing to take proper care of property in his custody. Taylor *v.* Thurman, (Tex. 1889) 12 S. W. 614. Where mortgaged perishable property is sold under an attachment the lien is released from the property and transferred to its proceeds. Welsh *v.* Lewis, 71 Ga. 387.

Attachment by officer of funds in his hands. — A sale of attached property is not vitiated by the fact that the officer illegally attaches the funds in his hands on a writ in favor of another creditor. Wheeler *v.* Raymond, 130 Mass. 247.

41. Weathers *v.* Mudd, 12 B. Mon. (Ky.) 112; Ah Lep *v.* Gong Choy, 13 Oreg. 205, 9 Pac. 483.

Dissolution as to part of property.—Where, after an appraisal of attached property, the officer dissolves the attachment on one of the articles before the sale, this does not render the sale of the remaining articles illegal if the debtor did not offer to deposit the money or give the bond permitted by the statute to prevent such sale. Wheeler *v.* Raymond, 130 Mass. 247.

42. Chadbourne *v.* Sumner, 16 N. H. 129, 41 Am. Dec. 720.

43. Kendallville First Nat. Bank *v.* Stanley, 4 Ind. App. 213, 30 N. E. 799; Kingsbury *v.* Baker, 17 Pick. (Mass.) 429. See also Grand *v.* Lathrop, 23 N. H. 67; Thalheimer *v.* Hayes, 14 N. Y. Civ. Proc. 232.

Agreement by part of creditors.— Where there are several attachments on the same goods, all the creditors take judgment and execution, all but the last attacher agree to a sale before judgment, and the proceeds are not sufficient to satisfy the first attacher's debt, the officer is not liable to the last for any of the property. Munger *v.* Fletcher, 2 Vt. 524.

Consent by subsequently attaching creditors.— Where subsequently attaching creditors forbid the officer to pay the proceeds of sale to the first attaching creditors who consented to sale, but orally consent that he may proceed in the sale, they cannot be permitted, in a suit against the officer for not paying to them the proceeds of such property, to allege that such sale was made without the consent of the debtor and of all the attaching creditors. Eastman *v.* Eveleth, 4 Metc. (Mass.) 137.

Objections by strangers.— Where, on application and consent of all creditors who have sued out attachments, and with the consent of the debtors and their assignee, the attached effects have been sold by order of the court, and the proceeds paid pursuant to that order to the clerk, creditors who did not obtain judgments until after such order was made have no such rights in the property as entitle them to object to the manner in which the writ was executed. Walter *v.* Bickham, 122 U. S. 320, 7 S. Ct. 1197, 30 L. ed. 1185.

Auctioneer agent of sheriff.— An order obtained by consent of the parties interested in an attachment proceeding, that, by an auctioneer named, the sheriff sell the seized property, "and hold the proceeds thereof in the same manner as the property sold subject to the existing rights of all parties therein," constitutes the auctioneer the sher-

4. Duty of Officer to Sell. Where the order is regularly issued the officer must sell and the order is a complete protection to him.[44] The object of the statute permitting sale of perishable property before judgment is to confide a power to be used for the benefit of both parties. The officer cannot be held liable in trover as for a conversion.[45] Such order protects the officer, although it will not affect the legality of the original seizure.[46]

5. Validity of Proceedings — a. In General. The proceedings upon the sale of attached property should be in strict compliance with the statute governing the matter.[47]

b. Order of Sale. An order of sale may be made at the next term after plaintiff recovers judgment in the action,[48] but when the statute permits the sale of property before judgment, by order of court, the sheriff has no right to sell without such order.[49]

c. Notice of Appraisal and Sale. Notice of appraisal and sale should be given as required by the statute, otherwise the sale will be illegal,[50] and it is held

iff's agent, and renders the sheriff responsible for moneys coming into the auctioneer's hands. Griffin *v.* Helmbold, 72 N. Y. 437.

Consent by claimant.— An agreement by plaintiff that goods which he claims, and for the taking of which by defendant, a deputy sheriff, upon attachment against a third person, he has brought his action, may be sold, and the proceeds retained in place of the goods, is not a release of the cause of action or conclusive against plaintiff's right to maintain the same. Sartwell *v.* Moses, 62 N. H. 355.

44. State *v.* Manly, 15 Ind. 8; State *v.* Manly, 11 Lea (Tenn.) 636.

No process or copy of the order from the clerk is necessary. Millard *v.* Hall, 24 Ala. 209.

45. Pollard *v.* Baker, 101 Mass. 259; Oeters *v.* Aehle, 31 Mo. 380; York *v.* Sanborn, 47 N. H. 403.

Determination on appraisal that property should be sold is conclusive on the officer and he is bound to sell. Kennedy *v.* Pike, 43 Me. 423.

Liability for failure to sell.— In Cilley *v.* Jenness, 2 N. H. 87, it was held that if the property attached be perishable the officer is liable for the net market value thereof, for he ought to sell it at auction before he suffers injury. See, generally, Sheriffs and Constables.

46. Sterling *v.* Ripley, 3 Pinn. (Wis.) 155.

47. Kirby *v.* Coldwell, 26 Miss. 103 (holding that a sale of perishable property without a strict compliance with the statute does not bind the owner); Walker *v.* Wilmarth, 37 Vt. 289.

Rules applicable to executions.—Sometimes the same rules govern as when the property is taken under execution. Thus in Nebraska it is held that the sale of attached lands under an order of court is under the statute governed by the same restrictions and regulations as if the land had been levied on by execution. Helmer *v.* Rehm, 14 Nebr. 219, 15 N. W. 344. See, generally, Executions.

Inventory and appraisal.— An attachment under Mass. Gen. Stat. c. 123, § 77, is not invalidated by the fact that the appraisers did not state in their certificate the separate value of each article in the schedule prepared by the officer, but appraised the whole property at a round sum. Wheeler *v.* Raymond, 130 Mass. 247.

48. Cozine *v.* Hatch, 17 Nebr. 694, 24 N. W. 389.

49. Work *v.* Kinney, (Ida. 1898) 51 Pac. 745.

Authority of officer issuing writ.— A justice of the peace who has issued an attachment returnable to a court in his county, which has been levied by the sheriff of another county on perishable property, has authority to make an order for the sale of such property. Young *v.* Davis, 30 Ala. 213. So if two attachments issue out of different courts at different times, the court from which the last writ issues may order a sale of the property, but has no power to interfere with the rights of the first attaching creditor in the proceeds. Weaver *v.* Wood, 49 Cal. 297.

Sufficiency of order.— The order need not show the facts which authorize the sale or making of the order. Moore *v.* Smith, 96 Ga. 763, 22 S. E. 297; Wilson *v.* Garrick, 72 Ga. 660.

50. Stoat *v.* Brown, 64 Ark. 312, 42 S. W. 415; Sawyer *v.* Wilson, 61 Me. 529 (where it is held that an officer who sells attached property on mesne process without giving the notice required by law is a trespasser *ab initio*); Kirby *v.* Coldwell, 26 Miss. 103; Walker *v.* Wilmarth, 37 Vt. 289 (which holds that a sale of attached property on the application of the creditor, made under statute without the written notice thereby required to be given to the owner of the property by the officer, is illegal, although the owner has verbal notice, is present at the appraisal and sale, and makes no objection); Gassett *v.* Sargeant, 26 Vt. 424.

Waiver by second attaching creditor.—A second attaching creditor, who signs as attorney of the first attaching creditor a written request to have the property appraised and sold under the first attachment, thereby waives the notice required by statute to be

that a sale of property which is subject to a valid mortgage should not be made without a previous warning order to the mortgagee.[51]

d. Time of Sale. The sale of attached property should not be made at a time other than that prescribed by the statute,[52] or ordered by the court;[53] but a general law fixing a certain day of the month for all sheriff sales is held to apply to sales of personalty ordered pending an attachment.[54]

e. Private Sale. Where under the terms of the statute the sale must be public, a private sale will be entirely unauthorized.[55]

f. Terms of Sale. When the terms of sale of attached property do not conform to the statutory rules regarding the time for which credit may be given the sale should be set aside,[56] and when an officer sells goods he becomes liable from the time of the sale for the price at which they are sold, and cannot set up in defense to an action for it that he never received the money or its equivalent, when he has no right to sell for anything but money.[57]

g. Sale of Real Estate. A sale of real estate which has been attached cannot be ordered until all the personal property attached has been sold.[58]

h. Indemnity Bond. Where an order of sale is regularly issued, the officer is bound to sell, although title to the property is disputed; and he cannot refuse to

given by the officer. Wheeler *v.* Raymond, 130 Mass. 247.

Notice to all parties.—If an officer attaches property of two tenants in common, on writs against both, in selling upon the writs he must commonly notify all the parties of the appraisal, and it will be the same as no appraisal in respect of the party not notified. Gassett *v.* Sargeant, 26 Vt. 424.

Aider of notice by postponement.—A notice of sale of attached property, defective for want of sufficient time, cannot be cured by a postponement of the sale, on the day appointed therefor, to a day remote enough to satisfy the statutory requirement as to notice. Sawyer *v.* Wilson, 61 Me. 529.

Sufficiency of service.—Notice to defendant that plaintiff has applied to the officer to make sale of goods attached on mesne process, under Mass. Stat. (1822), c. 93, and that defendant may appoint one of the appraisers, may be given by leaving a written notification at defendant's usual place of abode. Crocker *v.* Baker, 18 Pick. (Mass.) 407.

51. Simper *v.* Stein-Vogeler Drug Co., 18 Ky. L. Rep. 565, 37 S. W. 258, holding that a sale of property as perishable, no warning order having been issued to the mortgagee until the day of sale, could be set aside at the instance of the latter and the attaching creditor made to account for the proceeds, he having purchased the property at the sale for an inadequate price and subsequently sold them at a large advance. But see Jackson *v.* Colcord, 114 Mass. 60.

52. After appraisal.— Under the Maine statute, where property attached was appraised it could not be sold before four days from the appraisal and if so sold the officer became a trespasser *ab initio*. Knight *v.* Herrin, 48 Me. 533.

The time is to be reckoned, under such a statute, from the time of seizure, and not from the date of the certificate of the examiners. Sumner *v.* Crawford, 45 N. H. 416.

53. Parties cannot control officer.— The sheriff is not under the control of either party and neither can order the sale to be stopped. If the officer neglects to sell at the time ordered by the court he does so at his peril. Oeters *v.* Aehle, 31 Mo. 380.

54. Bayly *v.* Weil, 28 La. Ann. 264.

55. Culver *v.* Rumsey, 6 Ill. App. 598, holding that such private sale will postpone the lien of the creditor effecting it to those of subsequently attaching creditors.

56. Dunn *v.* Salter, 1 Duv. (Ky.) 342.

57. Appleton *v.* Bancroft, 10 Metc. (Mass.) 231.

Confederate notes.— In a forced sale of an absentee's property under an attachment process, in 1862, while Confederate notes were a circulating medium, the absentee was presumed not to have consented to the sale of his property for such unlawful currency; and where it was subsequently determined that the absentee should receive the price of the sale, the sheriff who made the sale and received the price was not permitted to set up in defense to its payment that the sale was made for, and the price received in, Confederate notes, and that he, the sheriff, could not be compelled to pay any other than such currency as he had received. Spalding *v.* Walden, 23 La. Ann. 474.

The giving of credit to the purchaser of the goods will not invalidate a sale, under the statute authorizing the immediate sale of attached property liable to depreciate in value by keeping, or which cannot be kept without great and disproportionate expense. Crocker *v.* Baker, 18 Pick. (Mass.) 407.

58. Davidson *v.* Simmons, 11 Bush (Ky.) 330; Camden *v.* Haymond, 9 W. Va. 680.

Affidavit.—Under the Kentucky code plaintiff was required to file an affidavit that there was not enough personal property to satisfy his claim. Payne *v.* Witherspoon, 14 B. Mon. (Ky.) 217. It seems, however, that a failure to file an affidavit that defendant has no personalty before the judgment for

proceed because plaintiff does not give an indemnity bond.[59] Some statutes, however, require an indemnity bond before sale in cases against non-residents, or where defendant has been constructively summoned and has not appeared, in order to secure him if he should appear and successfully defend within a certain time.[60] A sale without such bond having been executed is invalid and will be set aside.[61]

i. Sale of Part of Property. It is the duty of the sheriff on the final process to sell no more of the property than may be required to pay the amount due, including the costs,[62] and where the levy is upon a particular interest only, that interest alone should be sold;[63] but a sale after appraisal is not illegal by reason of the fact that more than enough to realize the amount called for by the precept is sold, where the last article sold was indivisible and previous to its sale the necessary amount had not been realized.[64]

j. Return and Confirmation. If a sale of attached property is not reported and confirmed as required it is not complete,[65] and may be set aside.[66]

6. Rights and Title of Purchaser. The title of a purchaser at a sale in an

sale of realty is rendered does not render the judgment void, or in any way operate to annul the lien. Fremd *v.* Ireland, 17 Ky. L. Rep. 1140, 33 S. W. 89.

Return of officer instead of affidavit.— An affidavit of the non-existence of personal property, as required by the statute, before an order will be made for the sale of land is not necessary where the officer's return shows an attachment of land because no personalty could be found. Webster *v.* Daniel, 47 Ark. 131, 14 S. W. 550.

59. State *v.* Manly, 11 Lea (Tenn.) 636.

60. Harris *v.* Adams, 2 Duv. (Ky.) 141; Daisy *v.* Houlihan, 19 Ky. L. Rep. 1337, 43 S. W. 487.

The security need not be given before execution issues, and if defendant dies after judgment plaintiff must give security to the personal representatives of deceased. Fitch *v.* Ross, 4 Serg. & R. (Pa.) 557.

In Maryland, under the act of 1715, providing that the court "shall and may condemn said goods, &c., . . . and award execution thereof to be had and made . . . as in other judgments," etc., upon plaintiff giving security, etc., it was held that at the time judgment is rendered plaintiff is entitled to judgment of condemnation, with the right of execution on giving the security (Dawson *v.* Contee, 22 Md. 27; Walters *v.* Munroe, 17 Md. 501), and plaintiff need not give security to defendant after the lapse of a year and a day from the granting of the attachment (Wallace *v.* Forrest, 2 Harr. & M. (Md.) 261).

61. Bush *v.* Visant, 40 Ark. 124 (holding that a sale without the required bond having been given is void, although the court appointed attorneys, who, without authority, entered a general denial for defendant, and demanded a jury trial); Calk *v.* Francis, 2 B. Mon. (Ky.) 42 (holding that where real estate of a non-resident is attached an indemnity bond must be given to authorize sale, and if not given in proper time, the defect cannot be subsequently cured); Hiller *v.* Lamkin, 54 Miss. 14 (holding the failure to give the bond renders the sale void); Hall *v.* Lowther, 22 W. Va. 570.

62. Dronillard *v.* Whistler, 29 Ind. 552.

Debt due by instalments.—On a bill against an absent debtor to subject his lands to the satisfaction of a debt due by instalments, some of which are not payable at the time of the decree, a sale to satisfy such as have become payable should be ordered, and the attachment preserved to secure such as are to become afterward payable. Watts *v.* Kinney, 3 Leigh (Va.) 272, 23 Am. Dec. 266.

63. Thompson *v.* Baker, 74 Me. 48.

64. Wheeler *v.* Raymond, 130 Mass. 247.

65. **No action can be maintained** for purchase-money until such confirmation. Freeman *v.* Watkins, 52 Ark. 446, 13 S. W. 79.

Return aided by parol evidence.— When an officer's return of the sale of attached property, sold by request of the creditor, does not state specifically that notice required by statute was given to the debtor, parol evidence is admissible to prove that such notice was given. Bentley *v.* White, 54 Vt. 564.

Return on original writ.— Where attached property was sold before judgment, it was not essential to the validity of the sale or the preservation of the attachment, that a return of the sale should be made on the original writ. The statute contemplated a sale either before or after the return of the writ. It was obvious that a sale after such return-day could not be made a part of the return on the original writ, and no provision was made for such return to be indorsed on the writ if the sale should be made before the return-day. Eastman *v.* Eveleth, 4 Metc. (Mass.) 137. But the certificate of appraisers of property attached on mesne process, on the back of the writ, and adopted by the officer as part of his return, is, together with the return, competent evidence of the disposition of the property. Kennedy *v.* Pike, 43 Me. 423.

Sale pending appeal.— Where, pending an appeal from a judgment of a justice of the peace, the officer sells the attached property, under the statute, at the request of a party, the return is properly made to the court where the cause is pending. Bentley *v.* White, 54 Vt. 564.

66. Greer *v.* Powell, 3 Metc. (Ky.) 124.

attachment proceeding relates back to the date of the levy.[67] Unless he can bring himself within the protection afforded a *bona fide* purchaser without notice, a purchaser at a sheriff's sale in an attachment proceeding can acquire only defendant's interest in the attached property;[68] but a mere purchaser who does nothing more than purchase is not responsible in trespass for the wrongful act of the sheriff in levying on and selling the goods.[69] An order of sale of property as perishable, and sale under such order, however, will confer a good title on the purchaser,[70] without regard to the title or interest of defendant in attachment and notwithstanding the property may have belonged to another or may have been burdened with other claims.[71]

7. Disposition of Proceeds or Property[72]— a. In General. The officer should continue his custody of the attached property until the formal disposition of the attachment suit.[73] The proceeds of a sale of such property when the sale thereof is made before judgment are to be held to be disposed of in like manner as the property would have been held and disposed of if it had remained unsold,[74] and

67. Grigg *v.* Banks, 59 Ala. 311; Howard *v.* Traer, 47 Iowa 702.

A deed made under attachment proceedings relates back to the date of the levy of the attachment. Woodward *v.* Brown, 119 Cal. 283, 51 Pac. 542, 63 Am. St. Rep. 108; Porter *v.* Pico, 55 Cal. 165.

68. Plea of bona fide purchaser is not available where before sale defendant has transferred the legal title to the equitable owner and the deed has been duly recorded. Byers *v.* Wackman, 16 Ohio St. 440.

Express notice of prior lien.—One who buys at an attachment sale with express notice of a prior attachment is not an innocent purchaser as against the prior attaching creditor. Riordan *v.* Britton, 69 Tex. 198, 7 S. W. 50, 5 Am. St. Rep. 37.

Interest acquired after levy.— An attachment sale passes all of defendant's interest, that which he held at the date of the levy as well as that subsequently acquired. Willis *v.* Pounds, 6 Tex. Civ. App. 512, 25 S. W. 715.

69. Talmadge *v.* Scudder, 38 Pa. St. 517, holding, however, that where the purchaser takes possession he is liable in trespass if defendant in attachment had no title, the wrong being, not the illegal seizure by the sheriff but the subsequent act of the purchaser in taking and removing the property.

70. Millard *v.* Hall, 24 Ala. 209; State *v.* Hadlock, 52 Mo. App. 297; McConnell *v.* Kaufman, 5 Wash. 686, 32 Pac. 782 (holding that the sale of property at the instance of several attaching creditors will confer a good title on the purchaser, notwithstanding one of the attaching creditors claimed under a levy made subsequently to the sale of the property by the attachment debtor, and notwithstanding mere excessiveness of a levy).

Collateral attack.— The order directing attached property to be sold cannot be collaterally attacked for the purpose of defeating the title of the purchaser at the sale. McCreery *v.* Berney Nat. Bank, 116 Ala. 224, 22 So. 577, 67 Am. St. Rep. 105; Buller *v.* Woods, 43 Mo. App. 494.

71. Young *v.* Kellar, 94 Mo. 581, 7 S. W. 293, 4 Am. St. Rep. 405; Toovey *v.* Baxter, 59 Mo. App. 470; Buller *v.* Woods, 43 Mo. App. 494; Megee *v.* Beirne, 39 Pa. St. 50; Apreda *v.* Romano, 24 Wkly. Notes Cas. (Pa.) 124; Meyer *v.* Sligh, 81 Tex. 336, 16 S. W. 1022.

Protection to sheriff.— The sheriff, as defendant in an action of trespass by the real owner, cannot justify the taking of goods on the ground that by this peculiar rule of law the title of his vendee was validated. State *v.* Hadlock, 52 Mo. App. 297; Megee *v.* Beirne, 39 Pa. St. 50.

Sale free from other liens.— The title acquired by a purchaser of attached goods sold as perishable, by order of court, while in its custody, is superior to a lawful lien thereon for taxes (Parlin, etc., Co. *v.* Howard, (Tex. Civ. App. 1899) 52 S. W. 631); and to a prior landlord's lien (Betterton *v.* Eppstein, 78 Tex. 443, 14 S. W. 861).

72. Return of property or proceeds on judgment for defendant or dissolution of attachment see *infra*, XV, E, 3, b.

73. Livingston *v.* Smith, 5 Pet. (U. S.) 90, 8 L. ed. 57.

Sale of part of property.— A sale under mesne process of only a part of the property attached, but for an amount exceeding both plaintiff's claim and the amount the officer was commanded to attach, does not dissolve the attachment, as to the balance or impair plaintiff's lien on it. Marshall *v.* Town, 28 Vt. 14.

The attaching officer cannot be charged as a wrong-doer for retaining possession until satisfactory evidence be given him that the attachment has been vacated, although the debt may have in fact been paid and the attachment thereby discharged. Wheeler *v.* Nichols, 32 Me. 233.

Writ issued without authority.— Where an officer, after attaching property, discovers within the time limited for making his return that the writ was issued without plaintiff's authority, he must return the property and make a true return of all the facts. Williams *v.* Ives, 25 Conn. 568.

74. Richmond *v.* Collamer, 38 Vt. 68. See also XIII, E, 1, d.

If the officer die before the order of distri-

should not it has been held be distributed before judgment and order for such distribution.[75]

b. Notice. It is proper that defendant should have notice of an order of distribution.[76]

c. Release of Property Under Excessive Levy. Where there is an excessive levy, the error should be corrected by procuring a release of the property in excess of what is sufficient to satisfy the writ and not by discharging the attachment altogether.[77]

d. According to Priority of Lien. The proceeds of the sale of attached property should be applied according to the priority of the attachment liens.[78]

bution and to the time of his death retain the money as a trust fund, separate and apart from his own money, he is guilty of no breach of his official bond for which his securities could be made liable. But if he converted the money in his lifetime or so mingled it with his own that his administrator cannot distinguish the one from the other it constitutes a conversion and a breach of his official bond. State *v.* Roberts, 21 Ark. 260.

75. Right to sue for proceeds.— A sheriff cannot be sued by attachment plaintiff for the proceeds of perishable property taken and sold by him by order of the court, until the court shall make an order upon him after final judgment in the attachment suit to pay the money to plaintiff. Yell *v.* Lawson, 7 Ark. 352; State *v.* Hickman, 150 Mo. 626, 51 S. W. 680; State *v.* Finn, 98 Mo. 532, 11 S. W. 994, 14 Am. St. Rep. 654.

Before determination of ownership of attached property the court should not order the proceeds to be paid to plaintiff. Simmons Clothing Co. *v.* Davis, (Indian Terr. 1900) 58 S. W. 655.

After interplea in several attachments.— Where several separate attachment suits are begun against an insolvent debtor and a creditor files an interplea in each case, claiming the attached property, which by consent of all plaintiffs is sold, the proceeds to be paid into court to await the order of the court, no disposition can be made of them until all the suits are disposed of. State *v.* Hockaday, 132 Mo. 227, 33 S. W. 812.

When assessment unnecessary.— Under a statute providing that the court shall direct the clerk to make an assessment of the amount each attaching creditor is entitled to out of the property attached, no order is necessary where the judge of the court is *ex officio* clerk thereof. Rawles *v.* People, 2 Colo. App. 501, 31 Pac. 941.

76. Morrow *v.* Smith, 4 B. Mon. (Ky.) 99.

Sheriff's duty.— As between different attaching creditors, a subsequent one may move that the sheriff be required to pay over to him the proceeds of the goods attached by all, and it is the sheriff's duty to notify the other creditors if he would have the decision on the motion binding upon them. Dixey *v.* Pollock, 8 Cal. 570.

Debtor party to rule against sheriff.— The debtor may become a party to a money rule against the sheriff by an attaching creditor, and may plead that said creditor has no valid lien upon the fund in the sheriff's hands, being the proceeds of the sale of his goods. Wynne *v.* Millers, 61 Ga. 343.

77. Moses *v.* Arnold, 43 Iowa 187, 22 Am. Rep. 239, holding that when causes of action authorizing attachment are united with others not authorizing such remedy, the error should be corrected by reducing the amount of property held until it is sufficient to cover only the causes of action authorizing attachment. See also McConnell *v.* Kaufman, 5 Wash. 686, 32 Pac. 782.

Release of property not in mortgage.— If a chattel mortgage held by an attaching creditor who has caused attachment to be levied upon the same and other property is ample security for the debt with interest and costs, the court may, upon proper application, discharge so much of the property not covered by the mortgage as is not necessary to satisfy the claim. Clyde State Bank *v.* Mottin, 47 Kan. 455, 28 Pac. 200.

78. Priorities of attachment lien, generally, see *supra*, XII, B.

Effect of recovery of damages for wrongful attachment.— Where property was sold subject to liens of two attachments and the proceeds paid into court and defendant recovered damages, on his answer, alleging that the first attachment was wrongful, it was held that the proper disposition of the proceeds was as follows: The amount recovered by defendant as damages should be deducted from the recovery of the first attaching creditor on the merits of his claim; the balance of his claim to be satisfied from the proceeds of sale, and what remained of these proceeds should be applied to the claim of the second attaching creditor. Blum *v.* Stein, 68 Tex. 608, 5 S. W. 454.

Joinder of creditors in common suits.— Where an attachment is held void as to subsequently attaching creditors who have proved their claim and joined in a common suit for their mutual benefit, it is held that the court may distribute the fund among them *pro rata* instead of in the order of the liens of their respective attachments. Craig *v.* California Vineyard Co., 30 Oreg. 43, 46 Pac. 421.

Laches in moving for distribution of proceeds cannot be imputed to one attaching creditor whereby another may acquire priority over him. State *v.* Hickman, 150 Mo. 626, 51 S. W. 680.

Where an attachment is dissolved plain-

e. **Upon Release or Payment.** Where plaintiff voluntarily releases an attachment,[79] or where he succeeds and defendant pays the judgment[80] the officer should return to defendant the property held.

f. **Application of Surplus.** A creditor under whose writ property could not be seized because it was held by an officer of another jurisdiction, under another writ, may intervene in the latter suit and share in the distribution of the proceeds,[81] and a mortgage lien perfected before the levy of a second attachment will be entitled to satisfaction out of the surplus proceeds of sale under a prior attachment.[82] The sale of property as perishable does not affect the right of subsequently attaching creditors to participate in the proceeds.[83]

g. **Purchase by Creditor.** If, under a sale by consent of all the parties, a creditor purchases a part of the property, in amount less than his debt, to satisfaction of which he is entitled under the agreement, the officer cannot maintain an action against him for the purchase-price.[84]

h. **Payment to Plaintiff.** If the purchaser at a sale of property under mesne process pays the price to the creditor whose recovery is sufficient to absorb the whole of such proceeds the purchaser will be discharged unless the officer holds paramount claims upon such proceeds.[85]

tiff's relation to a fund realized by sheriff's sale of the property is that of any other simple contract creditor, and he is not interested in such a way as to entitle him to demand an issue in a matter of the distribution. *In re* Jones, 2 Kulp (Pa.) 126.

79. Levy *v.* McDowell, 45 Tex. 220.

80. Neely *v.* Munnich, 27 Misc. (N. Y.) 507, 58 N. Y. Suppl. 316.

A mere deposit with the clerk of the court, by a defendant in an attachment suit, of the amount of the judgment rendered against him in the suit is not such a payment of the judgment as to entitle him to a release of the property attached in the suit. Sagely *v.* Livermore, 45 Cal. 613.

81. **In state and federal court.**— Where property has been seized by an officer under an attachment in a suit in a state court, who prevents the United States marshal from taking possession under a subsequent writ in a suit in the federal court, the creditor in the latter suit may intervene in the former and have the residue of the proceeds after satisfying the first writ applied upon his claim. Goodbar *v.* Brooks, 57 Ark. 450, 22 S. W. 96. So where in attachment in a state court the sheriff cannot seize the property because it is in possession of the United States marshal under an attachment from the federal court, the creditor in the first writ, although residing in the same state with defendant, may, on service of notice of his claim on the marshal, intervene in the federal court and, on showing a properly adjudicated claim, share in his proper order in the proceeds of the sale. Gumbel *v.* Pitkin, 124 U. S. 131, 8 S. Ct. 379, 31 L. ed. 374.

82. Hurt *v.* Redd, 64 Ala. 85.

Assignment of equity of redemption.— Where a mortgagor assigns his equity of redemption after it is attached, and the officer afterward sells it upon the attaching creditor's execution, which is satisfied by a part of the proceeds, and having no notice of the assignment applies the surplus in satisfaction of another attachment execution against the mortgagor, he is not answerable to the assignee for such surplus. Bacon *v.* Leonard, 4 Pick. (Mass.) 277 [*distinguishing* Clark *v.* Austin, 2 Pick. (Mass.) 528, where the sheriff had notice of the right of the assignee to the equity of redemption, and paid over the surplus to him, the assignee's right being precedent to the right under the other execution].

83. Donk *v.* Alexander, 117 Ill. 330, 7 N. E. 672. If two attachments issue from different district courts at different times and the sheriff levies on personal property by virtue of both, the court from which the second attachment issues may make an order for the sale of the property, but it has no power to dispose of the fund arising from the sale, other than the surplus remaining after the claim of the first attaching creditor is satisfied. Weaver *v.* Wood, 49 Cal. 297.

84. Ball *v.* Divoll, 17 Pick. (Mass.) 143.

Effect of agreement creating secret trust. — Upon the sale of attached property attaching plaintiff agreed with defendant to buy the property, satisfy his debt out of the proceeds thereof, and return the balance to the debtor, and it was held that this constituted a secret trust in favor of the debtor, and that attaching plaintiff was liable to other creditors of defendant for the surplus of the proceeds over the amount necessary to satisfy the attaching creditor's claim. Ries *v.* Rowland, 4 McCrary (U. S.) 85, 11 Fed. 657.

85. Barker *v.* Barker, 47 N. H. 341.

Payment to plaintiff under order of sale. — Where one creditor only obtains judgment in a suit commenced by writ of attachment, it is not necessary that the order of sale of the property attached, authorized by the statute, should require the money arising from the sale to be paid into court; but, if it require the same to be paid to plaintiff, this will not vitiate either the order or the proceedings under it. People *v.* Judges Calhoun Cir. Ct., 1 Dougl. (Mich.) 417.

i. Liability of Officer For Interest on Proceeds. Where attached property becomes changed into money in the officer's hands and is invested by him so as to produce interest, such interest belongs to the party entitled to the money and not to the officer.[86]

G. Proceedings by Trustees or Auditors — 1. In General. Some of the attachment acts contemplate a proceeding somewhat analogous to proceeedings in involuntary bankruptcy. Auditors or trustees are appointed to administer the debtor's estate,[87] and adjust the claims of all the creditors who come in under the attachment.[88]

2. Powers and Duties. It is the duty of the trustees or auditors to ascertain and adjust the demands of all creditors of defendant who come in under the writ.[89]

86. Richmond *v.* Collamer, 38 Vt. 68. And where the officer deposits the proceeds of sale in a savings bank he is liable for interest received on such deposit. Jackson *v.* Smith, 52 N. H. 9.

87. **References to auditors, trustees, or referees, generally,** see References.

Disqualification by interest — Substitution. — Where two of the auditors appointed in an attachment proceeding are shown to be interested in the suit others will be substituted on motion. Anonymous, 16 N. J. L. 355.

Pennsylvania — All must qualify but majority may act. — Under the Pennsylvania act of 1807 three trustees must be appointed and must qualify before any can act; but if they all qualify the acts of a majority will bind. Thus, where all the trustees have qualified and one afterward dies the other two may sue in the name of all. McCready *v.* Guardians of Poor, 9 Serg. & R. (Pa.) 94, 11 Am. Dec. 667.

Compensation. — Under the former New York absconding debtor's act the trustees were entitled to reasonable counsel fees, to costs accrued in the prosecution of a certiorari, although the commissioner's decision was confirmed by the court, and to commissions on such sum as, on compromise, was paid by the debtor to attachment creditor, although the money did not come to their hands. Matter of Bunch, 12 Wend. (N. Y.) 280.

88. **All creditors of defendant are entitled** to come in under the attachment and share in the distribution. Plunkett *v.* Moore, 4 Harr. (Del.) 379; Matter of Bonaffe, 23 N. Y. 169 [*affirming* 33 Barb. (N. Y.) 469, 18 How. Pr. (N. Y.) 15]; Matter of Coates, 3 Abb. Dec. (N. Y.) 231, 12 How. Pr. (N. Y.) 344 [*reversing* 13 Barb. (N. Y.) 452].

Any creditor whose debt is not due may apply to the court in the same manner as if it were due, deducting a rebate of legal interest. Devlan *v.* Wells, 65 N. J. L. 213, 47 Atl. 467.

When creditor may apply. — To entitle a creditor to a dividend under the absconding debtor's act (1 N. Y. Rev. Laws, 157, § 2), he must have been such at the first publication of the proceedings under the statute. He could not prove his claim after payment of a second dividend. Matter of De Peyster, 5 Cow. (N. Y.) 266.

Claim by state — Dividend made before notice. — Where auditors made a dividend before notice of a debt due to the commonwealth, which accrued previously to issuing the attachment, it was held that the commonwealth was entitled to no preference. Hollinsworth *v.* Hamelin, 1 Dall. (Pa.) 151, 1 L. ed. 77.

Applying creditor cannot attack attachment. — An applying creditor cannot claim the benefit of a writ of attachment by entering a rule for his admission and presenting his demand to the auditor, and afterward attack its validity on exception to the auditor's report. Westcott *v.* Sharp, 50 N. J. L. 392, 13 Atl. 243.

89. **New Jersey — Functions same as common-law auditors.** — In New Jersey the statute does not prescribe with particularity the powers and duties of such officers, but it is held that their functions are the same, and that they are to be governed by the same rules, as common-law auditors. Stewart *v.* Walters, 41 N. J. L. 430. See, generally, References.

Contesting judgment offered in evidence by plaintiff. — The creditors may contest a judgment in *cognovit* entered in favor of attachment plaintiff in another court, when it is offered in evidence before the auditors. Stewart *v.* Walters, 38 N. J. L. 274.

Relief against fraudulent claim. — In the case of attachment, where plaintiff imposes a fictitious or satisfied claim upon the auditors, or conceals from them any fact tending to show that his claim is not valid, he commits a fraud upon the absent defendant, against which equity will relieve. Tomkins *v.* Tomkins, 11 N. J. Eq. 512.

A statutory exemption claimed by debtor's wife cannot be considered by the auditor, his duty being merely to ascertain the claims of plaintiff and other applying creditors and to report on them. Westcott *v.* Sharp, 50 N. J. L. 392, 13 Atl. 243.

Discovery of property. — In New Jersey, after defendant has entered his appearance without giving bond, the auditor has no power to proceed for the discovery of other property of defendant. Jackson *v.* Johnson, 51 N. J. L. 457, 17 Atl. 959.

If a demand be unliquidated the trustees may assess and determine the damages in like manner as a jury. Matter of Negus, 7 Wend. (N. Y.) 499.

Preference — Claim against debtor as executor. — A claim against the debtor as exec-

Upon their appointment all the estate of the debtor vests in them,[90] and they may sell so much thereof as is sufficient to pay defendant's debts,[91] restoring to the debtor the surplus left after such payment.[92] They may sue for and recover property fraudulently transferred by the debtor before the issue of the writ,[93] and may maintain an action against the sheriff for loss of the attached goods through negligence.[94]

3. LIABILITIES. The powers of the trustees are not of a purely ministerial nature, and where they have acted in good faith they cannot be held responsible for an error of judgment or a mistake of law.[95] They can be compelled to account either by a creditor or by the debtor,[96] but no action by a creditor will lie against them until they have been called before the court which appointed them to settle their accounts.[97]

4. ACCEPTANCE OR REJECTION OF REPORT BY COURT. The report must be returned to the court for final judgment within the time specified by the statute.[98] The

utor is entitled to preference in the distribution of the funds in the hands of the trustees. Matter of Faulkner, 1 How. Pr. (N. Y.) 207.

90. Lee *v.* Hunter, 1 Paige (N. Y.) 519; McCormick *v.* Miller, 3 Penr. & W. (Pa.) 230; Ankrim *v.* Woodward, 4 Rawle (Pa.) 345; Henisler *v.* Friedman, 1 Phila. (Pa.) 290, 9 Leg. Int. (Pa.) 11, 5 Pa. L. J. Rep. 147, 4 Am. L. J. 355.

No suit can be maintained by the debtor in relation to his estate without joining the trustees. Lee *v.* Hunter, 1 Paige (N. Y.) 519.

A bill will not lie by a judgment creditor after the appointment of trustees to reach property of the debtor alleged to be holden by third persons in trust for him. Whitmarsh *v.* Campbell, 2 Paige (N. Y.) 67.

Where property sold on execution.—Where the absconding debtor's property attached in domestic attachment was sold on execution, the trustees are entitled to the residue of money in the sheriff's hands after satisfaction of the execution, although they did not show that they had advertised for the creditors to come in. Ebert *v.* Spangler, 3 Penr. & W. (Pa.) 389.

91. No more than enough to pay the debts of defendant can be sold. Orr *v.* Post, Hopk. (N. Y.) 11.

Equity will set aside a sale of land by auditors where such sale is infected with fraud (Bellows *v.* Wilson, 29 N. J. Eq. 124; Hodgson *v.* Farrell, 15 N. J. Eq. 88), or where the auditors sold in one parcel several distinct tracts of land which might reasonably and conveniently have been sold separately and the sale of a part would have been sufficient to pay all the claims under the attachment (Johnson *v.* Garrett, 16 N. J. Eq. 31).

Eviction of purchaser — Liability of trustees.— Where the trustees of an absconding debtor, appointed under the statute, sell the debtor's lands, and give a deed conveying all his right and title they are not liable to refund on the purchaser's being evicted. Murray *v.* Ringwood Co., 2 Johns. Cas. (N. Y.) 278.

92. Matter of Randall, 1 Cai. (N. Y.) 513; Lee *v.* Hunter, 1 Paige (N. Y.) 519.

93. Ankrim *v.* Woodward, 4 Rawle (Pa.) 345.

Check received before notice of attachment. — Where the debtor transferred to a third person before the latter had notice of the attachment a check for the payment of money which he applied to the payment of a debt for which he was security for the attachment debtor, it was held that an action for money had and received would not lie by the trustees against such third person to recover the amount of the check. An action for money had and received admits that defendant received the money fairly; and the check having been given before such third party had notice of the attachment the title to the money transferred did not vest in the trustees at the time of the attachment. Rutter *v.* Gable, 1 Watts & S. (Pa.) 108.

94. Acker *v.* Witherell, 4 Hill (N. Y.) 112.

95. Bradley's Appeal, 89 Pa. St. 514, where the trustees acted under advice of counsel.

Liability for loss of funds.— Where a trustee in domestic attachment in good faith deposited the funds of the trust, pending the confirmation of his account, in a bank of good standing and repute subject to his check, he was not responsible for a loss occasioned by the unexpected failure of the bank before final confirmation of the account, especially where he acted under the advice of counsel. Breneman *v.* Mylin, 12 Pa. Co. Ct. 324.

96. Matter of Cascaden, 2 Johns. Cas. (N. Y.) 107, Col. Cas. (N. Y.) 117, Col. & C. Cas. (N. Y.) 116.

97. Peck *v.* Randall, 1 Johns. (N. Y.) 165; Wilhelm *v.* Miley, 5 Serg. & R. (Pa.) 137.

May plead statute of limitations.— Trustees under the absconding debtor's act, when sued by a creditor, may avail themselves of the statute of limitations to the same extent as the debtor might in an action against him. Peck *v.* Randall, 1 Johns. (N. Y.) 165.

98. New Jersey — When judgment may be rendered.— Under the New Jersey statutes judgment cannot be rendered on the report until it has been on file for ten days and has been approved by the court or a judge. Plum *v.* Lugar, 49 N. J. L. 557, 9 Atl. 779.

Extension of time.— In New Jersey the court out of which the attachment issues has

court may inquire into the merits of the controversy and may, in a proper case,[99] set the report aside and refer the matter back to the auditors;[1] or, if the evidence given before them be sent with the report, the court may supersede the finding of the auditors and itself render the proper judgment.[2]

H. Charges For Care and Preservation of Property — 1. Right to — a. In General. As it is the duty of an officer, under a writ of attachment, to take and retain possession of the property levied upon, at his peril, the law does not deny him a reimbursement of actually necessary and reasonable expenses incurred in the performance of this duty.[3]

b. Necessity of Expenses Incurred. Such additional compensation cannot be allowed unless the officer is put to trouble and incurs expenses in taking or preserving attached property,[4] and the charges must be reasonable, necessary for the purposes for which they are incurred,[5] and in the proper exercise of the duty to take and retain possession.[6]

2. Liability — a. Of Debtor — (1) *In General.* The expense of keeping property attached is eventually upon the debtor, because the officer, if he prepays that expense, may deduct it from the proceeds before turning them over to the creditor and therefore so much of the debt will be paid,[7] and a defendant is

power to extend the time within which the auditors may make their report. Taylor *v.* Woodward, 10 N. J. L. 1.

99. Only in a clear case will the court set aside the report. Matter of Negus, 10 Wend. (N. Y.) 499; Cox *v.* Pearce, 7 Johns. (N. Y.) 298. See also Matter of Negus, 10 Wend. (N. Y.) 34.

1. Stewart *v.* Walters, 38 N. J. L. 274; Phœnix Iron Co. *v.* New York Wrought Iron R. Chair Co., 27 N. J. L. 484; Taylor *v.* Woodward, 10 N. J. L. 1; Berry *v.* Callet, 6 N. J. L. 179.

2. Stewart *v.* Walters, 41 N. J. L. 430.

3. Deering *v.* Wisherd, 46 Nebr. 720, 65 N. W. 788; Hanness *v.* Smith, 21 N. J. L. 495; Mitchell *v.* Downing, 23 Oreg. 448, 32 Pac. 394.

Expense of retaking.— Where property held by an officer under an attachment is wrongfully taken out of his hands, it is held that a reasonable sum for the expense of regaining possession will follow the officer's lien as an incident to the performance of his duty. Rhoads *v.* Woods, 41 Barb. (N. Y.) 471.

The sheriff is not bound to put a keeper in charge of attached property unless plaintiff, for whose benefit he acts, shall advance the necessary funds. Hawley *v.* Dawson, 16 Oreg. 344, 18 Pac. 592.

If not fixed by statute the officer will be entitled to the just and equitable expenses incurred in the proper care and keeping of the property while in his custody. Leadville City Bank *v.* Tucker, 7 Colo. 220, 3 Pac. 217.

If fixed by statute the sheriff can recover for expenses incurred in the keeping and custody of property under attachment no greater amount than that which the statute specifies, and if cases arise where his expenses are a little more than he is allowed to claim under the statute, he cannot bring an action against defendant for such expenses. This is one of the chances that the officer must take in the performance of his duty. Mathers *v.* Ramsey, 2 Disn. (Ohio) 334.

4. Calhoun *v.* Lee, 29 How. Pr. (N. Y.) 1.

Necessity of taking possession.— Compensation for trouble and expense in taking possession of and preserving property applies only to cases where the sheriff has taken actual possession and has preserved the property attached. Ridlon *v.* Flanigan, 12 Hun (N. Y.) 115; Ringgold *v.* Lewis, 3 Cranch C. C. (U. S.) 367, 20 Fed. Cas. No. 11,847.

Mere personal attention by officer.—In this connection it has been held that the sheriff is not entitled to compensation for a mere personal care of attached property, the statute providing for no such compensation. King *v.* Shepherd, 68 Iowa 215, 26 N. W. 82. But on the other hand, in Addington *v.* Sexton, 17 Wis. 327, 84 Am. Dec. 745, under a statute providing that the sheriff shall be entitled to receive all such necessary expenses incurred in taking possession of and preserving goods and chattels, as shall be just and reasonable in the opinion of the court, it was held that the sheriff was entitled to the reasonable value of his services just as he would have been entitled to such amount as it would have been necessary for him to expend to employ a clerk to care for the property and prevent it from spoiling.

5. McConnell *v.* McCormick, 2 Ida. 957, 28 Pac. 421; Seeman *v.* Tiedeman, 58 N. Y. App. Div. 615, 68 N. Y. Suppl. 401, in which latter case it is held that where the property attached was of the value of six hundred and fifty dollars, a charge by the sheriff for the employment of six persons as watchmen at a cost of one hundred and eighty dollars was unjustifiable and should not be allowed, no reason being suggested why one watchman would not have been sufficient.

6. Cutter *v.* Howe, 122 Mass. 541, holding that the permanent stationing of a watchman over property left on defendant's premises is not warranted by law, and that a charge therefor cannot be included in the taxable costs of the action.

7. Baldwin *v.* Hatch, 54 Me. 167; Tyler *v.* Ulmer, 12 Mass. 163; Dean *v.* Bailey, 12 Vt.

liable on his contract to pay the expenses of keeping attached property and the officer is not bound to credit the sum so received on his legal charges.[8]

(II) *Support of Live Stock.* If live stock is attached and defendant does not have it released on bond he is bound to support it and is responsible for such expense if judgment is entered against him.[9]

b. Of Creditor. If an attachment suit is dismissed, the attachment discharged, or defendant prevails on the final determination of the cause, the expenses of keeping the property must be paid by plaintiff, and the officer has no lien on the property or its proceeds as against defendant.[10]

c. Of Sheriff to Custodian. Ordinarily, when the sheriff appoints a custodian to keep and care for the attached property, he is liable, either under his express contract or for a reasonable compensation, and the custodian cannot look to plaintiff

142. See also Patton *v.* Harris, 15 B. Mon. (Ky.) 607.

Sale under agreement between assignor, assignee, and creditor.— Expenses incurred in preserving and selling attached property should be paid out of the proceeds of the property, where, by a written contract between attachment creditor, the assignee, and assignor, the property was delivered to the assignee to be converted by him into money, the proceeds to be held to await the event of the attachment suit, the attachment suit terminating in favor of the attaching creditor. McLain *v.* Simington, 37 Ohio St. 660.

8. Brown *v.* Cooper, 65 How. Pr. (N. Y.) 126.

9. McCormick *v.* Exchange Bank, 17 Ky. L. Rep. 847, 32 S. W. 932; Phelps *v.* Campbell, 1 Pick. (Mass.) 59; Dean *v.* Bailey, 12 Vt. 142.

If cattle perish after they have been attached and the debtor has failed upon notice to support them the loss will be his. Sewall *v.* Mattoon, 9 Mass. 535.

Use of property by officer.— If an officer use a horse which he has attached and the use is sufficient to pay for the keeping he cannot sustain an action for the pay of such keeping. Dean *v.* Bailey, 12 Vt. 142.

Dissolution by bankruptcy.— In Zeiber *v.* Hill, 1 Sawy. (U. S.) 268, 30 Fed. Cas. No. 18,206, 8 Nat. Bankr. Reg. 239, it was held that, where the dissolution of an attachment was brought about by subsequent bankruptcy of defendant, while the officer who levied the attachment must look to the party or attorney who employed him, he is entitled to compensation for keeping the live stock seized until it is claimed and received by the assignee, and for this purpose the officer may be considered as a bailee, entitled to compensation as any other agistor or feeder of cattle.

10. *Colorado.*— Leadville City Bank *v.* Tucker, 7 Colo. 220, 3 Pac. 217.

Massachusetts.— Phelps *v.* Campbell, 1 Pick. (Mass.) 59. But where an officer sells perishable property pursuant to the statute, and pays over the proceeds, less expenses of sale, to attachment defendant, upon his giving bond to procure a dissolution, he is not liable to an action by defendant, after he has prevailed in the attachment suit, to recover the amount deducted from the proceeds of the sale for expenses. Defendant in attachment may procure a release of the property by giving a bond. If he does not do this, and the property is perishable, a sale is as much for his interest as for that of the creditor. Pollard *v.* Baker, 101 Mass. 259.

Missouri.— Snead *v.* Wegman, 27 Mo. 176.

Nebraska.— Deering *v.* Wisherd, 46 Nebr. 720, 65 N. W. 788.

New Hampshire.— York *v.* Sanhorn, 47 N. H. 403, holding that, where oxen were attached and the officer fed them on defendant's hay, without his consent, defendant might, after judgment in his favor in the attachment suit, maintain trover against the officer for the conversion of the hay, and the latter could retain nothing for his expenses in selling the property.

North Carolina.— Stein *v.* Cozart, 122 N. C. 280, 30 S. E. 340; Haywood *v.* Hardie, 76 N. C. 384, which hold that a sheriff, who in attachment proceedings wrongfully seizes and sells property, which is subsequently adjudged to belong to an intervener, cannot retain the costs of the seizure and sale.

Oregon.— Mitchell *v.* Downing, 23 Oreg. 448, 32 Pac. 394.

Illegal seizure.— If the possession of property is illegally acquired under color of an attachment the officer cannot charge attachment defendant for keeping the same. Gardner *v.* Hust, 2 Rich. (S. C.) 601. And where the officer seizes property which he has no right to attach he cannot retain it for the purpose of reimbursement of money expended by him in discharge of a prior lien upon the property. Morton *v.* Hodgdon, 32 Me. 127.

By direction to dismiss the suit plaintiff cannot relieve himself from costs incurred in preserving the property after such direction and until the cause is regularly dismissed, where the sheriff could not deliver the property to the owner after plaintiff had directed the clerk to enter the dismissal and before the suit is in fact dismissed. Roberts *v.* Randolph, 17 Ark. 435. But where a plaintiff who agrees to release the levy on attached property and to give an order to the sheriff for its restoration to defendant, or for the delivery of the proceeds if any of the property has been sold, performs his agreement in these respects, he does not guarantee the good conduct of the sheriff and is not liable for the expenses incurred in taking care of the property. McPherson *v.* Harris, 59 Ala. 620.

in the action,[11] and in such an action against the officer it is no defense that he has no claim against another for the performance of such services.[12]

3. Allowance and Enforcement — a. In General. It seems that if attachment plaintiff is liable for the expenses incurred by reason of his order to the sheriff to levy the writ, the latter may recover them in an action against attachment plaintiff.[13] Ordinarily charges for keeping and preserving attached property are not taxable costs embraced in the ordinary fees for executing process,[14] or costs which abide the event of the suit.[15] Generally the compensation is such an amount as the officer who issues the writ[16] or the court[17] may fix or allow. It is

11. Hurd *v.* Ladner, 110 Iowa 263, 81 N. W. 470; Rowley *v.* Painter, 60 Iowa 432, 29 N. W. 401 (where it is held that under the statute in Iowa the sheriff is allowed the expenses incurred in keeping attached property which is to be paid by plaintiff and taxed as costs). But in Oregon in an action by the custodian against attachment plaintiff, under an alleged express contract, it was held that the sheriff by employing a keeper did not make himself personally responsible to such keeper, unless he had done so expressly, and that the sheriff might refuse to put a keeper in charge, unless plaintiff in whose behalf he acted should advance the necessary funds. Hawley *v.* Dawson, 16 Oreg. 344, 18 Pac. 592, where the custodian recovered against attachment plaintiff on a contract.

Employment by deputy sheriff.—In Dooley *v.* Root, 13 Gray (Mass.) 303, it was held that the sheriff was not liable for the services of a person employed by his deputy to keep property attached by the latter. But see Jones *v.* Thomas, 14 Ind. 474.

As against plaintiff the keeper cannot maintain an action unless the services were rendered at the instance or request of the attaching creditor. Baker *v.* Campbell, 2 Ohio S. & C. Pl. Dec. 143, 3 Ohio N. P. 297. Plaintiff's attorney in an attachment is not authorized by virtue of his employment as attorney to contract for putting a lock on a door to secure attached property. Glenn *v.* Savage, 14 Oreg. 567, 13 Pac. 442.

Recovery of amount allowed to sheriff.—In Jones *v.* Thomas, 14 Ind. 474, it was held that, where a sheriff's deputy told the bailee that his compensation would be what the law allowed, the latter was entitled to recover of the sheriff all that the court allowed to him.

Storage.— An officer who attaches chattels in the possession of a person other than the owner and appoints a keeper of them is liable for storage if he continues to keep them on the premises of the original bailee, although no agreement to that effect has been made, and he has had no notice to remove them. In such a case the officer's return of the writ in which he adds to his fees a claim (of plaintiff in the action against him) for storage, is admissible, not for the purpose of proving the amount due, but for the purpose of showing that the officer was aware of the claim and admitted it. The action being by a railroad company for the storage of freight cars attached, agents of other railroads are competent witnesses to the proper charge for such storage, and evidence is inadmissible to show that in similar cases no charge for storage had ever been made. Fitchburg R. Co. *v.* Freeman, 12 Gray (Mass.) 401, 74 Am. Dec. 600.

12. Tyler *v.* Winslow, 46 Me. 348 (holding that an officer is liable on his contract and that the right to recover the possession is not affected by the fact that the property had been mortgaged and the mortgagee has proved his right to acquire a lien); Stowe *v.* Buttrick, 125 Mass. 449.

Validity of levy.— As between the officer and the custodian the validity of the levy is not material. Lawrenson *v.* McDonald, 9 S. D. 440, 69 N. W. 586.

13. Phelps *v.* Campbell, 1 Pick. (Mass.) 59.

14. See Fletcher *v.* Morrell, 78 Mich. 176, 44 N. W. 133; Genesee County Sav. Bank *v.* Ottawa Cir. Judge, 54 Mich. 305, 20 N. W. 53; German American Bank *v.* Morris Run Coal Co., 68 N. Y. 585.

In the federal court keepers' fees are allowed by the clerk, and the allowance may be objected to and reviewed by the court, under rule of court. See Hood *v.* Hampton Plains Exploration Co., 108 Fed. 196.

15. Hanness *v.* Smith, 21 N. J. L. 495; Schneider *v.* Sears, 13 Oreg. 69, 8 Pac. 841.

Commission for sale under agreement.— Where, by consent of the sheriff and the parties, an auctioneer is appointed by the court to sell attached property, and there is no agreement for the compensation of the auctioneer, he cannot charge, and the sheriff has no right to allow, beyond the per cent fixed by the statute. Griffin *v.* Helmbold, 72 N. Y. 437.

16. German American Bank *v.* Morris Run Coal Co., 68 N. Y. 585.

17. *Arkansas.*— Roberts *v.* Randolph, 17 Ark. 435; Irvin *v.* Real Estate Bank, 5 Ark. 30.

Colorado.— Leadville City Bank *v.* Tucker, 7 Colo. 220, 3 Pac. 217.

Idaho.— McConnell *v.* McCormick, 2 Ida. 957, 28 Pac. 421, under a statute providing that a sheriff shall be allowed for his trouble and expense in taking and keeping the possession of and preserving property under attachment "such sum as the court may order: provided, no more than $3.00 *per diem* be allowed a keeper."

Minnesota.— Barman *v.* Miller, 23 Minn. 458, holding that the irregularity in taxing such charges by the clerk without a previous allowance by the court is cured by the sub-

held that where the statute provides the method of determining the compensation, as by allowance by the court, such method must be pursued.[18]

b. Lien — Deduction From Proceeds. Charges of an officer for keeping attached property are held to constitute a lien upon the same which must be satisfied before the proceeds of the sale of the property are applied upon the execution;[19] and it is not necessary in order to preserve this lien that a charge should be taxed as costs and included in the execution.[20]

XIV. CLAIMS OF THIRD PERSONS.

A. Determination of Claims — 1. Rights of Third Parties — a. In General. If, after seizure on attachment against a third party, the rightful owner can

sequent action of the court in approving the charges as reasonable and necessary.

Oregon.— Mitchell *v.* Downing, 23 Oreg. 448, 32 Pac. 394.

Wisconsin.— Addington *v.* Sexton, 17 Wis. 327, 84 Am. Dec. 745.

Review of discretion in allowing.— An appellate court will not review the discretion of the lower court in making the allowance (Irvin *v.* Real Estate Bank, 5 Ark. 30), notwithstanding it may seem to the former that some of the items indicate that the supply of help called in by the officer was very liberal (Toledo Sav. Bank *v.* Johnson, 90 Iowa 749, 57 N. W. 622).

Proof.— In the absence of proof compensation is not allowable to the sheriff for trouble and expense in taking and preserving property. Haase *v.* Levering, 38 N. Y. Suppl. 432, 1 N. Y. Annot. Cas. 404.

Notice of motion.— Before an allowance is made for the keeping of property attached the parties should be notified by rule or otherwise so that they may contest it. Harris *v.* Hill, 11 B. Mon. (Ky.) 199; Mitchell *v.* Downing, 23 Oreg. 448, 32 Pac. 394. See also Fletcher *v.* Morrell, 78 Mich. 176, 44 N. W. 133.

If an ex-sheriff has any valid charges as custodian, which are not statutory fees, he should apply to the court for such allowance upon motion and notice to the parties interested. He has no right arbitrarily to fix his own price and retain the property until paid. Fletcher *v.* Morrell, 78 Mich. 176, 44 N. W. 133.

18. Edinger *v.* Thomas, 9 Colo. App. 151, 47 Pac. 847, holding that the sheriff cannot safely contract for the payment of any specific sum.

Where the allowance is made as costs by the court or judge it is proper to tax these charges as a part of the costs. Leadville City Bank *v.* Tucker, 7 Colo. 220, 3 Pac. 217. And where the statute authorizes the sheriff to demand a sum sufficient to defray the expenses incurred in taking possession of and safely keeping the property it logically follows that the officer may return as costs in an attachment suit all necessary and reasonable charges. Deering *v.* Wisherd, 46 Nebr. 720, 65 N. W. 788. So, such expenses, when allowed by the court, are to be paid by plaintiff and taxed in the costs (Hurd *v.* Ladner, 110 Iowa 263, 81 N. W. 470; Rowley *v.* Painter, 69 Iowa 432, 29 N. W. 401; Mitchell *v.* Downing, 23 Oreg. 448, 32 Pac. 394; Hawley *v.* Dawson, 16 Oreg. 344, 18 Pac. 592); and if a plaintiff voluntarily dismisses his suit the court will render judgment against him for the amount of the sheriff's proper charges (Mitchell *v.* Downing, 23 Oreg. 448, 32 Pac. 394).

Application before justice at chambers.— Under the code provision requiring expenses incurred by the officer in preserving property to be settled by the officer issuing the attachment, an application for that purpose may be made before the justice issuing the attachment, while holding a special term at chambers. German American Bank *v.* Pittston, etc., Coal Co., 9 Hun (N. Y.) 205.

19. Baldwin *v.* Hatch, 54 Me. 167; McNeil *v.* Bean, 32 Vt. 429.

Lien confined to avails of property attached. — This lien is held to extend only to the avails of the property itself and not to money received from one who recognized to plaintiff for costs and who makes payment in satisfaction of the liability under such recognizance. McNeil *v.* Bean, 32 Vt. 429.

Settlement after sale.— A satisfaction of an attachment lien by payment by the debtor will not deprive the officer of his right to retain the expenses of keeping. Gleason *v.* Briggs, 28 Vt. 135.

Settlement before sale.— If the debtor settles the debt with the creditor, so that no execution comes into the officer's hands upon which to make sale, the officer may sustain an action against the debtor for the keeping. Dean *v.* Bailey, 12 Vt. 142. Where the statute expressly provides that the sheriff shall not be required to release attached property until his expenses for keepers' fees are refunded, a defendant who settles the suit after a keeper has been put in charge and receives from plaintiff an order directing a release of the levy on payment of the sheriff's fees cannot obtain possession of the property until he has paid the sheriff the keeper's fees. Robinett *v.* Connolly, 76 Cal. 56, 18 Pac. 130.

20. Baldwin *v.* Hatch, 54 Me. 167; McNeil *v.* Bean, 32 Vt. 429. Even where the costs are taxed and the amount is allowed for the officer in plaintiff's bill of costs the officer may deduct an additional amount for keeping the property. Twombly *v.* Hunewell, 2 Me. 221.

quietly and peaceably take possession of the property he may retain such possession, and the officer will not be justified in using forceable means to regain possession.[21] Where attachment is auxiliary to the principal action a claimant of attached property, having no interest in the action or whose rights will be unaffected by its determination, is not, in some jurisdictions, entitled to become a party to it, or to intervene therein for the purpose of asserting his title, but must resort to the common-law remedies or the statutory substitutes therefor.[22] In the greater number of states, however, interpleader, intervention in the action, or a resort to proceedings to try and determine the title to the property in dispute is permissible;[23] but notwithstanding intervention is permissible, a claimant is not, unless so required by statute, bound to intervene, but may have recourse to his other remedies.[24]

b. Who May Intervene — (i) *GENERALLY — PERSONS CLAIMING TITLE OR INTEREST.* Where intervention is permissible any person claiming title or interest in attached property may intervene in the case;[25] but to enable a person

21. Brownell *v.* Durkee, 79 Wis. 658, 48 N. W. 241, 24 Am. St. Rep. 743, 13 L. R. A. 487.

22. *Delaware.*— One not a party to an attachment cannot intervene in the absence of an express statutory provision therefor. Pennsylvania Steel Co. *v.* New Jersey Southern R. Co., 4 Houst. (Del.) 572.

Iowa.— Loving *v.* Edes, 8 Iowa 427.

Maine.— A grantee, whose conveyance was prior to the attachment, cannot appear and defend the attachment under Me. Rev. Stat. c. 82, § 19, providing that grantees may appear and defend in suits against their grantors in which real estate is attached. Sprague *v.* A. & W. Sprague Mfg. Co., 76 Me. 417.

Nebraska.— The only provision permitting intervention appears to be in section 47 of the civil code, providing that in an action to recover real or personal property any person having an interest in such property may be made the party. In an ordinary action upon a promissory note the rights of third parties to property seized by attachment cannot be adjudicated. Kimbro *v.* Clark, 17 Nebr. 403, 22 N. W. 788.

Ohio.— Vallette *v.* Kentucky Trust Co. Bank, 2 Handy (Ohio) 1, 12 Ohio Dec. (Reprint) 299. The owner of property who is not the same party that the attachment issues against cannot intervene to settle his rights, but must resort to replevin. Gates *v.* Pennsylvania Land, etc., Co., 9 Ohio Cir. Ct. 378, 6 Ohio Cir. Dec. 163.

Pennsylvania.— Thistle Mills *v.* Watson, 2 Pa. Co. Ct. 271.

Texas.— Ryan *v.* Goldfrank, 58 Tex. 356; Williams *v.* Bailey, (Tex. Civ. App. 1895) 29 S. W. 834; Jaffray *v.* Meyer, 1 Tex. App. Civ. Cas. § 1349.

Wyoming.— Stanley *v.* Foote, 9 Wyo. 335, 63 Pac. 940.

Intervention by wife.— In an action with an attachment against the husband, the wife cannot interplead at law but must assert her claim in chancery. Withers *v.* Shropshire, 15 Mo. 631.

23. *District of Columbia.*— Wallace *v.* Maroney, 6 Mackey (D. C.) 221; U. S. *v.* Howgate, 2 Mackey (D. C.) 408.

Illinois.— Weber *v.* Mick, 131 Ill. 520, 23 N. E. 646; Purcell *v.* Steele, 12 Ill. 93.

Kentucky.— Heaverin *v.* Robinson, 15 Ky. L. Rep. 15, 21 S. W. 876; Lee *v.* Wilson, 5 Ky. L. Rep. 765.

Maryland.— Kean *v.* Doerner, 62 Md. 475; Carson *v.* White, 6 Gill (Md.) 17.

North Carolina.— Toms *v.* Warson, 66 N. C. 417.

South Carolina.— Bryce *v.* Foot, 25 S. C. 467 [*distinguishing* Metts *v.* Piedmont, etc., L. Ins. Co., 17 S. C. 120; Copeland *v.* Piedmont, etc., L. Ins. Co., 17 S. C. 116].

Texas.— Hamburg *v.* Wood, 66 Tex. 168, 18 S. W. 623; Graves *v.* Hall, 27 Tex. 148; Marsh *v.* Thomason, 6 Tex. Civ. App. 379, 25 S. W. 43; Jaffray *v.* Meyer, 1 Tex. App. Civ. Cas. § 1349.

Claimant of an attached vessel may interplead. Holeman *v.* Steamboat P. H. White, 11 Ark. 237.

Foreign attachment.— Under the Pennsylvania act of 1881 a third person, claiming ownership, may intervene in foreign attachment. Gotthold *v.* Von Minden, 17 Wkly. Notes Cas. (Pa.) 157.

Intervention by a foreign corporation is not within a statute forbidding such corporation from "doing business" in the state before complying with certain conditions. Gates Iron Works *v.* Cohen, 7 Colo. App. 341, 43 Pac. 667.

24. Richardson *v.* Hall, 21 Md. 399; Olin *v.* Figeroux, 1 McMull. (S. C.) 203.

25. Daniels *v.* Solomon, 11 App. Cas. (D. C.) 163; Standard Implement Co. *v.* Lansing Wagon Works, 58 Kan. 125, 48 Pac. 638; Wichita Wholesale Grocery Co. *v.* Records, 40 Kan. 119, 19 Pac. 346; Long *v.* Murphy, 27 Kan. 375; Clarke *v.* Meixsell, 29 Md. 221; Carson *v.* White, 6 Gill (Md.) 17; Stone *v.* Magruder, 10 Gill & J. (Md.) 383, 32 Am. Dec. 177; Ranahan *v.* O'Neale, 6 Gill & J. (Md.) 298, 26 Am. Dec. 576; Campbell *v.* Morris, 3 Harr. & M. (Md.) 535.

A third party's claim can be set up only by himself. The right cannot be set up by defendant in attachment. Weber *v.* Mick, 131 Ill. 520, 23 N. E. 646; Foushee *v.* Owen, 122 N. C. 360, 29 S. E. 770.

Assertion of homestead claim by wife.—

to intervene or to resort to the statutory method of the trial of the right of property, he must be in actual possession or entitled thereto at the time of the levy under the attachment.[26]

(II) *Lien-Holders*—(A) *Where Lien Is Prior to Attachment.* The right to intervene is not confined to persons claiming ownership of the property but may be availed of by any one claiming a lien upon the same and a superior right to subject it thereto.[27] Thus, intervention is permitted to persons holding a common-law lien for storage of the attached goods,[28] to landlords,[29] and to mortgagees desirous of protecting their interest or of having the proceeds of the attached property applied first to the mortgage debt.[30]

(B) *Where Lien Is Subsequent to Attachment.* Although the words describing attacks on an attachment by a third person are sometimes used interchangeably, the mode of proceeding by intervention is usually not proper when the claim is based on a sale, transfer, or mortgage made subsequently to the

The wife of an attachment defendant may intervene for the purpose of asserting her homestead claim. Stoddart *v.* McMahan, 35 Tex. 267.

Sureties on a replevin bond may claim and try the right of property as against a junior attachment levied after the replevy. Cordaman *v.* Malone, 63 Ala. 556.

A trustee entitled to immediate possession can maintain the statutory action for trial of the right of property, although he has not taken actual possession (Willis *v.* Thompson, 85 Tex. 301, 20 S. W. 155) and may claim either the property or the proceeds of the sale thereof, although he has previously conveyed the property (Skinner *v.* Thompson, 21 Mo. 15).

A fraudulent purchaser of goods sold for the purpose of defrauding creditors has no standing to assert a claim against attachment plaintiff. Collingsworth *v.* Bell, 56 Kan. 338, 43 Pac. 252.

26. Plano Mfg. Co. *v.* Cunningham, 73 Mo. App. 376; Kirschenschlager *v.* Armitage Herschel Co., 58 Mo. App. 165. See also Hinzie *v.* Moody, 1 Tex. Civ. App. 26, 20 S. W. 769.

Claimant must have such title to the property claimed as would enable him to support trover, trespass, or detinue (Block *v.* Maas, 65 Ala. 211; Lehman *v.* Warren, 53 Ala. 535; Abraham *v.* Carter, 53 Ala. 8); but it is sufficient if he shows that the title is in a third party, under whom he holds the right of possession, or with whom he is jointly interested (Hollenback *v.* Todd, 119 Ill. 543, 8 N. E. 829).

Persons having no title to the property, and not in actual possession thereof or entitled thereto cannot claim or recover the property itself because their interests cannot be affected by the controversy. Endel *v.* Leibrock, 33 Ohio St. 254; Willis *v.* Thompson, 85 Tex. 301, 20 S. W. 155; Osborn *v.* Koenigheim, 57 Tex. 91.

27. *District of Columbia.*— Daniels *v.* Solomon, 11 App. Cas. (D. C.) 163.

Georgia.— Wade *v.* Hamilton, 30 Ga. 450.

Maryland.—Clarke *v.* Mcixsell, 29 Md. 221.

New Hampshire.— Clough *v.* Curtis, 62 N. H. 409; Buckman *v.* Buckman, 4 N. H. 319.

New York.— Jacobs *v.* Hogan, 85 N. Y. 243.

One who has contracted to sell property and received a partial payment has such an interest as will entitle him to intervene where the property was attached before delivery to the vendee. Mansur *v.* Hill, 22 Mo. App. 372.

One whose right to stoppage in transitu has been interfered with by an attachment against the purchaser may intervene to enforce his rights. Harris *v.* Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796.

28. J. I. Case Plow Works *v.* Union Iron Works, 56 Mo. App. 1.

29. Sullivan *v.* Cleveland, 62 Tex. 677; Reavis *v.* Moore, (Tex. Civ. App. 1892) 20 S. W. 955.

30. Hosea *v.* McClure, 42 Kan. 403, 22 Pac. 317; Symns Grocer Co. *v.* Lee, 9 Kan. App. 574, 58 Pac. 237; Bear *v.* Cohen, 65 N. C. 511; Rentfrow *v.* Lancaster, 10 Tex. Civ. App. 321, 31 S. W. 229; Langert *v.* Brown, 3 Wash. Terr. 102, 13 Pac. 704.

A mortgagee cannot intervene until after judgment in the action. Endel *v.* Leibrock, 33 Ohio St. 254.

Unrecorded mortgage.— A mortgagee of chattels in possession may intervene, although his mortgage is not filed for record. Applewhite *v.* Harrell Mill Co., 49 Ark. 279, 5 S. W. 292.

Removal of mortgaged property.—The seizing of mortgaged property under an attachment and removing it gives the mortgagee an option of taking it into his possession, which he may exercise by interpleading in the attachment. Huiser *v.* Beck, 55 Mo. App. 668.

Reformation of mortgage.— The mortgagee may interplead and ask that the mortgage purporting to be a lien on a different piece of land be reformed, on the ground of mutual mistake in the description, so as to be a lien on the property attached, as intended by both parties. Bodwell *v.* Heaton, 40 Kan. 36, 18 Pac. 901.

Mortgagees out of possession cannot avail themselves of a statutory remedy to try the right to property. Wilber *v.* Kray, 73 Tex. 533, 11 S. W. 540; Garrity *v.* Thompson, 64

attachment levy,[31] and the attacking party must show invalidity in the attachment proceedings to prevail.[32]

(III) *General Creditors.* General creditors as a rule cannot intervene.[33]

(IV) *Persons Acting on Defendant's Behalf.* In defendant's absence a stranger may intervene or avail himself of statutory remedies on defendant's behalf.[34]

2. **Subject-Matter of Claim.** If the right to determine the title in the principal action by intervention or interpleader, or in a special statutory proceeding, is confined to personal property, the claimant of realty or an interest therein cannot have his rights considered in those modes;[35] but it is otherwise if the right is not so confined.[36] The right to intervene is not affected by a change in the nature of the fund.[37]

3. **Nature of Intervention Proceedings.** Although consequential and dependent upon the levy of valid process on the property of claimant,[38] an intervention is, in many respects, an independent suit, performing, where the property is personalty, the same office in effect as replevin, and being a cumulative remedy therefor which the owner of property wrongfully attached may in some cases

Tex. 597; Saunders *v.* Ireland, (Tex. Civ. App. 1894) 27 S. W. 880. Nor can they interplead before condition broken. F. O. Sawyer Paper Co. *v.* Mangan, 60 Mo. App. 76; Endel *v.* Leibrock, 33 Ohio St. 254.

If a mortgagee has been found to have no lien on the property he cannot intervene to contest an attachment or to object that the mortgagor has no attachable interest. Phillips *v.* Both, 58 Iowa 499, 12 N. W. 481.

31. McAbee *v.* Parker, 78 Ala. 573; Harrison *v.* Shaffer, 60 Kan. 176, 55 Pac. 881.

A mortgagee taking a mortgage upon property after it has been attached is in no better position to attack collaterally than the mortgagor would be. Runner *v.* Scott, 150 Ind. 441, 50 N. E. 479.

A purchaser may intervene and assert that the debt for which the attachment issued is fictitious. Barkley *v.* Wood, (Tex. Civ. App. 1897) 41 S. W. 717. See also Johnson *v.* Garrett, 16 N. J. Eq. 31, holding that, if buying in good faith and in ignorance of the attachment, the purchaser may obtain relief against an illegal or inequitable sale made by an officer of the court.

32. **Right to show and manner of showing defects** see *infra*, XV, D.

33. Wolff *v.* Vette, 17 Mo. App. 36; Noyes *v.* Brown, 75 Tex. 458, 13 S. W. 36.

A firm creditor cannot intervene in an action by a retiring partner who has assumed the partnership debts, to recover on notes given him for his interest by his former partner, in which property formerly belonging to the firm is attached. Stansell *v.* Fleming, 81 Tex. 294, 16 S. W. 1033.

A subsequently attaching creditor cannot interplead as a claimant of the property in his own right. McCluny *v.* Jackson, 6 Gratt. (Va.) 96.

Employees of attachment defendant.— Where, subsequently to the sale of the attached property of an insolvent corporation which had made a general assignment, employees thereof delivered their claims to the sheriff under the statute but did not have them allowed by the assignee, they were allowed to intervene and procure an order on the sheriff to pay them without awaiting the result of either the interplea or the attachment suit. Holland *v.* Depriest, 65 Mo. App. 329.

34. **A foreign assignee of a non-resident defendant** may intervene in the proceeding to protect the latter's rights. Matthai *v.* Conway, 2 App. Cas. (D. C.) 45.

Where a stranger offers to replevy goods attached in the absence of defendant, and the sheriff improperly refuses the offer, he may enforce the statutory right in a court of law for the benefit of defendant, but he has no such interest as will authorize him to come into equity for relief. Kirk *v.* Morris, 40 Ala. 225.

35. Gordon *v.* McCurdy, 26 Mo. 304; Henry Petring Grocer Co. *v.* Eastwood, 79 Mo. App. 270.

Fixtures.— Statutory provisions for the trial of the right to personal property seized under attachment do not apply to fixtures. Jones *v.* Bull, 90 Tex. 187, 37 S. W. 1054.

Claimant of land under a title not derived from attachment debtor cannot intervene. Carothers *v.* Lange, (Tex. Civ. App. 1900) 55 S. W. 580.

The claim must be a legal and not an equitable one. Bostwick *v.* Blake, 145 Ill. 85, 34 N. E. 38; Juilliard *v.* May, 130 Ill. 87, 22 N. E. 477; Providence City Ins. Co. *v.* Commercial Bank, 68 Ill. 348; Simpson *v.* Harry, 18 N. C. 202.

36. Bennett *v.* Wolverton, 24 Kan. 284.

37. Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303, where the proceeds of the sale of attached property were paid to plaintiff on his giving a bond of indemnity.

A change, by judicial sale, in the form of the property attached, by which the proceeds are substituted therefor, on assignment of the proceeds to plaintiff subsequently to the sale by claimant, will authorize an interpleader by plaintiff. Carp *v.* Itzkowitz, 77 Mo. App. 592.

38. Jackson *v.* Bain, 74 Ala. 328.

invoke.[39] On the intervention, the intervener becomes plaintiff, and plaintiff in attachment defendant, and the action must be tried and determined separately from the issue in attachment and on its own facts.[40]

4. Time of Intervening — a. In General. Claimant may present his petition after the issues between plaintiff and defendant in attachment have been settled,[41] but it should properly be interposed before their trial.[42] It has been held, however, that claimant may intervene at any time before final judgment,[43] but it is a general rule that after rendition of such judgment intervention is not permissible,[44] although it has been held proper on appeal from a justice before whom claimant failed to interplead.[45] Notice of filing an interplea should be made within the time prescribed; but a failure so to do does not authorize a dismissal of the interplea where no special injury or inconvenience follows.[46]

b. Where Property Ordered Sold. An order of sale of attached property before judgment, the proceeds to be held subject to the ultimate decision of the cause, does not prevent a claimant from appearing and asserting his claim;[47] and

39. Kinnear *v.* Flanders, 17 Colo. 11, 28 Pac. 327; Hagardine-McKittric Dry Goods Co. *v.* Carnahan, 83 Mo. App. 318; Monarch Rubber Co. *v.* Bunn, 82 Mo. App. 603; Crow *v.* Stevens, 44 Mo. App. 137; Bradley Hubbard Mfg. Co. *v.* Bean, 20 Mo. App. 111; Wolff *v.* Vette, 17 Mo. App. 36.

Mississippi — Substitute for detinue or replevin.— The proceeding to try the title of the third person is a substitute for the action of detinue or replevin and is subject to the same rules. Helm *v.* Grav. 59 Miss. 54.

Interplea is an assertion of title to property attached superior to that of defendant in attachment, plaintiff in attachment being, by the interplea, challenged to defend the title which he has asserted to be in defendant by attaching it as his property. Boettger *v.* Roehling, 74 Mo. App. 257.

40. *Iowa.*— Markley *v.* Keeney, 87 Iowa 398, 54 N. W. 251.

Louisiana.— Harper *v.* Commercial, etc., Bank, 15 La. Ann. 136.

Mississippi.— Pierce *v.* Watkins, 74 Miss. 394, 21 So. 148.

Missouri.— Ely-Walker Dry Goods Co. *v.* McLaughlin, 87 Mo. App. 105; Monarch Rubber Co. *v.* Bunn, 82 Mo. App. 603; Boettger *v.* Roehling, 74 Mo. App. 257; Giett *v.* McGannon Mercantile Co., 74 Mo. App. 209; Walkers-Pierce Oil Co. *v.* American Exch. Bank, 71 Mo. App. 653; Huiser *v.* Beck, 55 Mo. App. 668; Crow *v.* Stevens, 44 Mo. App. 137; Bradley Hubbard Mfg. Co. *v.* Bean, 20 Mo. App. 111; Wolff *v.* Vette, 17 Mo. App. 36.

South Carolina.— Central R., etc., Co. *v.* Georgia Constr., etc., Co., 32 S. C. 319, 11 S. E. 192, 638.

41. Taylor *v.* Taylor, 3 Bush (Ky.) 118.

Laches in filing the claim will not defeat the right to be heard, if the adverse party suffered no prejudice. Graves *v.* Hall, 27 Tex. 148.

42. Whalen *v.* McMahon, 16 Colo. 373, 26 Pac. 583; Taylor *v.* Taylor, 3 Bush (Ky.) 118.

43. Heaverin *v.* Robinson, 15 Ky. L. Rep. 15, 21 S. W. 876; Melius *v.* Houston, 41 Miss. 59; Evans *v.* Governor's Creek Transp., etc. Co., 50 N. C. 331.

After judgment by default has been set aside and before trial on the merits, an application is in time. Latham *v.* Gregory, 9 Colo. App. 292, 47 Pac. 975. See also Dobson *v.* Bush, 4 N. C. 18.

44. *Georgia.*— Dow *v.* Smith, 8 Ga. 551.

Indiana.— Cooper *v.* Metzger, 74 Ind. 544.

Mississippi.— Paine *v.* Holliday, 68 Miss. 298, 8 So. 676.

Missouri.— State *v.* Langdon, 57 Mo. 350; Bradley Hubbard Mfg. Co. *v.* Bean, 20 Mo. App. 111; McElfatrick *v.* Macauley, 15 Mo. App. 102.

New Jersey.— Mount *v.* Ely, 7 N. J. L. 83. See 5 Cent. Dig. tit. "Attachment," § 1035.

In Illinois claimant may interplead at any time before the end of the **term** at which judgment is rendered against defendant. Springer *v.* Bigford, 160 Ill. 495, 43 N. E. 751 [*affirming* 55 Ill. App. 198]; Juilliard *v.* May, 130 Ill. 87, 22 N. E. 477.

In Missouri if the record fails to show as claimed that an interplea was improperly filed after a final judgment the record is conclusive. Bradley Hubbard Mfg. Co. *v.* Bean, 20 Mo. App. 111.

45. Wolff *v.* Vette, 17 Mo. App. 36.

46. Brownell, etc., Car Co. *v.* Barnard, 116 Mo. 667, 22 S. W. 503 (holding that a motion to dismiss an interplea because of failure to give notice of its filing within the proper time is addressed to the discretion of the court, whose action in overruling such motion, where not prejudicial to plaintiff in attachment, will not be reversed on appeal); Tennent-Stribling Shoe Co. *v.* Rudy, 53 Mo. App. 196.

47. Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303; O'Brien *v.* Norris, 16 Md. 122, 77 Am. Dec. 284. See also Simmons Clothing Co. *v.* Davis, (Indian Terr. 1900) 58 S. W. 655, holding that where proceeds of a sale ordered by the court before the question of ownership has been determined are turned over to plaintiff in attachment, and a claim to the property is subsequently made, a plea in abatement of the claim on the ground that the proceeds were paid to plaintiff before the filing of the intervention is bad, because prior to the determination of the ownership of the attached property the pro-

under some statutes claimant may file his petition at any time before the disposition of the proceeds of the sale.[48]

5. Estoppel to Assert Claim. A creditor, by attaching property belonging to his debtor, is estopped to afterward assert title in himself upon an interplea;[49] and the same has been held to be true where a party in possession of property executes a forthcoming bond conditioned for the delivery of the same if judgment is delivered against attachment defendant.[50] The true owner may also be estopped by his own declaration or by conniving at a statement respecting the ownership made by another.[51]

6. Notice of Claim or Demand of Property — a. Necessity of — (i) *In General.* Where a notice of claim to, or demand of, the property taken is required to be

ceeds should not be ordered to be paid to plaintiff.

48. Murphy *v.* Cochran, 80 Ky. 239.

Under a statute authorizing intervention in a summary manner before sale of attached property, claimant cannot intervene where the property has been sold under special executions issued upon judgments in actions in which attachments were issued and levied upon the same property. Newton First Nat. Bank *v.* Jasper County Bank, 71 Iowa 486, 32 N. W. 400.

49. Boettger *v.* Roehling, 74 Mo. App. 257. In Crawford *v.* Nolan, 70 Iowa 97, 30 N. W. 32, this principle was applied where claimant proceeded by action for conversion instead of by interplea.

50. Case *v.* Steele, 34 Kan. 90, 8 Pac. 242; Case *v.* Shultz, 31 Kan. 96, 1 Pac. 269; Wolf *v.* Hahn, 28 Kan. 588; Haxtun *v.* Sizer, 23 Kan. 310; Cooper *v.* Davis Mill Co., 48 Nebr. 420, 67 N. W. 178; Greenville Nat. Bank *v.* Evans-Snyder-Buel Co., 9 Okla. 353, 60 Pac. 249; Bowden *v.* Burnham, 59 Fed. 752, 19 U. S. App. 448, 8 C. C. A. 248 (construing Kansas statute). *Contra,* Applewhite *v.* Harrell Mill Co., 49 Ark. 279, 5 S. W. 292; Miller *v.* Desha, 3 Bush (Ky.) 212; Schwein *v.* Sims, 2 Metc. (Ky.) 209; Kinnimouth *v.* Kimmel, 15 Ky. L. Rep. 125. See also Tuttle *v.* Wheaton, 57 Iowa 304, 10 N. W. 748.

The question of estoppel depends upon whether or not claimant at the time of giving a forthcoming bond notifies the officer of his claim to the property. Huels *v.* Boettger, 40 Mo. App. 310; Mansur *v.* Hill, 22 Mo. App. 372; Bradley Hubbard Mfg. Co. *v.* Bean, 20 Mo. App. 111 [*distinguisning* Wolf *v.* Hahn, 28 Kan. 588; Haxtun *v.* Sizer, 23 Kan. 310]. See also Bleven *v.* Freer, 10 Cal. 172; Petring *v.* Christler, 90 Mo. 649, 3 S. W. 405.

As to notice of claim see *infra,* XIV, A, 6.

Execution of a bond to dissolve an attachment issued on mesne process does not estop a surety who claims the property from asserting his own title thereto against a subsequent attachment by the obligee. Rogers *v.* Bishop, 9 Gray (Mass.) 225. Nor would a purchaser of property be precluded from asserting his ownership by signing the bond given in the attachment suit by defendant to release the property attached. Redwitz *v.* Waggaman, 33 La. Ann. 26. *Compare* Wallace *v.* Burnham, 28 La. Ann. 791.

If a party has replevied the property attached he cannot, after the rendition of judgment against defendant and a demand of the property on his bond, interpose a claim to it under the statute, without having first surrendered it to the sheriff according to the conditions of his bond. Braley *v.* Clark, 22 Ala. 361.

The giving of an indemnity bond by attaching creditor to the officer does not preclude claimant from filing his claim. The bond is executed for the benefit of the sheriff and not for claimant, who, it is held, cannot maintain an action thereon. Hence the giving of such bond can in no way affect the claimant's right to intervene. Gevedon *v.* Branham, 20 Ky. L. Rep. 791, 47 S. W. 589.

51. Estoppel by declaration of attachment debtor.—Where a bailee in possession of property of another, for purposes of sale, represents to one of his creditors that he has bought the property, upon which the creditor attaches it, the real owner is estopped to set up the title in himself against the attaching creditor if he agreed that the bailee might hold it out as his own in order to effect a sale more readily, even though the bailee informs the attaching officer at the time of attachment that the property belongs to the person who claims it. Drew *v.* Kimball, 43 N. H. 282, 80 Am. Dec. 163. See also Kirkendall *v.* Davis, 41 Nebr. 285, 59 N. W. 915, construing statements made by claimant as an estoppel against his subsequent maintenance of an action of replevin. But where an attorney and officer for the attaching creditor asked plaintiff who owned a certain boat, giving him no intimation that they intended to attach, and he replied that A owned it, whereupon they immediately attached it as the property of A, but before they had taken actual possession plaintiff demanded the boat as his, it was held that he was not estopped from showing title in himself. Fountain *v.* Whelpley, 77 Me. 132.

Asserting same claim in another suit does not estop claimant from appearing and asserting his title to the property in an attachment case. Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303.

Effect of service as garnishee.— A claimant is not estopped to file his petition claiming the property by the service upon him of a summons requiring him to act as garnishee. Murphy *v.* Cochran, 80 Ky. 239.

given by claimant to protect his rights, his failure to assert his claim after knowledge of the seizure will bar his right of action for the trespass,[52] unless the attachment was wrongfully levied by direction of plaintiff, in which case he may recover damages of the latter.[53]

(n) *By Mortgagee.* In some jurisdictions where mortgaged personalty is attached the failure of the mortgagee to make a demand or to give notice of the existence of his lien will preclude a dissolution of the attachment and retention of the mortgage lien or an action against the attaching officer.[54]

b. Time of. The required notice or demand must be filed or served within the time prescribed.[55] but if the time is not prescribed a reasonable time will be

52. Taylor *v.* Seymour, 6 Cal. 512; Kinnimouth *v.* Kimmel, 15 Ky. L. Rep. 125; Trieber *v.* Blocher, 10 Md. 14.

Validity of statute requiring notice.— A statute protecting the officer from liability for levying on property of a person other than the debtor, unless he shall receive a notice in writing under oath from such person, his agent, or attorney, that such property belongs to him, etc., is not unconstitutional because authorizing the taking of property without due process of law. Such a statute does not deprive the person whose property is seized of his right of action on account thereof, but merely requires such notice as a condition precedent to his right of action. Cheadle *v.* Guittar, 68 Iowa 680, 28 N. W. 14.

Demand by consignee of pledgee.— A consignee to whom, with the pledgor's consent, the goods are consigned for sale may demand of the attaching officer, in his own name, payment of the amount for which they are pledged. Clark *v.* Dearborn, 103 Mass. 335.

Necessity of knowledge by creditor.— An attaching creditor is not affected by notice given to the sheriff before levy, but not communicated to the creditor, that the personal property about to be levied on has been sold by the debtor to a third person, although yet in defendant's possession. McKee *v.* Garcelon, 60 Me. 165, 11 Am. Rep 200.

Effect of indemnifying officer.— The necessity of notice will not be obviated by the fact that the officer has been indemnified by the attaching creditor. Taylor *v.* Seymour, 6 Cal. 512.

Commingled goods.— If the goods of a stranger are in the possession of a debtor and so mixed with the debtor's goods that the officer cannot distinguish them, the owner can maintain no action against the officer for taking them, until notice and a demand of his goods and refusal and delay of the officer to redeliver them. Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28.

Failure to appear after notice.— One who has notified the officer of his claim at the time of the attachment, but who fails to appear or make any claim in the action, cannot recover of the latter after condemnation and sale of the property. Ranahan *v.* O'Neale, 6 Gill & J. (Md.) 298, 26 Am. Dec. 576.

53. Bradley *v.* Miller, 100 Iowa 169, 69 N. W. 426.

54. Gross *v.* Jordan, 83 Me. 380, 22 Atl. 250; Potter *v.* McKenney, 78 Me. 80, 2 Atl. 844; Nichols *v.* Perry, 58 Me. 29; Bicknell *v.* Cleverly, 125 Mass. 164; Putnam *v.* Rowe, 110 Mass. 28; Wing *v.* Bishop, 9 Gray (Mass.) 223; Buck *v.* Ingersoll, 11 Metc. (Mass.) 226; Haskell *v.* Gordon, 3 Metc. (Mass.) 268; Moriarty *v.* Lovejoy, 23 Pick. (Mass.) 321.

Account to be served with demand or on request of officer or attaching plaintiff see *infra*, XIV, A, 7.

If demand is only required on actual seizure the mortgagee may maintain replevin after attachment by trustee process against the mortgagor, without a demand. Putnam *v.* Cushing, 10 Gray (Mass.) 334.

Successive levies.— The mortgagee must repeat his demand upon each successive levy. Wheeler *v.* Bacon, 4 Gray (Mass.) 550.

Where plaintiff may attack the validity of the mortgage, the necessity of notice is not affected by the omission to pay, tender, or deposit the amount due thereon. Hibbard *v.* Zenor, 75 Iowa 471, 39 N. W. 714, 9 Am. St. Rep. 497.

Waiver of notice.— The notice cannot be waived by the levying officer without the creditor's consent. Campbell *v.* Eastman, 170 Mass. 523, 49 N. E. 914.

Security for contingent liability.—Where personal property mortgaged as security against future and contingent liability, and not for the payment of money, is attached, the mortgagee, instead of demanding payment of the money due him and stating an account for the purpose, as provided in Mass. Rev. Stat. c. 90, §§ 78, 79, may protect his interests under the mortgage by giving the officer notice of its existence with a schedule of the property embraced in it, and an intimation that he claims to hold the property pursuant to the mortgage. Codman *v.* Freeman, 3 Cush. (Mass.) 306.

Demand of United States marshal.— The Massachusetts statutes requiring notice and demand by a mortgagee of the amount due him before suing an attaching officer do not apply to an attachment by a United States marshal. Howe *v.* Freeman, 14 Gray (Mass.) 566.

55. **If notice served is affixed to return on attachment** it is an admission of timely service. Crawford *v.* Nolan, 72 Iowa 673, 34 N. W. 754.

In New Jersey a creditor applying to the court to come in under an attachment is

intended,[56] or the sufficiency in this respect will be determined by the circumstances of the case.[57] Thus notice has been held sufficient when given after judgment in the principal action,[58] after judgment against another claimant for a return of the property replevied,[59] or before[60] or after[61] a sale of the attached property before payment of the proceeds.[62]

c. Sufficiency of[63]—(i) *In General.* Actual notice to an officer about to levy an attachment has been held sufficient to bind him,[64] and where no precise form is required it has been held enough if the demand give the officer or the attaching creditor notice of the existence of the claim and such information as to its nature and amount as will enable him to act understandingly in reference to it.[65] Where the notice given is sufficiently explicit and accurate to answer these purposes[66] it has been held that it will not be vitiated by mere informalities,

not bound to file his claim when he applies. Hanness *v.* Smith, 21 N. J. L. 495.

56. Witham *v.* Butterfield, 6 Cush. (Mass.) 217.

What is reasonable time is a question of law. Brackett *v.* Bullard, 12 Metc. (Mass.) 308. A demand ten months after the seizure, no good cause being shown for the delay, has been held not made within a reasonable time. Brackett *v.* Bullard, 12 Metc. (Mass.) 308. But where goods attached were replevied by the first mortgagee, against whom judgment was rendered for return of the goods to the attaching officer, a demand and statement made ten days after the judgment was held to be within a reasonable time, although more than two years after the goods were attached. Housatonic Bank *v.* Martin, 1 Metc. (Mass.) 294.

57. **Four months after sale.**— Where mortgaged goods were sold by consent of parties, within a week after they were attached, and before the sale the mortgagee gave notice of his claim to the officer and forbade the sale, the officer replying that he had seen the record of the mortgage and knew all about it, it was held that a demand four months afterward of the officer and creditor and the delivery to them of a written account of his debt was sufficient. Legate *v.* Potter, 1 Metc. (Mass.) 325.

More than three years after levy.— A motion by a claimant to dismiss the levy is not within a statute requiring a motion to set aside a judgment to be made within three years from the rendition of the judgment, and hence may be made in a proper case after the expiration of such period. Krutina *v.* Culpepper, 75 Ga. 602.

58. De Loach Mill Mfg. Co. *v.* Little Rock Mill, etc., Co., 65 Ark. 467, 47 S. W. 118, 67 Am. St. Rep. 942; Rogers *v.* Bates, 19 Ga. 545. *Contra*, where it is not designed to arrest the progress of the execution. Witherspoon *v.* Swift, 112 Ga. 689, 37 S. E. 976.

Dismissal of prior claim.— A claim interposed pending an attachment, and dismissed for irregularity, is no bar to an interposition of a similar claim after judgment. Benton *v.* Benson, 32 Ga. 354.

Judgment against one defendant.— Where an attachment suit against two defendants is dismissed as to one of them a judgment against the other cannot prevent him from interposing a claim. Dean *v.* Stephenson, 61 Miss. 175.

59. Housatonic Bank *v.* Martin, 1 Metc. (Mass.) 294.

60. Simmons *v.* Bennett, 20 Ga. 48.

61. Holmes *v.* Balcom, 84 Me. 226, 24 Atl. 821 (where the officer has given no notice of the attachment as provided by Me. Rev. Stat. c. 81, § 45, in which event the statute requires the lienor to give notice within ten days); Legate *v.* Potter, 1 Metc. (Mass.) 325.

62. De Loach Mill Mfg. Co. *v.* Little Rock Mill, etc., Co., 65 Ark. 467, 47 S. W. 118, 67 Am. St. Rep. 942; Morris *v.* Wilson, 7 Ky. L. Rep. 440.

63. **For form of notice or demand by mortgagee** see Holmes *v.* Balcom, 84 Me. 226, 24 Atl. 821; Nichols *v.* Perry, 58 Me. 29; Bigelow *v.* Capen, 145 Mass. 270, 13 N. E. 896; Bicknell *v.* Cleverly, 125 Mass. 164; Molineux *v.* Coburn, 6 Gray (Mass.) 124; Averill *v.* Irish, 1 Gray (Mass.) 254; Sprague *v.* Branch, 3 Cush. (Mass.) 575; Harding *v.* Coburn, 12 Metc. (Mass.) 333, 46 Am. Dec. 680; Jones *v.* Richardson, 10 Metc. (Mass.) 481; Housatonic Bank *v.* Martin, 1 Metc. (Mass.) 294.

For form of claim by partnership against attaching creditors of individuals composing the firm see Tappan *v.* Blaisdell, 5 N. H. 190.

64. Lyons *v.* Hamilton, 69 Iowa 47, 28 N. W. 429.

A conversation between claimant and the bailee of the attaching officer is not notice to the latter. Taylor *v.* Seymour, 6 Cal. 512.

65. Wilson *v.* Crooker, 145 Mass. 571, 14 N. E. 798; Folsom *v.* Clemence, 111 Mass. 273. See Brewster *v.* Bailey, 10 Gray (Mass.) 37. *Compare* Gilly *v.* Breckenridge, 2 Blackf. (Ind.) 100, holding that the claim must be set forth with the same certainty as is required in a declaration.

Notice of claim need not be in writing. — Huels *v.* Boettger, 40 Mo. App. 310.

66. **The notice or demand was sufficient in** Crawford *v.* Nolan, 70 Iowa 97, 30 N. W. 32; Hanson *v.* Herrick, 100 Mass. 323; Molineux *v.* Coburn, 6 Gray (Mass.) 124; Harding *v.* Coburn, 12 Metc. (Mass.) 333, 46 Am. Dec. 680; Jones *v.* Richardson, 10 Metc. (Mass.) 481.

inaccuracies, or defects which have no tendency to mislead or prejudice the parties.[67]

(II) *Claimant's Interest.* An improper statement of the nature and extent of claimant's interest in the attached property will not invalidate the notice where the true interest is determinable by the pleadings and proof in the action.[68]

(III) *Description of Property*—(A) *In General.* The property claimed, or upon which a mortgage lien is asserted, should be particularly described.[69]

(B) *Commingled Goods.* Where goods claimed are intermingled with goods of attachment debtor, if claimant fails to assert his ownership and designate the particular goods claimed by him, the whole is liable to seizure and sale.[70] A demand of mortgaged goods, however, need not specify what part of the attached property is included in the mortgage,[71] and is not defective because describing all the attached property as included in the mortgage.[72]

(IV) *Claim or Indebtedness.* The indebtedness secured[73] or the amount thereof[74] should be stated in the notice with reasonable certainty. Demand for a greater sum than is due will not, however, avail claimant, if the value of the property attached is less than the sum actually due[75] or the error was the result

67. Folsom *v.* Clemence, 111 Mass. 273; Witham *v.* Butterfield, 6 Cush. (Mass.) 217.

68. Leinkauf Banking Co. *v.* Grell, 62 N. Y. App. Div. 275, 70 N. Y. Suppl. 1083; Hamburg *v.* Wood, 66 Tex. 168, 18 S. W. 623.

69. Moriarty *v.* Lovejoy, 23 Pick. (Mass.) 321.

A description of the property by schedule and as the whole or part of the attached property in a particular house will be sufficient, provided the officer does not call upon the mortgagee to select and identify the articles more particularly, but persists in holding them as the property of the mortgagor. Codman *v.* Freeman, 3 Cush. (Mass.) 306.

Mortgaged and pledged chattels.— A demand by the mortgagee of certain chattels and pledgee of others to secure the same notes that "the chattels attached by you are liable and mortgaged to me, and possession taken for the security of the following notes" is a sufficient demand of both the mortgaged and the pledged property. Rowley *v.* Rice, 10 Metc. (Mass.) 7.

A demand which describes the property as "a certain stock of drugs," and refers to the mortgage, sufficiently designates property described in the mortgage as "drug stock," etc., and will not confine plaintiff to the drugs proper in the stock. Kern *v.* Wilson, 82 Iowa 407, 48 N. W. 919.

A notice stating ownership of all the property levied on, except a portion owned by another named, is not invalidated by the exception. Susskind *v.* Hall, (Cal. 1896) 44 Pac. 328.

70. See *supra*, IX, A, 2, b.

Where interveners claim the entire stock attached but do not ask any relief as to part of the stock, their purchase having been found fraudulent, they have no claim for goods of their own commingled and sold with the rest under the attachment. Blotcky *v.* Caplan, 91 Iowa 352, 59 N. W. 204.

71. Folsom *v.* Clemence, 111 Mass. 273; Averill *v.* Irish, 1 Gray (Mass.) 254.

72. Averill *v.* Irish, 1 Gray (Mass.) 254.

Mortgage on stock to be replaced.—The rule that requires the owner of chattels which he suffers to be mixed with those of another to point out his own and demand them of an officer who seizes the whole as the property of the debtor, before he can sue the officer, does not apply to the holder of a mortgage of all the personal property on certain premises with a provision that it shall also cover all other personal property which the mortgagor may put on the premises in the place of such as he should sell and deliver. Harding *v.* Coburn, 12 Metc. (Mass.) 333, 46 Am. Dec. 680 [*distinguishing* Shumway *v.* Rutter, 8 Pick. (Mass.) 443, 19 Am. Dec. 340; Sawyer *v.* Merrill, 6 Pick. (Mass.) 478; Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28].

73. **Date of note.**— A description of the note as bearing date prior to that of the mortgage is sufficient, for no presumption is raised thereby that the mortgage was not made to secure the note. Hibbard *v.* Zenor, 82 Iowa 505, 49 N. W. 63.

Time of maturity or rate of interest of note.—A notice which omits to state the time of maturity or the rate of interest of the note secured is insufficient. Wilson *v.* Crooker, 145 Mass. 571, 14 N. E. 798.

74. Phillips *v.* Fields, 83 Me. 348, 350, 22 Atl. 243 (where a statement, "it is impossible for me to know, the amount of my mortgage claim, but if I am correct, it is somewhere about $2300," was held insufficient); Campbell *v.* Eastman, 170 Mass. 523, 49 N. E. 914.

Amount exceeding a sum stated.— A statement that "there is now actually due me," from the mortgagor, "on note and account, exceeding nine hundred dollars," is sufficient. Nichols *v.* Perry, 58 Me. 29.

75. Bigelow *v.* Capen, 145 Mass. 270, 13 N. E. 896; Clark *v.* Dearborn, 103 Mass. 335; Rowley *v.* Rice, 10 Metc. (Mass.) 7.

Usury.— The demand may state the full amount of the debt, without deducting what the mortgagor might deduct on the ground of a usurious consideration. Brewster *v.* Bailey, 10 Gray (Mass.) 37.

of accident or mistake.[76] A mortgage under which the claim and demand is made must be designated with sufficient particularity to enable the officer to ascertain the title of demandant.[77]

d. Service of Notice. If the mode of service is not prescribed it will be sufficient if it appears that the proper person received the notice in fact.[78]

7. Account — a. Demand For.[79] Under provisions requiring a mortgagee of attached property to render an account of the amount due at the time of the attachment on demand of the creditor or attaching officer,[80] the demand must specify the time of the attachment.[81] Where no more is required than a demand of an account of the mortgage debt, a demand by the officer in his own name and official capacity is sufficient without designating the creditor, the claim sued, the nature of the suit, or the court to which the writ is returnable;[82] but the demand must disclose the authority of the creditor to make it by setting forth the fact of a levy or attachment and a right to redeem from the mortgage.[83] If the mortgaged premises are described correctly it is immaterial that the description in the mortgage is not followed.[84]

b. Necessity of. After demand of an account of the amount due, made on a mortgagee of the attached property by the creditor or officer, if it is not rendered, or a false one is given, the interest of the mortgagee in realty attached ceases as against the attachment.[85] If personalty is attached, it is discharged from the mortgage.[86] So where, to protect his rights or procure payment of his debt,

76. Rowley *v.* Rice, 10 Metc. (Mass.) 7.

77. **Consideration.**— The failure to state the consideration on which claimant acquired his interest in the property as required by statute will invalidate it. McIver *v.* Davenport, 110 Iowa 740, 81 N. W. 585.

The date of a mortgage will be deemed to be sufficiently stated, if although undated in fact, the date referred to is indorsed on the mortgage as the date thereof but is really the date of delivery. Folsom *v.* Clemence, 111 Mass. 273.

Name of mortgagor — Place of record.— A demand which does not state when or by whom the property was mortgaged or where the mortgage or record of it may be found is insufficient. Campbell *v.* Eastman, 170 Mass. 523, 49 N. E. 914.

Reference to the town records, without giving the date of, or parties to, the mortgage is insufficient. Wilson *v.* Crooker, 145 Mass. 571, 14 N. E. 798.

Claim under one of several mortgages.— Where personal property, three mortgages of which, of different dates, have been given to one person, is attached on a writ against the mortgagor, a demand specifying a claim under one mortgage only will not support a claim under either of the others. Witham *v.* Butterfield, 6 Cush. (Mass.) 217.

Notice of mortgage made subsequently to attachment.— Where an equity of redemption has been attached, is afterward mortgaged a second time, the mortgage recorded, and the equity sold on the first execution, a notice to the officer by the second mortgagee that he had a mortgage on the premises and that it was recorded, without exhibiting the mortgage or any evidence of title, is insufficient to require the officer to pay over the balance to him, but is sufficient to make it the duty of the officer to retain the money to enable the mortgagee to exhibit title. Littlefield *v.* Kimball, 17 Me. 313.

78. Turner *v.* Younker, 76 Iowa 258, 41 N. W. 10.

Service on attorney of attaching creditor is sufficient under a statute requiring service on such creditor or the attaching officer. Carter *v.* Green Mountain Gold Min. Co., 83 Cal. 222, 23 Pac. 317.

79. **For forms of demand on mortgagee** see Kimball *v.* Morrison, 40 N. H. 117; Gilmore *v.* Gale, 33 N. H. 410; Farr *v.* Dudley, 21 N. H. 372.

80. **Attorney for the attaching creditor may** waive the demand for an account (Green *v.* Kelley, 64 Vt. 309, 24 Atl. 133; Willard *v.* Goodrich, 31 Vt. 597), or may extend the time within which the account may be filed (Green *v.* Kelley, 64 Vt. 309, 24 Atl. 133 [*following* Willard *v.* Goodrich, 31 Vt. 597]).

Subsequent attachment.— Where the attached property is discharged from the mortgage because no account is rendered, the officer need not again make a demand under a subsequent attachment. Kimball *v.* Morrison, 40 N. H. 117.

81. Farr *v.* Dudley, 21 N. H. 372.

A demand for an account "forthwith" does not comply with the statute, or require an account to be rendered within the time fixed thereby. Green *v.* Kelley, 64 Vt. 309, 24 Atl. 133.

82. Kimball *v.* Morrison, 40 N. H. 117.

83. Ricker *v.* Blanchard, 45 N. H. 39, holding that the fact that the mortgagee within the time limited by law renders an imperfect account will not waive a defect in this respect.

84. Bryant *v.* Morrison, 44 N. H. 288.

85. Kimball *v.* Morrison, 40 N. H. 117.

86. Bryant *v.* Morrison, 44 N. H. 288; Kimball *v.* Morrison, 40 N. H. 117; Gilmore *v.* Gale, 33 N. H. 410.

claimant is required after notice of attachment to serve with his notice or demand[87] a statement or account of the amount due, or of the debt or demand for which the property is liable to him, the failure to observe the statutory requirement will have the like result.[88]

c. Sufficiency of[89]— (I) *False Account.* Any material misstatement in the account rendered which tends to mislead or in any way to injure the attaching creditor renders the demand of payment inoperative to dissolve the attachment and defeats the right of the mortgagee to maintain an action against the attaching officer.[90]

(II) *Inaccuracies and Omissions.* Innocent inaccuracies or errors in the account rendered by a mortgagee of attached property to the attaching officer or creditor, resulting from accident or mistake, and which do not mislead or injuriously affect the attaching creditor, will not invalidate the demand of payment of his debt or defeat the mortgagee's right to enforce his lien.[91]

(III) *Statement of Amount Due.* The amount due is the amount due at the time of the demand,[92] which will be sufficiently stated if it can be ascertained by computation.[93] Where a balance of the original indebtedness remains unpaid the account may state the sum actually due,[94] but where several demands are secured a statement of the aggregate is not sufficient.[95] Where distinct demands are separately secured, separate accounts should be rendered stating the amount due upon each, and not the aggregate due upon both,[96] and where one mortgage secures a gross sum to two persons the account may set forth the gross sum due to each,[97] although it has been held that the account need not contain a detailed statement of every item of a series of charges, which are covered by a mortgage for future advances, if the particular items are not requested.[98] A statement that the mortgage was given to secure a note given for a loan which is unpaid is sufficient,[99] but a mere statement of what the mortgage was given for is not a

A vendor of a chattel retaining a lien thereon for the purchase-money, who neglects to furnish on demand an account of the amount due, in accordance with N. H. Pub. Stat. c. 220, § 17, loses his lien thereon. Fife *v.* Ford, 67 N. H. 539, 41 Atl. 1051.

Where there is no valid subsisting attachment there is no necessity for a mortgagee to state what is due to him on his mortgage and demand payment of it. Jordan *v.* Farnsworth, 15 Gray (Mass.) 517. See also Allen *v.* Wright, 134 Mass. 347.

87. Notice of claim or demand of property see *supra*, XIV, A, 6.

88. Gross *v.* Jordan, 83 Me. 380, 22 Atl. 250; Phillips *v.* Fields, 83 Me. 348, 22 Atl. 243; Potter *v.* McKenney, 78 Me. 80, 2 Atl. 844; Colson *v.* Wilson, 58 Me. 416; Nichols *v.* Perry, 58 Me. 29; Citizens' Nat. Bank *v.* Oldham, 136 Mass. 515; Bicknell *v.* Cleverly, 125 Mass. 164; Haskell *v.* Gordon, 3 Metc. (Mass.) 268.

Delivery of account to attaching creditor instead of to attaching officer, as required by the statute, is not a compliance therewith. Phillips *v.* Fields, 83 Me. 348, 22 Atl. 243.

89. For forms of account of mortgagee claiming attached property see Johnson *v.* Sumner, 1 Metc. (Mass.) 172; Duncklee *v.* Gay, 39 N. H. 292.

For form of account by assignees of mortgagee see Gilmore *v.* Gale, 33 N. H. 410.

90. Bicknell *v.* Cleverly, 125 Mass. 164.

The inclusion of a sum not covered by the mortgage will render the account false. Hills *v.* Farrington, 3 Allen (Mass.) 427.

91. Ashcroft *v.* Simmons, 151 Mass. 497, 24 N. E. 389; Wilson *v.* Crooker, 145 Mass. 571, 14 N. E. 798; Bicknell *v.* Cleverly, 125 Mass. 164; Harding *v.* Coburn, 12 Metc. (Mass.) 333, 46 Am. Dec. 680; Rowley *v.* Rice, 10 Metc. (Mass.) 7; Gibbs *v.* Parsons, 64 N. H. 66, 6 Atl. 93; Putnam *v.* Osgood, 51 N. H. 192; Duncklee *v.* Gay, 39 N. H. 292.

Understatement of interest.— The mortgagee will not render his account untrue by understating the amount of interest, if his securities are not in his own hands or he has not the means of computing the interest exactly. Johnson *v.* Sumner, 1 Metc. (Mass.) 172.

92. Farr *v.* Dudley, 21 N. H. 372.

93. Sullivan Sav. Inst. *v.* Kelley, 59 N. H. 160.

94. Johnson *v.* Sumner, 1 Metc. (Mass.) 172.

95. Johnson *v.* Sumner, 1 Metc. (Mass.) 172.

96. Barton *v.* Chellis, 45 N. H. 135, where the mortgages described the notes secured, which were the same notes, and the whole sum secured was less than the aggregate of the two accounts.

97. Housatonic Bank *v.* Martin, 1 Metc. (Mass.) 294.

98. Hills *v.* Farrington, 6 Allen (Mass.) 80.

99. Hanson *v.* Herrick, 100 Mass. 323.

statement of the amount due,[1] nor is a mere unsworn letter stating the amount of the mortgage and claim, without showing the amount due, sufficient.[2] If but part of the amount due is stated a tender of that amount will discharge the mortgage.[3]

8. ACTION OR PROCEEDING — a. Form of Remedy — (i) *In General.* In some jurisdictions it is incumbent upon a claimant to prosecute his claim by an independent action.[4] In the greater number of jurisdictions, however, he may either institute an independent action, or interplead in the attachment suit at his option,[5] or, if the rights of the parties will not be prejudiced, may proceed by rule.[6] In still other jurisdictions a claimant may have his rights determined on a motion to discharge the attachment.[7] Where resort to an independent action is had claimant may usually maintain case, trespass, replevin, or trover.[8]

1. Sprague *v.* Branch, 3 Cush. (Mass.) 575.

2. Gilmore *v.* Gale, 33 N. H. 410.

3. Duncklee *v.* Gay, 39 N. H. 292, where a reference to others for information concerning a part of the claim, the amount of which was not stated in the account, was held insufficient as to that part.

4. Risher *v.* Gilpin, 29 Ind. 53; Gates *v.* Pennsylvania Land, etc., Co., 9 Ohio Cir. Ct. 378, 6 Ohio Cir. Dec. 163; Boyer *v.* Maginnis, 10 Ohio Dec. (Reprint) 378, 20 Cinc. L. Bul. 471.

In Ohio if a third party claim property affected by an order of attachment, it is the duty of the sheriff to have the validity of such claim tried, in a speedy form of proceeding. But a party not desiring to have the validity of his claim tried by the sheriff is not barred from asserting his claim in ordinary proceedings, suitable to obtain possession of property and redress injuries. Vallette *v.* Kentucky Trust Co. Bank, 2 Handy (Ohio) 1, 12 Ohio Dec. (Reprint) 299.

In Tennessee a third party interested in the subject-matter cannot of right present by petition his right to the property under attachment, but should proceed by original bill. If complainant does not object to the petition the court may determine the question. Bradshaw *v.* Georgia L. & T. Co., (Tenn. Ch. 1900) 59 S. W. 785.

5. *Alabama.*— Lehman *v.* Warren, 53 Ala. 535; Abraham *v.* Carter, 53 Ala. 8.

Arkansas.— Bloom *v.* McGehee, 38 Ark. 329.

Colorado.— Hannan *v.* Connett, 10 Colo. App. 171, 50 Pac. 214.

Georgia.— Bodega *v.* Perkerson, 60 Ga. 516.

Iowa.— Sperry *v.* Ethridge, 70 Iowa 27, 30 N. W. 4.

Kentucky.— Bamberger *v.* Halberg, 78 Ky. 376.

Louisiana.— Shuff *v.* Morgan, 9 Mart. (La.) 592.

Maryland.— Kean *v.* Doerner, 62 Md. 475; Richardson *v.* Hall, 21 Md. 399.

Pennsylvania.— Megee *v.* Beirne, 39 Pa. St. 50.

Must not retard principal suit.— In Louisiana it is said that as the intervener has always his remedy by separate action, he must always be ready to plead or to exhibit his testimony and must not retard the principal suit. Gaines *v.* Page, 15 La. Ann. 108.

When intervention not statutory interplea. — Where property is attached on a writ issuing from the federal court a petition of intervention filed by leave of the court in the attachment suit by claimant is not a statutory interplea under the Missouri statutes. Boltz *v.* Eagon, 34 Fed. 452.

6. Remington Paper Co. *v.* Louisiana Printing, etc., Co., 56 Fed. 287.

7. Wichita Wholesale Grocery Co. *v.* Records, 40 Kan. 119, 19 Pac. 346; Symns Grocer Co. *v.* Lee, 9 Kan. App. 574, 58 Pac. 237. See also Bryce *v.* Foot, 25 S. C. 467 [*citing* Metts *v.* Piedmont, etc., L. Ins. Co., 17 S. C. 120; Copeland *v.* Piedmont, etc., L. Ins. Co., 17 S. C. 116].

In Pennsylvania where a third person gives notice that he is the owner of attached goods, the sheriff cannot obtain a rule on him, under the interpleader act of Mar. 26, 1897, to show cause why an issue should not be framed to determine the ownership of the goods. The proper practice is under the domestic attachment act providing that on return of the writ the court shall appoint trustees, in whom the assets shall vest and who shall have power to sue for and recover the same. McCullough *v.* Goodhart, 8 Pa. Dist. 378, 22 Pa. Co. Ct. 369, 30 Pittsb. Leg. J. N. S. (Pa.) 44.

8. *Alabama.*—Bryan *v.* Smith, 22 Ala. 534.

Arkansas.— Willis *v.* Reinhardt, 52 Ark. 128, 12 S. W. 241.

Colorado.— Hannan *v.* Connett, 10 Colo. App. 171, 50 Pac. 214.

Connecticut.—Larkin *v.* Parmelee, 69 Conn. 79, 36 Atl. 1009; Griswold *v.* Cook, 46 Conn. 198; Jackson *v.* Hubbard, 36 Conn. 10.

Illinois.— Samuel *v.* Agnew, 80 Ill. 553; La Salle Pressed Brick Co. *v.* Coe, 65 Ill. App. 619.

Indiana.— Louisville, etc., Canal Co. *v.* Halborn, 2 Blackf. (Ind.) 267.

Iowa.— Smith *v.* Montgomery, 5 Iowa 370.

Maryland.— Ginsberg *v.* Pohl, 35 Md. 505.

Massachusetts.— Ayer *v.* Bartlett, 170 Mass. 142, 49 N. E. 82; Kittredge *v.* Sumner, 11 Pick. (Mass.) 50; Shumway *v.* Rutter, 8 Pick. (Mass.) 443, 19 Am. Dec. 340; Walcot *v.* Pomeroy, 2 Pick. (Mass.) 121.

(II) *Election.* As the different remedies available to claimants are but different modes of determining the ownership of the property, it follows that if a claimant elects to pursue one remedy he may be estopped to resort to another.[9] A mere failure, however, to avail himself of one statutory remedy does not preclude him from resorting to another action,[10] nor would the fact that claimant fails to interplead after having obtained leave to do so,[11] that he withdraws his claim from a sheriff's jury before a trial to test it is had,[12] or that he is prosecuting another suit in the same court for the same cause.[13] So the appearance and participation of a purchaser of property in an unsuccessful motion to discharge an attachment issued against his vendor on the ground that the conveyance was fraudulent does not preclude him from bringing subsequently an action to recover the property.[14]

b. Jurisdiction — (I) *In General.* In an action begun by attachment, the court has jurisdiction by reason of the writ and service thereof. Consequently if there is no writ in existence or it has not been levied or served, the court has no jurisdiction of the issue raised between the parties or by an interpleader.[15] Where the jurisdiction depends upon statute it is variously held that the trial of the right to the property must be had in the same court in which the attachment proceedings were instituted,[16] in a court which acquires jurisdiction of the persons of attachment plaintiff and claimant,[17] or where the writ is issued in a county other than that in which the property is seized, in the county where seizure was made.[18] The right to the property must be tried in a court which has jurisdiction of an

Minnesota.— Lescher *v.* Getman, 30 Minn. 321, 15 N. W. 309.

Mississippi.— Hopkins *v.* Drake, 44 Miss. 619 [*citing* Yarborough *v.* Harper, 25 Miss. 112].

Missouri.— Schwabacher *v.* Kane, 13 Mo. App. 126.

Nebraska.— Cole *v.* Edwards, 52 Nebr. 711, 72 N. W. 1045.

New Hampshire.— Johnson *v.* Farr, 60 N. H. 426.

New York.— Chapin *v.* FitzGerald, 1 Silv. Supreme (N. Y.) 349, 5 N. Y. Suppl. 722, 24 N. Y. St. 600 [*affirmed* in 127 N. Y. 670, 28 N. E. 255, 38 N. Y. St. 1016].

Pennsylvania.— Berwald *v.* Ray, 165 Pa. St. 192, 30 Atl. 727; Paxton *v.* Steckel, 2 Pa. St. 93.

Texas.—Rodrigues *v.* Trevino, 54 Tex. 198; Jaffray *v.* Meyer, 1 Tex. App. Civ. Cas. § 1349.

Vermont.— Angell *v.* Keith, 24 Vt. 371.

United States.— Marden *v.* Starr, 107 Fed. 199 (construing Indiana statute); Wise *v.* Jefferis, 51 Fed. 641, 2 C. C. A. 432 (construing Montana statute).

As to actions to recover damages see *infra*, XIV, C.

9. There is an estoppel where claimant interpleads in the attachment suit (Richardson *v.* Watson, 23 Mo. 34), institutes the statutory proceeding for trial of right of property (Bray *v.* Saaman, 13 Nebr. 518, 14 N. W. 474), or submits his claim to determination of a sheriff's jury (Capital Lumbering Co. *v.* Hall, 9 Oreg. 93).

A plea that claimant's interplea is pending is in abatement and not in bar of an independent action, since the interplea may be dismissed and the action renewed. Lowry *v.* Kinsey, 26 Ill. App. 309.

10. Davis *v.* Warfield, 38 Ind. 461; Thomas *v.* Baker, 41 Kan. 350, 21 Pac. 252.

11. Wangler *v.* Franklin, 70 Mo. 639.

12. Vulcan Iron Works *v.* Edwards, 27 Oreg. 563, 36 Pac. 22, 39 Pac. 403.

13. Hall *v.* Richardson, 16 Md. 396, 77 Am. Dec. 303. The fact that an action of replevin was instituted after a motion to discharge was filed, whereby claimant obtained possession of the attached property under the writ issued in his replevin action, will not prevent the hearing and decision of his motion to discharge. Wm. W. Kendall Boot, etc., Co. *v.* August, 51 Kan. 53, 32 Pac. 635.

14. Thomas *v.* Baker, 41 Kan. 350, 21 Pac. 252.

15. Jackson *v.* Bain, 74 Ala. 328; Splawn *v.* Martin, 17 Ark. 146; Gibson *v.* Wilson, 5 Ark. 422; Swofford Bros. Dry-Goods Co. *v.* Smith-McCord Dry-Goods Co., 1 Indian Terr. 314, 37 S. W. 103.

16. Thompson *v.* Evans, 12 Ala. 588.

17. Triest *v.* Enslen, 106 Ala. 180, 17 So. 356.

18. *Ex p.* Dunlap, 71 Ala. 73; State *v.* Mason County Super. Ct., 6 Wash. 417, 34 Pac. 151; State *v.* Pierce County Super. Ct., 5 Wash. 639, 32 Pac. 553.

Jurisdiction exclusive.— In Washington the jurisdiction of the county in which the property is seized is exclusive. State *v.* Mason County Super. Ct., 6 Wash. 417, 34 Pac. 151; State *v.* Pierce County Super. Ct., 5 Wash. 639, 32 Pac. 553.

Failure of the sheriff to return the bond to the court within the county where the property was seized, as required by law, will not deprive it of jurisdiction. Peterson *v.* Wright, 9 Wash. 202, 37 Pac. 419; State *v.* Mason County Super. Ct., 6 Wash. 417, 34 Pac. 151.

amount at which the attached property is valued,[19] but where the amount originally sued for is within the jurisdiction of a justice of the peace, he will have jurisdiction although the value of the property attached is in excess of the jurisdictional amount.[20] The jurisdiction of a designated court to try title to attached property is not affected by a statute authorizing the trial in another court of rights of property in general.[21] A court having common-law jurisdiction may try an issue where claimant alleges the legal title to land and the attaching creditor asserts the title to be equitable by way of mortgage.[22]

(II) *Removal of Controversy.* The trial of a claim to property levied on under final process of a state court is not removable to the United States court; but where the attachment is removed on the ground of diverse citizenship of the parties and claimant is a citizen of the same state as defendants, the claim may be removed with the attachment proceeding, as an incident thereto.[23]

c. **Conditions Precedent** — (I) *Affidavit* — (A) *Necessity of.* If claimant is required to present an affidavit of ownership, or make oath to his claim, his omission in that respect will preclude him,[24] since title or claim to property or an interest therein cannot be asserted by a simple unsworn statement.[25]

(B) *Sufficiency of.* An affidavit of ownership should name the claimants,[26] and, where such an averment is necessary to the validity of the affidavit, it should set out the nature of the claim.[27] A substantial compliance with the statute is sufficient, however, especially where it is so treated by the parties,[28] and if claimant has made oath in fact, the accidental absence of a jurat to the affidavit may be disregarded,[29] nor will it be deemed material that the oath was defective,

19. Wetzel *v.* Simon, 87 Tex. 403, 28 S. W. 274, 942; St. Louis Type Foundry *v.* Taylor, 6 Tex. Civ. App. 732, 26 S. W. 226.

Value in excess of jurisdiction.— Where several writs issue from a court of inferior jurisdiction, each for an amount within its jurisdiction, if the value of the property attached by the writs exceeds the amount of which it has jurisdiction, jurisdiction may be taken by a court having jurisdiction of the amount in question. McFarland *v.* Russ, 23 La. Ann. 608.

20. Fly *v.* Grieb, 62 Ark. 209, 35 S. W. 214; Mills *v.* Thomson, 61 Mo. 415; Springfield Engine, etc., Co. *v.* Glazier, 55 Mo. App. 95.

21. Springer *v.* Bigford, 160 Ill. 495, 43 N. E. 751 [*affirming* 55 Ill. App. 198].

22. Laclede Bank *v.* Keeler, 103 Ill. 425.

Proceedings in case of claim to lands.— In Georgia a claim to land levied on by virtue of attachment should be returned to and tried in the superior court of the county where the land is situated. Rogers *v.* Bates, 19 Ga. 545.

23. Hochstadter *v.* Harrison, 71 Ga. 21.

Removal of causes, generally, see Removal of Causes.

24. Rogers *v.* Bates, 19 Ga. 545; Higdon *v.* Vaughn, 58 Miss. 572; Ludington *v.* Hull, 4 W. Va. 130.

The filing of a verified statement with the clerk of the court from which the attachment issued is a sufficient presentation to the court from which process issued. Stuart *v.* Twining, (Minn. 1900) 83 N. W. 891.

Where the property is taken from the owner, filing an affidavit is not a condition precedent to an action against the officer. Lesher *v.* Getman, 30 Minn. 321, 15 N. W. 309.

Defendant in attachment cannot object that the affidavit was not filed by claimant with the sheriff before the delivery of the property to claimant. Mayer *v.* Woolery, 10 Wash. 354, 39 Pac. 135.

25. Witherspoon *v.* Swift, 112 Ga. 689, 37 S. E. 976; Carter *v.* Carter, 36 Tex. 693.

26. **An affidavit by an unincorporated company or firm** should state the individual names of its members. Richardson *v.* Smith, 21 Fla. 336.

27. Ludington *v.* Hull, 4 W. Va. 130. See also Chesapeake, etc., R. Co. *v.* Paine, 29 Gratt. (Va.) 502.

A statement that claimant is owner of the property sufficiently states the ground of title or right to possession. Carpenter *v.* Bodkin, 36 Minn. 183, 30 N. W. 453.

Claim of ownership by trustee.— The fact that a claimant stated that he claimed title to the property will not preclude him from proving that he was entitled to possession as trustee. Sutton *v.* Gregory, (Tex. Civ. App. 1898) 45 S. W. 932.

Variance as to source of title.— Where the statute merely requires a statement that the claim is made in good faith, the fact that the affidavit and claimant's answer on the issue of title vary in designating his assignor is immaterial. Wetzel *v.* Simon, 87 Tex. 403, 28 S. W. 274, 942.

28. Carpenter *v.* Bodkin, 36 Minn. 183, 30 N. W. 453.

29. Ryan *v.* Goldfrank, 58 Tex. 356.

where it is acted on, an indemnity bond given by plaintiff, and no prejudice has resulted.[30]

(II) *Bond* — (A) *Right to Execute.* Unless authorized by statute, claimant of attached property cannot obtain its release by giving a bond therefor,[31] and an instrument given by an intervener, in the absence of statutory authorization, is not a judicial bond and cannot be recovered on as such.[32]

(B) *Necessity of.* The statutes in general provide for the giving of a bond by claimant and, when this is the case, such provision must be observed,[33] or the court will have no jurisdiction to try the issue, even though the parties to the action consent thereto.[34]

(C) *Form and Requisites*[35] — (1) In General. As the form of a claimant's bond is usually determined by the provisions of the statute no general rules can be laid down as to when irregularities therein will be immaterial or fatal.[36] If the bond has been improperly framed the court may give leave to amend it before entering upon the trial,[37] or if insufficient under statute, the bond may be construed and enforced as a common-law obligation.[38] While the mere statement in a bond that it is intended as a delivery bond will not, if the prescribed statutory conditions of such a bond are omitted, entitle a claimant to possession of the property,[39] a failure of the bond to comply strictly with

30. Kellogg *v.* Burr, 126 Cal. 38, 58 Pac. 306.

31. Meyer *v.* Johnson, 28 La. Ann. 244; Dawson *v.* Morton, 22 La. Ann. 535; Hughes *v.* Klingender, 14 La. Ann. 52. Under a statute allowing only defendant the right to set aside an attachment by giving bond, an intervener, having possession of the property at the time of attachment and claiming to be its owner, should be allowed so to do. Letchford *v.* Jacobs, 17 La. Ann. 79. A claimant, however, was afterward allowed, by the Louisiana act of 1876, No. 51, to secure the possession of property by executing a bond. Meyer *v.* Fletcher, 35 La. Ann. 878.

32. Meyer *v.* Johnson, 28 La. Ann. 244; Dawson *v.* Morton, 22 La. Ann. 535, in which latter case it was said that such a bond could be recovered upon, if at all, as a simple conventional bond.

The denial of the right to bond the property does not mean, however, that the intervention should be dismissed. Claimant should be allowed to have his rights adjudicated, although his application to bond the property be dismissed. Letchford *v.* Jacobs, 17 La. Ann. 79.

33. Carter *v.* Carter, 36 Tex. 693, holding that a simple unsworn statement without bond, denominated by claimant "an intervention in the original suit," would be no basis for the determination of his claim.

34. Mobile L. Ins. Co. *v.* Teague, 78 Ala. 147 [*citing* Graham *v.* Hughes, 77 Ala. 590; Walker *v.* Ivey, 74 Ala. 475, which make the bond a jurisdictional prerequisite].

Where fraud is the ground on which the intervener would have the judgment set aside, no bond is necessary. Grabenheimer *v.* Rindskoff, 64 Tex. 49.

35. For forms of claimant's bonds see Bradley Hubbard Mfg. Co. *v.* Bean, 20 Mo. App. 111; Noakes *v.* Switzer, 12 Nebr. 156, 10 N. W. 536 (somewhat informal but nevertheless held sufficient); Eichoff *v.* Tidball, 61 Tex. 421.

36. Rhodes *v.* Smith, 66 Ala. 174, where it was said that as a general rule the bond is conditioned that claimant will have the property forthcoming to answer the judgment in the attachment suit if found liable therefor, and also for the payment of costs and damages occasioned by the institution of his claim.

Formal defects or irregularities of a bond are waived by attachment plaintiff if no objection thereto is made at some proper stage of the proceedings. Rhodes *v.* Smith, 66 Ala. 174. See also Clarinda Valley Bank *v.* Wolf, 101 Iowa 51, 69 N. W. 1131, where, a bond in some respects informal having been treated as sufficient for fourteen years, plaintiff was held to have waived the defect.

37. Martin *v.* Mayer, 112 Ala. 620, 20 So. 953, where the bond was so conditioned as to be in effect a replevin bond, and the court gave leave to amend so as to make it a claim bond before proceeding with the trial. And see Reeves *v.* Wallace, 3 Tex. App. Civ. Cas. § 178, holding that a claimant, who executes a bond unauthorized by statute and insufficient, is not estopped from securing trial of the right of property by subsequently executing a statutory bond and complying with other statutory requirements.

Validity of signature on claimant's bond. — Signature of a partnership or firm-name as surety on a claimant's bond is valid although the names of individual members be not signed. Jacobs *v.* Shannon, 1 Tex. Civ. App. 395, 21 S. W. 386.

38. Butler *v.* O'Brien, 5 Ala. 316; Frankfort Deposit Bank *v.* Thomason, (Ky. 1902) 66 S. W. 604; Eichoff *v.* Tidball, 61 Tex. 421; Jacobs *v.* Shannon, 1 Tex. Civ. App. 395, 21 S. W. 386, in which last case a claimant's bond with but one surety was held not valid as a statutory bond, but sustained as a common-law obligation. See also *supra*, XIV, A, 8, c, (II), (A).

39. Jennings *v.* Warnock, 37 Iowa 278, where it appeared that such statement was

the statute cannot be taken advantage of by the obligors after having obtained possession.[40]

(2) The Amount. The amount of the bond, while dependent wholly upon statute, is perhaps usually double the appraised value of the property,[41] and a bond for a less amount would be insufficient, although it be for more than double the amount of the debt for which the attachment was issued.[42]

(3) The Obligee. Whether the bond should be made payable to the officer or to attaching plaintiff depends upon the statutes. In one state at any rate the bond should be made payable to plaintiff in attachment if the claim is interposed *pendente lite*, but to the attaching officer if interposed after judgment.[43] Where the statutes provide for a bond payable to plaintiff, and the property is seized under several attachments the bond may be payable to all the plaintiffs jointly and severally,[44] or to all jointly instead of jointly and severally.[45]

(d) *Filing Bond.* In one state, at least, claimant must see that the bond has been duly filed and is in the proper court;[46] but, where the officer is as much the agent of attachment plaintiff as of claimant, a failure to file the bond until some months after its delivery to the officer does not affect claimant's right to the property.[47]

(e) *Operation and Effect*—(1) Presumption That Property Is Held by Virtue of. The giving of a bond raises the presumption that claimant holds the property under the bond and not as a custodian or receiptor at common law.[48]

(2) On Attachment Lien. Execution of a delivery bond by a claimant does not as a rule discharge the lien created by the levy,[49] and, under some statutes, claimant must make himself a party to the attachment action or be concluded by the judgment therein.[50]

(3) On Subsequent Claims. Execution of a bond by an intervener does not bar the interposition of other claims;[51] and if claimant would retain the property against a subsequently attaching creditor he must give another forthcoming bond to the latter.[52]

d. Parties—(1) *Necessary Parties.* The original defendant is not a

made in an appeal-bond, but the court held that it could have no further or greater effect than a mere appeal-bond and did not entitle claimant to the possession of the property.

40. Frankfort Deposit Bank *v.* Thomason, (Ky. 1902) 66 S. W. 604; Emanuel *v.* Mann, 14 La. Ann. 53; Noakes *v.* Switzer, 12 Nebr. 156, 10 N. W. 536.

41. Turner *v.* Lytle, 59 Md. 199, holding that whenever a claim was made an appraisal was necessary. See also Kamena *v.* Wanner, 6 Abb. Pr. (N. Y.) 193.

42. Kamena *v.* Wanner, 6 Abb. Pr. (N. Y.) 193 [*reversing* 15 How. Pr. (N. Y.) 5], where it was said that protection to the real owner of the property as well as to attachment plaintiff was contemplated by the statute. *Compare* Turner *v.* Lytle, 59 Md. 199, where the court, construing the Maryland attachment law, conceded that the taking of a bond for less than double the appraised value of the property might warrant a rescission of an order discharging the attachment, but concluded that the infirmity neither worked a total defeat of claimant's right to recover, nor prevented an inquiry of damages.

43. Benton *v.* Benson, 32 Ga. 354. See also Selman *v.* Schackelford, 17 Ga. 615.

44. P. J. Peters Saddlery, etc., Co. *v.* Schoelkopf, 71 Tex. 418, 9 S. W. 336; Elser *v.* Graber, 69 Tex. 222, 6 S. W. 560.

45. Jacobs *v.* Shannon, 1 Tex. Civ. App. 395, 21 S. W. 386.

46. Deware *v.* Wichita Valley Mill, etc., Co., 17 Tex. Civ. App. 394, 43 S. W. 1047, holding that plaintiff's failure so to do for two successive terms of the proper court should be treated as an abandonment of his claim.

47. Mayer *v.* Woolery, 10 Wash. 354, 39 Pac. 135.

48. Clarinda Valley Bank *v.* Shenandoah Nat. Bank, 109 Iowa 43, 79 N. W. 391.

49. Frankfort Deposit Bank *v.* Thomason, (Ky. 1902) 66 S. W. 604; Finn *v.* Mehrbach, 65 N. Y. Suppl. 250, 30 N. Y. Civ. Proc. 242; Coos Bay R. Co. *v.* Wieder, 26 Oreg. 453, 38 Pac. 338. *Contra*, Ledda *v.* Maumus, 17 La. Ann. 314; Emanuel *v.* Mann, 14 La. Ann. 53.

Effect of execution of forthcoming, replevy, or dissolution bond by attachment defendant see *supra*, XIII, E, 4, f.

50. Frankfort Deposit Bank *v.* Thomason, (Ky. 1902) 66 S. W. 604; Miller *v.* Desha, 3 Bush (Ky.) 212.

51. White *v.* Hawkins, 16 La. Ann. 25; Dreyfus *v.* Mayer, 69 Miss. 282, 12 So. 267.

52. Harris *v.* Stewart, 65 Ark. 566, 47 S. W. 634.

necessary party to an intervention by one asserting ownership;[53] nor is one having no interest in or claim to the property attached a necessary party to a controversy respecting its ownership.[54] Where claimant dies pending proceedings to try right to the attached property his heirs or legal representatives should be made parties.[55]

(II) *Proper Parties.* Attaching creditors may be made parties to an action of replevin by claimant against the attaching officer for the purpose of defeating the claim.[56] So if an interplea is improperly interposed by the beneficiary of a trust the trustee may be substituted in his stead by amendment.[57]

e. Defenses. Where the interpleader claims under a mortgage or sale, plaintiff in attachment may answer that the conveyance was made to hinder, delay, and defraud the creditors of attachment defendant, and is therefore void;[58] and a defense that the proceeds of property attached in the possession of defendant, but claimed by a third party, had been passed to the credit of the interveners in the books of attachment defendant is sufficient.[59] It is not a defense, however, where mortgaged chattels are attached in the possession of the mortgagee to say that he is the equitable and not the legal owner.[60]

f. Issues Triable. One claiming title to or ownership of attached property is generally concerned only with the establishment of that right. Accordingly, the issue triable is whether the property levied on is that of attachment defendant, or that of claimant, or whether the latter is entitled to its possession or has a lien thereon; and claimant cannot as a rule urge irregularities in or the invalidity of the attachment proceedings.[61] Thus it has been held that he cannot urge a defense

53. Where notes are attached as defendant's property on the ground that a sale of them to a third person was in fact to defendant, and a party intervenes asserting ownership because the sale was void, it is unnecessary for defendant to be before the court in any other capacity than defendant to the original bill. Bradshaw *v.* Georgia L. & T. Co., (Tenn. Ch. 1900) 59 S. W. 785. Again where subsequently attaching creditors intervene to have a previous attachment set aside as fraudulent, after the property has been sold and the fund is in court, it is not necessary that original attachment defendant be cited by the interveners. Joseph Peters Furniture Co. *v.* Dickey, 2 Tex. Unrep. Cas. 237.

54. Bradshaw *v.* Georgia L. & T. Co., (Tenn. Ch. 1900) 59 S. W. 785.

Creditors preferred by mortgage on other property are not necessary parties to an intervention by an assignee for the benefit of creditors. Bradley *v.* Bailey, 95 Iowa 745, 64 N. W. 758.

In an action by a trustee for instruction as to the administration of the trust, neither the officer holding a warrant of attachment against the depositor nor the depositary of the fund need be made parties if plaintiff in the attachment suit has been joined. Coe *v.* Beckwith, 31 Barb. (N. Y.) 339.

The claimant of an undivided interest is entitled to try the right of property without joining his coöwner. Hamburg *v.* Wood, 66 Tex. 168, 18 S. W. 623.

55. Muenster *v.* Tremont Nat. Bank, 92 Tex. 422, 49 S. W. 362.

56. Wafer *v.* Harvey County Bank, 36 Kan. 292, 13 Pac. 209; Morgan *v.* Spangler, 20 Ohio St. 38.

The creditor may be made a party after the case has been appealed to the district court, provided the fact of seizure under the writ was set up as a defense by the officer in the court below. Morgan *v.* Spangler, 20 Ohio St. 38.

An entry after the record of attachment suit that certain persons filed claims under the attachment does not make them parties. Sturgis *v.* Rogers, 26 Ind. 1. See also Ryan *v.* Burkam, 42 Ind. 507 [*citing* Schmidt *v.* Colley, 29 Ind. 120].

57. Winklemaier *v.* Weaver, 28 Mo. 358.

58. Cox *v.* Swofford Bros. Dry-Goods Co., 2 Indian Terr. 61, 47 S. W. 303; Edwards *v.* Stewart, (Mo. 1897) 44 S. W. 326; Caruth-Byrnes Hardware Co. *v.* Wolter, 91 Mo. 484, 3 S. W. 865.

Assignment for benefit of creditors.— An answer alleging that property claimed by an assignee as property belonging to an individual member of a firm was partnership property, and that the assignment gave interpleader no right to it states a good defense, and a further allegation that the assignment was fraudulent and void is surplusage. Cox *v.* Swofford Bros. Dry-Goods Co., 2 Indian Terr. 61, 47 S. W. 303.

59. Carman *v.* Anderson, 15 La. 135.

60. Russell *v.* Painter, 50 Ark. 244, 7 S. W. 35.

61. *Alabama.*— Schloss *v.* Inman, (Ala. 1901) 30 So. 667; Cofer *v.* Reinschmidt, 121 Ala. 252, 25 So. 769; Sloan *v.* Hudson, 119 Ala. 27, 24 So. 458; Schamagel *v.* Whitehurst, 103 Ala. 260, 15 So. 611; Dollins *v.* Pollock, 89 Ala. 351, 7 So. 904; Guy *v.* Lee, 81 Ala. 163, 2 So. 273; Nordlinger *v.* Gordon, 72 Ala. 239; Ellis *v.* Martin, 60 Ala. 394; Starnes *v.* Allen, 58 Ala. 316; Dryer *v.*

personal to attachment defendant,[62] as the insufficiency of the affidavit on which attachment issued,[63] the insufficiency of the bond,[64] the validity or amount of

Abercrombie, 57 Ala. 497; Lehman *v.* Warren, 53 Ala. 535; Pace *v.* Lee, 49 Ala. 571; Mayer *v.* Clark, 40 Ala. 259; Henderson *v.* Montgomery Bank, 11 Ala. 855; Butler *v.* O'Brien, 5 Ala. 316.

Georgia.— Cecil *v.* Gazan, 71 Ga. 631; Smith *v.* Wilson, 58 Ga. 322 [*following* Foster *v.* Higginbotham, 49 Ga. 263].

Illinois.— Ripley *v.* People's Sav. Bank, 18 Ill. App. 430.

Indiana.—Tyner *v.* Gapin, 3 Blackf. (Ind.) 370.

Iowa.— Markley *v.* Kecney, 87 Iowa 398, 54 N. W. 251.

Kentucky.— Morrow *v.* Smith, 4 B. Mon. (Ky.) 99; Miller *v.* Somerset Cedar Post, etc., Co., 21 Ky. L. Rep. 424, 51 S. W. 615.

Louisiana.— Gilkeson Sloss Commission Co. *v.* Bond, 44 La. Ann. 841, 11 So. 220 [*citing* Carroll *v.* Bridewell, 27 La. Ann. 239; Fleming *v.* Shields, 21 La. Ann. 118, 99 Am. Dec. 719]; Harper *v.* Commercial, etc., R. Bank, 15 La. Ann. 136; Frost *v.* White, 14 La. Ann. 140; Romagosa *v.* De Nodal, 12 La. Ann. 341; Ft. Wayne First Nat. Bank *v.* Ft. Wayne Artificial Ice Co., (La. 1900) 29 So. 379; Lee *v.* Bradlee, 8 Mart. (La.) 20. After submitting to the decision of the court the issue whether his alleged title is a simulation *vel non*, the intervener cannot dispute plaintiff's right to raise the issue otherwise than in a direct action in declaration of simulation. Schlieder *v.* Martinez, 38 La. Ann. 847.

Maryland.— Turner *v.* Lytle, 59 Md. 199.

Missouri.— Brownwell, etc., Car Co. *v.* Barnard, 139 Mo. 142, 40 S. W. 762; Hewson *v.* Tootle, 72 Mo. 632; Mills *v.* Thomson, 61 Mo. 415; Beck *v.* Wisely, 63 Mo. App. 239; Toney *v.* Goodley, 57 Mo. App. 235; Rindskoff *v.* Rogers, 34 Mo. App. 126; Nolan *v.* Deutsch, 23 Mo. App. 1.

New York.— Marx *v.* Ciancimino, 59 N. Y. App. Div. 570, 69 N. Y. Suppl. 672; Deimel *v.* Scheveland, 16 Daly (N. Y.) 34, 9 N. Y. Suppl. 482, 955, 29 N. Y. St. 713.

North Carolina.—Cotton Mills *v.* Weil, 129 N. C. 452, 40 S. E. 218; Springfield First Nat. Bank *v.* Asheville Furniture, etc., Co., 120 N. C. 475, 26 S. E. 927; Blair *v.* Puryear, 87 N. C. 101; Sims *v.* Goettle, 82 N. C. 268; Toms *v.* Warson, 66 N. C. 417; McLean *v.* Douglass, 28 N. C. 233.

Ohio.— Vallette *v.* Kentucky Trust Co. Bank, 2 Handy (Ohio) 1, 12 Ohio Dec. (Reprint) 299, where it is said that there may be cases in which the interest in the property attached, on the part of a third person, also involves an interest in the justice and amount of the claim of attachment plaintiff. This appears to be the case with different attaching creditors. For such a case, Ohio Code, § 225 (Ohio Rev. Stat. § 5559) probably provides by directing that where several attachments are executed on the same property the court, on motion of any of the plaintiffs, may order a reference to ascertain and report the amounts and prioritics of the several attachments.

Texas.— Pittman *v.* Rotan Grocery Co., 15 Tex. Civ. App. 676, 39 S. W. 1108. But irregularities in, or the invalidity of, the proceedings may be availed of by special plea pointing out the grounds relied on. Ft. Worth Pub. Co. *v.* Hitson, 80 Tex. 216, 14 S. W. 843, 16 S. W. 551; Roos *v.* Lewyn, 5 Tex. Civ. App. 593, 23 S. W. 450, 24 S. W. 538. But where no question is made in the pleadings, or otherwise, as to the regularity of a writ of attachment under which seizure was made, it is not necessary to submit to a jury the existence of the writ. Gilmour *v.* Heinze, 85 Tex. 76, 19 S. W. 1075. A subsequent purchaser intervening on the ground that a previous attachment was not based on a valid debt need not move to quash the attachment, but the issue of fact may be tried on the plea in intervention. Barkley *v.* Wood, (Tex. Civ. App. 1897) 41 S. W. 717.

Vermont.— Sanborn *v.* Kittredge, 20 Vt. 632, 50 Am. Dec. 58.

Virginia.— Starke *v.* Scott, 78 Va. 180; Smith *v.* Hunt, 2 Rob. (Va.) 205.

Wisconsin.— S. C. Herbst Importing Co. *v.* Burnham, 81 Wis. 408, 51 N. W. 262.

United States.— Swift *v.* Russell, 97 Fed. 443, 38 C. C. A. 259, construing Arkansas statute.

Canada.— Doyle *v.* Lasher, 16 U. C. C. P. 263, holding that the proper frame of an interpleader issue between a claimant of attached property and the attaching creditor is whether the goods taken under attachment were at the time of seizure the property of claimant as against attaching creditor, not as against absconding debtor.

Attacking validity of attachment.— For the special practice of certain states in allowing persons other than defendant to attack validity of attachment see *supra*, XII, B, 2, a; *infra*, XV, B, 1.

Where the trustee in a trust deed intervenes in an attachment suit against his grantees, secures the release of the property without assistance from the beneficiaries, and asserts his right to the property thereunder, his right to recover rests upon the validity of his title, and he cannot invoke the equities of any of the beneficiaries who are not parties. Batavia *v.* Wallace, 102 Fed. 240, 42 C. C. A. 310, construing Missouri statute.

62. Fleming *v.* Shields, 21 La. Ann. 118, 99 Am. Dec. 719 [*citing* Yeatman *v.* Estill, 13 La. Ann. 222; West *v.* His Creditors, 8 Rob. (La.) 123; Lee *v.* Bradlee, 8 Mart. (La.) 20].

63. Ft. Wayne First Nat. Bank *v.* Ft. Wayne Artificial Ice Co., (La. 1900) 29 So. 379; Lee *v.* Bradlee, 8 Mart. (La.) 20; Deimel *v.* Scheveland, 16 Daly (N. Y.) 34, 9 N. Y. Suppl. 482, 955, 29 N. Y. St. 713.

64. Lee *v.* Bradlee, 8 Mart. (La.) 20.

plaintiff's claim,[65] or the grounds of attachment where judgment against defendant has been rendered,[66] although there are decisions which recognize the right of claimant, under such circumstances, to contest the validity of the proceedings on the ground of jurisdictional defects,[67] or where the process is void on its face.[68] Again, the question of value or damages for detention cannot as a general rule be considered,[69] unless the issue is not restricted to the establishment of claimant's title or right of possession.[70]

g. Pleading — (I) *Complaint, Interplea, or Petition* — (A) *In General.* The complaint, interplea, or petition should be in writing,[71] and where statutes so require must be verified[72] by the party himself, his agent, or attorney.[73] It must, of course, set out matter sufficient to present an issue,[74] and to support a verdict and judgment.[75]

(B) *Particular Averments* — (1) Nature of Claim. The nature of the claim to the property should be stated,[76] and whether the claim be absolute or conditional.[77] Moreover, it has been held requisite for the claimant of the

65. Schloss *v.* Inman, (Ala. 1901) 30 So. 667; Sloan *v.* Hudson, 119 Ala. 27, 24 So. 458; Schamagel *v.* Whitehurst, 103 Ala. 260, 15 So. 611. Where a valid debt is proved, intervener cannot take advantage of a variance between the pleading and the proof as to its nature. Barkley *v.* Wood, (Tex. Civ. App. 1897) 41 S. W. 717.

Fraud.— In Louisiana claimant may show that plaintiff and defendant in attachment perpetrated fraud in combining to have the attachment issued to defeat intervener's property. Gilkeson Sloss Commission *v.* Bond, 44 La. Ann. 841, 11 So. 220. But the fictitious or simulated character of attachment plaintiff's claim cannot be raised by a creditor intervening under Miss. Code, § 174; nor can he move for an itemized account of the claim. Meridian First Nat. Bank *v.* Cochran, 71 Miss. 175, 14 So. 439.

66. Curtis *v.* Wortsman, 26 Fed. 36 [*citing* Foster *v.* Higginbotham, 49 Ga. 263].

67. Jackson *v.* Bain, 74 Ala. 328; Ellis *v.* Martin, 60 Ala. 394; Noyes *v.* Canada, 30 Fed. 665.

68. Dollins *v.* Pollock, 89 Ala. 351, 7 So. 904; Nordlinger *v.* Gordon, 72 Ala. 239.

69. McLean *v.* Douglass, 28 N. C. 233; Swift *v.* Russell, 97 Fed. 443, 28 C. C. A. 259 (construing Arkansas statute).

70. Turner *v.* Lytle, 59 Md. 199.

Failure to make issue.—Where a third person claims attached goods and files an affidavit of value, there is no issue as to value on the trial of the right of property, the defense giving no evidence of a greater value. Peterson *v.* Woolery, 9 Wash. 390, 37 Pac. 416.

71. Neal *v.* Newland, 4 Ark. 459.

72. *Alabama.*— Walker *v.* Ivey, 74 Ala. 475.

Illinois.— Farwell *v.* Jenkins, 18 Ill. App. 491.

Kansas.— Standard Implement Co. *v.* Lansing Wagon Works, 58 Kan. 125, 48 Pac. 638.

Kentucky.— Bamberger *v.* Halberg, 78 Ky. 376.

Missouri.— S. Albert Grocer Co. *v.* Goetz, 57 Mo. App. 8; Knapp *v.* Standley, 45 Mo. App. 264.

Texas.—McKinnon *v.* Reliance Lumber Co., 63 Tex. 30.

Utah.— Snell *v.* Crowe, 3 Utah 26, 5 Pac. 522.

73. Standard Implement Co. *v.* Lansing Wagon Works, 58 Kan. 125, 48 Pac. 638.

Sufficiency of verification by attorney.— The attorney of an interpleader may swear to the best of his knowledge and belief. Knapp *v.* Standley, 45 Mo. App. 264.

Where the complaint is verified and the answer makes no denial the allegations of the complaint are admitted with respect to the value of the attached property and the amount of damages. Snell *v.* Crowe, 3 Utah 26, 5 Pac. 522.

74. Neal *v.* Newland, 4 Ark. 459; Emerson *v.* McGregor First Nat. Bank, (Tex. Civ. App. 1894) 25 S. W. 433, the latter case holding that an averment that at the time of the levy the property was that of claimant and in his possession and control, and that he was entitled to hold the same from seizure, sufficiently presents an issue as to whether the property was that of attachment defendant, and subject to levy, and as to whether claimant could be deprived of possession.

Missouri — Following language of statute. — An interplea under Mo. Rev. Stat. (1889), § 572, need aver nothing not indicated by the statute. It is not necessary to make allegations that would be necessary for a settlement in replevin. S. Albert Grocer Co. *v.* Goetz, 57 Mo. App. 8.

75. Neal *v.* Newland, 4 Ark. 459.

76. *Indiana.*— Maus *v.* Bome, 123 Ind. 522, 24 N. E. 345.

Kentucky.— Bamberger *v.* Halberg, 78 Ky. 376; Freeman *v.* Lander, 3 Ky. L. Rep. 324.

Louisiana.— Lahitte *v.* Frere, 42 La. Ann. 864, 8 So. 598.

Missouri.— Wyeth Hardware Co. *v.* Carthage Hardware Co., 75 Mo. App. 518; S. Albert Grocer Co. *v.* Goetz, 57 Mo. App. 8.

Texas.— Choate *v.* McIlhenny Co., 71 Tex. 119, 9 S. W. 83; Whitman *v.* Willis, 51 Tex. 421; Emerson *v.* McGregor First Nat. Bank, (Tex. Civ. App. 1894) 25 S. W. 433.

77. Maus *v.* Bome, 123 Ind. 522, 24 N. E. 345.

attached property to deny in his complaint, interplea, or petition the claim of attachment plaintiff.[78]

(2) DESCRIPTION OF PROPERTY. A sufficient description of attached property should be given,[79] and the value of the property claimed should be averred.[80]

(c) *Amendments.* An amendment to the intervening petition setting up new issues and new causes of action must be made in due season.[81]

(II) *ANSWER OR PLEA.* Where the petition is filed in the attachment suit to which claimant has thereby become a party, the petition is taken as his answer, and unless replied to by plaintiff is an admission of what is alleged therein.[82] Where statutes require all pleadings to be in writing an answer to an interplea must be in writing,[83] and should sufficiently tender an issue.[84] Where claimants are permitted to deny the validity of the levy, the defect must be pointed out in the answer or plea.[85]

h. Evidence — (I) *BURDEN OF PROOF.* Where a party interpleads, or institutes an independent action, claiming a right in the property superior to that of the attaching creditor, the burden is, as a rule,[86] upon him to establish the

Aider by verdict.— A complaint defective for want of such an allegation is aided by verdict. Freeman *v.* Lander, 3 Ky. L. Rep. 324.

Allegation of ownership is sufficient. Maus *v.* Bome, 123 Ind. 522, 24 N. E. 345.

A person claiming in a fiduciary capacity must allege facts warranting his intervention. Sammis *v.* Hitt, 112 Iowa 664, 84 N. W. 945.

Failure to state true nature of claim.— A claimant failing to state that attachment debtor owned only a half interest in the property cannot take advantage of this circumstance on the trial. Choate *v.* McIlhenny Co., 71 Tex. 119, 9 S. W. 83; Freeman *v.* Lander, 3 Ky. L. Rep. 324.

When basis of claim is mortgage.— The interplea may simply state that interpleader is owner of the property, but if he shows a mortgage to secure a debt he must allege the maturity of the debt and a breach of the mortgage. Wyeth Hardware Co. *v.* Carthage Hardware Co., 75 Mo. App. 518. Where the only claim asserted is that of ownership, but in fact the claim is founded on a mortgage, a judgment against the interpleader will not be reversed, in order that he may assert his claim as mortgagee. Johnson *v.* Hatfield, 8 Ky. L. Rep. 427.

Where title is not directly involved such facts must be alleged as will authorize a court of equity to grant claimant a writ of injunction. Whitman *v.* Willis, 51 Tex. 421.

Failure of intervener claiming as assignee for creditors to file deed of assignment is ground for a motion for a more specific statement, but not for demurrer to the petition. Sanger *v.* Flow, 48 Fed. 152, 4 U. S. App. 32, 1 C. C. A. 56, construing Arkansas statute.

78. Bamberger *v.* Halberg, 78 Ky. 376.

79. Grove *v.* Foutch, 6 Colo. App. 357, 40 Pac. 852, where an allegation that the intervener claimed "all the goods and chattels attached" was held sufficient.

80. Ashley *v.* Millett, 8 Ky. L. Rep. 536, holding that a failure to make such an allegation is not cured by filing an affidavit of value.

81. Bicklin *v.* Kendall, 72 Iowa 490, 34 N. W. 283, holding that, under Iowa Code (1873), § 3016, an amendment cannot be made after final judgment in the attachment proceedings, which settled all the rights of the parties thereto, including the claim of the interpleader, and after the attached property had been sold.

82. Williams *v.* Vanmetre, 19 Ill. 293; Ashley *v.* Millett, 8 Ky. L. Rep. 536.

83. Rosewater *v.* Schwab Clothing Co., 58 Ark. 446, 25 S. W. 73.

84. Emerson *v.* McGregor First Nat. Bank, (Tex. Civ. App. 1894) 25 S. W. 433.

It may, by way of general denial or otherwise, show that the title of claimant is fraudulent as to creditors of attachment defendant. Lahitte *v.* Frere, 42 La. Ann. 864, 8 So. 598; Claflin *v.* Sommers, 39 Mo. App. 419.

Sufficient answer.— An averment that at the time of seizure of goods under attachment they were the property of attachment defendant and subject to plaintiff's attachment is sufficient. Smokey *v.* Wack, 57 Miss. 832.

Where an interplea admits indebtedness of attachment defendant plaintiff need not allege such indebtedness in his answer. Meyberg *v.* Jacobs, 40 Mo. App. 128.

Amendment to answer.— Where the creditors stipulate not to file an answer, and not to interpose any defense to claim of intervener, except as to matters of law arising on the pleadings, the creditors cannot amend by showing distribution to them of the proceeds of the attached property subsequently to the interplea. Robinson *v.* Belt, 2 Indian Terr. 360, 51 S. W. 975.

85. Davis *v.* Dallas Nat. Bank, 7 Tex. Civ. App. 41, 26 S. W. 222 [*following* Ft. Worth Pub. Co. *v.* Hitson, 80 Tex. 216, 14 S. W. 843, 16 S. W. 551].

86. Possession of the property by the intervening claimant at the time of the levy raises a presumption that he was then the owner of the property. Doane *v.* Glenn, 1 Colo. 495.

validity of his claim.[87] By statute, however, if claimant is in possession at the time of the levy, the burden has been placed upon the attaching party;[88] and in some states the statutes impose upon the attaching creditor the duty of introducing evidence showing *prima facie* ownership of property in the debtor and that it was subject to levy, whereupon the burden of proof shifts to claimant to establish his claim.[89] If, however, the transfer of the property to the interpleader is admitted and fraud is alleged, to avoid such conveyance the burden of proof is upon the party so alleging.[90]

Sufficient possession to warrant presumption.— Evidence that cattle were waybilled as belonging to the interpleader and that he went with them to the place of their consignment where they were attached for the debt of the shipper while still on the cars shows such actual possession of the interpleader as to warrant the presumption of his ownership, although the carrier had possession for the purpose of carriage. Wear *v.* Sanger, 91 Mo. 348, 2 S. W. 307.

87. *Colorado.*— Burr *v.* Clement, 9 Colo. 1, 4, 9 Pac. 633, where it is said: "The correct view, as it seems to us, is that the interpleader in such case, by interpleading, is deemed to admit *prima facie* the legal possession of the attaching creditor, and sets up a right in himself to overcome the presumptive or supposed right founded upon the legal process of the attachment proceedings; the burden of proof is upon the interpleading claimant to show a superior right in himself; if he fails in this, it leaves the possession and presumptive right thereof in the attaching creditor, as at the beginning of the contest upon the interplea."

District of Columbia.—Daniels *v.* Solomon, 11 App. Cas. (D. C.) 163.

Georgia.— Thompson *v.* Waterman, 100 Ga. 586, 28 S. E. 286.

Illinois.— Hollenback *v.* Todd, 119 Ill. 543, 8 N. E. 829.

Iowa.—Lagomarcino *v.* Quattrochi, 89 Iowa 197, 56 N. W. 435; Saar *v.* Fuller, 71 Iowa 425, 32 N. W. 405.

Kansas.— Standard Implement Co. *v.* Parlin, etc., Co., 51 Kan. 566, 33 Pac. 363.

Louisiana.— Ft. Wayne First Nat. Bank *v.* Ft. Wayne Artificial Ice Co., (La. 1900) 29 So. 379; Minge *v.* Barbre, 51 La. Ann. 1285, 26 So. 180; Ober *v.* Matthews, 24 La. Ann. 90.

Mississippi.— It is held that it is incumbent upon a claimant to show that he was an innocent purchaser for value. Richards *v.* Vaccaro, (Miss. 1890) 7 So. 506.

Missouri.— Stone *v.* Spencer, 77 Mo. 356; Rock Island Implement Co. *v.* Sloan, 83 Mo. App. 438; Wyeth Hardware Co. *v.* Carthage Hardware Co., 75 Mo. App. 518; Boller *v.* Cohen, 42 Mo. App. 97.

North Carolina.— Wallace *v.* Robeson, 100 N. C. 206, 6 S. E. 650.

United States.— Sanger *v.* Flow, 48 Fed. 152, 4 U. S. App. 32, 1 C. C. A. 56, construing Arkansas statute.

See 5 Cent. Dig. tit. "Attachment," § 1105.

As dependent upon grounds of claimant's motion.— In some jurisdictions the determination of whether the burden of proof shall be on attachment plaintiff or claimant seems to be dependent upon the grounds upon which claimant places his claim. If the interplea is a denial of plaintiff's right to hold the property because of some vice or defect in the judgment proceedings, the burden is upon attachment plaintiff to show the levy of a valid process and *prima facie* ownership in attachment defendant, before it is necessary for claimant to introduce any evidence; but where the interpleader does not assail any irregularity or validity of the attachment proceedings, but simply asserts his claim of ownership to the property, the burden is on him as to all facts essential to his cause of action. Swofford Bros. Dry-Goods Co. *v.* Smith-McCord Dry-Goods Co., 1 Indian Terr. 314, 37 S. W. 103. And see Standard Implement Co. *v.* Parlin, etc., Co., 51 Kan. 566, 33 Pac. 363.

88. Compton *v.* Marshall, 88 Tex. 50, 27 S. W. 121, 28 S. W. 518, 29 S. W. 1059; Brown *v.* Lessing, 70 Tex. 544, 7 S. W. 783; Lewy *v.* Fischl, 65 Tex. 311.

Where the sheriff's return does not state who was in possession, it is further incumbent upon the attaching party to prove by competent evidence who was in possession. Boaz *v.* Schneider, 69 Tex. 128, 6 S. W. 402.

Where attachment defendant is in possession the rule is otherwise and it is not necessary that defendant should be in the actual corporeal possession of the property. It is sufficient if it is found in the possession of his agents or those holding it in his behalf or in his right. Pierson *v.* Tom, 10 Tex. 145.

89. Wollner *v.* Lehman, 85 Ala. 274, 4 So. 643; Foster *v.* Goodwin, 82 Ala. 384, 2 So. 895; Jackson *v.* Bain, 74 Ala. 328; Shahan *v.* Herzberg, 73 Ala. 59. And see Bernheim *v.* Dibrell, (Miss. 1892) 11 So. 795; Mandel *v.* McClure, 14 Sm. & M. (Miss.) 11.

When the attaching creditor's claim antedates the sale or conveyance by which claimant obtained title the burden is on the claimant to prove that he paid an adequate and valuable consideration. Ellis *v.* Allen, 80 Ala. 515, 2 So. 676.

90. Reinecke *v.* Gruner, 111 Iowa 731, 82 N. W. 900; Mansur-Tebbetts Implement Co. *v.* Ritchie, 143 Mo. 587, 45 S. W. 634; J. S. Merrill Drug Co. *v.* Knighton, 73 Mo. App. 571; Meyberg *v.* Jacobs, 40 Mo. App. 128; Morgan *v.* Wood, 38 Mo. App. 255; Deering *v.* Collins, 38 Mo. App. 73; Ellis *v.* Valentine, 65 Tex. 532.

(II) *Admissibility* — (A) *In General* — (1) Rule Stated. Inasmuch as the proper procedure of the interpleading claimant is determined largely by the statutes of each jurisdiction, no general rules concerning the admissibility of evidence therein can be laid down. The claimant must, however, establish his title,[91] and can recover only on the strength thereof.[92] Hence, if he bases his claim on an assignment as payment of the prior debt proof of the debt is essential to his recovery.[93] He may, however, on framing the proper issue, show that the judgment obtained by the attaching creditor against the debtor was obtained by collusion and fraud.[94] On the part of the attaching creditor it would seem that any facts disproving or tending to avoid such title[95] can be shown under the denial contained in the general replication.[96] He cannot, however, show that other persons have an interest in conjunction with the interpleader, or that the interest of the interpleader is subject to the claims of a stranger.[97]

(2) Acts, Admissions, or Declarations of Parties — (a) Of Attachment Defendant. The acts or declarations of attachment defendant while in possession, tending to indicate or explain the character of his possession, are admissible,[98] it would seem, as a part of the *res gestæ*;[99] but declarations of defendant after he

91. Hutchinson Nat. Bank *v.* Crow, 56 Ill. App. 558; Harper *v.* Commercial, etc., Bank, 15 La. Ann. 136.

Admissibility of bill of sale to show title. —A bill of sale offered for the purpose of showing that the title to the property is in claimant, if bearing date after the levy, is *prima facie* irrelevant. Fontaine *v.* Beers, 19 Ala. 722. Nor would it be admissible at the instance of claimant, without proof by the attesting witness of its execution, or accounting for the absence of such witness. Martin *v.* Mayer, 112 Ala. 620, 20 So. 963.

Testimony relating to the transaction between plaintiff and attachment defendant is competent and admissible to prove a sale of the property to claimant. Frank *v.* Levi, 110 Iowa 267, 81 N. W. 459.

Admissibility of judgment to show interest of intervener in property.— A judgment obtained by a subsequently attaching creditor is admissible in evidence in favor of an assignee thereof, when the latter intervenes in a suit between the prior attaching creditor and the debtor for the purpose of showing that the relation of creditor and debtor existed between his assignor and the debtor, and that he has succeeded to the former's rights by the assignment. Cogbill *v.* Marks, 29 Cal. 673.

Claimant under a prior execution by garnishment must show a valid judgment on which the execution was issued. Alley *v.* Myers, 2 Tenn. Ch. 206.

92. Thompson *v.* Waterman, 100 Ga. 586, 28 S. E. 286.

If claimant bases his title upon a fraudulent bill of sale which is insufficient to transfer title he cannot recover. Dallas Nat. Bank *v.* Davis, 78 Tex. 362, 14 S. W. 706.

If the claim is joint neither is entitled to recover unless both can show a good title; and therefore if the evidence shows that the title of one was acquired by fraud the claim must fail as to the other. Cottingham *v.* Armour Packing Co., 109 Ala. 421, 19 So. 842.

93. Blackly *v.* Matlock, 3 La. Ann. 366. But a debt due from the attachment debtor is sufficient consideration to sustain the transfer to the interpleader. Hamburg *v.* Wood, 66 Tex. 168, 18 S. W. 623.

94. Still *v.* Focke, 66 Tex. 715, 2 S. W. 59.

95. Thus, where claimant shows title in himself by a mortgage from defendant prior to the levy of the attachment, plaintiff may, in rebuttal, introduce the instrument creating his lien, which shows that his claim is antecedent in date to claimant's mortgage. Boswell *v.* Carlisle, 55 Ala. 554.

96. Hutchinson Nat. Bank *v.* Crow, 56 Ill. App. 558; Tennent *v.* Battey, 18 Kan. 324.

A contract apparently showing an abandonment by claimant of his claim is admissible. Henderson *v.* Baker, 20 Ky. L. Rep. 580, 47 S. W. 211.

When claimant is the wife of attachment defendant and derives title to the property under bills of sale, or other written instruments, from third persons, plaintiff may prove in rebuttal acts of ownership on the part of the husband, with the knowledge and consent of the wife, subsequent to the date of such written instrument and prior to the levy. Roberts *v.* Burgess, 85 Ala. 192, 4 So. 733.

97. Levy *v.* Levy, 31 Mo. 403.

98. Wright *v.* Smith, 66 Ala. 514; Pulliam *v.* Newberry, 41 Ala. 168; Rowan *v.* Hutchisson, 27 Ala. 328; Maus *v.* Bome, 123 Ind. 522, 24 N. E. 345.

Sale after date of supposed mortgage.— After the date of a supposed mortgage to claimant it may be shown that defendant sold a part of the mortgaged goods in the absence of the claimant; but this is admissible as explanatory of defendant's possession and not as a circumstance to show the bad faith of the mortgage transaction. Mayer *v.* Clark, 40 Ala. 259.

99. McCrae *v.* Young, 43 Ala. 622; Derrett *v.* Alexander, 25 Ala. 265; Fontaine *v.* Beers, 19 Ala. 722; French *v.* Sale, 60 Miss. 516.

has parted with his possession,[1] or subsequently to the levy and interposition of claimant's claim,[2] are inadmissible against him.[3]

(b) Of Claimant. Declarations of a claimant tending to prove the validity of his title to property in controversy are inadmissible;[4] but his admissions or declarations derogatory to his claim are admissible in evidence against him.[5]

(c) Of Party in Possession. The testimony of a witness that he held possession of the goods for claimant but not for attachment defendant is admissible when the title of the latter is not well established.[6]

(3) Affidavit and Bond of Claimant. The affidavit[7] and bond given by claimant for the redelivery of the property[8] are admissible for plaintiff to prove the levy.

(4) Proceedings in Attachment — (a) Writ. In a statutory trial of the right of property the writ of attachment is admissible in evidence against claimant,[9] and, if lost, may be proved by secondary evidence.[10]

(b) Judgment. Inasmuch as the validity or invalidity of attachment plaintiff's claim against defendant does not arise on the trial of the right of property, it has been held that a judgment in an attachment suit would be inadmissible as evidence against claimant in a trial of the right of property.[11]

(5) Relationship of Claimant.[12] Evidence that claimant was a relative

1. Smith *v.* Haire, 58 Ga. 446.

2. Fontaine *v.* Beers, 19 Ala. 722.

3. Pulliam *v.* Newberry, 41 Ala. 168.

When the attachment and interplea are tried together it is not error to admit evidence of acts of the debtor which might have been inadmissible had the interplea been tried alone. Carl, etc., Co. *v.* Beal, etc., Co., 64 Ark. 373, 42 S. W. 664.

Attachment defendant's receipt for the price of property attached, received from claimant, is admissible, and *prima facie* evidence of the claim. Obart *v.* Letson, 17 N. J. L. 78, 34 Am. Dec. 182.

A replevin bond executed by attachment defendant, which does not in express terms assert that he claims or has an interest in the attachment property, is not admissible in evidence against a claimant as proof of defendant's title to the property at the time of the levy. Wright *v.* Smith, 66 Ala. 514.

4. Barber *v.* Kinard, (Miss. 1888) 4 So. 120. But see Martin *v.* Duncan, 181 Ill. 120, 54 N. E. 908 [*affirming* 79 Ill. App. 527].

5. As for instance a writing executed by the interpleader authorizing her attorney to withdraw her plea and allow judgment to go against her. F. O. Sawyer Paper Co. *v.* Mangan, 68 Mo. App. 1.

What constitutes an admission.— A claimant, by admitting that land levied upon under an execution on a judgment in attachment against a non-resident was *prima facie* subject to that execution, does not thereby admit that attachment defendant was in possession when the attachment was levied, or that the levy was legal. New England Mortg. Security Co. *v.* Watson, 99 Ga. 733, 27 S. E. 160. An admission by claimant that attachment defendant was in possession at the time of the levy would, however, place upon him the burden of proof, and it would be incumbent upon him to show that such possession was not inconsistent with his own claim. People's Nat. Bank *v.* Harper, (Ga. 1902) 40 S. E. 717 [*citing* Richardson *v.* Subers, 82 Ga. 427, 9 S. E. 172]. And see Bleven *v.* Freer, 10 Cal. 172, holding that an admission by a claimant that the attached property is that of the debtor is *prima facie* evidence against him, and casts upon him the burden of proof.

6. Max *v.* Watkins, 30 Ga. 682.

7. Guy *v.* Lee, 81 Ala. 163, 2 So. 273.

8. Guy *v.* Lee, 81 Ala. 163, 2 So. 273; Mayer *v.* Clark, 40 Ala. 259; Henderson *v.* Montgomery Bank, 11 Ala. 855.

9. Guy *v.* Lee, 81 Ala. 163, 2 So. 273 [*citing* Mayer *v.* Clark, 40 Ala. 259; Lanier *v.* Montgomery Branch Bank, 18 Ala. 625]; Sheldon *v.* Reihle, 2 Ill. 519.

If regular on its face it will be presumed to have been properly issued. Harris *v.* Dangherty, 74 Tex. 1, 11 S. W. 921, 15 Am. St. Rep. 812.

As the validity of the writ should not be contested except by a special plea pointing out the grounds relied on for its invalidity, a failure to introduce the writ in evidence, where claimant pleads a general denial, is no ground for reversing a judgment in favor of the attaching party (Ft. Worth Pub. Co. *v.* Hitson, 80 Tex. 216, 14 S. W. 843, 16 S. W. 551), and if not attacked by special plea the writ itself is sufficient evidence of its validity (Yarborough *v.* Weaver, (Tex. Civ. App. 1893) 22 S. W. 771).

10. Derrett *v.* Alexander, 25 Ala. 265.

11. Taliaferro *v.* Lane, 23 Ala. 369. See also French *v.* Sale, 60 Miss. 516, holding that, under the proper procedure in Mississippi, the judgment in favor of attachment plaintiff against attachment defendant is a part of the record in a trial of the right of property against a claimant and need not be offered in evidence.

12. **Membership of same church.**—It is incompetent for the attaching creditor, in the absence of any evidence showing the application of such testimony, to prove that the interpleader and attachment debtor were mem-

of one of the attachment defendants is inadmissible as against the intervener.[13]

(B) *To Contradict Officer's Return.* An interpleader is not a party to the suit in the sense that the officer's return is conclusive against him, and evidence contradictory thereof is admissible on his behalf.[14]

(C) *To Show Fraud in Defendant's Acquisition of Property.* If claimant alleges that attachment defendant obtained the goods from him through fraud, collections made and disposition of assets by defendant prior to the levy are competent and admissible.[15] He may likewise testify to statements made by defendant to obtain such credit from him.[16]

(D) *To Show Fraudulent Transfer to Claimant.* Evidence tending to show that the title of the interpleader was fraudulently acquired is admissible,[17] although in some jurisdictions attaching plaintiff must prove defendant's indebtedness to him before he can attack the *bona fides* of the transfer.[18] If attachment defendant has, by default, admitted the fraud, it is only necessary to connect the interpleader with it to show knowledge in himself or agent;[19] but such judgment is not *prima facie* evidence that the sale to claimant was fraudulent.[20] This fraud must, however, be proved by evidence other than the affidavit for attachment, which in some jurisdictions is held inadmissible for that purpose.[21] On the other hand, claimant cannot in rebuttal introduce his petition filed in an action against his debtor in a suit to which attaching creditor was not a party showing the consideration paid for the property.[22]

(E) *To Show Indebtedness to Claimant.* The account-books of a debtor are admissible to show the existence and amount of his indebtedness to intervening claimant.[23]

bers of the same church. Albert *v.* Besel, 88 Mo. 150.

13. Baum *v.* Sanger, (Tex. Civ. App. 1898) 49 S. W. 650, holding further that evidence of prior failures of certain of the defendants in which they had preferred the claimant as a creditor is inadmissible. *Compare* Porterfield *v.* Greenwood, 10 La. Ann. 51.

14. Burgert *v.* Borchert, 59 Mo. 80, where the court say that if the interpleader has neglected to interplead he might still assert his claim to the property in an action of replevin, in which action the return of the sheriff might be contradicted by other evidence; that the mere fact that the party chose interpleader as his relief should not debar him from introducing evidence contradictory to the sheriff's return; or, in other words, the form of the action would not change the rule of the evidence, or render that conclusive which otherwise would be *prima facie*.

15. But transactions subsequent thereto are not. Wollner *v.* Lehman, 85 Ala. 274, 4 So. 643.

16. D'Arrigo *v.* Texas Produce Co., 18 Tex. Civ. App. 41, 44 S. W. 531.

17. Mankato First Nat. Bank *v.* Kansas City Lime Co., 43 Mo. App. 561. Thus where a bank intervenes, claiming to have purchased the attached property of defendant in payment and satisfaction of all claims held by it against him, questions tending to bring out the *bona fides* of the transaction are admissible. Deere *v.* Wolf, 77 Iowa 115, 41 N. W. 588. And see Meyberg *v.* Jacobs, 40 Mo. App. 128, where it was held eminently proper to ask the husband and agent of the interpleader what he had said about this not being the first sale he had had attached as a "humbug sale."

Where the validity of the sale is the only issue, evidence that claimant, who had purchased the property only twelve days before the levy, was in possession at the time of the levy is not admissible as showing the title in him. Springfield First Nat. Bank *v.* Asheville Furniture, etc., Co., 120 N. C. 475, 26 S. E. 927.

The fact that defendant is a son of the interpleader is not in itself evidence of fraud. Splawn *v.* Martin, 17 Ark. 146.

18. Campbell, etc., Co. *v.* Ross, 187 Ill. 553, 58 N. E. 596 [*affirming* 86 Ill. App. 356]; Springer *v.* Bigford, 160 Ill. 495, 43 N. E. 751 [*affirming* 55 Ill. App. 198]; Commercial Nat. Bank *v.* Canniff, 51 Ill. App. 579.

The affidavits, bonds, and other papers in attachment are not evidence of such indebtedness. Yost Mfg. Co. *v.* Alton, 168 Ill. 564, 48 N. E. 175.

19. Graham Paper Co. *v.* St. Joseph Times Printing, etc., Co., 79 Mo. App. 504.

20. Ott *v.* Smith, 68 Miss. 773, 10 So. 70. And see Lewy *v.* Fischl, 65 Tex. 311, holding that the introduction of the affidavit for attachment and the judgment against attachment defendant foreclosing the attachment lien does not show *prima facie* that claimant acquired his title fraudulently.

21. Dollins *v.* Pollock, 89 Ala. 351, 7 So. 904; Albert *v.* Besel, 88 Mo. 150.

22. Howard *v.* Parks, 1 Tex. Civ. App. 603, 21 S. W. 269.

23. Broach *v.* Wortheimer-Swartz Shoe Co., (Miss. 1897) 21 So. 300.

(F) *To Prove Title in Third Party.* As an intervening claimant of property must recover on the strength of his own title,[24] any evidence tending to show title in a third person not connected with the suit is inadmissible,[25] unless claimant in some proper way connects himself with such outstanding title.[26]

(G) *To Prove Value of Property.* Evidence of the value of the property in a suit between claimant and the attaching creditor is relevant and admissible,[27] and may be offered by either party.[28] If attachment plaintiff fails to recover judgment the exclusion of such evidence would not be an error for which he could complain;[29] although if the validity of the conveyance to claimant is assailed its exclusion would be reversible error.[30] As tending to prove such value it has been held that the inventory or appraisal made by the attaching officer is admissible at the instance of the attaching creditor.[31]

(III) *Weight and Sufficiency* — (A) *On Part of Attaching Creditor* — (1) In General. In a suit between a claimant and a plaintiff in attachment the latter makes out a *prima facie* case when he shows his judgment and that the property attached was in the possession of defendant at the time the levy was made;[32] although in some jurisdictions he must also prove that the property in controversy belonged to attachment defendant at the time of the levy.[33] It is not

24. See *supra*, XIV, A, 8, h, (II), (A), (1).

Should be allowed to show removal of defects to title.— Where it appears that a claimant has received an absolute bill of sale of property, but that after its execution it was modified by a subsequent agreement so as to make it invalid as to attaching creditors, claimant should be allowed to show that before the levy of the attachment the second agreement had been abrogated by the parties; and it is error to refuse to allow him to thus show a good title. Davis *v.* Dallas Nat. Bank, 7 Tex. Civ. App. 41, 26 S. W. 222.

25. Seisel *v.* Folmar, 103 Ala. 491, 15 So. 850; Starnes *v.* Allen, 58 Ala. 316; Tomlinson *v.* Collins, 20 Conn. 364; Thompson *v.* Waterman, 100 Ga. 586, 28 S. E. 286 [*citing* Moody *v.* Travis, 76 Ga. 832].

Rule does not preclude claimant from showing source of title in third party.— An intervener may show in the prosecution of his claim that before the attachment issued defendant had sold the property to persons from whom claimant purchased it. In such case he does not claim the property as that of a third person. His object in producing the evidence is simply to show that defendant had parted with his interest before the issue of attachment. It is necessary for the intervener to show his claim of title, but there is no good reason why he should be precluded from showing that the property had ceased to belong to defendant and was owned by persons from whom the intervener derived his title. Shields *v.* Perry, 16 La. 463.

26. Wollner *v.* Lehman, 85 Ala. 274, 4 So. 643; Jackson *v.* Bain, 74 Ala. 328.

If claimant claims as trustee he must show the existence and *bona fides* of the secured debts. Elliott *v.* Stocks, 67 Ala. 290.

27. Wollner *v.* Lehman, 85 Ala. 274, 4 So. 643; Roswald *v.* Hobbie, 85 Ala. 73, 4 So. 177, 7 Am. St. Rep. 23. And see Schluter *v.* Jacobs, 10 Colo. 449, 15 Pac. 813 [*approving* Turner *v.* Lytle, 59 Md. 199], holding that, under Colo. Gen. Stat. § 2011, which provides for summary proceedings to try the title to property, and if found to be in claimant, for the assessment of damages and for costs, the court having found the title to be in claimant may receive evidence as to the value of the goods, although no formal issue of value is raised by the pleadings.

28. Roswald *v.* Hobbie, 85 Ala. 73, 4 So. 177, 7 Am. St. Rep. 23.

29. Roswald *v.* Hobbie, 85 Ala. 73, 4 So. 177, 7 Am. St. Rep. 23.

30. Roswald *v.* Hobbie, 85 Ala. 73, 4 So. 177, 7 Am. St. Rep. 23.

31. Roswald *v.* Hobbie, 85 Ala. 73, 4 So. 177, 7 Am. St. Rep. 23; Schloss *v.* Inman, (Ala. 1901) 30 So. 667. *Contra*, Leeser *v.* Boekhoff, 33 Mo. App. 223.

32. Curtis *v.* Wortsman, 25 Fed. 893.

The facts were sufficient to support a verdict for attachment plaintiff in Sargent *v.* Cameron, 11 Colo. App. 200, 53 Pac. 394; F. O. Sawyer Paper Co. *v.* Mangan, 68 Mo. App. 1; Tillman *v.* Fletcher, 78 Tex. 673, 15 S. W. 161; Floege *v.* Wiedner, 77 Tex. 311, 14 S. W. 132; Reavis *v.* Moore, (Tex. Civ. App. 1892) 20 S. W. 955.

33. Elliott *v.* Stocks, 67 Ala. 290, holding that for this purpose he may trace the title from the original owner to defendant and show the character of the actual possession to disprove the authority of the one actually in possession to convey or assign the property to claimant; and in such a case any evidence as to the authority of the person in actual possession to convey the property, or as to the consideration of the conveyance, is admissible.

In Louisiana the attaching creditor need not show that the property belonged to his debtor. It is sufficient to show that it did not belong to the intervener. Slocomb *v.* Breedlove, 8 La. 143, 28 Am. Dec. 135.

Prima facie case.— In Schamagel *v.* White-

necessary for attaching plaintiff to show that he is a creditor in good faith until his *bona fides* is questioned.[34]

(2) Proof of Debt. In a controversy between an attaching creditor and the claimant of the property the creditor must show that attachment defendant owed the debt or some part thereof.[35] In some jurisdictions the attachment proceedings are sufficient proof of this indebtedness,[36] while in others they are only so when attachment defendant is in possession of the property, and if it was taken from the possession of a claimant a judgment or other proof is required.[37]

(B) *On Part of Claimant.* The claimant of attached property need not prove his title beyond a reasonable doubt,[38] and although his evidence is such that a demurrer might be sustained thereto yet, if the introduction of the creditor's evidence shows for him a *prima facie* case of ownership,[39] the judgment must be in his favor.[40] It is incumbent upon claimant, however, to show that he acquired his title prior to the interposition of his claim.[41] If he claims as a trustee for the benefit of creditors he must show that there are other creditors than attachment plaintiff;[42] if he alleges fraud on the part of the attachment debtor, evidence of a general nature and founded largely upon supposition will be insufficient on his part;[43] and where there is evidence that claimant acquired his title fraudulently it is error for the court to direct a verdict in his favor.[44]

hurst, 103 Ala. 260, 15 So. 611, where plaintiff introduced evidence which tended to show that the property belonged to defendant debtor, and also introduced claimant's affidavit and bond, which recited the levy of the attachment on the property at the suit of plaintiff against defendant, it was held that plaintiff had made out a *prima facie* case, and that it was unnecessary for him to introduce additional evidence to show the levy of the attachment; the recitals of the claimant's affidavit and bond estopping him from denying the levy. A judgment condemning property to be sold is *prima facie* evidence but not conclusive in a suit between attachment plaintiff and an interpleader that the title to the property is in attachment defendant. State *v.* Spikes, 33 Ark. 801.

34. Peterson *v.* Woolery, 9 Wash. 390, 37 Pac. 416.

35. Dickman *v.* Williams, 50 Miss. 500.

36. Moore *v.* Penn, 95 Ala. 200, 10 So. 343; Pulliam *v.* Newberry, 41 Ala. 168; Butler *v.* O'Brien, 5 Ala. 316. But it would not be error to allow plaintiff to introduce the notes which are the evidence of the original debt and to state their consideration. Mayer *v.* Clark, 40 Ala. 259.

When introduction of such record unnecessary.— If claimants in the progress of the trial admit that the attached property and that which they claim is one and the same, it is not necessary for the attaching creditor to offer in evidence the record in the attachment suit to show that he has secured a lien on the property. Swofford Bros. Dry-Goods Co. *v.* Smith-McCord Dry-Goods Co., 85 Fed. 417, 56 U. S. App. 355, 29 C. C. A. 239.

37. Sexey *v.* Adkinson, 34 Cal. 346, 91 Am. Dec. 698. And see Shaffer *v.* Alden, 2 Ind. 42, where, although the property was in the possession of claimant, the court laid no stress upon this fact, but simply held that the affidavit in the attachment was insufficient to prove the indebtedness of the attaching creditor.

38. Wollner *v.* Lehman, 85 Ala. 274, 4 So. 643.

The mere fact that interpleader is a relative of defendant does not require of him a clearer proof of title. Troy Fertilizer Co. *v.* Norman, 107 Ala. 667, 18 So. 201.

The evidence was held sufficient to justify a verdict for claimant in Bowling *v.* Davis, 103 Ky. 187, 19 Ky. L. Rep. 1859, 44 S. W. 643, 45 S. W. 77; Hahn *v.* Katz, (Miss. 1899) 24 So. 964; Hargadine *v.* Davis, (Tex. Civ. App. 1896) 34 S. W. 342.

39. As where, for instance, it shows interpleader to have been in possession of the attached goods. Baer *v.* Groves, 46 Mo. App. 245.

40. If the interpleader makes out a prima facie case evidence in rebuttal, from which a jury might infer that he had knowledge of the attachment debtors' fraud, does not destroy the interpleader's whole case or authorize the court to direct a verdict against him. John Deere Plow Co. *v.* Sullivan, 158 Mo. 440, 59 S. W. 1005.

41. Seisel *v.* Folmar, 103 Ala. 491, 15 So. 850; Foster *v.* Goodwin, 82 Ala. 384, 2 So. 895.

42. Reynolds *v.* Collins, 78 Ala. 94.

The reason being that if there were no other creditors his interference would be a useless proceeding. Caton *v.* Jones, 21 Tex. 788.

If he claims as administrator he must offer proof tending to show his authority as such. Sammis *v.* Hitt, 112 Iowa 664, 84 N. W. 945.

43. Perkins *v.* Lyons, 111 Iowa 192, 82 N. W. 486.

Where a claimant interposes a claim to certain goods under each of two different attachments, a payment of the assessed value of the goods under one claim does not of itself sustain his claim under the second attachment. Derrett *v.* Alexander, 25 Ala. 265.

44. Meridian Fertilizer Factory *v.* Bush, 77 Miss. 697, 27 So. 645; Burns *v.* Woolery, 15 Wash. 134, 45 Pac. 894.

i. Trial — (I) *Order of Trying Principal Action and Right to Attached Property.* In some jurisdictions the right to the attached property is required to be tried prior to the determination of the rights of the parties to the original action,[45] while in others it may not be tried until the attachment suit has been prosecuted to judgment.[46]

(II) *Consolidation of Claims Under Several Attachments.* Where different parties levy attachments on the same property, the causes for a trial of the right of property may be consolidated, although claimant has given separate bonds to the creditors, but the failure to consolidate is not available as error if no injury resulted.[47]

(III) *Province of Court and Jury.* All questions of fact must as a general rule be submitted to the jury,[48] and its finding either way should not be disturbed.[49] Thus the *bona fides* of claimant's claim is always a question for the jury,[50] as is the question of the attaching creditor's knowledge that a third party owned the property.[51] In like manner the jury should determine whether there is such a depreciation if the attached property is at the time of attachment subject to a mortgage providing that the mortgagee may take the property into his possession in the event of an unreasonable depreciation in its value.[52] Where, however, it is apparent from the evidence that claimant has no cause of action, the court may properly direct a verdict to be returned in favor of attaching creditor or the officer attaching the property.[53]

The mere showing of admissions of defendant in favor of claimant's title and a surrender of possession to claimant a few hours before the levy does not overcome the *prima facie* case which the possession by attachment defendant on the date of the levy and for some time previous, and the use of the property apparently as his own, makes against claimant. Harvey *v.* Jewell, 84 Ga. 234, 10 S. E. 631.

45. Wheeles *v.* New York Steam Dye Works, (Ala. 1901) 29 So. 793; Sloan *v.* Hudson, 119 Ala. 27, 24 So. 458; Abraham *v.* Nicrosi, 87 Ala. 173, 6 So. 293; Moore *v.* Dickerson, 44 Ala. 485; Lampley *v.* Beavers, 25 Ala. 534; Howard *v.* Oppenheimer, 25 Md. 350; Brownwell, etc., Car Co. *v.* Barnard, 139 Mo. 142, 40 S. W. 762; Bradley Hubbard Mfg. Co. *v.* Bean, 20 Mo. App. 111; Melvin *v.* Chaney, 8 Tex. Civ. App. 252, 28 S. W. 241.

Claim to part of attached property.— Although by statute no judgment can be rendered in the principal action until the determination of the claim suit, yet where only a part of the property levied on is claimed there need be no suspension of the trial in the main action. Richards *v.* Bestor, 90 Ala. 352, 8 So. 30.

Where property in the hands of a garnishee is claimed, the issue upon the interpleader must be tried and determined before the trial of the issue between plaintiff and garnishee. Ladd *v.* Couzins, 35 Mo. 513.

46. Gazan *v.* Royce, 78 Ga. 512, 3 S. E. 753 [*disapproving* Hines *v.* Kimball, 47 Ga. 587]; Dickman *v.* Williams, 50 Miss. 500 [*disapproving* Melius *v.* Houston, 41 Miss. 59]; Maury *v.* Roberts, 27 Miss. 225; Mandel *v.* McClure, 14 Sm. & M. (Miss.) 11; Waples-Platter Co. *v.* Low, 54 Fed. 93, 10 U. S. App. 704, 4 C. C. A. 205; Sanger *v.* Flow, 48 Fed. 152, 4 U. S. App. 32, 1 C. C. A. 56, the last two cases construing Arkansas statute.

Under the Georgia act of 1814, the sheriff or constable was required to return the fact of the claim to the court not to the "term of the court," and the claim was to be tried at the same term to which the attachment was made returnable unless the case was continued. Simmons *v.* Bennett, 20 Ga. 48.

47. Davis *v.* Dallas Nat. Bank, 7 Tex. Civ. App. 41, 26 S. W. 222.

48. *Colorado.*— Campbell *v.* Denver First Nat. Bank, 22 Colo. 177, 43 Pac. 1007.

Iowa.— Saar *v.* Fuller, 71 Iowa 425, 32 N. W. 405.

Maryland.— Cecil Bank *v.* Snively, 23 Md. 253.

Michigan.—Heaton *v.* Nelson, 74 Mich. 199, 41 N. W. 895.

Missouri.— John Deere Plow Co. *v.* Sullivan, 158 Mo. 440, 59 S. W. 1005; Hagardine-McKittric Dry Goods Co. *v.* Carnahan, 83 Mo. App. 318; Henton *v.* Spearman, 62 Mo. App. 307.

New Hampshire.—Taylor *v.* Jones, 42 N. H. 25.

Texas.— Baum *v.* Sanger, (Tex. Civ. App. 1898) 49 S. W. 650.

49. Heaton *v.* Nelson, 74 Mich. 199, 41 N. W. 895; John Deere Plow Co. *v.* Sullivan, 158 Mo. 440, 59 S. W. 1005; Hagardine-McKittric Dry Goods Co. *v.* Carnahan, 83 Mo. App. 318.

50. Cecil Bank *v.* Snively, 23 Md. 253; Heaton *v.* Nelson, 74 Mich. 199, 41 N. W. 895; John Deere Plow Co. *v.* Sullivan, 158 Mo. 440, 59 S. W. 1005; Hagardine-McKittric Dry Goods Co. *v.* Carnahan, 83 Mo. App. 318; Baum *v.* Sanger, (Tex. Civ. App. 1898) 49 S. W. 650; St. Louis Wire-Mill Co. *v.* Lindheim (Tex. App. 1892) 18 S. W. 675.

51. Campbell *v.* Denver First Nat. Bank, 22 Colo. 177, 43 Pac. 1007.

52. Henton *v.* Spearman, 62 Mo. App. 307.

53. Munns *v.* Loveland, 15 Utah 250, 49 Pac. 743, holding that, in replevin for the

(iv) *Instructions.* On the trial of the right to the attached property the instructions given by the court should not in any manner invade the province of the jury by withdrawing from its consideration any question of fact,[54] must not be conflicting,[55] misleading,[56] or in any way prejudicial to either party;[57] and must correctly state the law upon the evidence before the jury.[58] Moreover, an instruction in such case should not hypothesize a state of facts, and upon their existence direct a verdict, unless all facts are hypothesized that are necessary to sustain one.[59] So, the instructions should define to the jury the issues that are for its consideration,[60] and should confine its attention to the issues made by the pleadings.[61]

possession of goods or their value against a sheriff attaching same as the property of attachment defendant, where the liability of the officer is dependent upon the validity of a sale of the goods claimed to have been made by a bill of sale never recorded, and where there was no change of possession as required by Utah Comp. Laws (1888), § 2837, it is not erroneous for the court to direct a jury to return a verdict of no cause of action.

54. Union Mfg., etc., Co. *v.* East Alabama Nat. Bank, (Ala. 1901) 29 So. 781.

55. Mansur-Tebbetts Implement Co. *v.* Ritchie, 143 Mo. 587, 45 S. W. 634, holding that an instruction given for the attaching creditor declaring that the burden of proof is on claimant conflicts with an instruction given for claimant declaring that fraud must be proved, and not presumed, and that upon the attaching creditor lies the burden of proof.

Instructions not conflicting.— Instructions that if property was taken from claimant's possession the burden of proof would be upon plaintiff in attachment, and that in the absence of a bill of sale there is a presumption that claimant has no title to such property are not conflicting. Traders Nat. Bank *v.* Day, 7 Tex. Civ. App. 569, 27 S. W. 264.

56. Mayer *v.* Walker, 82 Tex. 222, 17 S. W. 505.

Goods in controversy.—Where instructions refer to property as "goods in controversy" the term is not misleading when referring alone to the attached property. Mayer *v.* Walker, 82 Tex. 222, 17 S. W. 505.

57. What Cheer *v.* Hines, 86 Iowa 231, 53 N. W. 126, holding that where the question is as to the *bona fides* of a sale to claimant an erroneous charge that he was in possession of the property at the time of attachment is prejudicial.

An instruction which confines the damages recoverable by a person claiming as mortgagee to the reasonable value of the property that is attached, provided that such value does not exceed the amount of the mortgage debt, is not prejudicial to plaintiff in attachment. State *v.* Crowder, 40 Mo. App. 536.

58. *Colorado.*— Comforth *v.* Maguire, 12 Colo. 432, 21 Pac. 191.

Georgia.— Winston First Nat. Bank *v.* Atlanta Rubber Co., 77 Ga. 781.

Iowa.— Martin *v.* Davis, 76 Iowa 762, 40 N. W. 712.

Missouri.— Harvey *v.* Stephens, 159 Mo. 486, 60 S. W. 1055; Stewart *v.* Outhwaite, 141 Mo. 562, 44 S. W. 326; Edwards *v.* Stewart, (Mo. 1897) 44 S. W. 326; Desnoyers Shoe Co. *v.* Lisman, 85 Mo. App. 340; Baer *v.* Lisman, 85 Mo. App. 317.

Montana.— Brownell *v.* McCormick, 7 Mont. 12, 14 Pac. 651.

Texas.— Traders Nat. Bank *v.* Day, 7 Tex. Civ. App. 569, 27 S. W. 264.

Where the question of burden of proof is ignored and no instruction thereon requested, and the only question is whether claimant purchased from defendant in attachment in good faith, an instruction that claimant must show by preponderance of evidence that he is owner, and that if a purchase from defendant in attachment and payment to him for the property were in good faith the sale was valid but otherwise invalid does not appear to be erroneous as casting on claimant the burden of proof. Martin *v.* Davis, 76 Iowa 762, 40 N. W. 712.

Where the good faith of a transaction between claimant and defendant is in question, it is erroneous to charge that claimant should recover if a chattel mortgage and bill of sale were given in consideration of a valid subsisting debt. Stewart *v.* Outhwaite, 141 Mo. 562, 44 S. W. 326. See also Martin *v.* Davis, 76 Iowa 762, 40 N. W. 712.

Where the court charges properly on a theory urged by claimants that the property was purchased for them and never belonged to defendant in attachment, it is not erroneous as against them to charge also touching a sale by him to them, even if the only evidence of such sale is the fact that he delivered them possession. Harvey *v.* Jewell, 84 Ga. 234, 10 S. E. 631.

59. Fink *v.* Phelps, 30 Mo. App. 431, holding that where the interpleader claimed to have purchased the property *bona fide* prior to the attachment an instruction purporting to cover the whole case and directing a verdict for the interpleader without reference to a change of possession was erroneous.

60. Neill *v.* Rogers Bros. Produce Co., 41 W. Va. 37, 23 S. E. 702.

61. Springfield Engine, etc., Co. *v.* Glazier, 55 Mo. App. 95; Rindskoff *v.* Rogers, 34 Mo. App. 126; McLean *v.* Douglass, 28 N. C. 233.

A charge as to the value of property attached is erroneous where the only issue is whether such property is that of claimant. Springfield Engine, etc., Co. *v.* Glazier, 55 Mo. App. 95. The fact that the property has been destroyed does not change the rule. McLean *v.* Douglass, 28 N. C. 233.

The instructions should also be so framed as to confine the jury's attention to the evidence adduced in the case.[62]

(v) *VERDICT*—(A) *In General.* In order to support a judgment the verdict must be free from uncertainty,[63] responsive to the issue or issues,[64] to the evidence,[65] and to the charge of the court.[66] It must, moreover, dispose of the whole

Where the only issue is the right of property an instruction authorizing a money verdict is erroneous. Rindskoff *v.* Rogers, 34 Mo. App. 126.

An interpleader tendering an immaterial issue on which he introduces evidence cannot complain of instructions respecting such issue, especially where it is apparent that they were not prejudicial to him. Mansur-Tebbetts Implement Co. *v.* Ritchie, 143 Mo. 587, 45 S. W. 634.

Ownership of claimant.— An instruction that the only question is whether the property is that of claimant who claims in his own right and as guardian of minor children having undivided interests properly submits the question of ownership to the jury, when the evidence discloses that claimant holds in his own right and as guardian. Breedlove *v.* Dennis, 2 Indian Terr. 606, 53 S. W. 436.

62. Yarborough *v.* Moss, 9 Ala. 382; Stewart *v.* Outhwaite, 141 Mo. 562, 44 S. W. 326; Mahner *v.* Linck, 70 Mo. App. 380.

Where the allegations are admitted the jury may be so instructed. Snell *v.* Crowe, 3 Utah 26, 5 Pac. 522.

63. Heidenheimer *v.* Johnson, 76 Tex. 200, 13 S. W. 46; Pitkins *v.* Johnson, (Tex. 1886) 2 S. W. 459.

A verdict which in effect finds the property to be in attachment plaintiff as against claimant is sufficient, even if it does not say so in express words. It is not necessary to find that the attachment lien should be established upon the property. Pitkins *v.* Johnson, (Tex. 1886) 2 S. W. 459.

A verdict for each of several interveners and against attachment plaintiff for a specific sum with interest from a certain date at a fixed rate is sufficiently intelligible to authorize a judgment. Heidenheimer *v.* Johnson, 76 Tex. 200, 13 S. W. 46.

Where several claim suits are pending in the same tribunal, each presenting precisely the same issues on the record, and the determination of these issues depends upon precisely the same evidence in each case, an agreement of all parties that a verdict in one case actually submitted to the jury shall be the verdict in all of the cases has the effect of making the finding in the case that is actually tried regular and valid in all of them. Jaffray *v.* Smith, 106 Ala. 112, 17 So. 218.

Conflict between special finding and general verdict.— A general finding that claimants are not owners of the property and specially that defendant in attachment and claimants were owners at the time of attachment is not necessarily inconsistent. Moffitt *v.* Albert, 97 Iowa 213, 66 N. W. 162.

A finding of the value of the property and that claimant has failed to establish a right to it is sufficient. Floege *v.* Wiedner, 77 Tex. 311, 14 S. W. 132.

Where the property is found subject to attachment the verdict need not specify why it was subject to attachment, whether there be one or several issues. Daniel *v.* Frost, 62 Ga. 697.

Insufficiency of general finding.— Where the evidence shows that attachment defendant had an interest in the property attached it is error for the jury to find in general terms for claimant. Columbia Bank *v.* Spring, 55 N. J. L. 545, 26 Atl. 711.

A verdict that "the jury find the issue for the claimant" is sufficient to support a judgment thereon. Beck *v.* Wisely, 63 Mo. App. 239.

64. Hewson *v.* Tootle, 72 Mo. 632; Mills *v.* Thomson, 61 Mo. 415; Hagardine-McKittric Dry Goods Co. *v.* Carnahan, 83 Mo. App. 318; Plano Mfg. Co. *v.* Cunningham, 73 Mo. App. 376; Beck *v.* Wisely, 63 Mo. App. 239; S. Albert Grocer Co. *v.* Goetz, 57 Mo. App. 8; Nelson Distilling Co. *v.* Hubbard, 53 Mo. App. 23; Rindskoff *v.* Rogers, 34 Mo. App. 126; Nolan *v.* Deutsch, 23 Mo. App. 1; Pitkins *v.* Johnson, (Tex. 1886) 2 S. W. 459.

A verdict in favor of claimant for money is not responsive to an issue whether the property is that of claimant. Hewson *v.* Tootle, 72 Mo. 632; Rindskoff *v.* Rogers, 34 Mo. App. 126. See also Plano Mfg. Co. *v.* Cunningham, 73 Mo. App. 376. But where the property has been sold by order of court and the proceeds converted into money and brought into court, a verdict for delivery of possession of the specific property is not necessary, and a money verdict is sufficient, even though the law provides that the verdict may be for return of the property, or for a judgment for its value where it cannot be returned. Ranney-Alton Mercantile Co. *v.* Hanes, 9 Okla. 471, 60 Pac. 284.

Triable issues see *supra*, XIV, A, 8, f.

65. Ranney-Alton Mercantile Co. *v.* Hanes, 9 Okla. 471, 60 Pac. 284; Halff *v.* Goldfrank, (Tex. Civ. App. 1899) 49 S. W. 1095; Linz *v.* Atchison, 14 Tex. Civ. App. 647, 38 S. W. 640, 47 S. W. 542.

Where the verdict is for attachment plaintiff claimant cannot object that the jury did not understand the issue, because they found the value of the property attached to be much less than the proof indicated. Halff *v.* Goldfrank, (Tex. Civ. App. 1899) 49 S. W. 1095.

66. Heidenheimer *v.* Johnson, 76 Tex. 200, 13 S. W. 46, holding where the court instructs the jury as to the form of verdict in the event of a finding in favor of claimant, and the verdict returned is in a different form, that it is sufficient to support a judg-

issue submitted to the jury.[67] In cases of special ownership or partial interest in the property or its proceeds, where there is a privity of title between claimant and attachment defendant, the jury should make a finding as to the extent of claimant's interest therein if they have found that the attached property belongs to him.[68]

(B) *Assessing Value of Property.* It is not necessary to assess the value of the property claimed,[69] unless so required by statute.[70]

(C) *Setting Aside Verdict.* Where the verdict is neither responsive to the issues nor supported by the evidence it will be set aside.[71]

(D) *Amending Verdict.* Where the verdict as returned by the jury is responsive to the issue which has been tried, and the intent of the jury is clear, the court may, and should, correct it in matters of form and detail, but it must not amend it in such a manner as to change its meaning or effect.[72]

j. Judgment — (I) *In General.* There must be a valid judgment,[73]

ment thereon, provided it is responsive to the issues presented, and its meaning is definite and clear. Heidenheimer *v.* Johnson, 76 Tex. 200, 13 S. W. 46.

67. State Bank *v.* Byrd, 8 Ark. 152; Pitkins *v.* Johnson, (Tex. 1886) 2 S. W. 459.

Where two or more chattels are attached and a claim is made to all of them, a verdict in favor of claimant for one chattel only, without a finding for either party as to the remainder of the chattels, is a mere nullity. State Bank *v.* Byrd, 8 Ark. 152.

68. Nelson Distilling Co. *v.* Hubbard, 53 Mo. App. 23.

Unless a special interest is claimed the amount of claimant's interest in the property need not be stated. Beck *v.* Wisely, 63 Mo. App. 239.

69. Powell *v.* Hadden, 21 Ala. 745; Seamans *v.* White, 8 Ala. 656.

70. Jordan *v.* Collins, 107 Ala. 572, 18 So. 137; Jaffray *v.* Smith, 106 Ala. 112, 17 So. 218; Roberts *v.* Burgess, 85 Ala. 192, 4 So. 733; Clarke *v.* Parker, 63 Miss. 549; Irion *v.* Hume, 50 Miss. 419.

Where several chattels are attached.— In Alabama, under statute, the jury must, when practicable, assess the value of several articles claimed separately. Jordan *v.* Collins, 107 Ala. 572, 18 So. 137. Failure to assess value separately is not ground for motion in arrest of judgment, under a statute requiring an assessment in this manner when practicable, since where a record fails to show that it was done the presumption is that it was not practicable. Jordan *v.* Collins, 107 Ala. 572, 18 So. 137.

When writ of inquiry necessary.— Where the jury fails to assess the value of the property, and there is nothing in the return of the officer who made the attachment indicating what the value is, a writ of inquiry should be prosecuted to determine the value. Clarke *v.* Parker, 63 Miss. 549. Where the value of the property is not assessed, and there is a judgment for plaintiff in attachment, he may elect to take the value of the property as assessed by the officer at the time of the levy of the attachment. Irion *v.* Hume, 50 Miss. 419.

71. Columbia Bank *v.* Spring, 55 N. J. L. 545, 26 Atl. 711; Ranney-Alton Mercantile Co. *v.* Hanes, 9 Okla. 471, 60 Pac. 284.

Effect of insufficient verdict.— The fact that a verdict is insufficient does not entitle interpleader to file a second interplea, nor after such a verdict and a judgment thereon in his favor can his name be struck from the docket without his consent. State Bank *v.* Byrd, 8 Ark. 152.

72. Swofford Bros. Dry-Goods Co. *v.* Smith-McCord Dry-Goods Co., 85 Fed. 417, 56 U. S. App. 355, 29 C. C. A. 239 [*affirming* 1 Indian Terr. 314, 37 S. W. 103].

Time of amendment.— Amendment may be made after the jury has been discharged. Swofford Bros. Dry-Goods Co. *v.* Smith-McCord Dry-Goods Co., 85 Fed. 417, 56 U. S. App. 355, 29 C. C. A. 239 [*affirming* 1 Indian Terr. 314, 37 S. W. 103].

Verdict prepared by court.— Where the jury return an informal verdict the court may ask whether the jury intends to find for plaintiff in attachment, and upon a reply in the affirmative may order the jury to return a verdict prepared by the court, provided the court does not in any manner direct the jury or indicate in any degree through the medium of a form what the character of the verdict should be. Floege *v.* Wiedner, 77 Tex. 311, 14 S. W. 132.

73. State *v.* Silverstein, 77 Mo. App. 304, holding that a verdict merely cannot be substituted for both verdict and judgment.

A judgment in favor of claimant for the property attached, "costs of suit taxed against the plaintiff," is sufficient to support an appeal. Sloan *v.* Hudson, 119 Ala. 27, 24 So. 458.

Where claimant has not complied with jurisdictional requirements as to the making of an affidavit of claim to property levied on, and as to execution of a bond conditioned and payable in the manner and amount prescribed by statute, no judgment can be rendered, except perhaps for costs against claimant. Mobile L. Ins. Co. *v.* Teague, 78 Ala. 147.

Where the claim of an intervener is not adjudicated upon in the attachment suit, and

founded upon a regular and valid verdict, to which the judgment must conform.[74] Moreover, it should be in accordance with any statutory provision.[75] Where sureties have intervened and defended claimant's rights judgment may be rendered in their behalf, although it inures to the benefit of claimant.[76] Where claimant fails to appear and join issue judgment by default may be had against him like any other defendant.[77] In event of a clerical misprision, the judgment may be amended on motion,[78] or, where necessary, it may be reformed.[79]

(II) *Assessment of Value of Property.* The judgment need not contain an assessment of the value of the property,[80] unless statutes provide otherwise.[81]

(III) *In Favor of Claimant.* Where judgment is in favor of claimant and the goods claimed have been sold under attachment, the proceeds of the sale being in the hands of the proper officer, judgment should be that claimant have and recover the proceeds arising from the sale of the goods by such officer, who should be ordered to pay the proceeds to claimant;[82] and

it does not appear that it was abandoned or that the intervener has any knowledge of a judgment rendered against defendant in attachment the rights of intervener are unaffected, and he may retain possession if he has it. Levy *v.* Weber, 8 La. Ann. 439.

74. Clarke *v.* Parker, 63 Miss. 549; Hewson *v.* Tootle, 72 Mo. 632; Mills *v.* Thomson, 61 Mo. 415; Hagardine-McKittric Dry Goods Co. *v.* Carnahan, 83 Mo. App. 318; Nelson Distilling Co. *v.* Hubbard, 53 Mo. App. 23. Where a verdict was rendered finding the claimant owner of the goods seized and giving damages judgment was entered thereon which, in addition, decreed that possession be delivered to the intervener. This was held pursuant to the verdict. Bach *v.* Leopold, 8 La. Ann. 386. Where claimant received a portion of his claim upon a sale of the property, in accordance with an agreement under which he permitted a sale thereof, a judgment based upon a finding that his claim was invalid should contain a provision establishing his right to the money he received from the sale, as against the other parties where an advantage was secured to them by reason of the sale. Bryant *v.* Fink, 75 Iowa 516, 39 N. W. 820.

A special finding controls where inconsistent with a general verdict: thus, where there is a general verdict against claimants, and a special finding that they had some interest in the property at the time of attachment, and claimants do not ask for an order protecting their interests after the special finding is returned a judgment on the general verdict should not be disturbed. Moffitt *v.* Albert, 97 Iowa 213, 66 N. W. 162.

Joint judgment.—Under Tex. Rev. Stat. art. 4843, a judgment in favor of several plaintiffs should not be a joint one, but it should establish the rights and priorities. Ft. Worth Pub. Co. *v.* Hitson, 80 Tex. 216, 14 S. W. 843, 16 S. W. 551.

75. Martin *v.* Harnett, 86 Tex. 517, 674, 25 S. W. 1115, 26 S. W. 945; Pitkins *v.* Johnson, (Tex. 1886) 2 S. W. 459.

A judgment not following a statute strictly will not be reversed where no injury results to claimant. Cobb *v.* Campbell, (Tex. Civ. App. 1896) 38 S. W. 246.

In Texas judgment against claimant may be satisfied by return of the property to the attaching creditor under Tex. Rev. Stat. art. 4845. This provision, however, in no way controls the form of judgment but simply grants to claimant a means of satisfying the same otherwise than by paying it in money. Floege *v.* Wiedner, 77 Tex. 311, 14 S. W. 132.

76. Boehm *v.* Calisch, (Tex. 1887) 3 S. W. 293.

77. Cobb *v.* Campbell, (Tex. Civ. App. 1896) 38 S. W. 246 [*citing* Martin *v.* Harnett, 86 Tex. 517, 674, 25 S. W. 1115, 26 S. W. 945, and Tex. Rev. Stat. art. 4835].

78. Seisel *v.* Folmar, 103 Ala. 491, 15 So. 850; Gray *v.* Raiborn, 53 Ala. 40.

79. Burlacher *v.* Watson, 38 Tex. 62.

80. Seamans *v.* White, 8 Ala. 656. But see Derrett *v.* Alexander, 25 Ala. 265, where it was said that some necessity existed for ascertaining its value, as in case of execution from courts of record.

The judgment need not find the value of each article claimed. Joslin *v.* McGee, 5 Colo. App. 531, 39 Pac. 349.

81. Martin *v.* Harnett, 86 Tex. 517, 674, 25 S. W. 1115, 26 S. W. 945.

In Texas under Rev. Stat. art. 4843, judgment should fix the value of the use of property where there is judgment for plaintiffs in attachment. Ft. Worth Pub. Co. *v.* Hitson, 80 Tex. 216, 14 S. W. 843, 16 S. W. 551.

Where the jury duly assessed separately the value of different articles such separate values need not be repeated in the judgment. Roberts *v.* Burgess, 85 Ala. 192, 4 So. 733.

82. Fly *v.* Grieb, 62 Ark. 209, 35 S. W. 214; Hewson *v.* Tootle, 72 Mo. 632; Rogers, etc., Hardware Co. *v.* Randell, 69 Mo. App. 342; Williams *v.* Braden, 57 Mo. App. 317; S. Albert Grocer Co. *v.* Goetz, 57 Mo. App. 8; Rindskoff *v.* Rogers, 34 Mo. App. 126; Nolan *v.* Deutsch, 23 Mo. App. 1.

Where claimant has only a partial interest in the property the proceeds of sale should be awarded to him according to his interest therein as ascertained by the verdict. Nelson Distilling Co. *v.* Hubbard, 53 Mo. App. 23.

Where all the property was sold as perishable and an interplea is sustained as to a portion thereof, the amount realized on the sale of the property adjudged to the interpleader may be ascertained by the court, and

it is erroneous to enter judgment for value of the property against plaintiff in attachment.[83]

(IV) *AGAINST CLAIMANT.* Where the issue is found against claimant, the judgment should, under some statutes, condemn the property to the satisfaction of the judgment in the attachment which has been or may be obtained,[84] it being erroneous to render a money judgment against him,[85] to direct that claimant and his sureties in the claim bond pay plaintiff in attachment the value of the property as assessed by the jury and the costs of suit,[86] or to order the issue of an execution against claimant in advance of the return of the claim bond forfeited.[87] Under other statutes, judgment may be rendered against claimant and his sureties on the bond, in the event of its forfeiture or breach of condition,[88]

payment thereof ordered to be made to the interpleader. If the attaching creditor appeals from the order he cannot complain that the amount ordered to be paid is excessive, unless he calls the attention of the trial court thereto. St. Louis Brewing Assoc. *v.* Drulinger, 62 Mo. App. 485.

Where the property has previously been sold by order of court judgment for recovery and restitution of the property is improper. The defect, however, is not a ground for reversal, as the court has power to make judgments conform to the issues tried in the cause. Scott-Force Hat Co. *v.* Hombs, 127 Mo. 392, 30 S. W. 183.

Where there are separate attachments and a claim to the property filed by the same person in each, claimant cannot, upon obtaining judgment for recovery and restitution in one case, have possession of the proceeds of the property if sold, till all the suits have been determined. State *v.* Hockaday, 132 Mo. 227, 33 S. W. 812.

Where an appeal from a justice of the peace is taken to a circuit court, such court has the same power to order the proceeds of the sale of attached property to be turned over as if the proceedings originated in it. Springfield Engine, etc., Co. *v.* Glazier, 65 Mo. App. 616.

83. Williams *v.* Braden, 57 Mo. App. 317.

Where one of two claimants is found to be owner as against attachment plaintiff and another claimant in possession, judgment should be entered for the possession and against attachment plaintiff for the value of the property in the event of it not being delivered up. Burlacher *v.* Watson, 38 Tex. 62.

84. Jaffray *v.* Smith, 106 Ala. 112, 17 So. 218; Seisel *v.* Folmar, 103 Ala. 491, 15 So. 850; Abraham *v.* Nicrosi, 87 Ala. 173, 6 So. 293; Gray *v.* Raiborn, 53 Ala. 40; Derrett *v.* Alexander, 25 Ala. 265; Seamans *v.* White, 8 Ala. 656; Box *v.* Goodbar, 54 Ark. 6, 14 S. W. 925; Weber *v.* Mick, 131 Ill. 520, 23 N. E. 646.

Where judgment has already been rendered in the original attachment suit, a judgment condemning the property is appropriate. Rogers *v.* Bailey, 121 Ala. 314, 25 So. 909 [*citing* Roberts *v.* Burgess, 85 Ala. 192, 4 So. 733].

On a finding that the property belongs to one claiming as trustee under a mortgage, judgment should not give the attaching creditor a lien on the surplus beyond the amount required to satisfy the debts secured by the mortgage. This would give a levy by seizure the effect of service of a writ of garnishment. Linz *v.* Atchison, 14 Tex. Civ. App. 647, 38 S. W. 640, 47 S. W. 542.

Upon a finding that the property was subject to a valid mortgage, a judgment in favor of claimant should not discharge the attachment lien, but should direct that the mortgagee retain possession until the mortgage is discharged, but that the attaching creditor may sell subject to the mortgage, in the manner provided by Tex. Rev. Stat. art. 2296. Lapowski *v.* Taylor, 13 Tex. Civ. App. 624, 35 S. W. 934.

An attaching creditor who proves his debt may have a personal decree against attachment defendant, even if the property attached is awarded to another claimant. Schofield *v.* Cox, 8 Gratt. (Va.) 533.

Attachment lien enforced in judgment against claimant.— An express vendor's lien on personal property attached in an action for the purchase-money may be foreclosed if the attaching creditor gets judgment but does not foreclose his lien, and enforced in a judgment subsequently rendered against claimant in a trial of right to the property, notwithstanding that the attachment debtor is not a party to such action. Howard *v.* Parks, 1 Tex. Civ. App. 603, 21 S. W. 269.

85. Clarinda Valley Bank *v.* Wolf, 101 Iowa 51, 69 N. W. 1131.

86. Seisel *v.* Folmar, 103 Ala. 491, 15 So. 850; Gray *v.* Raiborn, 53 Ala. 40; Derrett *v.* Alexander, 25 Ala. 265; Box *v.* Goodbar, 54 Ark. 6, 14 S. W. 925.

87. Rogers *v.* Bailey, 121 Ala. 314, 25 So. 909.

88. In Arkansas the judgment does not accrue unless the appraisal of the property is made and shown by the officer's return, and not then until the officer shows by his return, on a fieri facias issued against defendant in the original suit, the failure of the obligors on the bond to deliver the property according to its conditions. Turner *v.* Collier, 37 Ark. 528.

In Kentucky it is error to render a personal judgment for the value of the attached property against the principal obligor without permitting him to deliver the property or show its value. Connor *v.* Williams, 17 Ky. L. Rep. 73, 30 S. W. 401.

In Mississippi under Anno. Code, § 167, if

and where judgment may thus be entered against claimant and his sureties attachment plaintiff may have execution issue thereon.[89]

(v) *Effect of Judgment.* A judgment on the interplea does not affect the attachment suit,[90] the title of the property as between attachment defendant and claimant, or the rights of third parties;[91] but as between attachment plaintiff and claimant the judgment is conclusive that the property is or is not the property of the latter.[92] Such judgment is also held to bind the sureties on claimant's bond

the value of the property equal the amount found due to plaintiff, judgment must be entered against claimant and his sureties on the bond for the amount of said value, and if the value be less than the amount found due, judgment must be entered against claimant for amount of the verdict, and against sureties in the bond for the value of the property. If judgment by default is entered against defendant, an inquiry must be awarded to assess the value of the property claimed, and on execution thereupon judgment shall be entered as above provided. *Compare* Irion *v.* Hume, 50 Miss. 419, decided under an earlier statute.

In Texas, upon failure of claimant to establish a right to the property, judgment should, under Tex. Rev. Stat. art. 4843, be entered up on the bond. Floege *v.* Wiedner, 77 Tex. 311, 14 S. W. 132. See also Mardis *v.* Johnson, 43 Tex. 225. A surety upon a statutory bond for a trial of the right of property becomes a party to the litigation, and the court can render judgment against him without having him served with citation or otherwise notified. Johnson *v.* Blum, 17 Tex. Civ. App. 260, 42 S. W. 791.

When a claim suit is removed by certiorari from a justice court to the circuit court, where the property is condemned, the judgment in the circuit court should be certified with a procedendo to the justice who issues execution, and on failure of defendant to deliver the property the officer should indorse such failure on the bond filed with the justice, and execution should issue thereupon for the assessed value of the property as fixed by the circuit court against the principal and surety if such value does not exceed the amount of the judgment in attachment and costs, and if exceeding that amount then for the judgment and costs. Derrett *v.* Alexander, 25 Ala. 265.

Enforcement of liability on bond see *infra,* XIV, B, 2, a.

89. Rhodes *v.* Smith, 66 Ala. 174.

In Arkansas, under the provisions of the act of Jan. 19, 1861, plaintiff in attachment may have execution against the property, and if the same is not delivered to the sheriff on demand execution shall issue on a return of the facts in a fieri facias on the bond for such a sum as will be sufficient to satisfy the damages and costs. Adams *v.* Hobbs, 27 Ark. 1.

90. Dilley *v.* McGregor, 24 Kan. 361 (holding that the trial is designed principally for protection of the attaching officer and is not conclusive upon the rights of the parties); Brownell, etc., Car Co. *v.* Barnard, 139 Mo. 142, 40 S. W. 762 (holding that, where the interpleader obtains judgment for all the attached property, attachment plaintiff may dismiss the attachment voluntarily and proceed without regard to it).

91. Hershy *v.* Clarksville Inst., 15 Ark. 128; Weber *v.* Mick, 131 Ill. 520, 23 N. E. 646; Needham *v.* Clary, 62 Ill. 344. But see Tipton Bank *v.* Cochel, 27 Mo. App. 529, where the fraudulent character of an assignment under which an interpleader claimed was in issue, and the assignment was by the judgment declared fraudulent, and the judgment held conclusive against defendant in attachment.

Judgment may be rendered against the debtor in an equitable proceeding by interveners to establish the priority of their claims if one of them asks judgment for a claim admitted by the debtor. Clinton Lumber Co. *v.* Mitchell, 61 Iowa 132, 16 N. W. 52.

92. Hershy *v.* Clarksville Inst., 15 Ark. 128; Weber *v.* Mick, 131 Ill. 520, 23 N. E. 646; Tipton Bank *v.* Cochel, 27 Mo. App. 529. But see Ansley *v.* Tearson, 8 Ala. 431, which was a bill in equity where complainant, who had been claimant in a trial of the right of property, alleged that the validity of a mortgage under which he claimed was not controverted by plaintiff in attachment, and that the mortgage was rejected by the trial court as evidence, not because it was objectionable as a security, but on the ground that it did not tend to prove the issue on the part of claimant, which was whether defendant in attachment had an interest in the property subject to the attachment, and the court held that complainant should be allowed to show what transpired at the trial of the right of property, since the matter, although involved in the trial, was not essential to the finding of a verdict that the property was liable to attachment. Under Nebr. Comp. Stat. §§ 996–998, judgment in favor of claimant is not conclusive as to ownership of the property; and the attachment creditor may still contest his right to the same. Accordingly mandamus will not lie against the officer who seized the property to compel him to return it to the person adjudged to be the owner, as his refusal so to do is not a failure to discharge an official duty. State *v.* Gillespie, 9 Nebr. 505, 4 N. W. 239.

Opposition to sale under attachment.— Where a third party opposes a sale of attached property on the ground that it is his, and the opposition is sustained, purchasers of the property at the sale are affected with notice of the opposition, and must restore possession to the party making the same. Lobdell *v.* Union Bank, 8 La. Ann. 117.

Judgment for claimant in an action against

in the event the property in controversy is not forthcoming, or the value thereof is not paid by claimant.[93]

k. Costs and Damages — (I) *Costs.* General costs of suit must be borne by the defeated party.[94]

(II) *Damages.* Damages may be awarded against an unsuccessful claimant where the statutes so provide,[95] and under similar circumstances against plaintiff in attachment.[96]

the attaching officer is not binding on the attaching creditor unless he has notice of the suit. Peaslee *v.* Staniford, Brayt. (Vt.) 140.

93. Triest *v.* Enslen, 106 Ala. 180, 17 So. 356 [*citing* Charles *v.* Haskins, 14 Iowa 471, 83 Am. Dec. 378].

A claimant's issue not determined by trial court may be passed upon on appeal. Dreyfus *v.* Mayer, 69 Miss. 282, 12 So. 267.

94. Roberts *v.* Burgess, 85 Ala. 192, 4 So. 733; Derrett *v.* Alexander, 25 Ala. 265; Fly *v.* Grieb, 62 Ark. 209, 35 S. W. 214; Graham *v.* Swayne, 1 Rob. (La.) 186; Hagardine-McKittric Dry Goods Co. *v.* Carnahan, 83 Mo. App. 318; S. Albert Grocer Co. *v.* Goetz, 57 Mo. App. 8. But see Floege *v.* Wiedner, 77 Tex. 311, 14 S. W. 132, as to award of costs under Tex. Rev. Stat. art. 4845. See, generally, Costs.

Connection with main action.— Costs and disbursements have no connection with the main action. Schneider *v.* Sears, 13 Oreg. 69, 8 Pac. 841.

Claimant partially successful may be liable for all costs.— A person who claims under two mortgages is liable for all costs if upon trial the claim is allowed only as to one. Stewart *v.* Outhwaite, 141 Mo. 562, 44 S. W. 326. So under a statute making costs discretionary with the court all costs may be awarded against one who claims all the property, but only has judgment for a small portion thereof which was purchased by him after the time of attachment. Edwards *v.* Stewart, (Mo. 1897) 44 S. W. 326.

Party claiming as trustee.— A claimant who is a trustee is entitled to costs accruing before satisfaction, if pending trial the deed of trust is satisfied. Helm *v.* Gray, 59 Miss. 54.

Suit dismissed for want of jurisdiction.— Under a statute providing that if judgment be in favor of the attaching creditor he may recover costs against claimant, such costs should be taxed against claimant where the suit is dismissed for want of jurisdiction. Kinnear *v.* Flanders, 17 Colo. 11, 28 Pac. 327.

Expenses of sale and custody.— Where the property is sold by agreement of the parties the attaching officer may retain the expenses of sale and custody of the property until sold from the date of the agreement, and claimant must look to plaintiff in attachment for his reimbursement. Graham *v.* Swayne, 1 Rob. (La.) 186.

95. Dupree *v.* Woodruff, (Tex. 1892) 19 S. W. 469; Wetzel *v.* Simon, (Tex. Civ. App. 1894) 25 S. W. 792, 26 S. W. 642; Harris *v.* Schuttler, (Tex. Civ. App. 1893) 24 S. W. 989.

Statutory damages alone can be recovered. Wetzel *v.* Simon, (Tex. Civ. App. 1894) 25 S. W. 792, 26 S. W. 642; Harris *v.* Schuttler, (Tex. Civ. App. 1893) 24 S. W. 989. It is error to include in a judgment against claimant interest on damages from date of the bond, as well as on value of the property from such date. Floege *v.* Wiedner, 77 Tex. 311, 14 S. W. 132.

In Alabama, under Rev. Code, § 3343, authorizing the award of damages against claimant, if it appears that claim was interposed for delay, a claimant in attachment is not liable for damages since the statute by its terms applies only to cases of execution. Murphy *v.* Butler, 75 Ala. 381.

96. Cornforth *v.* Maguire, 12 Colo. 432, 21 Pac. 191; Brasher *v.* Holtz, 12 Colo. 201, 20 Pac. 616; Joslin *v.* McGee, 5 Colo. App. 531, 39 Pac. 349; Swift *v.* Guy, (Indian Terr. 1899) 49 S. W. 46; Cleveland *v.* Tufts, 69 Tex. 580, 7 S. W. 72.

In the absence of statute a successful claimant must maintain a separate action.

Alabama.— Roberts *v.* Heim, 27 Ala. 678.

Arkansas.— Jefferson *v.* Dunavant, 53 Ark. 133, 13 S. W. 701.

California.— Bunting *v.* Saltz, 84 Cal. 168, 24 Pac. 167.

Iowa.— Jennings *v.* Hoppe, 44 Iowa 205.

Louisiana.— Gerson *v.* Jamar, 30 La. Ann. 1294, holding that, except in case of trespass for real estate, a claim for damages cannot be made in an intervention against a person not residing in the parish where the principal action is pending.

As to actions to recover damages for wrongful attachment of a third person's property see *infra*, XIV, C.

Measure of claimant's damages after reversal of judgment against him.— Where a judgment for plaintiff in attachment is reversed on appeal, and on a new trial judgment is rendered for claimant, the measure of his damages is the true value of the property taken, together with the damages and costs he was obliged to pay under the former judgment. Cleveland *v.* Tufts, 69 Tex. 580, 7 S. W. 72.

In Colorado, under section 103 of the code, the measure of damages is the value of the property with interest from the date of attachment. Cornforth *v.* Maguire, 12 Colo. 432, 21 Pac. 191; Brasher *v.* Holtz, 12 Colo. 201, 20 Pac. 616.

Actual or vindictive damages are recoverable. Powers *v.* Wright, 62 Miss. 35.

Where mortgaged property is attached, the

l. Appeal and Error — (I) *Right of Review.* The parties to a proceeding to establish or determine a third party's claim to attached property have the same right of appeal as in actions commenced in an ordinary way.[97]

(II) *To What Court.* The appeal must of course be taken to a court having proper jurisdiction; thus, where a question involving the title to land is in issue, appeal must be taken to that court alone which has jurisdiction as to such question;[98] and so where the jurisdiction of the appellate court is dependent upon the amount in controversy.[99]

(III) *Parties.* Where there is judgment against the intervener and defendant in attachment, the intervener must himself appeal.[1]

(IV) *Time For Taking and Perfecting.* The proceeding must be taken and perfected within the prescribed statutory time.[2]

(V) *Supersedeas or Stay of Proceedings.* Where a bond is given by claimant the pendency of the appeal operates as a supersedeas.[3]

reasonable market value of mortgaged property at the time of attachment is the measure of damages, provided the value does not exceed the mortgage debt, and if the value does exceed the debt then the amount of the debt is the measure of damages. State *v.* Crowder, 40 Mo. App. 536.

Attorney's fees cannot be allowed as damages in a case where a mortgagee of chattels intervenes in an attachment thereof, unless there is a statutory provision therefor. Joslin *v.* McGee, 5 Colo. App. 531, 39 Pac. 349. See also Hopkins *v.* Pratt, 7 La. Ann. 336, where it was said that counsel fees could not be recovered where attaching creditor in good faith prosecuted a right which he considered legal.

Storage fees of mortgaged goods stored by mortgagee.—Where an intervening mortgagee is successful, and the property was attached while in possession of one with whom they were stored by the mortgagee but were not removed, the costs of storage, from time of demand on the attaching officer for the goods, cannot be recovered unless the mortgagee notified his desire to remove them, or incurred additional costs owing to the attachment. Joslin *v.* McGee, 5 Colo. App. 531, 39 Pac. 349.

The value of the goods, if sold, may be recovered. Swift *v.* Guy, (Indian Terr. 1899) 49 S. W. 46.

97. Mitchell *v.* Woods, 11 Ark. 180; Seass *v.* Manion, 92 Ill. App. 471; McLean *v.* McDaniel, 44 N. C. 203; Chaffee *v.* Malarkee, 26 Vt. 242.

A right of appeal is not lost because the statute giving a right to interplead does not expressly grant an appeal. Mitchell *v.* Woods, 11 Ark. 180.

Nature of proceeding on appeal.— A proceeding by intervention in attachment under Iowa Code, § 3016, is not necessarily equitable, and when not so treated by the trial court will not be so regarded on appeal. Clinton Nat. Bank *v.* Studemann, 74 Iowa 104, 37 N. W. 112.

Intervener is bound on appeal by a position voluntarily assumed by him on trial. Stewart *v.* Outhwaite, 141 Mo. 562, 44 S. W. 326, holding that if he accepts the burden of proof on trial he must retain it on appeal.

Effect of statutory certiorari.—A statutory certiorari to a judgment rendered in favor of plaintiff in attachment condemning the property of claimant for payment of the attachment debt has the effect of an appeal, in that where the action would on appeal be tried *de novo* the cause stands for trial anew in the court issuing the certiorari. Cofer *v.* Reinschmidt, 121 Ala. 252, 25 So. 769. Where, subsequent to certiorari to review a judgment of a justice condemning the property to payment of plaintiff's claim, defendant in attachment dies and plaintiff fails to revive the action within the statutory time, claimant may interpose a defense that the action had abated against him because of such failure on the trial of the certiorari. Cofer *v.* Reinschmidt, 121 Ala. 252, 25 So. 769.

98. Ducker *v.* Wear, etc., Dry Goods Co., 145 Ill. 653, 34 N. E. 562.

Appellate jurisdiction of particular courts see COURTS.

99. On appeal from judgment in interpleader the amount involved is the value of the property attached, and not the amount of the claim sued upon, since the issue is as to the ownership of the property and not as to the indebtedness of attachment debtor. Martin *v.* Duncan, 156 Ill. 274, 41 N. E. 43 [*reversing* 47 Ill. App. 84].

Amount in controversy for appellate purposes, generally, see APPEAL AND ERROR, 2 Cyc. 558.

1. Hardie *v.* Colvin, 43 La. Ann. 851, 9 So. 745, holding that an appeal by defendant in attachment is not sufficient.

2. Ryan *v.* Heenan, 76 Iowa 589, 41 N. W. 367 (where an appeal must, under Iowa Code (1873), § 3019, in order to retain the attachment lien, be perfected within two days from an order discharging it); Pfiefer *v.* Hartman, 60 Miss. 505.

Where intervener's petition is dismissed before an interlocutory decree in the attachment suit, directing a sale of the attached property, intervener may appeal after such interlocutory decree. Brawshaw *v.* Georgia L. & T. Co., (Tenn. Ch. 1900) 59 S. W. 785.

3. State *v.* Ranson, 86 Mo. 327.

(VI) *Record.* The record on appeal must be kept distinct from the record of the proceedings in attachment,[4] and must show that an issue was made up between claimant and attaching creditor.[5]

(VII) *Scope and Extent of Review.* Where no objection was raised below to trial without a jury of a claim to attached property, and the parties agreed to a trial by the court, the objection cannot be raised on appeal.[6] So, an appellate court will not interfere with the discretion of the trial court in refusing permission to interplead after the time for interpleading has passed,[7] nor will the court review conflicting evidence to determine its weight.[8] Again, the court will not look into the attachment suit for the purpose of finding error in the claim suit, unless the record of the former is introduced in some legitimate way into the latter;[9] and where the question in issue on trial was the right to the attached property the appellate court can pass on that question only.[10]

B. Liability on Claimant's Bond — 1. In General — a. Liability of Claimant. The liability of a claimant on his bond is analogous to that of an attachment defendant on a forthcoming bond, and hence is fixed by a final judgment against him.[11] If the bond is conditioned for the payment of the judgment or a return of the property for the satisfaction thereof, a claimant establishing his claim is liable, in event of plaintiff's recovery against defendant, only to the extent of defendant's interest, if any, in the property.[12]

Where an appeal operates as a supersedeas the attaching officer is not liable for failure to levy an execution issued against the property interpleaded. State *v.* Ranson, 86 Mo. 327.

4. Brennan *v.* O'Driscoll, 33 Mo. 372; Monarch Rubber Co. *v.* Bunn, 82 Mo. App. 603.

5. Tupper *v.* Cassell, 45 Miss. 352, holding that a recital of the clerk to that effect is not sufficient.

Partnership claim.— Where a claim is interposed by one partner in the name of his firm, subsequent proceedings are properly conducted against the partnership as claimant, notwithstanding the bond is given by each partner individually, and recites that he "has filed a claim." Accordingly, a recital in the judgment entry that the one interposing the claim is a member of the partnership is sufficient on error to sustain a default against the partnership as claimant. Pace *v.* Lee, 49 Ala. 571.

6. Dean *v.* Oppenheimer, 25 Md. 368; Howard *v.* Oppenheimer, 25 Md. 350.

7. Funkhouser *v.* How, 18 Mo. 47, holding that interference by the appellate court is warranted only when there was a flagrant abuse of discretion.

8. Knight *v.* Rhoades, (Kan. App. 1900) 61 Pac. 869. See also Rauer *v.* Silva, 128 Cal. 42, 60 Pac. 525.

Any question of fact determined by the jury will be considered eliminated from the case by an appellate court. McDonald *v.* Cash, 57 Mo. App. 536.

9. Gray *v.* Raiborn, 53 Ala. 40, holding that the attachment suit is distinct and independent.

10. Clarinda Valley Bank *v.* Wolf, 101 Iowa 51, 69 N. W. 1131.

11. Wright *v.* Oakey, 16 La. Ann. 125.

Unavoidable loss and destruction of property pending claimant's suit.— Whether or not claimant, in the event of an unsuccessful prosecution of his claim, will be held liable for the value of the property if lost or destroyed without his fault depends upon whether he gave the bond in good faith to obtain possession of the property, or whether it was given wrongfully to obtain such property. Dear *v.* Brannon, 4 Bush (Ky.) 471, 478, where it is said: "These cases clearly distinguish between a bond rightfully given, to retain possession until litigation is ended, and one given wrongfully, to get a possession the party is not legally entitled to." In the latter case the party is to be regarded as a bailee in his own wrong, liable for all accidents and taking all hazards. See also Atkinson *v.* Fox[illegible]rth, 53 Miss. 741.

Death of one of attachment defendants before rendition of judgment.— Under a statute providing that persons associated as partners, transacting business under a common name, may be sued thereunder and the summons being served on one or more of such partners, the judgment shall bind the "joint property," it is held that where an attachment was levied upon partnership property which was delivered to a claimant who failed to redeliver same within thirty days after judgment, the fact that one of the partners against whom judgment was rendered in the attachment suit died before its rendition does not invalidate the claim bond and is not a ground for a supersedeas in an execution on the bond against claimant. Comer *v.* Reid, 93 Ala. 391, 9 So. 620.

12. Halbert *v.* McCulloch, 3 Metc. (Ky.) 456, 79 Am. Dec. 556 [*approved* in Bell *v.* Western River Imp., etc., Co., 3 Metc. (Ky.) 558].

It is error to quash the bond where claimant shows that all but a small portion of the property belongs to him, as his liability to deliver that which does not belong to him still continues. Bowling *v.* Davis, 103 Ky. 187, 19 Ky. L. Rep. 1859, 44 S. W. 643, 45 S. W. 77.

b. Liability of Sureties — (i) *Generally.* The liability of the surety does not become fixed or enforceable until a liability can be shown to be due on the part of his principal.[13] A liability, however, is created and a proceeding against the surety authorized on a failure of claimant to deliver the property in accordance with a condition of the bond,[14] or the dismissal of the claim because of a failure to comply with the statutory procedure.[15]

(ii) *Discharge of.* The sureties will not be discharged by the neglect of claimant to take advantage of the failure of attachment plaintiff to make up the issue to try the right of property,[16] by an agreement between attachment plaintiff and several claimants whereby suits are tried together,[17] or by an agreement that the verdict and judgment in one of several suits to be actually tried shall be the verdict and judgment in all.[18] Nor will a payment by the sureties on one of claimant's bonds of a judgment for a greater amount than the value of the property release them from their obligation on a bond given to a subsequently attaching creditor of the same property.[19]

2. Enforcement of Liability — a. Form of Procedure. In one state at least the liability may be enforced either by rule or by action on the bond;[20] and, in many states, a judgment on the bond may be entered in the claim suit against claimant and his sureties.[21]

b. When Action Accrues. The time at which an action accrues depends upon the nature of the bond given by claimant. If it is conditioned to satisfy any judgment which may be rendered against attachment defendant, action lies after rendition of judgment notwithstanding the intervention be undisposed of.[22] If, however, the bond is conditioned to satisfy only such judgment as may be rendered against claimant himself, no action lies until after rendition of such judgment.[23]

c. Who May Sue. Where the bond is payable to plaintiff his right to main-

Liability of claimant to sureties.— A surety against whom, together with claimant, judgment for damages and costs has been rendered, and who has paid a fieri facias issued thereon was entitled, under early statutes of Georgia, to control the fieri facias for the purpose of reimbursing himself out of the effects of claimant. Keith *v.* Whelchel, 9 Ga. 179.

13. Fraser *v.* Thorpe, 11 La. Ann. 47; Goodman *v.* Allen, 8 La. Ann. 381.

14. Seisel *v.* Folmar, 103 Ala. 491, 15 So. 850.

Liability of sureties, generally, see Bonds.

15. Higdon *v.* Vaughn, 58 Miss. 572, where it was held that a failure of claimant to file the affidavit required by statute determines the suit, and the liability of the sureties is fixed upon a failure to deliver up the property.

16. Atkinson *v.* Foxworth, 53 Miss. 741.

17. Triest *v.* Enslen, 106 Ala. 180, 17 So. 356.

18. Jaffray *v.* Smith, 106 Ala. 112, 17 So. 218, where it was also held that an agreement of claimant with attachment plaintiffs that the value of the property at the time of the trial should be assessed at the sum shown by an inventory taken some time before did not release the sureties.

19. Conway *v.* Backus, 3 Tex. App. Civ. Cas. § 266. And see Armour *v.* Tabor, 7 Pa. Dist. 462, 21 Pa. Co. Ct. 425, holding that sureties cannot be released from liability upon application therefor by representing that claimant is about to leave the country and permit an issue framed to go by default. The release of sureties in such case would destroy vested rights of attachment plaintiff.

20. Wright *v.* Oakey, 16 La. Ann. 125.

Usual procedure by action.—Where attaching creditor assails a conveyance of his debtor on the ground of fraud, he may both attach the property in the hands of the vendee and at the same time institute an action to cancel the sale. Under these circumstances, if the fraudulent transferee bonds the property and then transfers it to a *bona fide* purchaser, attaching creditor, if successful in both of his actions, is not confined to his remedy on the bond, but, by reason of his revocatory action, can also proceed against the property in the hands of the *bona fide* purchaser. Ranlett *v.* Constance, 15 La. Ann. 423.

21. **As to when judgment in the claim suit may be rendered against sureties on the bond** see *supra*, XIV, A, 8, j, (iv).

22. Clarinda Valley Bank *v.* Shenandoah Nat. Bank, 109 Iowa 43, 79 N. W. 391, where intervener executed a delivery bond for delivery of the property or its value to satisfy any judgment obtained against defendant within twenty days after its rendition, as provided by statute, and it was held that action would lie at expiration of the twenty days notwithstanding the intervention was undisposed of and the judgment did not condemn the attached property.

23. Yale *v.* Hoopes, 16 La. Ann. 311.

If the intervention is dismissed without trial on the merits, because claimant's bond

tain the action is clear;[24] and, under some statutes, inasmuch as plaintiff is the real party in interest, action may be maintained in his name although the bond was payable to the attaching officer.[25]

d. Defenses. Defendant can set up no defense that would permit him to prove the very issue that it was incumbent upon him to prove in a trial of his claim,[26] nor can he assign errors in the attachment proceedings between the creditor and his debtor,[27] or that the officer, bringing the action and to whom the bond was given, has no interest in the property.[28] Payment by claimant of the judgment obtained against attachment defendant is a sufficient defense to an action on the claim bond;[29] as is a defense of the statute of limitations[30] or that the officer accepting the bond had no authority so to do.[31]

e. Pleadings — Declaration. If plaintiff proceeds by a common-law action on the bond it is only necessary to set out a breach of its conditions,[32] and inasmuch as the parties are bound to notice the determination of the claim suit, no averment of notice to them of determination is necessary.[33]

f. Evidence. Evidence showing refusal of claimant to deliver the property after the failure of his claim is sufficient to fix his liability.[34] So where claimant

was not filed in time, and there is a judgment for costs for attaching creditor, an action lies on the bond if claimant makes no further effort to establish his right to the property, and the property is not returned by him. Wallace *v.* Terry, (Tex. App. 1889) 15 S. W. 35.

24. Kohn *v.* Hinshaw, 17 Oreg. 308, 20 Pac. 629.

25. Wright *v.* Oakey, 16 La. Ann. 125, holding that the assignment of the bond to plaintiff is not essential to maintain the suit. See also Lomme *v.* Sweeney, 1 Mont. 584, holding that an action for damages against the sureties on a replevin undertaking can be maintained in the name of the creditor who caused the officer to attach, notwithstanding the bond is in the name of the officer.

26. Ormsbee *v.* Davis, 16 Conn. 567, holding that in an action on a claimant's bond, given in replevin, the question was not whether claimant in fact had title to the property, but whether he made out such title on the trial of his claim suit, a judgment against him in that suit being conclusive against him in an action on his claim bond.

That the property was not liable to attachment is not a good plea. Higdon *v.* Vaughn, 58 Miss. 572.

27. Goodman *v.* Allen, 11 La. Ann. 246, holding that the validity of the attachment could not be drawn into question collaterally except in cases where there was an entire want of citation.

Claimant is bound by the judgment in the principal suit unless that judgment be void. Atkinson *v.* Foxworth, 53 Miss. 741.

28. Morgan *v.* Furst, 4 Mart. N. S. (La.) 116, 16 Am. Dec. 166; Spears *v.* Robinson, 71 Miss. 774, 15 So. 111, the latter case holding that, although the statute required a special deputy to deliver the property seized therewith to the regular officer, a claimant who had gained possession from such deputy by giving a delivery bond could not deny liability thereon, because the deputy had no right to take it.

Execution after delivery as defense.— Where claimant's bond is quashed and another substituted, the sureties on the latter cannot escape liability because their bond was executed after the delivery of the property. Bull *v.* Jones, (Tex. Civ. App. 1898) 47 S. W. 474.

29. Wheaton *v.* Thompson, 20 Minn. 196, the reason being that notwithstanding the absolute engagement expressed by the literal terms of the bond, the purpose of the law under which it is executed is sufficiently satisfied when that which the law regards as legal indemnity of the obligee is accomplished.

30. Where claimant gives a delivery bond conditioned for delivery of the property or its value to satisfy any judgment, which may be obtained against defendant, within twenty days after its rendition, the statute of limitation begins to run from the expiration of twenty days after the rendition of such judgment, notwithstanding the fact of the intervention being not decided until long thereafter. Clarinda Valley Bank *v.* Shenandoah Nat. Bank, 109 Iowa 43, 79 N. W. 391.

31. If claimants have been enjoined from taking attached property under claimant's title, the officer having the custody of such property would have no authority to take a bond from them and deliver the property to them, and hence no recovery could be had on such bond. Thixton *v.* Goff, 5 Ky. L. Rep. 765.

32. Garnett *v.* Roper, 10 Ala. 842.

33. Garnett *v.* Roper, 10 Ala. 842.

Allegation as to execution of bond.— A declaration alleging that the bond was executed by the principal through his agent is sufficient. Gilmer *v.* Allen, 9 Ga. 208.

For sufficiency of declaration on a replevin bond for the forthcoming of property see Clark *v.* Norton, 6 Minn. 412.

34. Stinson *v.* Hall, 54 Ga. 676, where it was held that attaching creditor need not prove that the property had been advertised for sale pursuant to the statute, as the re-

failed to establish his claim, a return of *nulla bona* on an execution against attachment defendant is sufficient to render sureties on the bond liable.[35]

g. Damages. As a rule the damages which may be recovered on claimant's bond are limited to the value of the property delivered to him, with interest,[36] regardless of the amount of the judgment recovered in the attachment suit,[37] or of the fact that there are several attaching creditors.[38] Again, where the value of the property taken exceeds the amount of the creditor's claim, the damages should be limited to the amount of the claim,[39] and a sum which claimant has paid to attachment debtor in lieu of the latter's exemption cannot be considered in fixing the amount of the liability on his bond.[40]

C. Recovering Damages For Dispossession — 1. Right of Action. Where property has been attached which does not belong to attachment defendant the claimant of the ownership and right of possession thereof[41] has a right of action

fusal to deliver the property was a forfeiture of the bond.

35. Emanuel *v.* Mann, 14 La. Ann. 53.

36. Bruck *v.* Feiner, 26 Misc. (N. Y.) 724, 56 N. Y. Suppl. 1025; Eichoff *v.* Tidball, 61 Tex. 421.

The value of the property attached fixed by the clerk on taking the bond is not binding on either party or the sureties on the bond. Muhling *v.* Ganeman, 4 Baxt. (Tenn.) 88.

37. Jaffray *v.* Smith, 106 Ala. 112, 17 So. 218; Bruck *v.* Feiner, 26 Misc. (N. Y.) 724, 56 N. Y. Suppl. 1025.

38. Blankenship *v.* Thurman, 68 Tex. 671, 5 S. W. 836.

Right of obligors to equitable adjustment of claims.— Where several attachments in favor of different creditors have been levied successively on the same property and a claimant has interposed his claim in each case, and his claim suits are decided against him, if the aggregate of the debts of the several attaching creditors when reduced to judgment is largely in excess of the value of the property, the sureties on the claim bond can maintain a bill in equity to adjust the priorities of the judgment creditors and to settle their liabilities in the several cases, and need not pay each separate judgment, the aggregate of which greatly exceeds the value of the property. Jaffray *v.* Smith, 106 Ala. 112, 17 So. 218 [*followed* in Cottingham *v.* Bamberger, 121 Ala. 527, 25 So. 771]. But if the execution issued against the surety is irregular in form and for an amount exceeding the penalty of the bond, the surety has a plain and complete remedy in the court of law from which the execution issued, and hence cannot invoke the interposition of equity. Triest *v.* Enslen, 106 Ala. 180, 17 So. 356.

39. Wallace *v.* Terry, (Tex. App. 1889) 15 S. W. 35.

Recovery of attorney's fees.—Where claimant's bond is conditioned to pay plaintiff all damages he may sustain if claimants fail to establish their title to the property, it is held that, if intervener's claim was a reasonable one, the attaching creditor may only recover interest for detention of the property, and that attorney's fees are not a natural result of the bond and not recoverable. Eichoff *v.* Tidball, 61 Tex. 421.

Recovery for use of property.— Where property is delivered to claimant, upon execution by him of a forthcoming bond, and is afterward adjudged to attaching creditor, the curators of the debtor's estate can recover the hire of such property during the time it was in claimant's possession as well as the value of any part of the property which he fails to deliver. Botts *v.* Nichols, 7 La. Ann. 263.

Damages for deterioration of property.— The statutes of Georgia make the claimants of property, when attached, liable to pay attachment plaintiff not only damages for the hire and use of the property but for its deterioration in value while in claimants' possession after the levy of the attachment. Under these statutes it is held that, where the property is delivered by a claimant upon plaintiff's recovery in judgment sustaining the attachment and sold for less than the judgment, no action can be maintained against the sureties on claimant's bond for the use and deterioration thereof while in his possession unless the advertisement of the sale was in strict compliance with the statute; and where such statute required the advertisement to be made "weekly for four weeks" and it was shown that there were four publications, but only twenty-seven days had elapsed between the first publication and the date of the sale, it was held that no recovery could be had. Frost *v.* Gibson, 59 Ga. 600.

Recovery of costs.— In Texas the statutes expressly provide that the sureties on claimant's bond shall be liable for all costs awarded against claimant. Ft. Worth Pub. Co. *v.* Hitson, 80 Tex. 216, 14 S. W. 843, 16 S. W. 551. It has also been held that on a bond conditioned that claimant shall have the property forthcoming and "pay such costs and damages as may be recovered for putting in said claim for delay," the sureties are bound for the costs, although the claim be not put in for delay. McElrath *v.* Whetstone, 89 Ala. 623, 8 So. 7 [*following* Robertson *v.* Patterson, 17 Ala. 407].

40. Jaffray *v.* Smith, 106 Ala. 112, 17 So. 218.

41. Necessity of claimant having interest in property.— It is essential that a claimant of property, to prosecute successfully his claim, have some actual interest in the property. Hence, if by a proper construction of

at once, either for the reclamation of the property, or to recover damages,[42] it not being material that the property was sold subsequently to the wrongful levy,[43]

the contract or lease under which the property is held, he has no property interest therein he cannot maintain his action (Upham *v.* Dodd, 24 Ark. 545; Newman *v.* Woodson Nat. Bank, 38 Kan. 456, 16 Pac. 823; Turner *v.* Bachelder, 17 Me. 257), and an assignee of property who has not taken possession of it or had the assignment recorded cannot maintain his claim against a subsequently attaching creditor (Yates *v.* Dodge, 23 Ill. App. 338). *Compare* Carter *v.* Wilson, 61 Ala. 434; Lewis *v.* Birdsey, 19 Oreg. 164, 26 Pac. 623; Bradshaw *v.* Georgia L. & T. Co., (Tenn. Ch. 1900) 59 S. W. 785, where, upon a judicial construction of the facts of each case, it was held that claimant had such right or title as would entitle him to interpose his claim.

A cestui que trust may come in as claimant of the property, for if he is precluded from bringing his suit, and the trustee will not permit his name to be used, he will then stand in the attitude of a party having an undeniable right but no remedy — a thing which the law will not endure. State *v.* McKellop, 40 Mo. 184.

A mortgagee having possession of specific mortgaged property has a right of action. Poundstone *v.* Maben, 5 Colo. App. 70, 37 Pac. 37; Poundstone *v.* Holt, 5 Colo. App. 66, 37 Pac. 35.

Assignee under invalid assignment.— An assignee, who receives goods under an assignment valid between the parties but void as to creditors, has a right of action against a party levying an attachment which, on account of the insufficiency of the levy, creates no lien, and could render the attaching parties mere wrong-doers. Ahern *v.* Purnell, 62 Conn. 21, 25 Atl. 393.

Second mortgagees of personal property may sue one who wrongfully attaches the property and interferes with their security and diminishes the value thereof. Taylor *v.* Hines, 31 Mo. App. 622.

Where goods have been bought on account of a firm, and been paid for by it, an individual member of the firm, to whom an attachment bond was given, is the proper party to sue on the bond and not the firm. State *v.* Merritt, 70 Mo. 275.

42. *California.*— Hillman *v.* Griffin, (Cal. 1899) 59 Pac. 194.

Connecticut.— Griswold *v.* Cook, 46 Conn. 198.

Kentucky.— Taylor *v.* Smith, 17 B. Mon. (Ky.) 536.

Louisiana.— Shuff *v.* Morgan, 9 Mart. (La.) 592.

Maine.— Richardson *v.* Kimball, 28 Me. 463.

Maryland.— Richardson *v.* Hall, 21 Md. 399.

Missouri.— State *v.* McKellop, 40 Mo. 184.

Texas.— Adams *v.* Powell, (Tex. Civ. App. 1898) 44 S. W. 547.

The mere fact that when attached it is in possession of attachment defendant does not affect this right. Hillman *v.* Griffin, (Cal. 1899) 59 Pac. 194.

Invalidity of sale to third party not material.— One who wrongfully attaches property of a third party is liable for damages, even if he came into possession under a fraudulent sale. Moore *v.* Pope, 27 La. Ann. 254.

The recovery of judgment by an interpleader is not a bar to a suit by him for wrongful procedure. Clark *v.* Brott, 71 Mo. 473 [*following* Perrin *v.* Claflin, 11 Mo. 13].

Actions to recover possession of the property see *supra*, XIV, A, 8.

Waiver of right to recover damages.—A resort to a statutory remedy to try the right to attached property waives a right to recover for damages caused by unlawful seizure. Lera *v.* Freiberg, (Tex. Civ. App. 1893) 22 S. W. 236.

When right accrues.— A statute of limitations begins to run against an action for wrongful attachment from the time of attachment, or at any rate from the time the property was sold in the attachment suit, and not from the time of final judgment in said suit against plaintiff. Smyth *v.* Peters Shoe Co., 111 Iowa 388, 82 N. W. 898.

43. Ellis *v.* Allen, 80 Ala. 515, 2 So. 676; Holly *v.* Huggeford, 8 Pick. (Mass.) 73, 19 Am. Dec. 303.

Sale under order of court.— The right to sue is not divested because the property was sold as perishable by order of court. Bibb *v.* Jones, 12 Ky. L. Rep. 605.

Acceptance of proceeds of sale of perishable property.— If a party's property is attached as belonging to another and sold by order of the court as perishable, an acceptance of the proceeds by claimant does not prevent his recovering for damages sustained by the attachment. In such case the privilege of the true owner to elect his remedy is not complete, for he cannot elect to replevy or take back the property. The doctrine of election is made only when full freedom of choice exists, and in the absence of such freedom should not be applied. Franke *v.* Eby, 50 Mo. App. 579.

Failure to prosecute claim after giving forthcoming bond.— An owner who retains possession of goods wrongfully attached by giving a forthcoming bond for them, but who is not a party to the attachment suit and declines to become such, is estopped after they have been condemned to sale under the attachment to maintain an independent action against attachment plaintiff for the value of the goods thus wrongfully converted, but if, in satisfaction of the judgment claimed, other goods than those attached were seized under the execution he may maintain an action for these. McCadden *v.* Lowenstein, 92 Tenn. 614, 22 S. W. 426.

that there has been a rendition of judgment in the attachment suit,[44] or that there was a rendition of judgment in the claim suit adverse to claimant.[45]

2. PERSONS LIABLE — a. In General. Where an officer levies a writ of attachment on the property of a stranger, attachment plaintiff is liable to the claimant of the ownership and right of possession thereof not only when he directed the wrongful levy,[46] but also when he subsequently adopts or ratifies the officer's acts,[47] independently of any bond,[48] and jointly with the attaching officer.[49]

44. Juilliard *v.* May, 130 Ill. 87, 22 N. E. 477; Samuel *v.* Agnew, 80 Ill. 553.

45. Louisville, etc., R. Co. *v.* Brinkerhoff, 119 Ala. 606, 24 So. 892.

46. *Arkansas.*— Moores *v.* Winter, 67 Ark. 189, 53 S. W. 1057.

Connecticut.— Bowen *v.* Hutchins, 18 Conn. 550.

Indiana.— Rodde *v.* Hollweg, 19 Ind. App. 222, 49 N. E. 282.

Iowa.— Peterson *v.* Foli, 67 Iowa 402, 25 N. W. 677; Robinson *v.* Keith, 25 Iowa 321.

Kansas.— H. B. Lee Mercantile Co. *v.* Chapman, 9 Kan. App. 374, 58 Pac. 125.

Kentucky.— Blakely *v.* Smith, 16 Ky. L. Rep. 109, 26 S. W. 584; Roche *v.* Link, 15 Ky. L. Rep. 702; Bibb *v.* Jones, 12 Ky. L. Rep. 605; Goodwin *v.* Pinnell, 11 Ky. L. Rep. 140; Chisholm *v.* Gooch, 3 Ky. L. Rep. 247.

Louisiana.— Caldwell *v.* Mayes, 6 Rob. (La.) 376.

Massachusetts.— Knight *v.* Nelson, 117 Mass. 458.

Minnesota.— Lesher *v.* Getman, 30 Minn. 321, 15 N. W. 309.

Missouri.— State *v.* Merritt, 70 Mo. 275; Perrin *v.* Claflin, 11 Mo. 13; Vaughn *v.* Fisher, 32 Mo. App. 29; Taylor *v.* Hines, 31 Mo. App. 622.

Nebraska.— Omaha Nat. Bank *v.* Robinson, 56 Nebr. 590, 77 N. W. 73; Cole *v.* Edwards, 52 Nebr. 711, 72 N. W. 1045; Walker *v.* Wonderlick, 33 Nebr. 504, 50 N. W. 445; Taylor *v.* Ryan, 15 Nebr. 573, 19 N. W. 475.

New York.— Dyett *v.* Hyman, 129 N. Y. 351, 29 N. E. 261, 41 N. Y. St. 644, 26 Am. St. Rep. 533 [*affirming* 13 N. Y. Suppl. 895, 37 N. Y. St. 251]; Castle *v.* Lewis, 78 N. Y. 131; Wehle *v.* Butler, 61 N. Y. 245; Guilfoyle *v.* Seeman, 41 N. Y. App. Div. 516, 58 N. Y. Suppl. 668; Herrman *v.* Gilbert, 8 Hun (N. Y.) 253; Marsh *v.* Backus, 16 Barb. (N. Y.) 483.

Texas.— Willis *v.* Whitsitt, 67 Tex. 673, 4 S. W. 253.

Wisconsin.— Adams *v.* Savery House Hotel Co., 107 Wis. 109, 82 N. W. 703.

There is a presumption that an execution was issued by plaintiff in attachment. Peterson *v.* Foli, 67 Iowa 402, 25 N. W. 677.

Attachment plaintiff not liable for acts of attorney when the latter had notice of the third person's claim. Wiegmann *v.* Morimura, 12 Misc. (N. Y.) 37, 33 N. Y. Suppl. 39, 66 N. Y. St. 537.

47. *Iowa.*— Robinson *v.* Keith, 25 Iowa 321.

Kansas.— H. D. Lee Mercantile Co. *v.* Chapman, 9 Kan. App. 374, 58 Pac. 125.

Kentucky.— Roche *v.* Link, 15 Ky. L. Rep. 702.

Minnesota.— Lesher *v.* Getman, 30 Minn. 321, 15 N. W. 309.

Missouri.— Perrin *v.* Claflin, 11 Mo. 13.

Nebraska.— Omaha Nat. Bank *v.* Robinson, 56 Nebr. 590, 77 N. W. 73; Cole *v.* Edwards, 52 Nebr. 711, 72 N. W. 1045; Taylor *v.* Ryan, 15 Nebr. 573, 19 N. W. 475.

New York.— Castle *v.* Lewis, 78 N. Y. 131; Brainerd *v.* Dunning, 30 N. Y. 211; Herrman *v.* Gilbert, 8 Hun (N. Y.) 253.

Texas.— Heidenheimer *v.* Sides, 67 Tex. 32, 2 S. W. 87.

Wisconsin.— Adams *v.* Savery House Hotel Co., 107 Wis. 109, 82 N. W. 703.

Plaintiff in attachment, although acting bona fide, is liable for a wrongful sale. Goodwin *v.* Pinnell, 11 Ky. L. Rep. 140.

What constitutes ratification.— Refusal to release the property on demand constitutes ratification (Cole *v.* Edwards, 52 Nebr. 711, 72 N. W. 1045), and, although not personally present when the writ is served, attachment plaintiff and his attorney are liable on such refusal to release (Cook *v.* Hopper, 23 Mich. 511). So, the act of the officer is ratified where the property is sold and attachment plaintiff receives proceeds of sale (H. D. Lee Mercantile Co. *v.* Chapman, 9 Kan. App. 374, 58 Pac. 125; Omaha Nat. Bank *v.* Robinson, 56 Nebr. 590, 77 N. W. 73; Cole *v.* Edwards, 52 Nebr. 711, 72 N. W. 1045; Brainerd *v.* Dunning, 30 N. Y. 211); when the creditor is made co-defendant with the sheriff who attached, and justifies with him (Robinson *v.* Keith, 25 Iowa 321; Taylor *v.* Ryan, 15 Nebr. 573, 19 N. W. 475 [*citing* Perrin *v.* Claflin, 11 Mo. 13]; Herrman *v.* Gilbert, 8 Hun (N. Y.) 253); and when attachment plaintiff gives an indemnity bond to the officer (Lesher *v.* Getman, 30 Minn. 321, 15 N. W. 309). The fact that defendant's attorney appeared after the levy and procured an adjournment, by stipulation to give a bond of indemnity, and received a part of the proceeds of the sale, establishes an interference with the property sufficient to render the defendant liable if no want of authority in the attorney is shown. Castle *v.* Lewis, 78 N. Y. 131.

48. Magee *v.* Frazer, 20 Ky. L. Rep. 1467, 49 S. W. 452.

An attaching creditor who merely signs an undertaking, agreeing to pay defendant in attachment all damages he may sustain, in case he recovers judgment, is not liable for conversion of the property. Koch *v.* Peters, 97 Wis. 492, 73 N. W. 25.

49. *Iowa.*— Robinson *v.* Keith, 25 Iowa 321.

Kentucky.— Magee *v.* Frazer, 20 Ky. L. Rep. 1467, 49 S. W. 452; Blakely *v.* Smith,

Where, however, attachment plaintiff takes no part in the levy it is held that he is not liable.[50]

b. Sureties on Attachment Bond. It seems that a surety on an attachment bond who undertakes to pay all damages which may be sustained by defendant is not liable for a trespass committed to the property of a third party.[51]

3. Joinder of Parties. Since the attaching creditor is jointly and severally liable with the attaching officer, it is not requisite to join the officer in an action against the creditor;[52] so where there were several attaching creditors plaintiff may sue one without joining the others,[53] or may sue all.[54]

4. Defenses. It is a defense to an attaching creditor that plaintiff's claim is invalid and rests upon a fraudulent transfer of the property by the debtor,[55] unless the vacating of the attachment has precluded the defendant from justifying under it.[56] Where attachment defendant pleads in recoupment and recovers therefor, attachment plaintiff cannot, in an action by a third person for wrongful attachment, plead in justification that a sale to plaintiff was in fraud of creditors.[57] The fact that defendant had reason to believe that the property belonged to his debtor instead of plaintiff is not a defense to an action to recover the value of the property;[58] and it is not a defense that plaintiff might have given a claim bond

16 Ky. L. Rep. 109, 26 S. W. 584; Roche *v.* Link, 15 Ky. L. Rep. 702.

Minnesota.— Lesher *v.* Getman, 30 Minn. 321, 15 N. W. 309.

Nebraska.— Cole *v.* Edwards, 52 Nebr. 711, 72 N. W. 1045; Walker *v.* Wonderlick, 33 Nebr. 504, 50 N. W. 445; Taylor *v.* Ryan, 15 Nebr. 573, 19 N. W. 475.

New York.— Dyett *v.* Hyman, 129 N. Y. 351, 29 N. E. 261, 41 N. Y. St. 644, 26 Am. St. Rep. 533 [*affirming* 13 N. Y. Suppl. 895, 37 N. Y. St. 251]. The attaching officer and attachment creditors may be substituted in the place of the debtor, in an action against him to recover the attached fund brought by a third party claiming the same, upon the payment of the same into court. American Trust, etc., Bank *v.* Thalheimer, 29 N. Y. App. Div. 170, 51 N. Y. Suppl. 813.

Texas.— B. C. Evans Co. *v.* Reeves, 6 Tex. Civ. App. 254, 26 S. W. 219.

Where an indemnity bond is given to the sheriff before he levies the injured party must proceed on the bond, and cannot sue the sheriff on his official bond, unless he fails to return the bond of indemnity or takes insufficient security. Chisholm *v.* Gooch, 3 Ky. L. Rep. 247.

A clerk of court issuing an attachment in the absence of an affidavit authorizing its issue is liable therefor to a third party damaged thereby. Faulkner *v.* Brigel, 101 Ind. 329.

Liability of attaching officers who wrongfully levy on the property of a third person see Sheriffs and Constables.

50. Butler *v.* Borders, 6 Blackf. (Ind.) 160; Guilfoyle *v.* Seeman, 41 N. Y. App. Div. 516, 58 N. Y. Suppl. 668; Adams *v.* Savery House Hotel Co., 107 Wis. 109, 82 N. W. 703.

51. Crow *v.* National Bank of Commerce, 62 Ill. App. 24; Rodde *v.* Hollweg, 19 Ind. App. 222, 49 N. E. 282; Edwards *v.* Turner, 6 Rob. (La.) 382; Raspillier *v.* Brownson, 7 La. 231; Davis *v.* Com., 13 Gratt. (Va.) 139, the last case holding that under Va. Code, c. 151, § 8, providing that attaching plaintiff must give a bond conditioned to pay all costs and damages sustained by reason of his suing out the attachment, the owner of attached property may sue if the attachment is against specific property. *Compare* Cassani *v.* Dunn, 44 N. Y. App. Div. 248, 60 N. Y. Suppl. 756.

Liability governed by terms of bond.— Where the condition of the bond does not provide that sureties shall be liable thereon for costs that may accrue, in the event of the trial of a right of property, a statute which subjects the surety to all the liability of his principal must be so construed as to extend only to the liability for which the bond was executed. Thompson *v.* Gates, 18 Ala. 32.

52. Dyett *v.* Hyman, 129 N. Y. 351, 29 N. E. 261, 41 N. Y. St. 644, 26 Am. St. Rep. 533 [*affirming* 13 N. Y. Suppl. 895, 37 N. Y St. 251], holding that where plaintiff elects to sue an attaching creditor instead of the officer, the fact that an indemnity bond has been given to such officer is not prejudicial to plaintiff.

53. Dyett *v.* Hyman, 129 N. Y. 351, 29 N. E. 261, 41 N. Y. St. 644, 26 Am. St. Rep. 533 [*affirming* 13 N. Y. Suppl. 895, 37 N. Y. St. 251]; Wehle *v.* Butler, 61 N. Y. 245.

54. Wehle *v.* Butler, 61 N. Y. 245.

55. Hess *v.* Hess, 117 N. Y. 306, 22 N. E. 956, 27 N. Y. St. 346; Rinchey *v.* Stryker, 28 N. Y. 45, 84 Am. Dec. 324, 31 N. Y. 140, 26 How. Pr. (N. Y.) 75.

Indemnitors who come in aid of the attaching creditor will probably stand in the same position. Hess *v.* Hess, 117 N. Y. 306, 22 N. E. 956, 27 N. Y. St. 346.

56. Hess *v.* Hess, 117 N. Y. 306, 22 N. E. 956, 27 N. Y. St. 346.

57. Grisham *v.* Bodman, 111 Ala. 194, 20 So. 514, holding that the judgment for defendant in attachment was equivalent to a judgment that plaintiff in attachment had no cause of action.

58. Angell *v.* Hopkins, 79 Cal. 181, 21 Pac. 729.

and have had a trial of the right of property in the goods attached, since plaintiff had a right to allow the property to be carried away, and if the levy should be wrongful to bring an action for damages.[59]

5. PLEADINGS — a. Complaint, Declaration, or Petition. In an action to recover damages for depriving a third party of the possession and use of his property it is sufficient to aver that the attachment and levy thereof was wrongful;[60] it not being necessary to allege that the attachment was malicious and without probable cause,[61] or the time when the levy was made.[62] There must, however, be an averment that the property taken was the property of plaintiff,[63] and where the latter desires to recover special damages he must plead them.[64]

b. Answer or Plea. A defendant who was plaintiff in attachment need not, when justifying, aver the ground on which the attachment was issued, or set out the return of the writ,[65] although the latter allegation is requisite if defendant be the officer who attached,[66] and in such case he must allege all facts necessary to support the writ, and also the existence of a debt due to attaching plaintiff from defendant in attachment.[67] Moreover, he must allege that the property was, at the time of the seizure, that of defendant in attachment,[68] and must deny that such property was that of plaintiff.[69]

6. EVIDENCE — a. Plaintiff's. In an action by a claimant of goods against an officer of the attaching creditor, evidence that they had notice of the former's claim is admissible,[70] and where the good faith of such claim is attacked plaintiff may show that the claim was *bona fide*,[71] and generally may give evidence

59. Smith *v.* Kaufman, 94 Ala. 364, 10 So. 229.

60. Richardson *v.* Hall, 21 Md. 399, holding that the manner or mode in which the levy was made need not be specified.

Sufficient statement of cause of action.— A count claiming damages by reason of defendant's wrongful attachment of plaintiff's property, at the time of attachment in possession of an officer under a prior attachment sued out by others, and alleging that by reason of such levy plaintiff was wholly deprived of his property, states a good cause of action. Joseph *v.* Henderson, 95 Ala. 213, 10 So. 843.

61. Wolf *v.* Hunter, 15 Ky. L. Rep. 846.

The good faith of defendant in attaching is not negatived by an averment that he caused attachment to be levied on plaintiff's property, and that he knew, or could have known, by ordinary diligence, that such property was owned by plaintiff. Moore *v.* Lowrey, 74 Miss. 413, 21 So. 227.

62. Richardson *v.* Hall, 21 Md. 399.

63. Joseph *v.* Henderson, 95 Ala. 213, 10 So. 843; Meriden Britannia Co. *v.* Whedon, 31 Conn. 118.

64. Cook *v.* Clary, 48 Mo. App. 166.

65. Berry *v.* Hart, 1 Colo. 246.

66. Berry *v.* Hart, 1 Colo. 246; Snell *v.* Crowe, 3 Utah 26, 5 Pac. 522.

67. Fisher *v.* Kelly, 30 Oreg. 1, 46 Pac. 146.

68. Richardson *v.* Hall, 21 Md. 399; Adler *v.* Cole, 12 Wis. 188.

A vendee of a chattel who has leased for a specified time to his vendor cannot maintain an action against an officer attaching the right of lessee therein, pending the lease; and in such an action a plea that the property was in the lessee when he attached it, without setting out his title specifically, is good after verdict, and on demurrer. Wheeler *v.* Train, 3 Pick. (Mass.) 255.

69. Richardson *v.* Hall, 21 Md. 399.

Title of plaintiff to the attached property may be attacked by an officer justifying under the writ. Fisher *v.* Kelly, 30 Oreg. 1, 46 Pac. 146.

70. Lyons *v.* Hamilton, 69 Iowa 47, 28 N. W. 429. And for this purpose evidence of bills of goods sold to claimant by the attaching creditors for the purpose of replenishing the stock which he had purchased from the attaching debtor is admissible, as tending to show that claimant had taken steps to apprise the public, and especially the attaching creditors, of his title and possession. Leeser *v.* Boekhoff, 33 Mo. App. 223.

Proof that defendant gave attaching officer an indemnifying bond at the time of attachment presumptively establishes defendant's liability for the officer's wrongful act. Dyett *v.* Hyman, 129 N. Y. 351, 29 N. E. 261, 41 N. Y. St. 644, 26 Am. St. Rep. 533 [*affirming* 13 N. Y. Suppl. 895, 37 N. Y. St. 251].

71. Simis *v.* Hodge, 121 N. Y. 671, 24 N. E. 1094, 30 N. Y. St. 1015 [*affirming* 50 Hun (N. Y.) 410, 3 N. Y. Suppl. 228, 21 N. Y. St. 955], holding that plaintiff may show that after a mortgage under which he based his claim in the attachment proceedings was made mortgagor directed that the property, which he retained in his possession, was not to be sold. Such evidence is admissible as part of the *res gestæ*, and as tending to show that the transaction was valid and *bona fide*.

as to damage,[72] and the identity of the goods attached with those claimed by him.[73]

b. Defendant's. Under the general issue defendant may show that the goods did not belong to plaintiff but belonged to attachment defendant,[74] and, under proper allegations, may show fraud affecting the attachment creditor,[75] or that it was not defendant's intention to make an excessive levy;[76] but no evidence relating to the merits of the attachment suit[77] or as to the regularity of the proceedings therein[78] is admissible. In mitigation of damages defendant may show that the property wrongfully attached has been returned, or has been applied for the benefit or advantage of plaintiff with his consent, express or implied, or through legal proceedings instituted by third persons.[79]

7. Trial — Instructions. The instructions given must duly state the law upon the evidence submitted to the jury.[80] Thus where the evidence is substantially conclusive that plaintiff gave notice of his claim to the property and demanded it, an instruction that defendant took the property *bona fide* and plaintiff intentionally neglected to give sufficient notice of his claim, thereby permitting the property to be sold, is improper.[81] An instruction is also improper which misleads the jury with respect to matter that may be considered by it in measuring the damages sustained by plaintiff.[82]

72. Damages.—The cost price of the property, while not conclusive as to its value at the time of its conversion by defendant, is admissible to aid in arriving at the value at the time of the alleged conversion. Bunting *v.* Salz, (Cal. 1889) 22 Pac. 1132. The finding of the jury in the claim suit cannot be given in evidence for the purpose of increasing the damages. Batchellor *v.* Schuyler, 3 Hill (N. Y.) 386.

An affidavit made by plaintiff in replevin as to the worth of the property replevied is not admissible against him in a subsequent action by him for wrongful attachment, for the purpose of showing that he was not damaged because part of the goods were converted. Walker *v.* Collins, 59 Fed. 70, 19 U. S. App. 307, 8 C. C. A. 1.

73. The sheriff's return on the attachment proceedings is not conclusive as to the identity of the goods attached, and plaintiff may show *aliunde* that the goods attached were the same as those described in a mortgage on which his claim is based. Crawford *v.* Nolan, 72 Iowa 673, 34 N. W. 754.

74. Smith *v.* Kaufman, 94 Ala. 364, 10 So. 229.

75. Rinchey *v.* Stryker, 28 N. Y. 45, 84 Am. Dec. 324, 31 N. Y. 140, 26 How. Pr. (N. Y.) 75; Adler *v.* Cole, 12 Wis. 188. See also Fisher *v.* Kelly, 30 Oreg. 1, 46 Pac. 146.

Sufficient averment.— An averment that the property was at time of seizure that of attachment defendant, allows evidence showing that a sale under which plaintiff claims was fraudulent as to an attachment creditor. Adler *v.* Cole, 12 Wis. 188.

No presumption of fraud from failure to call debtor.— The failure of the attaching creditor, after having testified to the *bona fides* of his claim and the consideration paid therefor, to introduce the debtors who are present in court as witnesses is not a suspicious circumstance against the validity of the transaction, and does not authorize any presumption against him. Pollak *v.* Harmon, 94 Ala. 420, 10 So. 156.

76. Pollak *v.* Searcy, 84 Ala. 259, 4 So. 137.

77. Evidence of the indebtedness of defendant in attachment to plaintiff in that suit is not relevant to any issue that can arise in an action arising out of the wrongful attachment of a third person's property. Edinger *v.* Heuchler, 8 Iowa 513. See also Moffett *v.* Boydstum, 4 Kan. App. 406, 46 Pac. 24. *Compare* Cook *v.* Hopper, 23 Mich. 511.

78. Cevada *v.* Miera, (N. M. 1900) 61 Pac. 125.

Evidence of levy and sale under the writ of attachment is not material, where the officer does not plead a justification. Snell *v.* Crowe, 3 Utah 26, 5 Pac. 522.

79. Grisham *v.* Bodman, 111 Ala. 194, 20 So. 514, holding that this evidence is admissible, even if plaintiff claimed the property attached under a sale fraudulent and void as against creditors of attachment defendant, and that it may be also shown that the property attached or a part of it had been seized under a second attachment debtor and applied to payment of their debts.

80. The attachment of an undivided interest in the property of a stranger is *pro tanto* trespass. Therefore an instruction to find for defendant in the event of plaintiff having an undivided interest in the property at the time of levy is erroneous. Brownell *v.* McCormick, 7 Mont. 12, 14 Pac. 651.

81. Lathers *v.* Wyman, 76 Wis. 616, 45 N. W. 669.

82. Simmons Clothing Co. *v.* Davis, (Indian Terr. 1900) 58 S. W. 655.

In an action on an attachment bond the jury may be instructed that if they believe the claim of plaintiff was *bona fide*, and that a sale to him by attachment defendant was made solely for the payment of a debt, and that after plaintiff took open possession of

8. Damages — a. In General. All actual damages resulting from the wrongful seizure are recoverable from plaintiff in attachment,[83] and in such damages may be included necessary expenses incurred in a suit to recover the property.[84] Where the attachment was malicious or wilful punitive damages may be recovered,[85] if specially pleaded.[86]

b. Measure of Damages. Where plaintiff was totally deprived of his property the measure of damages is the value of the property taken[87] at the time of

the property he retained it until the attachment was levied, the reasonable market value of the property, not exceeding the amount of the indebtedness, as of the date of the levy, may be the recoverable damage. State *v.* Crowder, 40 Mo. App. 536.

83. Frank *v.* Chaffe, 34 La. Ann. 1203; State *v.* Silverstein, 77 Mo. App. 304; Fechheimer *v.* National Exch. Bank, 31 Gratt. (Va.) 651.

Damages for unlawful levy on realty.— In a case where land is attached, if no actual injury has been done thereto, plaintiff can recover nominal damages only (Spear *v.* Hubbard, 4 Pick. (Mass.) 143), and mesne rents and profits are never recoverable, because the levy does not entitle the attaching creditor to possession (Heathman *v.* Million, 17 Ky. L. Rep. 421, 31 S. W. 473). The levy of an attachment upon and in which the debtor has no interest does not constitute a cloud on the owner's title, and hence gives him no right of action for the damages against attachment plaintiff. Duncan *v.* Citizens Nat. Bank, 20 Ky. L. Rep. 237, 45 S. W. 774.

Injury or deterioration to the property may increase the amount of damages recoverable. Witascheck *v.* Glass, 46 Mo. App. 209.

Plaintiff may recover further damages actually sustained by him by reason of the seizure. Comly *v.* Fisher, Taney (U. S.) 121, 6 Fed. Cas. No. 3,053.

The amount of recovery may be reduced where plaintiff has received any of the proceeds from a sale of the property. Straub *v.* Wooten, 45 Ark. 112; Corner *v.* Mackintosh, 48 Md. 374.

Injury to credit is too remote as a ground for damages. Cunningham *v.* Sugar, 9 N. M. 105, 49 Pac. 910.

Recovery for lost profits on goods attached is not proper for any time after that when plaintiff could reasonably have had his stock replenished. Cunningham *v.* Sugar, 9 N. M. 105, 49 Pac. 910.

84. Frank *v.* Chaffe, 34 La. Ann. 1203; State *v.* Silverstein, 77 Mo. App. 304.

Counsel fees paid in defending the property in the attachment proceedings are not recoverable. Farmers, etc., Tobacco Warehouse Co. *v.* Gibbons, 21 Ky. L. Rep. 1348, 55 S. W. 2; Corner *v.* Mackintosh, 48 Md. 374. But see State *v.* Silverstein, 77 Mo. App. 304, where, in an action on an attachment bond, it was held that a successful interpleader was entitled to damages as broad as would be allowed a defendant who defeated an attachment; and that therefore attorney's fees might be recovered. And see Roberts *v.* Heim, 27 Ala. 678, where the jury were permitted to consider counsel fees, paid by plaintiff in a suit brought to try the right of property, in assessing his damages in a subsequent action therefor. Under a statute making an attachment bond stand as an indemnity to an interpleader, as well as to defendant, reasonable attorney's fees may be recovered. State *v.* East Joplin Lumber Co., 70 Mo. App. 663.

85. Ellis *v.* Allen, 80 Ala. 515, 2 So. 676; Hayes *v.* Parmalee, 79 Ill. 563; Moore *v.* Schultz, 31 Md. 418; Cunningham *v.* Sugar, 9 N. M. 105, 49 Pac. 910.

Where the evidence does not show any gross negligence or malice on the part of the attaching creditor exemplary damages are not recoverable. Cunningham *v.* Sugar, 9 N. M. 105, 49 Pac. 910.

86. Frank *v.* Chaffe, 34 La. Ann. 1203; Cook *v.* Clary, 48 Mo. App. 166.

87. *Alabama.*— Ellis *v.* Allen, 80 Ala. 515, 2 So. 676.

Arkansas.— Perkins *v.* Ewan, 66 Ark. 175, 49 S. W. 569; Straub *v.* Wooten, 45 Ark. 112.

Illinois.— Hayes *v.* Parmalee, 79 Ill. 563. Under the statute relative to damages for wrongful attachment, plaintiff is not limited in his recovery to only such sum as his property might have brought under a forced sale. Whitaker *v.* Wheeler, 44 Ill. 440.

Iowa.— Crawford *v.* Nolan, 72 Iowa 673, 34 N. W. 754; Jennings *v.* Hoppe, 44 Iowa 205.

Maryland.— Corner *v.* Mackintosh, 48 Md. 374; Moore *v.* Schultz, 31 Md. 418.

Massachusetts.— Henshaw *v.* Bellows Falls Bank, 10 Gray (Mass.) 568. But where goods assigned to a trustee for creditors were attached wrongfully, and the value of the goods exceeded the amount of the assignee's demand, the measure of damages was held to be the amount of the demand against the attaching debtor and not the value of the goods. Boyden *v.* Moore, 11 Pick. (Mass.) 362.

Missouri.— State *v.* Crowder, 40 Mo. App. 536.

Texas.— Weaver *v.* Goodman, (Tex. Civ. App. 1899) 51 S. W. 860.

United States.— Comly *v.* Fisher, Taney (U. S.) 121, 6 Fed. Cas. No. 3,053.

The market value of the goods is the measure of damages. Weaver *v.* Goodman, (Tex. Civ. App. 1899) 51 S. W. 860.

Officer's return as to value not conclusive. — The true value of the property is recoverable in case of a sale under a wrongful attachment, irrespective of the value recited in attaching officer's return. Straub *v.* Wooten, 45 Ark. 112.

seizure,[88] with interest from the date of the levy up to the time of trial;[89] but where the property was only detained for a time, the measure of damages is the value of the use during such time.[90] Where plaintiff had only a partial interest in the property the damages recoverable must be measured by the extent of his interest.[91]

XV. DISSOLUTION, QUASHING, AND VACATING.

A. Causes For Dissolution[92]— **1. GENERALLY.**[93] Since special proceeding[94] and particular grounds[95] are necessary to authorize an attachment of property, defendant may raise issues regarding the validity of the attachment without touching upon the merits of the claim[96] upon which plaintiff's cause of action is

Diminution of damages.— Damages cannot be diminished by allowance for the costs of an unlawful sale. Perkins *v.* Ewan, 66 Ark. 175, 49 S. W. 569.

The fact that the goods attached were sold by a receiver appointed in the attachment suit does not preclude the owner from recovering the full value of the property sold. Perkins *v.* Ewan, 66 Ark. 175, 49 S. W. 569.

88. Perkins *v.* Ewan, 66 Ark. 175, 49 S. W. 569; Robinson *v.* Mansfield, 13 Pick. (Mass.) 139; Comly *v.* Fisher, Taney (U. S.) 121, 6 Fed. Cas. No. 3,053.

89. *Alabama.*— Ellis *v.* Allen, 80 Ala. 515, 2 So. 676.

Arkansas.— Perkins *v.* Ewan, 66 Ark. 175, 49 S. W. 569.

Iowa.— Crawford *v.* Nolan, 72 Iowa 673, 34 N. W. 754.

Maryland.— Corner *v.* Mackintosh, 48 Md. 374; Moore *v.* Schultz, 31 Md. 418.

Missouri.— Witascheck *v.* Glass, 46 Mo. App. 209.

Texas.— Weaver *v.* Goodman, (Tex. Civ. App. 1899) 51 S. W. 860.

90. Turner *v.* Younker, 76 Iowa 258, 41 N. W. 10; Robinson *v.* Mansfield, 13 Pick. (Mass.) 139; Witascheck *v.* Glass. 46 Mo. App. 209.

91. Becker *v.* Dunham, 27 Minn. 32, 6 N. W. 406.

The extent of recovery by a tenant in common is his interest in the property. Wilson *v.* Blake, 53 Vt. 305 [*citing* Chandler *v.* Spear, 22 Vt. 388; White *v.* Morton, 22 Vt. 15, 52 Am. Dec. 75; Bradley *v.* Arnold, 16 Vt. 382; Ladd *v.* Hill, 4 Vt. 164].

Where pledged goods are attached and taken from the possession of the pledgee without a payment or tender of the amount for which they were pledged, pledgee may recover the full value of the goods, and not merely the amount due from the pledgor. Pomeroy *v.* Smith, 17 Pick. (Mass.) 85. See also Martin-Brown Co. *v.* Henderson, 9 Tex. Civ. App. 130, 28 S. W. 695.

92. Void and voidable attachment distinguished.— Even though a writ could be quashed because of defective counts therein, it is not an absolute nullity and will serve as a justification for the officer holding the property. Ela *v.* Shepard, 32 N. H. 277.

93. The expiration of the term of office of a judge of the supreme court does not affect the validity of an attachment issued by him because he acts in his judicial capacity in issuing the writ, and not as a supreme court commissioner. Davis *v.* Ainsworth, 14 How. Pr. (N. Y.) 346.

A writ of error from the supreme court of the United States, to reverse a judgment of a state court before execution, *ipso facto* dissolves an attachment made at the commencement of the suit, because such a writ of error cannot be taken without giving security which replaces the security of the attachment. Otis *v.* Warren, 16 Mass. 53.

94. Proceedings to procure attachment see *supra*, VII.

95. Grounds for attachment see *supra*, V.

96. Failure of plaintiff's pleadings to show any cause of action has been held sufficient to justify a motion to dissolve an attachment.

California.— Hathaway *v.* Davis, 33 Cal. 161, where plaintiff was first given an opportunity to amend.

Iowa.— Cramer *v.* White, 29 Iowa 336.

Kansas.—Quinlan *v.* Danford, 28 Kan. 507.

Maryland.— Mayer *v.* Soyster, 30 Md. 402.

North Carolina.— Knight *v.* Hatfield, 129 N. C. 191, 39 S. E. 807.

Oklahoma.— Carnahan *v.* Gustine, 2 Okla. 399, 37 Pac. 594.

Pennsylvania.— Vienne *v.* McCarty, 1 Dall. (Pa.) 154, 1 L. ed. 79. *Compare* Farquhar *v.* Wisconsin Condensed Milk Co., 30 Misc. (N. Y.) 270, 62 N. Y. Suppl. 305, where the allegations of a breach of contract were held sufficient and the attachment was not vacated.

See 5 Cent. Dig. tit. "Attachment," § 783.

A rule on plaintiff to file an affidavit of claim or have the attachment dissolved has been granted on the application of a defendant in foreign attachment. Hartman *v.* Wallach, 17 Pa. Co. Ct. 88.

Where the cause of action will not support an attachment, defendant may move on this ground to have the attachment quashed (Holmes *v.* Barclay, 4 La. Ann. 63, 64; Elliott *v.* Jackson, 3 Wis. 649); and where part of a cause of action would not support an attachment because plaintiff had security therefor, it has been held that the entire attachment must be vacated (Vollmer *v.* Spencer, (Ida. 1897) 51 Pac. 609. *Compare* Boarman *v.* Patterson, 1 Gill (Md.) 372, where an attachment suit embraced several causes of action, some of which would not support

founded;[97] and the facts which are ordinarily relied on for this purpose are either defects in the proceeding to obtain attachment[98] or the falsity of the matter alleged in the affidavit,[99] although in some jurisdictions the truth of the affidavit

attachment, and it was held that the attachment should be dissolved as to these but allowed to stand for the remainder).

The immaturity of a valid indebtedness does not of itself furnish a ground to dissolve an attachment issued in a suit in an action brought on such indebtedness. Read *v.* Ware, 2 La. Ann. 498. *Compare* Gowan *v.* Hanson, 55 Wis. 341, 13 N. W. 238, where an attachment on a debt not due was dissolved because the affidavit did not state that the debt was to become due, and a bond was not given for three times the amount demanded as required by statute.

Where a defense to the principal cause of action has been waived, defendant cannot assert such a defense to defeat the attachment proceedings. Pennsylvania *v.* Peoples, 31 Ohio St. 537.

The pendency of a suit in another court for the same cause of action is not sufficient to justify a dissolution of the attachment (Netter *v.* Harding, 6 Pa. Dist. 169, 18 Pa. Co. Ct. 353; Seeley *v.* Missouri, etc., R. Co., 39 Fed. 252, the latter case construing New York statute); although it has been held that when an order of attachment was issued in the earlier proceeding the attachment in the subsequent action will be dissolved (Smith-Frazer Boot, etc., Co. *v.* Derse, 41 Kan. 150, 21 Pac. 167). *Compare* Davidson *v.* Owens, 5 Minn. 69, where it was held to be no ground for vacating a writ of attachment that plaintiff's claim had been decided adversely to him in an action in a federal court. See also Johnson *v.* Stockham, 89 Md. 368, 43 Atl. 943.

The existence of a counter-claim against plaintiff or plaintiff's assignor is no ground for dissolving the attachment in the suit, if defendant is prevented from pleading and taking advantage of his counter-claim. Dolbeer *v.* Stout, 60 N. Y. Super. Ct. 276, 17 N. Y. Suppl. 186, 42 N. Y. St. 693.

The failure to attach a copy of the instrument sued on is not a ground for dissolving the attachment, but such an objection must be taken advantage of by a demurrer (McCarn *v.* Rivers, 7 Iowa 404); or by a properly directed motion (Olmstead *v.* Rivers, 9 Nebr. 234, 2 N. W. 366).

97. Judgment for defendant on the merits terminates the attachment lien. See *supra*, XII, A, 1.

98. *Idaho.*— Mason *v.* Lieuallen, (Ida. 1895) 39 Pac. 1117.

Iowa.— McLaren *v.* Hall, 26 Iowa 297.

Pennsylvania.— Fernau *v.* Butcher, 113 Pa. St. 292, 6 Atl. 67; Steel *v.* Goodwin, 113 Pa. St. 288, 6 Atl. 49; Crawford *v.* Stewart, 38 Pa. St. 34; Singerly *v.* Dewees, 6 Pa. Dist. 92, 19 Pa. Co. Ct. 80.

South Carolina.— Lipscomb *v.* Rice, 47 S. C. 14, 24 S. E. 925; Kerchner *v.* McCormac, 25 S. C. 461; Ivy *v.* Caston, 21 S. C. 583; Claussen *v.* Easterling, 19 S. C. 515; Bates *v.* Killian, 17 S. C. 553.

South Dakota.— Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

Irregularity and improvidence in issue of writ distinguished.— An attachment is irregularly issued where the facts or allegations contained in the affidavit upon which it is founded are insufficient; in other words where, even admitting them to be true, they do not constitute a legal ground for the warrant. It is improvidently issued where the allegations, if true, would be sufficient, yet it satisfactorily appears that they are not true. The first ground may be determined upon an inspection of the affidavit; the second upon affidavits *pro* and *con*. Kerchner *v.* McCormac, 25 S. C. 461.

The legal sufficiency of the steps taken to procure the writ is a matter for adjudication by the court. Mayhew *v.* Dudley, 1 Pinn. (Wis.) 95.

A bond will not be required when the warrant in attachment "on its face appears to have been issued irregularly, or for a cause insufficient in law, or false in fact." Knight *v.* Hatfield, 129 N. C. 191, 194, 39 S. E. 807.

99. *Arkansas.*— Ward *v.* Carlton, 26 Ark. 662.

Georgia.— Blackwell *v.* Compton, 107 Ga. 764, 33 S. E. 672; Simpson *v.* Holt, 89 Ga. 834, 16 S. E. 87 (where the attachment was issued without a previous order).

Kentucky.— Tingle *v.* Beasley, 8 Ky. L. Rep. 878, holding an attachment without grounds cannot be sustained merely because plaintiff is entitled to retain enough of the proceeds of the attached property to satisfy his debt.

Louisiana.— Gordon *v.* Baillio, 13 La. Ann. 473.

Mississippi.— Montague *v.* Gaddis, 37 Miss. 453.

Nebraska.— Symns Grocery Co. *v.* Snow, 58 Nebr. 516, 78 N. W. 1066.

New Jersey.— Day *v.* Bennett, 18 N. J. L. 287; Branson *v.* Shinn, 13 N. J. L. 250. *Compare* Peacock *v.* Wildes, 8 N. J. L. 179, where the absence of a ground for attachment appeared on the face of the affidavit.

North Carolina.— Hale *v.* Richardson, 89 N. C. 62 [*overruling* O'Neal *v.* Owens, 2 N. C. 419].

Pennsylvania.—Boyes *v.* Coppinger, 2 Yeates (Pa.) 277.

Rhode Island.— Kelley *v.* Force, 16 R. I. 628, 18 Atl. 1037.

South Carolina.— Ivy *v.* Caston, 21 S. C. 583; Claussen *v.* Easterling, 19 S. C. 515; Bates *v.* Killian, 17 S. C. 553.

South Dakota.— Pierie *v.* Berg, 7 S. D. 578, 64 N. W. 1130; Quebec Bank *v.* Carroll, 1 S. D. 372, 47 N. W. 397; Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

Wisconsin.— Morrison *v.* Ream, 1 Pinn.

cannot be put in issue on the trial of the attachment suit, and defendant must resort to his action on the attachment bond.[1] It has also been held that fraud in procuring a levy on the property is sufficient to justify an application to have the attachment set aside.[2]

2. Defects in Proceeding. Not every defect or slight irregularity in attachment proceedings will justify a quashing of the attachment,[3] for the mistake must

(Wis.) 244, holding the truth of the affidavit may be examined, although the officer before whom it is made indorses his satisfaction of the facts alleged therein. *Compare* a *dictum* to the contrary in Mayhew *v.* Dudley, 1 Pinn. (Wis.) 95, from which Dunn, C. J., dissented.

See 5 Cent. Dig. tit. "Attachment," § 789.

The false statement in an affidavit that a claim is unsecured will furnish a ground for vacating the attachment. Fisk *v.* French, 114 Cal. 400, 46 Pac. 161.

1. Tucker *v.* Adams, 52 Ala. 254; Sturman *v.* Stone, 31 Iowa 115; McLaren *v.* Hall, 26 Iowa 297; Berry *v.* Gravel, 11 Iowa 135; Veiths *v.* Hagge, 8 Iowa 163; Burrows *v.* Lehndorff, 8 Iowa 96; Churchill *v.* Fulliam, 8 Iowa 45; Lord *v.* Gaddis, 6 Iowa 57; Sackett *v.* Partridge, 4 Iowa 416; Smith *v.* Herring, 10 Sm. & M. (Miss.) 518; Gimbel *v.* Gomprecht, 89 Tex. 497, 35 S. W. 470 [*overruling* Avery *v.* Zander, 77 Tex. 207, 13 S. W. 971; Cox *v.* Reinhardt, 41 Tex. 591]; Bateman *v.* Ramsey, 74 Tex. 589, 12 S. W. 235; Dwyer *v.* Testard, 65 Tex. 432; Cloud *v.* Smith, 1 Tex. 611.

2. Kizer *v.* George, 10 Ohio Dec. (Reprint) 218, 19 Cinc. L. Bul. 257; Powell *v.* McKee, 4 La. Ann. 108. *Compare* Rainey *v.* Jefferson Iron Works, 8 Ohio Cir. Ct. 674, where it was held that plaintiff's asking a garnishee to buy defendant's property which was subsequently attached was not such a fraud in procuring the levy as would justify the court in setting aside the attachment.

Collusive attachment vacated.— Where a debtor, in collusion with some of his creditors, permits all of his property to be attached, with a view to giving such creditors a preference over other creditors, the attachment will be held to be an assignment with preferences, and will be vacated (Meinhard *v.* Youngblood, 41 S. C. 312, 19 S. E. 675); and where a partnership creditor levied an attachment on firm property for the purpose of preventing individual creditors from getting satisfaction from their claims and took no further steps for four months the attachment was set aside as fraudulent (Reed *v.* Ennis, 4 Abb. Pr. (N. Y.) 393).

3. **Defects not justifying dissolution.**— It has been held that an attachment will not be quashed because the clerk made an error in dating the bond and affidavit (Henderson *v.* Drace, 30 Mo. 358) or neglected to advertise until the second term after the writ issued (Cory *v.* Lewis, 5 N. J. L. 994); because the summons failed to state the county where plaintiff desired the trial as required by the code (Thomson *v.* Tilden, 24 Misc. (N. Y.) 513, 53 N. Y. Suppl. 920); because of a slight inconsistency between the date of the summons and the date of the sheriff's return (Cureton *v.* Dargan, 12 S. C. 122), of a clerical error in the body of the affidavit (Citizens' Bank *v.* Hancock, 35 La. Ann. 41), or of failure to affix the affidavit to the writ when the writ was served on defendant (Simpson *v.* Oldham, 2 Pinn. (Wis.) 461, 2 Chandl. (Wis.) 129); because of an abortive attempt to serve process on a non-resident defendant (Kennard *v.* Hollenbeck, 17 Nebr. 362, 22 N. W. 771), or of a wrongful levy on real estate as well as upon personalty when the real estate could not properly be attached (Mechanics' Nat. Bank *v.* Miners' Bank, 13 Wkly. Notes Cas. (Pa.) 515); because there was a misstatement in the writ regarding the judicial district from which it issued (Standard Cotton Seed Oil Co. *v.* Mathison, 47 La. Ann. 710, 17 So. 251), regarding the time when (Dandridge *v.* Stevens, 12 Sm. & M. (Miss.) 723), or the court to which (Carter *v.* O'Bryan, 105 Ala. 305, 16 So. 894), it was returnable; because the first names of defendants were omitted from the writ (Laws *v.* McCarty, 1 Handy (Ohio) 191, 12 Ohio Dec. (Reprint) 96); or because the attachment bond mentioned the sum due without including interest (Smith *v.* Pearce, Gilmer (Va.) 34). *Compare* Dawson *v.* Brown, 12 Gill & J. (Md.) 53, where it was held that an irregularity in issuing a writ for a greater amount than that claimed in the affidavit and account was not a ground for dissolving the attachment.

By statute in Mississippi attachments cannot be vacated for want of form if essential matters are expressed. Bosbyshell *v.* Emanuel, 12 Sm. & M. (Miss.) 63.

Irregularities in superfluous proceedings will not justify a dissolution of the attachment; such as defects in an unnecessary affidavit (Thorn *v.* Alvord, 54 N. Y. App. Div. 638, 67 N. Y. Suppl. 1147 [*affirmed* in 32 Misc. (N. Y.) 456, 66 N. Y. Suppl. 587]); failure of the petition to state what part of the account sued on was due, since such a statement was not required (Tootle *v.* Alexander, 13 Tex. Civ. App. 615, 35 S. W. 821), or irregularity in the return of an unnecessary alias citation (Walker *v.* Birdwell, 21 Tex. 92).

The improper joinder of a defendant in attachment is no ground for dissolving the attachment (Albers *v.* Bedell, 87 Mo. 183); and a discontinuance against a garnishee does not dissolve an attachment on the land which the garnishee is alleged to have purchased by fraud (Hand *v.* Fritsch, 7 Ky. L. Rep. 439).

Irregularities in obtaining a judgment are no cause for dissolving an attachment (Mur-

be a material one;[4] and, although irregularities which warrant a dissolution of the writ will usually appear on the face of the affidavit or undertaking to procure attachment, or by comparison with the summons and complaint,[5] such is not the invariable rule and other defects may be shown.[6]

3. Falsity of Affidavit — a. Non-Existence of Alleged Grounds For Attachment.[7] The falsity of an affidavit for attachment is shown with sufficient certainty to justify a quashing of the writ by evidence that an alleged non-resident does in fact reside within the state,[8] that an alleged absconder had not in fact

dock *v.* Steiner, 45 Pa. St. 349); and the failure of the journal entries regarding the calling and default of defendant to state the special capacity in which plaintiff sued seems to be a defect of this nature (Drew *v.* Dequindre, 2 Dougl. (Mich.) 93). *Compare* Johnson *v.* Stockham, 89 Md. 368, 43 Atl. 943, where the docket entries disclosed the fact that by leave of the court two notes were withdrawn and copies left in their place, and it was held that the failure of the clerk to send a transcript of them along with the record is no ground for holding that the attachment was properly quashed, when it is plain that the only ground upon which it was in fact quashed was wholly different.

A void service is not a ground for quashing an attachment, where defendant has entered an appearance in the suit, but the levy and return alone should be quashed. Lawrence *v.* Featherston, 10 Sm. & M. (Miss.) 345.

4. Irregularities in the proceedings have been held sufficient to justify a dissolution of the attachment when the affidavit was defective in matter of substance (Hall *v.* Brazelton, 46 Ala. 359; Simon *v.* Kugler Syndicate, 68 N. Y. Suppl. 1128), even though the affidavit is only required to be made before the writ is "executed" (Bowen *v.* Slocum, 17 Wis. 181), as where it failed to state any ground for the attachment (Miller *v.* Brinkerhoff, 4 Den. (N. Y.) 118, 47 Am. Dec. 242), or showed on its face that the alleged grounds for the attachment were insufficient in law or in fact (Bear *v.* Cohen, 65 N. C. 511); where it failed to set out a good cause of action (Thomas *v.* Pendleton, 1 S. D. 150, 46 N. W. 180, 36 Am. St. Rep. 726), or was based on information and on belief merely (Meinhard *v.* Neill, 85 Ga. 265, 11 S. E. 613; Clowser *v.* Hall, 80 Va. 864); where the bond recited that the suit was brought in a non-existing court (Bonner *v.* Brown, 10 La. Ann. 334), or was otherwise defective, although such defect did not affect the principal cause of action (Elliott *v.* Mitchell, 3 Greene (Iowa) 237); when the clerk failed to sign the writ (Smith *v.* Hackley, 44 Mo. App. 614); where there was no order directing the writ to issue (Blackwell *v.* Compton, 107 Ga. 764, 33 S. E. 672); where there was no clause for a summons in the writ (Bland *v.* Schott, 5 Mo. 213); when the service of the writ was defective (Coughlin *v.* Angell, 68 N. H. 352, 44 Atl. 525), or service by publication was not begun within the time prescribed by statute (Blossom *v.* Estes, 84 N. Y. 614; Mojarrieta *v.* Saenz, 80 N. Y. 547; Taylor *v.* Troncoso, 76 N. Y. 599). *Compare* Crowns *v.* Vail, 51 Hun (N. Y.) 204, 4 N. Y. Suppl. 324, 21 N. Y. St. 208, where an affidavit in an action by an assignee of claims stated that plaintiff was entitled to recover a specified sum over and above all counter-claims known to "him," and it was held that this defect was a sufficient basis for a motion to vacate the attachment.

5. Kohler *v.* Agassiz, 99 Cal. 9, 33 Pac. 741.

6. A defect in the short note required by statute as a substitute for the declaration, which would be fatal on demurrer, is a good ground for quashing the attachment. Hirsh *v.* Thurber, 54 Md. 210.

An illegal interchange of trial justices has been held to furnish a ground for quashing the attachment. Wells *v.* Mansur, 52 Vt. 239.

The unauthorized substitution of another defendant in place of the original one would justify a quashing of the writ. Milledgeville Mfg. Co. *v.* Rives, 44 Ga. 479.

A writ of attachment against executors commanding a sheriff to attach the defendants by "their" goods and chattels, lands, etc., is defective and will be quashed. Haight *v.* Bergh, 15 N. J. L. 183. *Compare* Connelly *v.* Lerche, 56 N. J. L. 95, 28 Atl. 430, where it is held that a writ of attachment will not lie against executors, because to allow attachment would be an unwarranted interference with the distribution of the assets of the decedent's estate. And see *supra*, IV, E, 1.

It is not an improper renewal of an action, contrary to the statutory provision which forbids a plaintiff upon dismissing a suit to renew it at the same term of court, where plaintiff brought a suit by attachment for a different amount, and there is nothing in the record to show that the cause of action was the same as in the suit which had been dismissed. Baldwin *v.* Conger, 9 Sm. & M. (Miss.) 516.

Confession of error.—Where plaintiff had levied two attachments, a statement by his counsel that he claims nothing under the second writ is a confession of error, and it was properly held that the writ should be discharged. Kuehn *v.* Paroni, 20 Nev. 203, 19 Pac. 273.

7. See *supra*, V, L, 1, note 83.

8. Bliss *v.* Benedict, 24 Nebr. 346, 38 N. W. 827; Peru Plow, etc., Co. *v.* Benedict, 24 Nebr. 340, 38 N. W. 824; Likens *v.* Clark, 26 N. J. L. 207; Brundred *v.* Del Hoyo, 20 N. J. L. 328; Weber *v.* Weitling, 18 N. J.

absconded,[9] or that defendant lacked a fraudulent intent in making an alleged fraudulent transfer or concealment of property;[10] and as it is usually not enough that a creditor have reasonable cause for believing that a ground for attachment exists, proof of reasonable grounds for such belief will not defeat a proceeding to vacate an attachment.[11]

Eq. 441; Kauffman *v.* Musin, 9 Pa. Co. Ct. 414; Blake *v.* Hawkes, 2 Hill (S. C.) 631 (holding that the court would not interfere in a doubtful case); Degnans *v.* Wheeler, 2 Nott & M. (S. C.) 323. But see Easton *v.* Malavazi, 7 Daly (N. Y.) 147, where it was held that an attachment could not be vacated for want of jurisdiction even if the evidence supporting the matter in the affidavit was insufficient, provided the statements in the affidavit were such that they fairly called for an exercise of judgment by the officer issuing the writ.

The return of a non-resident after the issue of the writ is not a ground for dissolving an attachment, for it does not prove the allegations in the affidavit to be false. Larimer *v.* Kelley, 10 Kan. 298; Simons *v.* Jacobs, 15 La. Ann. 425; Offutt *v.* Edwards, 9 Rob. (La.) 90; Reeves *v.* Comly, 3 Rob. (La.) 363; New Orleans Canal, etc., Co. *v.* Comly, 1 Rob. (La.) 231.

Estoppel to allege non-residence.—Where plaintiff falsely alleged that defendant was a citizen of the state in order to obtain possession of goods by an attachment issued in a federal court, he was held to be estopped from stating the non-residence of defendant as a ground for attachment in an action brought simultaneously in the state court, and the attachment was properly quashed. Gilbert *v.* Hollinger, 14 La. Ann. 441.

9. Matter of Warner, 3 Wend. (N. Y.) 424; Blankinship *v.* McMahon, 63 N. C. 180.

Entry of an appearance by defendant does not disprove an allegation that he had absconded. Phillips *v.* Orr, 11 Iowa 283.

A substituted service of summons in an attachment action several days after the writ was issued does not conclusively disprove the allegation of an affidavit that defendant had left the state and that his residence was unknown to plaintiff. Barth *v.* Burnham, 105 Wis. 548, 81 N. W. 809.

10. Cuendet *v.* Lahmer, 16 Kan. 527; Robinson *v.* Melvin, 14 Kan. 484; Palmer *v.* Hightower, 47 La. Ann. 17, 16 So. 560; Bridge *v.* Ennis, 28 La. Ann. 309; Walker *v.* Hagerty, 20 Nebr. 482, 30 N. W. 556; McGrath *v.* Sayer, 19 N. Y. App. Div. 321, 46 N. Y. Suppl. 113; Donnelly Contracting Co. *v.* Stanton, 6 Misc. (N. Y.) 168, 27 N. Y. Suppl. 124.

Sufficiency of proof.—Although it has been held that facts must be clearly established showing that defendant was about to convert his property into money with intent to defraud his creditor to prevent a dissolution of the attachment (Bussey *v.* Rothschilds, 26 La. Ann. 258), a fair preponderance of evidence showing the existence of alleged grounds for attachment would ordinarily be sufficient to defeat an attempt to have the attachment vacated (Walton *v.* Chadwick, 6 Misc. (N. Y.) 293, 26 N. Y. Suppl. 789, 58 N. Y. St. 145), even where the evidence was in the form of a defective affidavit (Matter of Aycinena, 1 Sandf. (N. Y.) 690); and evidence of equal weight on the other side would justify a dissolution of the attachment on motion (Flannagan *v.* Newberg, 1 Ida. 78); so that evidence was held insufficient to justify a reversal of an order dismissing an attachment in Noonan *v.* Pomeroy, 14 Wis. 568. *Compare* Koenig *v.* Huck, 51 La. Ann. 1368, 26 So. 543, where it was held that an attachment based on a fraudulent transfer must be dissolved without regard to the question of motive, when proof of the validity of the transfer was offered and plaintiff withdrew his averment of fraudulent intent.

Partial failure of grounds for attachment. — Although where no grounds for attachment existed for part of the debt sued for it has been held that the entire attachment must be dissolved (Meyer *v.* Evans, 27 Nebr. 367, 43 N. W. 109; Mayer *v.* Zingre, 18 Nebr. 458, 25 N. W. 727; Strasburger *v.* Bachrach, 13 N. Y. Suppl. 538, 36 N. Y. St. 1006); it has also been decided that an attachment will be sustained by proof of one of two alleged grounds for the issue of the writ (Tucker *v.* Frederick, 28 Mo. 574, 75 Am. Dec. 139); by proof of one of three alleged grounds (Strauss *v.* Abrahams, 32 Fed. 310, construing Missouri statute); or by proof of one of several alleged grounds (Cole Mfg. Co. *v.* Jenkins, 47 Mo. App. 664); although proof of a ground for attachment not alleged in the affidavit will not sustain the attachment (Dumay *v.* Sanchez, 71 Md. 508, 18 Atl. 890); and that where one defendant in an attachment against several parties denied the alleged non-residence of his co-defendant, such denial afforded no cause for quashing the writ (Warren *v.* Winterstein, 114 Mich. 647, 72 N. W. 600; Curran *v.* William Kendall Boot, etc., Co., 8 N. M. 417, 45 Pac. 1120. *Compare* Rosenberg *v.* Burnstein, 60 Minn. 18, 61 N. W. 684. *Contra*, Converse *v.* Steamer Lucy Robinson, 15 La. Ann. 433, where it was held that an attachment on the ground of non-residence which was bad against some of the owners of the attached property, because they were residents of the state, must be set aside *in toto*).

An offer to return property, the concealment of which was the ground for attachment, is not a sufficient cause for dissolving the attachment. Jackson *v.* White, 15 Phila. (Pa.) 294, 39 Leg. Int. (Pa.) 42.

11. Citizens' State Bank *v.* Baird, 42 Nebr. 219, 60 N. W. 551; Likens *v.* Clark, 26 N. J. L. 207; Brundred *v.* Del Hoyo, 20

b. Variance From Allegations as to Amount of Claim. Although it is ordinarily required that the affidavit to procure an attachment shall state the amount of attaching plaintiff's claim,[12] it is not a ground for quashing the writ that a verdict for a smaller amount is recovered on a trial of the action;[13] and while it has been held that variance as to the amount claimed between the writ of attachment and the affidavit is a fatal defect,[14] it is not a ground for quashing an attachment that the petition claimed a greater amount than that for which the writ of attachment is issued[15] for plaintiff is not bound to attach for the full amount of his claim.[16]

4. Insufficient Circumstances[17] — a. Appearance in Suit.[18] The early theory of foreign attachment made its purpose to compel an appearance and, taken in conjunction with the obsolete practice of requiring bail to complete an appearance, this gave some weight to the argument that appearance dissolved an attachment;[19]

N. J. L. 328; Weber *v.* Weitling, 18 N. J. Eq. 441; Lesage *v.* Schmitt, 10 N. J. L. J. 10; Matter of Warner, 3 Wend. (N. Y.) 424. *Contra*, Claflin *v.* Steenbock, 18 Gratt. (Va.) 842; Scott *v.* Mitchell, 8 Ont. Pr. 518.

An attachment on the ground that the debtor did not have sufficient property in the state to satisfy plaintiff's demand was not reversed, although the debtor's property subsequently sold for more than plaintiff's debt. Brasher *v.* Tandy, 18 Ky. L. Rep. 701, 37 S. W. 1045.

12. See *supra*, VII, D, 7, c, (v), (F).

13. Brewer *v.* Ainsworth, 32 Ga. 487; D'Bebian *v.* Gola, 64 Md. 262, 21 Atl. 275; Byrne *v.* Lake Charles First Nat. Bank, 20 Tex. Civ. App. 194, 49 S. W. 106; Woldert *v.* Nedderhut Packing Provision Co., 18 Tex. Civ. App. 602, 46 S. W. 378. *Contra*, Smith *v.* Swenson, 26 Misc. (N. Y.) 151, 56 N. Y. Suppl. 783. In Thorn *v.* Alvord, 32 Misc. (N. Y.) 456, 66 N. Y. Suppl. 587 [*affirmed* in 54 N. Y. App. Div. 638, 67 N. Y. Suppl. 1147], the principle of the *contra* case was recognized, but the court held that plaintiff had not claimed more in his affidavit than he was entitled to recover.

Pro tanto quashing.—Although it has been held that where an attachment could not properly issue for part of a claim it should be quashed as to that part (Gross *v.* Goldsmith, 4 Mackey (D. C.) 126; Hubbard *v.* Haley, 96 Wis. 578, 71 N. W. 1036), this principle has been denied, and the court has refused to quash any portion of the attachment (Sackett *v.* Partridge, 4 Iowa 416; Grotte *v.* Nagle, 50 Nebr. 363, 69 N. W. 973). *Compare* Delmas *v.* Morrison, 61 Miss. 314, where an attachment in the circuit court was discharged, because the grounds for attachment were only sustained as to one count, and that count was within the jurisdiction of a justice of the peace.

Variance in proof.— Where an attachment is issued to recover a joint indebtedness and the evidence disproves that the indebtedness was joint, the proceedings must necessarily be quashed. Cox *v.* Henry, 113 Ga. 259, 38 S. E. 856; Boyd *v.* Wolff, 88 Md. 341, 41 Atl. 897.

14. Woodley *v.* Shirley, Minor (Ala.) 14; Sanger *v.* Texas Gin, etc., Co., (Tex. Civ. App. 1898) 47 S. W. 740; Moore *v.* Corley, (Tex. App. 1890) 16 S. W. 787. *Contra*, Hughes *v.* Foreman, 78 Ill. App. 460, where it was held that defendant could not take advantage of a variance between the amount of damages stated in the declaration and the affidavit, unless the declaration counts upon a different cause of action.

There was held to be no variance between an affidavit claiming a certain amount for rent of land, and a declaration on a bond executed by defendant when it did not appear but that the bond was for the payment of rent. Perkerson *v.* Snodgrass, 85 Ala. 137, 4 So. 752.

15. Evans *v.* Lawson, 64 Tex. 199; Joiner *v.* Perkins, 59 Tex. 300; Smith *v.* Mather, (Tex. Civ. App. 1899) 49 S. W. 257.

16. Dwyer *v.* Testard, 65 Tex. 432.

17. Existence of concurrent remedies.— That a proceeding is pending to foreclose a chattel mortgage securing the claim is no ground for dissolving an attachment in an action brought concurrently to recover the claim (Pech Mfg. Co. *v.* Groves, 6 S. D. 504, 62 N. W. 109); and an attachment will not be dissolved, because in the same proceeding plaintiff seeks to foreclose a lien on property held as security for the claim, provided the security is insufficient (Shedd *v.* McConnell, 18 Kan. 594).

18. Effect of appearance on liability of sureties on dissolution bond see *supra*, XIII, E, 3.

19. Attachment dissolved by appearance.— Under the Revised Statutes of Virginia of 1819, providing that a non-resident defendant could have an attachment discharged by appearing and giving security, the attachment was dissolved when such defendant was allowed to appear and file his answer without giving the usual security. Tiernans *v.* Schley, 2 Leigh (Va.) 25. *Compare* Ferguson *v.* Ryder, 2 Ohio St. 493, where a defendant appeared and surrendered his body in order to dissolve an attachment, but it was held that he failed to accomplish this purpose because the act regarding imprisonment had been repealed and the surrender was a nullity or, in case it was held the act regarding the imprisonment had not been repealed, because he did not plead while in actual custody.

but the universal rule to-day is that appearance has not such an effect[20] for a defendant can appear without giving bail.[21]

b. Lack of Interest in Attached Property. As seizure of property which he does not own can do an attachment defendant no possible injury, it naturally follows that courts have refused to allow defendant to move to quash on the ground that he has no interest in the attached property;[22] but although the reason applies with equal force to foreign attachments, a non-resident defendant has been allowed to show lack of interest in the attached property to oust the court of jurisdiction.[23]

B. Who May Move or Plead[24]—1. GENERALLY. In the absence of special statutes the general rule is that only the defendant and his assignee[25] are entitled

20. Lambden *v.* Bowie, 2 Md. 334; Goldmark *v.* Magnolia Metal Co., 65 N. J. L. 341, 47 Atl. 720; Vreeland *v.* Bruen, 21 N. J. L. 214; Hoppock *v.* Ramsey, 28 N. J. Eq. 413; Stewart *v.* Parnell, 8 Pa. Co. Ct. 604.

Appearance by defendant and confession of judgment by him have been held not to dissolve a foreign attachment or discharge the lien of the writ. Wigfall *v.* Byne, 1 Rich. (S. C.) 412.

21. Sydnor *v.* Chambers, Dall. (Tex.) 601. See also *infra*, XVI, B, 1.

22. *Alabama.*— Exchange Nat. Bank *v.* Clement, 109 Ala. 270, 19 So. 814.

Kansas.—Mitchell *v.* Skinner, 17 Kan. 563.

Minnesota.— Davidson *v.* Owens, 5 Minn. 69.

Nebraska.— McCord, etc., Co. *v.* Bowen, 51 Nebr. 247, 70 N. W. 950; Kountz *v.* Scott, 49 Nebr. 258, 68 N. W. 479; Darst *v.* Levy, 40 Nebr. 593, 58 N. W. 1130.

New York.— Herman *v.* Bailey, 20 Misc. (N. Y.) 94, 45 N. Y. Suppl. 88 [*affirming* 43 N. Y. Suppl. 1155]; McKinlay *v.* Fowler, 67 How. Pr. (N. Y.) 388.

North Carolina.— Foushee *v.* Owen, 122 N. C. 360, 29 S. E. 770.

Ohio.— Langdon *v.* Conklin, 10 Ohio St. 439; Bernard *v.* Schwartz, 22 Ohio Cir. Ct. 147, 12 Ohio Cir. Dec. 183; Cleveland Sierra Min. Co. *v.* Sears Union Water Co., 4 Ohio Dec. (Reprint) 208, 1 Clev. L. Rep. 117; Emerson *v.* Love, 2 Ohio Dec. (Reprint) 348, 2 West. L. Month. 480.

Oregon.— Winnemucca Bank *v.* Mullaney, 29 Oreg. 268, 45 Pac. 796, where defendant moved to dissolve an attachment on the ground that the attached property belonged to his wife, and it was held that the statute authorizing defendant to move for a discharge expressly excluded cases where the cause of action and the ground for attachment were the same.

Pennsylvania.— Miller *v.* Paine, 2 Kulp (Pa.) 304.

South Dakota.— Quebec Bank *v.* Carroll, 1 S. D. 372, 47 N. W. 397.

Contra, Rhine *v.* Logwood, 10 La. Ann. 585 (holding defendant must show his lack of interest with reasonable certainty); Kilpatrick *v.* O'Connell, 62 Md. 403; Gardner *v.* James, 5 R. I. 235 (where the defense was set up in a plea in abatement).

Exemption of property from seizure by reason of a homestead claim is not a sufficient ground upon which to base a motion to discharge an attachment. Mason *v.* Lieuallen, (Ida. 1895) 39 Pac. 1117; Herman *v.* Bailey, 20 Misc. (N. Y.) 94, 45 N. Y. Suppl. 88 [*affirming* 43 N. Y. Suppl. 1155]. *Compare* Pech Mfg. Co. *v.* Groves, 6 S. D. 504, 62 N. W. 109, where the exemption of a portion of the property attached under homestead laws was held to afford no ground for vacating the attachment. But see McLaren *v.* Hall, 26 Iowa 297, where it was suggested that exemption of the attached property would be a sufficient ground for dissolving the attachment, although in the case at bar the facts showing the property to be exempt were not sufficient to justify dissolution.

The existence of a mortgage on the attached property is no ground for the dissolution of an attachment, but merely entitles the mortgagee to intervene. Bear *v.* Cohen, 65 N. C. 511.

23. Schlater *v.* Broaddus, 3 Mart. N. S. (La.) 321; Harris *v.* Taylor, 3 Sneed (Tenn.) 536, 67 Am. Dec. 576.

24. Right of subsequently attaching creditors to attack prior attachment see *supra*, XII, B, 2, d.

25. An assignee is entitled to move to vacate an attachment on his assignor's property (Sims *v.* Jacobson, 51 Ala. 186; Von Roun *v.* San Francisco Super. Ct., 58 Cal. 358; Ringen Stove Co. *v.* Bowers, 109 Iowa 175, 80 N. W. 318; Palmer *v.* Hughes, 84 Md. 652, 36 Atl. 431; Merriam *v.* Wood, etc., Lithographing Co., 19 N. Y. App. Div. 329, 46 N. Y. Suppl. 484; Quebec Bank *v.* Carroll, 1 S. D. 372, 47 N. W. 397), and therefore is bound by any disposition the court may make of such a motion (National Park Bank *v.* Whitmore, 7 N. Y. St. 456); but he waives this right by suing the sheriff for the value of the property seized (Marx *v.* Ciancimino, 59 N. Y. App. Div. 570, 69 N. Y. Suppl. 672), or by entering into a binding agreement for the disposition of the proceeds arising from a sale of the attached property (National Park Bank *v.* Whitmore, 7 N. Y. St. 456), and cannot move where similar motions made by defendant, his assignor, have been denied (Strauss *v.* Vogt, 24 N. Y. Suppl. 483, 53 N. Y. St. 588, 23 N. Y. Civ. Proc. 251).

Some courts have denied the assignee's right to file a motion to discharge the attachment (Stichtenoth *v.* Sowles Lumber Co., 1 Ohio S. & C. Pl. Dec. 352, 7 Ohio N. P. 235),

to move to dissolve an attachment for irregularities [26] or to traverse the grounds for the attachment.[27] On the other hand where the attachment is fraudulent so that some remedy in a court of equity [28] would be open to an interested

to traverse the facts alleged in the affidavit as a ground for the attachment (Emerson *v.* Detroit Steel, etc., Co., 100 Mich. 127, 58 N. W. 659; Gott *v.* Hoschna, 57 Mich. 413, 24 N. W. 123; Howitt *v.* Blodgett, 61 Wis. 376, 21 N. W. 292), or to defend the suit (Elberman *v.* Bloom, 10 Pa. Co. Ct. 413); and it has been held that under the Missouri law defendant's assignee could not move to quash an attachment, but must intervene in the attachment suit (Boltz *v.* Eagon, 34 Fed. 445). *Compare* Teweles *v.* Lins, 98 Wis. 453, 74 N. W. 122, where both assignee and assignor were allowed to join in a traverse of the matter alleged in the affidavit.

An assignee has been held to have the same right as creditors under a statute permitting creditors to intervene or interplead and assert their claims or defend the action against their debtor. Witters *v.* Chicago Globe Sav. Bank, 171 Mass. 425, 50 N. E. 932; F. O. Sawyer Paper Co. *v.* Continental Printing Co., 77 Mo. App. 184; Commercial Nat. Bank *v.* Nebraska State Bank, 33 Nebr. 292, 50 N. W. 157 [*criticized* in Lancaster County Bank *v.* Gillian, 49 Nebr. 165, 68 N. W. 852].

Under the New Mexico statutes an assignee in a deed of trust has no right to intervene, as the right of property is immaterial to the issue. C. J. L. Meyer, etc., Co. *v.* Black, 4 N. M. 190, 16 Pac. 620.

26. *Alabama.*— May *v.* Courtnay, 47 Ala. 185; Cockrell *v.* McGraw, 33 Ala. 526 (where the motion was based on matter outside the record); Kirkman *v.* Patton, 19 Ala. 32. See also Rea *v.* Longstreet, 54 Ala. 291, where it is said that a motion to set aside the levy of an attachment can be made only by a party or privy to the process. *Compare* the early case of Planters', etc., Bank *v.* Andrews, 8 Port. (Ala.) 404, where it was held that a garnishee summoned in the suit could move to discharge an attachment for defects in the proceedings, and furthermore that the particular defect suggested was not sufficient to invalidate the attachment.

California.—Hillman *v.* Griffin, (Cal. 1899) 59 Pac. 194; Shea *v.* Johnson, 101 Cal. 455, 35 Pac. 1023.

Iowa.— Williams *v.* Walker, 11 Iowa 77.

Kansas.— Dickenson *v.* Cowley, 15 Kan. 269.

Louisiana.— Ft. Wayne First Nat. Bank *v.* Ft. Wayne Artificial Ice Co., (La. 1900) 29 So. 379; Emerson *v.* Fox, 3 La. 178; Clamageran *v.* Bucks, 4 Mart. N. S. (La.) 487, 16 Am. Dec. 185.

Michigan.— Gott *v.* Hoschna, 57 Mich. 413, 24 N. W. 123; Rowe *v.* Kellogg, 54 Mich. 206, 19 N. W. 957, holding the proceeding to dissolve an attachment is a special and peculiar statutory remedy which can only avail defendant.

Nebraska.— Rudolf *v.* McDonald, 6 Nebr. 163.

New Hampshire.— Martin *v.* Wiggin, 67 N. H. 196, 29 Atl. 450.

South Carolina.— Copeland *v.* Piedmont, etc., L. Ins. Co., 17 S. C. 116; Lindau *v.* Arnold, 4 Strobh. (S. C.) 290; McBride *v.* Floyd, 2 Bailey (S. C.) 209; Kincaid *v.* Neall, 3 McCord (S. C.) 201. *Compare Ex p.* Perry Stove Co., 43 S. C. 176, 20 S. E. 980, where it was held that the legislative enactment allowing defendant to move to discharge the attachment was a declaration of the law as it formerly stood.

Texas.— Slade *v.* Le Page, 8 Tex. Civ. App. 403, 27 S. W. 952; Roos *v.* Lewyn, 5 Tex. Civ. App. 593, 23 S. W. 450, 24 S. W. 538.

The reason for this rule is found in the general doctrine that attachment proceedings are not open to collateral attack. Moresi *v.* Swift, 15 Nev. 215; Bascom *v.* Smith, 31 N. Y. 595; Barth *v.* Burnham, 105 Wis. 548, 81 N. W. 809. See also Bowers *v.* Chaney, 21 Tex. 363, where it was held that a judgment in an attachment suit could not be attacked collaterally because the writ was erroneously issued before the petition was filed. *Compare* Van Alstyne *v.* Erwine, 11 N. Y. 331, where trustees appointed under attachment proceedings brought trover against a judgment creditor of the attachment debtor who had seized property on his execution, and it was held that defendant could show want of jurisdiction of the court over the attachment proceedings.

Motion by amicus curiæ.— Although the doctrine of allowing a motion to dissolve an attachment to be made by an *amicus curiæ* has been suggested in an early case (Planters', etc., Bank *v.* Andrews, 8 Port. (Ala.) 404), no doctrine of this sort is recognized by later cases (Sanborn *v.* Elizabethport Mfg. Co., 22 How. Pr. (N. Y.) 106, 13 Abb. Pr. (N. Y.) 432), even though the person appearing as an *amicus curiæ* has an interest in the attached property (Cockrell *v.* McGraw, 33 Ala. 526). See, generally, AMICUS CURIÆ, 2 Cyc. 281.

Plaintiff cannot move to have an attachment dissolved. Mense *v.* Osbern, 5 Mo. 544.

27. Meyer *v.* Keefer, 58 Nebr. 220, 78 N. W. 506; Farmers', etc., Nat. Bank *v.* Waco Electric R., etc., Co., (Tex. Civ. App. 1896) 36 S. W. 131; Barth *v.* Burnham, 105 Wis. 548, 81 N. W. 809; Madison First Nat. Bank *v.* Greenwood, 79 Wis. 269, 45 N. W. 810, 48 N. W. 421; Landauer *v.* Vietor, 69 Wis. 434, 34 N. W. 229; Rice *v.* Adler-Goldman Commission Co., 71 Fed. 151, 36 U. S. App. 266, 18 C. C. A. 15 (construing Arkansas statute).

28. Relief in equity.— Where a prior attachment was based on an invalid claim, a judgment creditor who filed a bill in equity setting out the circumstances of the prior attachment was held to be entitled to an injunction restraining the prior creditor from enforcing his judgment (Norton *v.* Hickok,

third party,[29] the more convenient practice of determining such controversies in the original suit[30] is often provided for by statute or by local practice rules,

25 Conn. 356); and an assignee in insolvency could properly file a bill in equity to dissolve an attachment which had been levied upon the insolvent's land (Emerson *v.* Detroit Steel, etc., Co., 100 Mich. 127, 58 N. W. 659; Gott *v.* Hoschna, 57 Mich. 413, 24 N. W. 123), where there was no remedy at law (Turner *v.* Hatch, 100 Mich. 65, 58 N. W. 605) and the proceedings were brought within the time prescribed for asking equitable relief (Zeman *v.* Steinberg, 21 Ky. L. Rep. 1152, 54 S. W. 178); but the absence of grounds for an attachment would not furnish a basis for equity to interfere (Putney *v.* Wolberg, 127 Ala. 124, 28 So. 741). See also Ramash *v.* Scheuer, 81 Wis. 269, 51 N. W. 330, where a vendor of land filed a bill to have a prior attachment annulled on the ground that it was fraudulent and collusive, and it was held that he was entitled to the relief prayed for.

May enjoin attachment although invoked for another purpose.— If a bill primarily seeking the correction of mistake in the description of lands shows that after the execution of the deed an alleged creditor of the grantor levied a writ of attachment upon the property, the court, after acquiring jurisdiction to reform the deed, can retain the bill and grant the complainant full relief in accordance with his prayer by enjoining the attachment proceedings and annulling the writ and levy as a cloud upon the title to such lands. Bieler *v.* Dreher, (Ala. 1901) 30 So. 22.

Although the property has been sold under the fraudulent attachment, a court of equity may order that the constructive trust on the proceeds in favor of applying creditors be properly administered. Henderson *v.* J. B. Brown Co., 125 Ala. 566, 28 So. 79.

Admissibility of evidence to sustain bill.— Where a bill is filed by creditors of an insolvent debtor to set aside an attachment sued out by other creditors of the common debtor, on the ground that the claims of the attaching creditors were false and simulated and that the attachments were issued by collusion for the purpose of defrauding complainants and other creditors, evidence, that after the filing of the bill the goods were sold under an order of the court and were bought in the name of a third person who in fact purchased for one of the attaching creditors, and paid for them with the money of the debtor, is competent and admissible as explanatory and confirmatory of other facts which, when proved, sustain an averment of the bill, and tend very strongly to show collusion. Rice *v.* Less, 105 Ala. 298, 16 So. 719.

29. The interest of the third person claiming to have acquired a lien upon attached property can be disputed by the attaching creditor, and if the facts are decided against the moving party his motion must fail. Delmore *v.* Owen, 44 Hun (N. Y.) 296 [*affirmed* in 110 N. Y. 679, 18 N. E. 482, 18 N. Y. St. 1030]. *Compare* Williams *v.* Stewart, 56 Ga. 663, where it was held that a person not a party to an attachment suit could not have it enjoined without showing that it was necessary for the protection of his rights.

Determining validity of adverse claim.— It has been held that after a claimant has presented his petition to the court, and has been made a party to the suit, a jury should be impaneled to determine the justice of his claim. Schwein *v.* Sims, 2 Metc. (Ky.) 209.

Proof of the interest of a third person is sufficiently made out by showing that a judgment-roll was filed although the clerk of court neglects to enter the judgment (Steuben County Bank *v.* Alberger, 78 N. Y. 252); but affidavits averring, on affiant's own knowledge, matter which entitles a third person to move are insufficient when no facts are stated showing affiant had personal knowledge of the matter alleged in the affidavit (Belmont *v.* Sigua Iron Co., 12 N. Y. App. Div. 441, 42 N. Y. Suppl. 122), and an affidavit by a subsequent judgment creditor whose judgment was recovered in a court of inferior jurisdiction must show that such court had jurisdiction both of the subject-matter and of the nerson of defendant (Hamerschlag *v.* Cathoscope Electrical Co., 16 N. Y. App. Div. 185, 44 N. Y. Suppl. 668). See also Ruppert *v.* Hang, 87 N. Y. 141, where the affidavit regarding the interest of an intervening judgment creditor was held to be sufficient, since no inference could be drawn therefrom other than that the attachment and the execution were levied upon the same property and that the levy of the execution was subsequent.

30. *Alabama.*— When an equitable attachment had been sued out by a surety against the principal debtor before payment of the claim secured, it was held that the creditor might intervene and prosecute the suit to a decree in his own favor. Peevey *v.* Cabaniss, 70 Ala. 253.

California.— It has been held that judgment creditors may seek relief against an attachment issued in a suit prematurely brought. Davis *v.* Eppinger, 18 Cal. 378, 79 Am. Dec. 184.

Colorado.— It has been held that a subsequent judgment creditor cannot, by petition of intervention, attack the sufficiency of an affidavit for attachment. Leppel *v.* Beck, 2 Colo. App. 390, 31 Pac. 185.

Connecticut.—A statute provides that other creditors of an attachment defendant may intervene in the attachment suit and set up defenses or impeach the judgment recovered therein. Norton *v.* Hickok, 25 Conn. 356.

District of Columbia.—An intervener in attachment proceedings has been allowed to move to quash the attachment on other grounds than his ownership of the attached property (Wallace *v.* Maroney, 6 Mackey (D. C.) 221); and although a failure to al-

and the defenses are not strictly limited to circumstances which would justify equitable action.

lege that defendant has no other property than that attached on which interveners may levy execution is not a jurisdictional defect it renders the petition demurrable (Daniels *v.* Solomon, 11 App. Cas. (D. C.) 163).

Georgia.—A claimant of the attached property may move to dismiss the attachment for a defect in the affidavit (Krutina *v.* Culpepper, 75 Ga. 602; Hines *v.* Kimball, 47 Ga. 587); but this motion cannot be made before the trial of the issues raised by his claim (Gazan *v.* Royce, 78 Ga. 512, 3 S. E. 753).

Illinois.— A judgment creditor has been allowed to interplead in an attachment suit and have a default judgment therein set aside on the ground that it was based on a debt not due. Schilling *v.* Deane, 36 Ill. App. 513.

Iowa.—A creditor who has not reduced his claim to judgment or otherwise secured a lien therefor on the property of the debtor cannot attack an attachment levied on the property of his debtor. Smith *v.* Sioux City Nursery, etc., Co., 109 Iowa 51, 79 N. W. 457.

Kentucky.—It has been held that any creditor who is affected by an attachment against his debtor's property may make a motion to have the attachment discharged (Farmers' Nat. Bank *v.* National Bank, 4 Ky. L. Rep. 451), such as creditors claiming under a deed of trust of the attached property who have been allowed to controvert the attachment proceedings (Bamberger *v.* Halberg, 78 Ky. 376); and collusion between the debtor and the attaching creditor is sufficient ground for setting an attachment aside upon the application of other creditors (Moore *v.* Stege, 93 Ky. 27, 12 Ky. L. Rep. 469, 18 S. W. 1019); but a general creditor having no junior lien cannot controvert the ground of an attachment (Brewer *v.* Spalding, 11 Ky. L. Rep. 307).

Louisiana.— Creditors cannot have a previous attachment dissolved on the ground that it was collusively obtained when the debt upon which the attachment suit was based was a just one (John Henry Shoe Co. *v.* Gilkerson-Sloss Commission Co., 47 La. Ann. 860, 17 So. 340); and in a suit by a creditor to annul a judgment sustaining an attachment, he is restricted to showing fraud between the attaching creditor and the debtor, and he cannot object to defects in the affidavit for such defenses are personal to attachment defendant (Claflin *v.* Benjamin, 47 La. Ann. 1447, 17 So. 864). See also Rawlins *v.* Pratt, 45 La. Ann. 58, 12 So. 197, where judgment creditors of defendant attacked a prior attachment and it was held that consent by the debtor would not of itself invalidate the attachment. *Compare* New Orleans Canal, etc., Co. *v.* Beard, 16 La. Ann. 345, 79 Am. Dec. 582, where the intervener was allowed to plead description as a defense to the attachment when defendant was insolvent.

Maine.— It has been held that Me. Rev. Stat. c. 82, § 19, which provides that "grantees may appear and defend in suits against their grantors in which the real estate is attached" is not applicable to a grantee whose conveyance was prior to the attachment in question, since his rights were not affected. Sprague *v.* A. & W. Sprague Mfg. Co., 76 Me. 417.

Maryland.— A subsequent judgment creditor can intervene in a previous attachment and have the attachment dissolved because it was issued improvidently by reason of a fatal defect in the affidavit (Clarke *v.* Meixsell, 29 Md. 221); and it has been held generally that any third person claiming an interest in the property attached may have an attachment set aside for defects apparent on the face of the proceeding (Clarke *v.* Meixsell, 29 Md. 221; Lambden *v.* Bowie, 2 Md. 334; Stone *v.* Magruder, 10 Gill & J. (Md.) 383, 32 Am. Dec. 177; Campbell *v.* Morris, 3 Harr. & M. (Md.) 535). *Compare* Wever *v.* Baltzell, 6 Gill & J. (Md.) 335, where it was held that want of jurisdiction in the attachment proceeding could be taken advantage of at the trial either by defendant or a claimant of the property.

Massachusetts.—The statute providing that any subsequent lienor may dispute the validity and effect of a prior attachment by filing a petition in the attachment suit does not authorize the holder of a mortgage which is prior to the attachment to file such a petition (Peirce *v.* Richardson, 9 Metc. (Mass.) 69); but a subsequent lienor has been allowed to set up defenses which were not open to debtor, such as collusion between debtor and plaintiff (Carter *v.* Gregory, 8 Pick. (Mass.) 165).

Mississippi.— Under Miss. Acts (1884), p. 76, § 2, providing that a creditor of attachment defendant may intervene and contest the grounds of the attachment, an intervening creditor must file an affidavit that the claim sued on was fictitious in order to be entitled to raise that issue, but such an affidavit is unnecessary when he sets up fraud and collusion between the attaching plaintiff and defendant. Lowenstein *v.* Aaron, 69 Miss. 341, 12 So. 269. *Compare* Desmond *v.* Levy, (Miss. 1893) 12 So. 481, where it was held that intervening general creditors could not show that the debt on which the proceedings were based was fictitious, presumably because they had not filed a proper affidavit.

Nebraska.— It has been held that a mortgagee of chattels on which an order of attachment had been levied could not question the grounds for the issue of the writ. Meyer *v.* Keefer, 58 Nebr. 220, 78 N. W. 506.

New Jersey.—A subsequent judgment creditor has been allowed to contest a prior attachment because the non-residence of defendant which was alleged as a ground for the attachment did not in fact exist. National

2. Circumstances Affecting Defendant's Right to Move[31]**— a. Ownership of Attached Property.** The general right of an attachment defendant to move for the dissolution of the attachment made in an action against himself[32] cannot be defeated by showing that he had no interest in the attached property at the time of the levy under the writ,[33] for the attaching plaintiff is estopped to raise this

Papeterie Co. *v.* Kinsey, 54 N. J. L. 29, 23 Atl. 275.

New York.—Any person who has acquired an interest in the property attached may move to have the attachment set aside for insufficiency of the affidavits on which it was granted (Steuben County Bank *v.* Alberger, 78 N. Y. 252; Smith *v.* Davis, 29 Hun (N. Y.) 306, 3 N. Y. Civ. Proc. 74); or on additional affidavits denying the grounds for the attachment (Thalheimer *v.* Hays, 42 Hun (N. Y.) 93); for such an attack is a direct and not a collateral one (Acker *v.* Saynisch, 25 Misc. (N. Y.) 415, 54 N. Y. Suppl. 937); but the interest must be acquired subsequently to the levy of the attachment to entitle the interested party to move (Key West Bldg., etc., Assoc. *v.* Key West Bank, 18 N. Y. Suppl. 390, 45 N. Y. St. 152; Allen *v.* Key West Bank, 18 N. Y. Suppl. 391, 45 N. Y. St. 152; Brown *v.* Guthrie, 39 Hun (N. Y.) 29). *Compare* Gere *v.* Gundlach, 57 Barb. (N. Y.) 13, for the earlier practice by which defendant alone could object to defects in the proceedings; although even then want of jurisdiction could be taken advantage of by a third party (Decker *v.* Bryant, 7 Barb. (N. Y.) 182). A purchaser of part of the property attached acquires an interest therein within the meaning of the code (Trow's Printing, etc., Co. *v.* Hart, 9 Daly (N. Y.) 413); and so does a judgment creditor, provided he produces proper evidence of his judgment (Sill Stove Works *v.* Scott, 62 N. Y. App. Div. 566, 71 N. Y. Suppl. 181).

Oklahoma.— Where an attachment was levied after defendant had made an assignment for the benefit of creditors, it was held that all the creditors of the assignor could interplead in the attachment action to have the proceeds administered in equity as a trust fund for their benefit. Hockaday *v.* Drye, 7 Okla. 288, 54 Pac. 475.

Pennsylvania.— A subsequent judgment creditor has been allowed to contest the fact of non-residence alleged as a ground for a prior attachment (Reed's Appeal, 71 Pa. St. 378) and to show the illegality of a prior attachment proceeding (Matter of Dillon, 2 Pearson (Pa.) 182); and a claimant of the attached property has been allowed to have the attachment dissolved for defects in the affidavit (National Bank of Republic *v.* Tasker, 1 Pa. Co. Ct. 173). *Compare* Frost *v.* Holmes, 11 Wkly. Notes Cas. (Pa.) 442, where a scire facias was brought to revive a judgment in an attachment suit, and it was held that an adverse claimant of the attached property would prevail on showing that attachment defendant was not a non-resident, because an attachment upon insufficient grounds created no lien.

South Dakota.— The statute (S. D. Comp. Laws, § 5011) providing that a subsequent lienor may move to discharge an attachment, authorizes a motion for insufficiency or irregularity of the affidavit and this right is irrespective of his right to move as an intervener. Citizens' Bank *v.* Corkings, 9 S. D. 614, 70 N. W. 1059, 62 Am. St. Rep. 891.

Texas.— Sureties on a bond given to replevy attached property have been allowed to intervene and set up a defect in the affidavit (Burch *v.* Watts, 37 Tex. 135), although a claimant of the attached property could not raise this objection (Slade *v.* Le Page, 8 Tex. Civ. App. 403, 27 S. W. 952); and a judgment creditor has been allowed to have a prior attachment set aside for fraud (Murphy *v.* Nash, (Tex. Civ. App. 1898) 45 S. W. 944). But see Saunders *v.* Ireland, (Tex. Civ. App. 1894) 27 S. W. 880, where it was held that one claiming property against an attaching creditor could not inquire into the validity of the claim upon which the attachment suit was brought.

West Virginia.—An interested person, after filing his petition in the attachment suit, may attack the validity of an attachment for defects in the affidavit or by controverting the facts set forth as a ground for attachment (Capehart *v.* Dowery, 10 W. Va. 130); but mere creditors at large are not "interested persons" within the meaning of the code (Crim *v.* Harmon, 38 W. Va. 596, 18 S. E. 753). *Compare* Tappan *v.* Pease, 7 W. Va. 682, where it was held that a mortgagee who sought to attack an attachment on the land covered by the mortgage for a defect in the attachment affidavit must file a petition and give security for costs.

31. **Effect of giving a bond to dissolve the attachment on defendant's right to move** see *supra*, XIII, E, 4, f, (III).

32. **Defendant may move although** he is the only one of several co-defendants (Walts *v.* Nichols, 32 Hun (N. Y.) 276; Windt *v.* Banniza, 2 Wash. 147, 26 Pac. 189), trustees have been appointed in pursuance of the act relative to absconding debtors (Matter of Faulkner, 4 Hill (N. Y.) 598), or the attachment has become inoperative because of failure to serve the summons within the time limited by statute (Betzemann *v.* Brooks, 31 Hun (N. Y.) 271); and the application may be to have the attachment vacated as to the whole or as to any part of the property seized (Ellsworth *v.* Scott, 3 Abb. N. Cas. (N. Y.) 9).

In Rhode Island defendant cannot impeach the attachment for improvidence, but can only apply to the court to reduce the amount attached when the levy has been excessive. Wood *v.* Watson, 20 R. I. 223, 37 Atl. 1030.

33. *Georgia.*— Holmes *v.* Langston, 99 Ga. 555, 27 S. E. 155; Falvey *v.* Adamson, 73 Ga. 493.

objection,[34] but there is no estoppel to show that defendant has subsequently parted with his interest in the attached property and, in some jurisdictions, a transfer of his entire interest[35] has been held to preclude defendant from moving to dissolve the attachment.[36]

b. Estoppel. Although an agreement, after seizure of property attached, that the sheriff shall sell summarily and retain the proceeds until final judgment pre-

Louisiana.—Hicks *v.* Duncan, 4 Mart. N. S. (La.) 314, where no property had been actually attached.

Nebraska.— Skinner *v.* Pawnee City First Nat. Bank, 59 Nebr. 17, 80 N. W. 42; Kountze *v.* Scott, 52 Nebr. 460, 72 N. W. 585; South Park Imp. Co. *v.* Baker, 51 Nebr. 392, 70 N. W. 952; Grimes *v.* Farrington, 19 Nebr. 44, 26 N. W. 618.

New York.— Whitelegge *v.* De Witt, 12 Daly (N. Y.) 319.

Ohio.— Bernard *v.* Schwartz, 22 Ohio Cir. Ct. 147, 12 Ohio Cir. Dec. 183. But see Northern Bank *v.* Nash, 1 Handy (Ohio) 153, 12 Ohio Dec. (Reprint) 75, where it was held that defendant must show an interest in the attached property to entitle him to move for a discharge of the attachment.

United States.—Salmon *v.* Mills, 49 Fed. 333, 4 U. S. App. 101, 1 C. C. A. 278, construing Arkansas statute.

Contra, Powell *v.* Rankin, 80 Ala. 316; Macumber *v.* Beam, 22 Mich. 395; Price *v.* Reed, 20 Mich. 72; Chandler *v.* Nash, 5 Mich. 409, the Michigan cases being based on the theory that the evil intended to be remedied by the statute was depriving defendant of the possession of his property, and hence he could not move to have the attachment dissolved, unless he had a right to have the property restored to him.

What amounts to a lack of interest.—Although it was formerly held that the levy of a subsequent execution upon attached property terminated defendant's interest therein so that he was precluded from moving to vacate the attachment (Johnson *v.* De Witt, 36 Mich. 95), the court has repudiated this doctrine (Drs. K. & K. U. S. Medical, etc., Assoc. *v.* Post, etc., Printing Co., 58 Mich. 487, 25 N. W. 477), and it has always been the law that the levy of a subsequent attachment on the property previously attached does not affect defendant's right to move (Sheldon *v.* Stewart, 43 Mich. 574, 5 N. W. 1067; Schall *v.* Bly, 43 Mich. 401, 5 N. W. 651). See also Ripon Knitting Works *v.* Johnson, 93 Mich. 129, 53 N. W. 17; Pierce *v.* Johnson, 93 Mich. 125, 53 N. W. 16, 18 L. R. A. 486, where it was held that defendant was not precluded from moving to quash the writ by the fact that the attached property was in the possession of a third party who obtained a release thereof by giving bond. *Compare* Patterson *v.* Goodrich, 31 Mich. 225, where land belonging to a wife and used as a homestead by the family was attached in an action against the husband, and it was held that he had sufficient interest as head of the family to move for a dissolution of the attachment.

Presumption of right to possession from allegation of ownership.— An allegation of present ownership of attached property is enough to give jurisdiction to hear a petition for the dissolution of the attachment, although it does not distinctly allege that petitioner is entitled to the possession of the property. Zook *v.* Blough, 42 Mich. 487, 4 N. W. 219; Macumber *v.* Beam, 22 Mich. 395.

34. Holmes *v.* Langston, 99 Ga. 555, 27 S. E. 155; Kountze *v.* Scott, 52 Nebr. 460, 72 N. W. 585; McCord, etc., Co. *v.* Bowen, 51 Nebr. 247, 70 N. W. 950; Dayton Spice-Mills Co. *v.* Sloan, 49 Nebr. 622, 68 N. W. 1040; Standard Stamping Co. *v.* Hetzel, 44 Nebr. 105, 62 N. W. 247.

35. An assignor's interest in the surplus after making a general assignment for the benefit of creditors is sufficient to entitle him to move for the dissolution of an attachment upon the property assigned (Winona First Nat. Bank *v.* Randall, 38 Minn. 382, 37 N. W. 799; Richards *v.* White, 7 Minn. 345; Rowles *v.* Hoare, 61 Barb. (N. Y.) 266; Gasherie *v.* Apple, 14 Abb. Pr. (N. Y.) 64; Brewer *v.* Tucker, 13 Abb. Pr. (N. Y.) 76; Dickinson *v.* Benham, 12 Abb. Pr. (N. Y.) 158, 20 How. Pr. (N. Y.) 343; Holland *v.* Atzerodt, 1 Walk. (Pa.) 237; Tolerton, etc., Co. *v.* Casperson, 7 S. D. 206, 63 N. W. 908; Teweles *v.* Lins, 98 Wis. 453, 74 N. W. 122; Keith *v.* Armstrong, 65 Wis. 225, 26 N. W. 445), although his right has been limited in some instances to moving for the discharge of his residuary interest (Kountze *v.* Scott, 49 Nebr. 258, 68 N. W. 479; McCord, etc., Co. *v.* Krause, 36 Nebr. 764, 55 N. W. 215). *Compare* Blossom *v.* Estes, 59 How. Pr. (N. Y.) 381, where a motion made nominally by defendant was held proper, although the real purpose was to assist defendant's assignees.

A reason for allowing defendant to move after an assignment is that if he succeeds costs are allowed to him and damages for the wrongful seizure of his property. Keith *v.* Armstrong, 65 Wis. 225, 26 N. W. 445.

36. Symns Grocery Co. *v.* Snow, 58 Nebr. 516, 78 N. W. 1066; Kountze *v.* Scott, 49 Nebr. 258, 68 N. W. 479; Dickinson *v.* Benham, 12 Abb. Pr. (N. Y.) 158, 20 How. Pr. (N. Y.) 343; Furman *v.* Walter, 13 How. Pr. (N. Y.) 348. *Compare* Smith-Frazer Boot, etc., Co. *v.* Derse, 41 Kan. 150, 21 Pac. 167, where defendant was allowed to move to dissolve an attachment although he had mortgaged the attached property subsequent thereto.

cludes defendant from insisting on a dissolution of the writ,[37] requesting a suspension of legal proceedings has been held not to estop him from moving to vacate for plaintiff's failure to publish within the time prescribed by statute.[38]

C. To Whom Application Made.[39] Attachment, especially when a suit is pending, is of the nature of a process of the court over which the court has the inherent power of control,[40] and as a general rule an application to vacate or set aside an attachment should be made to the court or judge trying the same.[41] In some jurisdictions, however, it is expressly provided that the application for relief from an attachment may be made to a designated officer of the court, such as a court commissioner or the clerk.[42]

D. Procedure — **1. Where Court Acts Ex Mero Motu.** Where an attachment has been irregularly issued, it is within the power of the court to quash or dis-

37. Wickman *v.* Nalty, 41 La. Ann. 284, 6 So. 123. *Compare* Thames *v.* Schloss, 120 Ala. 470, 24 So. 835, where the consent of one partner to an attachment against partnership property was held to bar any subsequent objection thereto either by the firm or by the other partners.

38. Mojarrieta *v.* Saenz, 80 N. Y. 547.

39. Power of judge at chambers or in vacation see Judges.

40. Morgan *v.* Avery, 7 Barb. (N. Y.) 656, 2 Code Rep. (N. Y.) 91; Furman *v.* Walter, 13 How. Pr. (N. Y.) 348; Bank of Commerce *v.* Rutland, etc., R. Co., 10 How. Pr. (N. Y.) 1; Lansingburgh Bank *v.* McKie, 7 How. Pr. (N. Y.) 360; Hildeburn *v.* Philadelphia Watch Co., 7 Phila. (Pa.) 450.

41. Weston *v.* Jones, 41 Fla. 188, 25 So. 888; Ruppert *v.* Haug, 87 N. Y. 141, 62 How. Pr. (N. Y.) 364; Matter of Marty, 3 Barb. (N. Y.) 229; Lansingburgh Bank *v.* McKie, 7 How. Pr. (N. Y.) 360; White *v.* Featherstonhaugh, 7 How. Pr. (N. Y.) 357; Conklin *v.* Dutcher, 5 How. Pr. (N. Y.) 386, Code Rep. N. S. (N. Y.) 49; Winnemucca Bank *v.* Mullaney, 29 Oreg. 268, 45 Pac. 796; Sims *v.* Tyrer, 96 Va. 5, 26 S. E. 508 [*citing* Anderson *v.* Johnson, 32 Gratt. (Va.) 558]. See also Disher *v.* Disher, 12 Ont. Pr. 518, holding that a judge of the county court who orders the issue of a writ of attachment out of the high court under Ont. Rev. Stat. (1877), c. 66, § 2, has no jurisdiction to entertain an application to set aside such writ.

Officer granting has no power to discharge after an attachment has been regularly issued, unless in a case expressly provided for by statute. Matter of Marty, 3 Barb. (N. Y.) 229. In Conklin *v.* Dutcher, 5 How. Pr. (N. Y.) 386, Code Rep. N. S. (N. Y.) 49, it was held that under N. Y. Code Civ. Proc. §§ 324, 349, an attachment improvidently granted could only be vacated by application to the judge who granted it, or by appeal to the appellate branch of the court.

Presiding judge need not be he who granted writ.—Where an application to vacate an attachment is made to the court on notice, the presiding judge need not be he who granted the writ. The application is required to be made to him only when it is made to a judge. Ruppert *v.* Haug, 87 N. Y. 141, 62 How. Pr. (N. Y.) 364.

Hearing and determination at any place within judicial district.— Under S. D. Comp. Laws, § 4828, providing that motions may be heard and determined at any place within a judicial district in which is situated a county or judicial subdivision where the same is brought or is pending, a motion to discharge an attachment in a case pending in the circuit court of one county may be heard and determined in any other county of the same circuit. Benedict *v.* Ralya, 1 S. D. 167, 46 N. W. 188.

New York — Motion founded on papers.— A motion to dissolve an attachment founded on the papers on which it is granted, which N. Y. Code Civ. Proc. § 683, provides may be heard with or without notice, is not a "litigated motion", which rule 1 of the appellate division rules requires to be heard in part I of the court, but is within rule 5, providing that application for all court orders *ex parte* — "where notice is not required must be made to the special term for the transaction of *ex parte* business." Sturz *v.* Fischer, 15 Misc. (N. Y.) 410, 36 N. Y. Suppl. 893, 72 N. Y. St. 252, 25 N. Y. Civ. Proc. 202, 2 N. Y. Annot. Cas. 365.

Pennsylvania — Jurisdiction not confined to courts of common pleas.—Under the Pennsylvania act of 1869, giving jurisdiction to the court of common pleas of the county to dissolve an attachment, it has been held that such jurisdiction is not confined to the courts of common pleas, but extends to the district and nisi prius courts. Dallett *v.* Feltus, 7 Phila. (Pa.) 627; Hildeburn *v.* Philadelphia Watch Co., 7 Phila. (Pa.) 450.

42. Circuit court commissioner.— Schall *v.* Bly, 43 Mich. 401, 5 N. W. 651; Heyn *v.* Farrar, 36 Mich. 258; Macumber *v.* Beam, 22 Mich. 395; Price *v.* Reed, 20 Mich. 72; Vinton *v.* Mead, 17 Mich. 388; Albertson *v.* Edsall, 16 Mich. 203; Nelson *v.* Hyde, 10 Mich. 521; Osborne *v.* Robbins, 10 Mich. 277; Edgarton *v.* Hinchman, 7 Mich. 352.

Clerk of the superior court.— Palmer *v.* Bosher, 71 N. C. 291, where it was held that the clerk of the superior court had jurisdiction to vacate an attachment under N. C. Code Civ. Proc. § 212, notwithstanding N. C. Acts (1870–71), 166, made the process returnable to court in term-time.

miss the same *ex mero motu*, and without any application for such action by defendant or any other person.[43]

2. By Motion or Rule to Show Cause — a. In General — (i) *Defects Apparent of Record.* Where the defects are apparent on the face of the proceedings[44] a motion to quash the writ or dissolve the attachment is proper.[45]

(ii) *Defects Not Apparent of Record.* In some jurisdictions, where the defects are not apparent on the face of the proceedings but defendant has a good defense upon evidence *dehors* the record, an application for the dissolution of the attachment may be made by motion or rule to show cause why the attach-

43. Israel *v.* Ivey, 61 N. C. 551; Deaver *v.* Keith, 61 N. C. 428; Webb *v.* Bowler, 50 N. C. 362; Mantz *v.* Hendley, 2 Hen. & M. (Va.) 308; Neill *v.* Rogers Bros. Produce Co., 41 W. Va. 37, 23 S. E. 702. But see Gaar *v.* Lyon, 99 Ky. 672, 18 Ky. L. Rep. 500, 37 S. W. 73, 148, holding that, where a general attachment on statutory grounds is sued out, the grounds are not controverted, and no motion to discharge is made, although a levy thereunder is properly quashed because the property seized is not subject, the attachment should be allowed to stand.

44. Motion is substantially treated as a demurrer to a pleading. Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068. See also Hubbard *v.* Haley, 96 Wis. 578, 71 N. W. 1036. By a traverse of the facts alleged in the affidavit (see *infra*, XV, D, 3) issues of fact are raised while the motion to vacate or dissolve for irregularities raises issues of law. Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068. In the one instance the defects are established by the production of evidence, in the other by an inspection of the record. Johnson *v.* Stockham, 89 Md. 368, 43 Atl. 943.

Objections requiring introduction of evidence to sustain them cannot, in some jurisdictions, be shown upon a motion to quash. Hill *v.* Cunningham, 25 Tex. 25 [*followed* in Sanger *v.* Texas Gin, etc., Co., (Tex. Civ. App. 1898) 47 S. W. 740]. But see *infra*, XV, D, 2, a, (II).

45. *Alabama.*— De Bardeleben *v.* Crosby, 53 Ala. 363; Hall *v.* Brazleton, 40 Ala. 406; Steamboat Farmer *v.* McCraw, 31 Ala. 659; Hazard *v.* Jordan, 12 Ala. 180; Cotton *v.* Huey, 4 Ala. 56; Planters', etc., Bank *v.* Andrews, 8 Port. (Ala.) 404.

Arkansas.— Alexander *v.* Pardue, 30 Ark. 359.

Colorado.— Rice *v.* Hauptman, 2 Colo. App. 565, 31 Pac. 862.

Georgia.— Blackwell *v.* Compton, 107 Ga. 764, 33 S. E. 672; Garrett *v.* Taylor, 88 Ga. 467, 14 S. E. 869; Brafman *v.* Asher, 78 Ga. 32; Thompson *v.* Arthur, Dudley (Ga.) 253. See also Loeb *v.* Smith, 78 Ga. 504, 3 S. E. 438.

Illinois.— Cline *v.* Patterson, 191 Ill. 246, 61 N. E. 126; House *v.* Hamilton, 43 Ill. 185; Plato *v.* Turrill, 18 Ill. 273.

Indiana.— Fremont Cultivator Co. *v.* Fulton, 103 Ind. 393, 3 N. E. 135; Cooper *v.* Reeves, 13 Ind. 53; Collins *v.* Nichols, 7 Ind. 447.

Iowa.— Cox *v.* Allen, 91 Iowa 462, 59 N. W. 335; Lease *v.* Franklin, 84 Iowa 413, 51 N. W. 21; Hastings *v.* Phœnix, 59 Iowa 394, 13 N. W. 346; Rausch *v.* Moore, 48 Iowa 611, 30 Am. Rep. 412; Tidrick *v.* Sulgrove, 38 Iowa 339; Cramer *v.* White, 29 Iowa 336; Phillips *v.* Orr, 11 Iowa 283; Pomroy *v.* Parmlee, 9 Iowa 140, 74 Am. Dec. 328; Sample *v.* Griffith, 5 Iowa 376; Carothers *v.* Click, Morr. (Iowa) 54.

Kansas.— Wm. W. Kendall Boot, etc., Co. *v.* August, 51 Kan. 53, 32 Pac. 635; Ballinger *v.* Lantier, 15 Kan. 608.

Kentucky.— Kentucky Jeans Clothing Co. *v.* Bohn, 104 Ky. 387, 20 Ky. L. Rep. 612, 47 S. W. 250.

Maryland.— Coward *v.* Dillinger, 56 Md. 59; Lambden *v.* Bowie, 2 Md. 334.

Michigan.— Roelofson *v.* Hatch, 3 Mich. 277.

Mississippi.— Baldwin *v.* Conger, 9 Sm. & M. (Miss.) 516.

Missouri.— Owens *v.* Johns, 59 Mo. 89; Graham *v.* Bradbury, 7 Mo. 281; Smith *v.* Hackley, 44 Mo. App. 614.

New Hampshire.— Coughlin *v.* Angell, 68 N. H. 352, 44 Atl. 525; Crawford *v.* Crawford, 44 N. H. 428.

New York.— Guarantee Sav. Loan, etc., Co. *v.* Moore, 35 N. Y. App. Div. 421, 54 N. Y. Suppl. 787, 88 N. Y. St. 787; Van Camp *v.* Searle, 79 Hun (N. Y.) 134, 29 N. Y. Suppl. 757, 61 N. Y. St. 349, 24 N. Y. Civ. Proc. 16 [*affirmed* in 147 N. Y. 150, 41 N. E. 427, 70 N. Y. St. 878]; Peiffer *v.* Wheeler, 76 Hun (N. Y.) 280, 27 N. Y. Suppl. 771, 59 N. Y. St. 106; Crowns *v.* Vail, 51 Hun (N. Y.) 204, 4 N. Y. Suppl. 324, 21 N. Y. St. 208; Morgan *v.* Avery, 7 Barb. (N. Y.) 656, 2 Code Rep. (N. Y.) 91; Sanborn *v.* Elizabethport Mfg. Co., 13 Abb. Pr. (N. Y.) 432, 22 How. Pr. (N. Y.) 106; Boscher *v.* Roullier, 4 Abb. Pr. (N. Y.) 396; Downes *v.* Phœnix Bank, 6 Hill (N. Y.) 297; Lenox *v.* Howland, 3 Cai. (N. Y.) 257.

North Carolina.— Knight *v.* Hatfield, 129 N. C. 191, 39 S. E. 807; Toms *v.* Warson, 66 N. C. 417; Webb *v.* Bowler, 50 N. C. 362.

Ohio.— Harrison *v.* King, 9 Ohio St. 388; Egan *v.* Lunsden, 2 Disn. (Ohio) 168; Kentucky Northern Bank *v.* Nash, 1 Handy (Ohio) 153, 12 Ohio Dec. (Reprint) 75; Jacoby *v.* Dotson, 7 Ohio S. & C. Pl. Dec. 412.

Oregon.— Winnemucca Bank *v.* Mullaney, 29 Oreg. 268, 45 Pac. 796.

Pennsylvania.— Steel *v.* Goodwin, 113 Pa. St. 288, 6 Atl. 49; Crawford *v.* Stewart, 38 Pa. St. 34; Singerly *v.* Dewees, 6 Pa. Dist.

ment should not be dissolved,[46] the application in such case being supported by affidavits[47] or other evidence[48] as the statutes of each state may provide.

92, 19 Pa. Co. Ct. 80; H. B. Claflin Co. *v.* Weiss, 16 Pa. Co. Ct. 247; Herman *v.* Saller, 25 Wkly. Notes Cas. (Pa.) 408.

South Carolina.— Kerchner *v.* McCormac, 25 S. C. 461; Bates *v.* Killian, 17 S. C. 553; Metts *v.* Piedmont, etc., L. Ins. Co., 17 S. C. 120.

South Dakota.— Wilcox *v.* Smith, 4 S. D. 125, 55 N. W. 1107; Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

Tennessee.— Alabama Bank *v.* Fitzpatrick, 4 Humphr. (Tenn.) 311.

Texas.— City Nat. Bank *v.* Cupp, 59 Tex. 268; Hill *v.* Cunningham, 25 Tex. 25; Wright *v.* Smith, 19 Tex. 297.

Virginia.— Sims *v.* Tyrer, 96 Va. 5, 26 S. E. 508; Anderson *v.* Johnson, 32 Gratt. (Va.) 558.

West Virginia.— Miller *v.* Fewsmith Lumber Co., 42 W. Va. 323, 26 S. E. 175; Tingle *v.* Brison, 14 W. Va. 295.

Wyoming.— Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743.

United States.— Salmon *v.* Mills, 49 Fed. 333, 4 U. S. App. 101, 1 C. C. A. 278, construing Arkansas statute.

Discharge of equitable attachment upon motion or demurrer.— Where no sufficient cause of attachment is alleged in an attachment bill, such attachment may be discharged upon objection taken either by motion or demurrer. Bittick *v.* Wilkins, 7 Heisk. (Tenn.) 307.

Defendant may move to discharge as to whole or part of the property attached. Kentucky Northern Bank *v.* Nash, 1 Handy (Ohio) 153, 12 Ohio Dec. (Reprint) 75.

Motion to modify attachment.— Where an attachment was issued for a debt, part of which only was due, defendant is confined to a motion for a modification of the writ, under Wis. Rev. Stat. § 2744, on that ground, and a release of the property from the attachment as to the debt not due, because of failure to give a proper bond. Hubbard *v.* Haley, 96 Wis. 578, 71 N. W. 1036.

46. *Alabama.*— Drakford *v.* Turk, 75 Ala. 339, holding that when an attachment is sued out for a cause of action upon which the statutes do not authorize its issue, the irregularity cannot be reached by a plea in abatement or by a motion to quash it. The proper method of reaching the objection, where the writ will not lie for the enforcement of the action, is a rule upon plaintiff to show cause against the dissolution of the writ and its levy; and the motion must precede a plea to the merits.

Louisiana.— Read *v.* Ware, 2 La. Ann. 498, holding that where a defendant seeks to dissolve an attachment on the ground of the falsehood of the affidavit made to obtain it he may do so summarily, by a rule to show cause, and it is not necessary that such a defense should be set up by plea or exception. Under La. Code Prac. art. 258, however, a writ of attachment can be dissolved by exception as well as by rule to show cause. Poutz *v.* Reggio, 26 La. Ann. 305.

Maryland.— The truth of the statements of the affidavit may be inquired into upon a motion to quash. Johnson *v.* Stockham, 89 Md. 368, 43 Atl. 943; Ferrall *v.* Farnen, 67 Md. 76, 8 Atl. 819; Clarke *v.* Meixsell, 29 Md. 221; Gover *v.* Barnes, 15 Md. 576.

Michigan.— Genesee County Sav. Bank *v.* Michigan Barge Co., 52 Mich. 164, 17 N. W. 790, 18 N. W. 206; Gray *v.* York, 44 Mich. 415, 6 N. W. 874; Bower *v.* Town, 12 Mich. 230; Roelofson *v.* Hatch, 3 Mich. 277; Paddock *v.* Matthews, 3 Mich. 18.

New York.— Under N. Y. Code Civ. Proc. § 683, a motion to vacate may be founded upon proof by affidavit on the part of defendant. Thalheimer *v.* Hays, 42 Hun (N. Y.) 93; National Park Bank *v.* Whitmore, 7 N. Y. St. 456.

South Carolina.— Attachment may be dissolved or defeated upon two grounds: (1) where some irregularities of fatal character appear on the face of the proceedings; (2) where the allegations upon which it issued are untrue. The dissolution in either case may be had upon motion — the first being made upon papers and the second upon affidavits as to matters *dehors* the record. Bates *v.* Killian, 17 S. C. 553. And see Kerchner *v.* McCormac, 25 S. C. 461.

47. Supporting affidavits see *infra*, XV, D, 2, f.

48. Affidavits or oral evidence.— The motion to vacate may, in some jurisdictions, be supported either by affidavits or by oral evidence. Carnahan *v.* Gustine, 2 Okla. 399, 37 Pac. 594; Wearne *v.* France, 3 Wyo. 273, 21 Pac. 703. It is not, however, contemplated by such statutes that defendant may support his motion to discharge both by affidavits and oral testimony, and where a defendant has made his motion for a discharge upon affidavit he has no right to depart from that mode of proof and introduce oral testimony in support of his motion. Hansen *v.* Doherty, 1 Wash. 461, 25 Pac. 297.

Depositions.— In some states it is expressly provided that upon trial of a motion to dissolve an attachment depositions may properly be introduced in evidence. Hanna *v.* Barrett, 39 Kan. 446, 18 Pac. 497 (even though taken upon insufficient notice); Newton *v.* West, 3 Metc. (Ky.) 24. See also Gibson *v.* McLaughlin, 1 Browne (Pa.) 292, where it was held that the depositions of the creditors were properly admitted, although taken after the writ issued. But the deposition of plaintiff taken *ex parte* after the writ issued has been held not admissible. Coulon *v.* De Lisle, 1 Browne (Pa.) 291.

Oral evidence.— Unless expressly provided that the trial shall be upon affidavits and counter-affidavits it would seem that upon motion to dissolve an attachment for defects

b. Necessity For General Appearance in Action. In some jurisdictions defendant may move to vacate an attachment without appearing generally in the action.[49] In others, however, such motion cannot be made without full appearance to the action.[50]

c. Time to Move. As soon as defendant is before the court he may move to quash an attachment issued in the action against him,[51] but owing to varying provisions of practice acts and of local practice rules in different states there is a great diversity of holdings as to the time after which defendant cannot move. Thus while it is required in some jurisdictions that defendant move to quash at the very outset,[52] and waives his right to make such a motion by pleading in bar

not apparent of record, oral evidence is admissible to support or disprove the grounds alleged in the motion. Holliday *v.* Cohen, 34 Ark. 707; Newton *v.* West, 3 Metc. (Ky.) 24. *Compare* Kountze *v.* Scott, 52 Nebr. 460, 72 N. W. 585, holding that whether or not oral evidence should be admitted on the hearing of a motion for discharging the attachment rested in the discretion of the court, and that such right was not conferred by statute. In some cases oral evidence in addition to affidavits is proper. Robinson *v.* Morrison, 2 App. Cas. (D. C.) 105; Tyler *v.* Sufford, 24 Kan. 580; Lambden *v.* Bowie, 2 Md. 334; State *v.* Quick, 45 N. J. L. 308 [*following* Baldwin *v.* Flagg, 43 N. J. L. 495]. See also Shadduck *v.* Marsh, 21 N. J. L. 434.

Production of books and papers.— In Schwartz *v.* Atkin, 12 Pa. Co. Ct. 373, it was held that upon a rule to dissolve, taken on defendant's motion, plaintiff may, upon motion, have an order on defendant to appear with his books and papers as for cross-examination.

Suppression of affidavit on failure to produce affiant.— Under Ark. Code Proc. § 661, which provides that where a provisional remedy is granted upon an affidavit, and a motion is made to discharge or vacate it, the party against whom it is granted may require the production of affiant for cross-examination, and "if the affiant is not produced his affidavit shall be suppressed, and if produced he may be examined by either party," it is held that it is only where the affidavit might be used as evidence that it can be suppressed; and that if an attachment be issued on an affidavit, and the grounds of attachment be controverted, the affidavit cannot be used as evidence, and should not be suppressed because of plaintiff's failure to produce affiant for cross-examination. Churchill *v.* Hill, 59 Ark. 54, 26 S. W. 378.

49. Manice *v.* Gould, 1 Abb. Pr. N. S. (N. Y.) 255; Monette *v.* Chardon, 16 Misc. (N. Y.) 165, 37 N. Y. Suppl. 2, 72 N. Y. St. 135 (defendant may appear generally or specially for the purpose of moving to vacate for defect of jurisdiction).

50. Will *v.* Whitney, 15 Ind. 194; Rodolph *v.* Mayer, 1 Wash. Terr. 133; Feurer *v.* Stewart, 82 Fed. 294 (construing Washington statute).

51. Defendant may move before the writ has been levied on property (Kennedy *v.* California Sav. Bank, 97 Cal. 93, 31 Pac. 846, 33 Am. St. Rep. 163; Winona First Nat. Bank *v.* Randall, 38 Minn. 382, 37 N. W. 799; Andrews *v.* Schofield, 27 N. Y. App. Div. 90, 50 N. Y. Suppl. 132); and he need not wait until he files an answer (Quinlan *v.* Danford, 28 Kan. 507); or until the return-term of the writ (Wilson *v.* Louis Cook Mfg. Co., 88 N. C. 5). *Compare* De Leon *v.* Heller, 77 Ga. 740, where it was held that a demurrer to an affidavit could be decided at the first term, although plaintiff has the whole of that term during which to file his declaration.

Motion premature before report by commissioner.— It has been held that the supreme court would not entertain a motion in respect to the regularity of the proceedings of a commissioner under the act concerning absent, concealed, or absconding debtors, until after report made by the commissioner. The jurisdiction of the court to review the proceedings is acquired only by report made by certiorari returned. Matter of Gilbert, 7 Wend. (N. Y.) 490.

52. Hall *v.* Brazleton, 40 Ala. 406; Gill *v.* Downs, 26 Ala. 670; Brewster *v.* James, 3 Ill. 464; Beecher *v.* James, 3 Ill. 462; Miltenberger *v.* Lloyd, 2 Dall. (Pa.) 79, 1 L. ed. 297; Sloo *v.* Powell, Dall. (Tex.) 467. *Contra*, Kennedy *v.* Mitchell, 4 Fla. 457. *Compare* Kearney *v.* McCullough, 5 Binn. (Pa.) 389, where it was held that an application in the case of an attachment brought to the July term was in time, if made in the December term following, where the July term being held for one day only was not regarded as strictly speaking a term.

Time fixed with reference to other proceedings.— It has been held that defendant must make his motion to quash within the time prescribed for pleading in abatement (De Bardeleben *v.* Crosby, 53 Ala. 363; Steamboat Farmer *v.* McCraw, 31 Ala. 659; Hazard *v.* Jordan, 12 Ala. 180), or within the time for answer (Merritt *v.* St. Paul, 11 Minn. 223), and the time will not be extended by calling the motion a substituted motion (Magee *v.* Fogerty, 6 Mont. 237, 11 Pac. 668), or by an order denying the motion without prejudice to its renewal before another court to which the case is removed (Wallace *v.* Lewis, 9 Mont. 399, 24 Pac. 22). *Compare* Reg. *v.* Stewart, 8 Ont. Pr. 297, where defendant in attachment accepted service of the writ with knowledge of all the irregularities in the proceedings, and it was held he

to the principal cause of action,[53] or by pleading in abatement to the writ,[54] a more lenient rule prevails in several of the states, and defendant can make his

could not move to set aside the attachment after the time for pleading had expired.

Where the period for opening a default is fixed by statute at twelve months, this refers to the application by defendant, and if the application is made in due time defendant is not prejudiced by the failure of the court to pass upon his rights within the time limited. Bledsoe *v.* Wright, 2 Baxt. (Tenn.) 471.

Motion on merits not defeated by laches.— The general rule that a motion to discharge an attachment for irregularity must be made promptly or excuse given for the laches does not apply to a motion made on the merits (Thalheimer *v.* Hayes, 14 N. Y. Civ. Proc. 232; Swezey *v.* Bartlett, 3 Abb. Pr. N. S. (N. Y.) 444; Lawrence *v.* Jones, 15 Abb. Pr. (N. Y.) 110); and mere lapse of time within the limits provided by the statutes, before levy, is no objection to the ground of the motion (Andrews *v.* Schofield, 27 N. Y. App. Div. 90, 50 N. Y. Suppl. 132).

Affidavit sufficiently answering charge of laches.—Laches charged against the assignee of the attachment debtors in making a motion to set aside the attachment is fully answered by his affidavit, alleging that had the estate realized the amount for which it had been sold by the assignors, prior to the assignment, there would have been sufficient to pay all creditors, and that afterward he was obliged to rescind the sale and resell the goods for less than their worth, being barely enough to pay plaintiffs, and that he served the motion papers the day of the sale. Kahle *v.* Muller, 57 Hun (N. Y.) 144, 11 N. Y. Suppl. 26, 32 N. Y. St. 448.

53. *Alabama.*— Carter *v.* O'Bryan, 105 Ala. 305, 16 So. 894; Rosenberg *v.* H. B. Claflin Co., 95 Ala. 249, 10 So. 521; Bledsoe *v.* Gary, 95 Ala. 70, 10 So. 502; Drakford *v.* Turk, 75 Ala. 339. *Compare* Steamboat Farmer *v.* McCraw, 31 Ala. 659, where it was held that a third person who was permitted to come in and defend against an attachment was bound to move before setting up a defense to the action.

Illinois.— Palmer *v.* Logan, 4 Ill. 56. *Compare* Wheat *v.* Bower, 42 Ill. App. 600, where an attempt was made to raise a defect in a collateral proceeding, and it was held that defendant waived the defect by appearing.

Indiana.— Foster *v.* Dryfus, 16 Ind. 158. See also Root *v.* Monroe, 5 Blackf. (Ind.) 594, where a motion to quash a writ of attachment made on the calling of the cause at the term at which the writ was returnable and on the first appearance of defendant was held to be in time, although he had previously entered special bail in vacation. *Compare* Collins *v.* Nichols, 7 Ind. 447, where a motion to quash was held to be too late after appearance entered, continuance, and trial.

Louisiana.— Ealer *v.* McAllister, 14 La. Ann. 821; Enders *v.* The Steamer Henry Clay, 8 Rob. (La.) 30.

Michigan.— Crane *v.* Hardy, 1 Mich. 56.

Mississippi.— Smith *v.* Cromer, 66 Miss. 157, 5 So. 619; Bishop *v.* Fennerty, 46 Miss. 570. *Compare* Thompson *v.* Raymon, 7 How. (Miss.) 186, where it was held that a court for the correction of errors would not dismiss an attachment for irregularities where there was no motion in the court below.

New Jersey.—State *v.* Noblett, (N. J. 1900) 47 Atl. 438.

New Mexico.—Wagner *v.* Romero, 3 N. M. 131, 3 Pac. 50.

North Carolina.—Symons *v.* Northern, 49 N. C. 241; Price *v.* Sharp, 24 N. C. 417.

Pennsylvania.— Memphis, etc., R. Co. *v.* Wilcox, 48 Pa. St. 161; Loewenstein *v.* Sheetz, 7 Phila. (Pa.) 361; Atlas Steamship Co. *v.* U. S. Foreign, etc., Fruit Co., 2 Pa. Co. Ct. 123.

South Carolina.— Townes *v.* Augusta, 46 S. C. 15, 23 S. E. 984; Young *v.* Gray, Harp. (S. C.) 38; Smith *v.* Goudalock, 1 Brev. (S. C.) 468.

Tennessee.— Johnson *v.* Luckado, 12 Heisk. (Tenn.) 270.

Wisconsin.— Woodruff *v.* Sanders, 18 Wis. 161; Lowe *v.* Stringham, 14 Wis. 222.

Contra, Dulin *v.* McCaw, 39 W. Va. 721, 20 S. E. 681, where it was held that defendant by appearing and pleading to the principal action did not waive his right to contest the validity of the attachment, but merely waived the right to take objection to the service by publication. *Compare* Horton *v.* Fancher, 14 Hun (N. Y.) 172, where motion to quash was disallowed and defendant pleaded to merits, but was held not to have waived his right to insist on his motion on an appeal.

Where proceedings were instituted under a state law not adopted by congress the right to raise objection to jurisdiction of the court was held not to be waived by pleading to the merits. Binns *v.* Williams, 4 McLean (U. S.) 580, 3 Fed. Cas. No. 1,423, construing Michigan statute.

54. Rice *v.* Hauptman, 2 Colo. App. 565, 31 Pac. 862; Archer *v.* Claflin, 31 Ill. 306. *Contra,* Smith *v.* Hackley, 44 Mo. App. 614; Harrisburg Boot, etc., Co. *v.* Johnson, 3 Pa. Dist. 433. *Compare* Stoddard *v.* Miller, 29 Ill. 291, where it was held that the right to make a motion to dismiss the suit because the declaration was not filed in time was not waived by pleading in abatement to an attachment writ.

Simultaneous motion to quash and plea in abatement.— In Arkansas defendant may file a motion to vacate and plead in abatement at the same time, and the court will postpone action on the motion until the issue of fact is determined, and then decide the motion in the light of the result reached upon that issue. Salmon *v.* Mills, 49 Fed. 333, 4 U. S. App. 101, 1 C. C. A. 278.

motion to quash at any time before final judgment[55] or even after judgment,[56] provided the proceeds of the attached property have not been applied in satisfaction of the judgment.[57]

d. Notice of Application — (i) *Necessity For.* As a general rule, notice should be given to plaintiff of a motion to dissolve or discharge an attachment,[58]

55. *Kansas.*— Guest *v.* Ramsey, 50 Kan. 709, 33 Pac. 17; Smith-Frazer Boot, etc., Co. *v.* Derse, 41 Kan. 150, 21 Pac. 167; Doggett *v.* Bell, 32 Kan. 298, 4 Pac. 292; Merchants' Nat. Bank *v.* Danford, 28 Kan. 512; Quinlan *v.* Danford, 28 Kan. 507.

Louisiana.— Shewell *v.* Stone, 12 Mart. (La.) 386.

Michigan.— Gore *v.* Ray, 73 Mich. 385, 41 N. W. 329.

Nebraska.— Herman *v.* Hayes, 58 Nebr. 54, 78 N. W. 365; Stutzner *v.* Printz, 43 Nebr. 306, 61 N. W. 620; Moline, etc., Co. *v.* Curtis, 38 Nebr. 520, 57 N. W. 161; Reed *v.* Maben, 21 Nebr. 696, 33 N. W. 252; Hilton *v.* Ross, 9 Nebr. 406, 2 N. W. 862.

Ohio.— Egan *v.* Lumsden, 2 Disn. (Ohio) 168; Ross *v.* Miller Merchant Tailoring Co., 7 Ohio Cir. Ct. 51.

Wyoming.— Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. 743.

A motion to quash must be submitted to the court as well as filed before judgment in order to be seasonable (Herman *v.* Hayes, 58 Nebr. 54, 78 N. W. 365 [*overruling* on this point Stutzner *v.* Printz, 43 Nebr. 306, 61 N. W. 620]); but where the motion has been heard before trial, the court may rule upon it after judgment (Moline, etc., Co. *v.* Curtis, 38 Nebr. 520, 57 N. W. 161 [*distinguishing* Rudolf *v.* McDonald, 6 Nebr. 163]).

Defendant may move to quash after announcement of ready for trial (Osborn *v.* Schiffer, 37 Tex. 434); or at any time when the answer stands undisposed of, although it may be insufficient (Winona First Nat. Bank *v.* Randall, 38 Minn. 382, 37 N. W. 799).

A garnishee may move to quash after having appeared and confessed assets and expressed willingness to abide by order of the court in the premises. Cromwell *v.* Royal Canadian Ins. Co., 49 Md. 366, 33 Am. Rep. 258. *Compare* Noyes *v.* Canada, 30 Fed. 665, construing Kansas statute, where it was held that even if appearance waived defendant's right to object to the invalidity of attachment proceedings, it would not preclude garnishees summoned in the suit from contesting the validity of the attachment.

56. Thompson *v.* Culver, 38 Barb. (N. Y.) 442, 15 Abb. Pr. (N. Y.) 97, 24 How. Pr. (N. Y.) 286; Zerega *v.* Benoist, 7 Rob. (N. Y.) 199, 33 How. Pr. (N. Y.) 129; Drury *v.* Russell, 27 How. Pr. (N. Y.) 130; Bittick *v.* Wilkins, 7 Heisk. (Tenn.) 307; Watt *v.* Carnes, 4 Heisk. (Tenn.) 532.

Contra.— *Iowa.*— Clark *v.* Tull, 113 Iowa 143, 84 N. W. 1030.

Minnesota.— McDonald *v.* Clark, 53 Minn. 230, 54 N. W. 1118.

Pennsylvania.— Whiteside *v.* Oakman, 1 Dall. (Pa.) 294, 1 L. ed. 143. *Compare* Keegan *v.* Sutton, 12 Wkly. Notes Cas. (Pa.) 292, where it was held that a judgment rendered for want of an appearance in foreign attachment may be opened and the attachment quashed, where it is shown that defendant is in fact a resident of the state.

West Virginia.— Camden *v.* McCoy, 48 W. Va. 377, 37 S. E. 637.

Wisconsin.— Jarvis *v.* Barrett, 14 Wis. 591.

Although the debtor has previously applied for and had a hearing pursuant to the statute in any proceedings under the absconding debtors' act, he will not be precluded from questioning the sufficiency of the evidence to give jurisdiction to the officer issuing the attachment. Matter of Faulkner, 4 Hill (N. Y.) 598.

Order of motions.— After a judgment of condemnation has been rendered in attachment, if the defendant desire to move to quash a writ he should first move to strike out the judgment and then make his motion. Boarman *v.* Patterson, 1 Gill (Md.) 372.

After judgment has been affirmed on appeal it is too late to move to quash an attachment. Bassett *v.* Hughes, 48 Wis. 23, 3 N. W. 770.

57. Andrews *v.* Schofield, 27 N. Y. App. Div. 90, 50 N. Y. Suppl. 132; Parsons *v.* Sprague, 30 Hun (N. Y.) 19, 3 N. Y. Civ. Proc. 290, 65 How. Pr. (N. Y.) 151; Thompson *v.* Culver, 38 Barb. (N. Y.) 442, 15 Abb. Pr. (N. Y.) 97, 24 How. Pr. (N. Y.) 286; Friede *v.* Weissenthanner, 27 Misc. (N. Y.) 518, 58 N. Y. Suppl. 336; Claflin *v.* Baere, 57 How. Pr. (N. Y.) 78.

An actual and real application of the property or its proceeds is intended and a mere levy under an execution will not be regarded as such an actual application as will bar the right of the subsequent lienor to move it. Woodmansee *v.* Rogers, 82 N. Y. 88, 59 How. Pr. (N. Y.) 402.

Where the writ is void a court may vacate the attachment at any time when its attention is called to the fact (Black *v.* Scanlon, 48 Ga. 12; Goodyear Rubber Co. *v.* Knapp, 61 Wis. 103, 20 N. W. 651); and the same rule has been applied to motions based on defects which go to the question of jurisdiction (Evesson *v.* Selby, 32 Md. 340; Barr *v.* Perry, 3 Gill (Md.) 313; Stone *v.* Magruder, 10 Gill & J. (Md.) 383, 32 Am. Dec. 177; Bruce *v.* Cook, 6 Gill & J. (Md.) 345). *Compare* Merritt *v.* St. Paul, 11 Minn. 223, where the writ was void and the court held there was no waiver by failure to move to quash for there was nothing to be vacated.

58. *California.*— Freeborn *v.* Glazer, 10 Cal. 337.

Kansas.— Guest *v.* Ramsey, 50 Kan. 709, 33 Pac. 17; Smith-Frazer Boot, etc., Co. *v.*

but such notice is unnecessary where the motion is founded upon plaintiff's application and proofs.[59]

(II) *FORM AND SUFFICIENCY* — (A) *In General.* In some states the manner[60] and time[61] of notice are prescribed while in others provision is made only for "reasonable" notice.[62] In such case the reasonableness of the notice will be determined by the circumstances and conditions existing at the time the matter was to be presented.[63]

(B) *Specifying Grounds.* In some jurisdictions the notice of motion to vacate an attachment for irregularity must specify the irregularity complained of,[64] but it has been held that this rule does not apply where the defect is not a mere irregularity.[65]

e. Requisites of Motion or Application[66] — (I) *ENTITLING.* A motion to quash or vacate should be entitled as in the original cause except in a special proceeding.[67]

(II) *PARTICULAR AVERMENTS* — (A) *Specifying Grounds of Application.* A motion for the dissolution of an attachment must state the grounds relied on,

Derse, 41 Kan. 150, 21 Pac. 167; Merchants' Nat. Bank *v.* Danford, 28 Kan. 512; Quinlan *v.* Danford, 28 Kan. 507.

Louisiana.— Claflin *v.* Lisso, 31 La. Ann. 171, holding that a judge has no authority to release an attachment of property claimed to be exempt from seizure on the *ex parte* application of defendant, but that plaintiff must be duly notified and given an opportunity to be heard.

Minnesota.— Blake *v.* Sherman, 12 Minn. 420.

Montana.— Omaha Upholstering Co. *v.* Chauvin-Fant Furniture Co., 18 Mont. 468, 45 Pac. 1087.

Nebraska.—Herman *v.* Hayes, 58 Nebr. 54, 78 N. W. 365; Sterling Mfg. Co. *v.* Hough, 49 Nebr. 618, 68 N. W. 1019.

59. Thalheimer *v.* Hays, 42 Hun (N. Y.) 93.

60. **Upon whom served.**— Service of citation is to be made upon plaintiff in the attachment, if found within the county, and if not, then upon his agent or attorney. Cleland *v.* Clark, 111 Mich. 336, 69 N. W. 652, holding that service upon attorney was sufficient, although both plaintiff and attorney were non-residents, and the latter was within the county only for the purposes of the attachment.

Manner of service.— Service of citation is by reading the same to the party upon whom it is intended to be served. Cleland *v.* Clark, 111 Mich. 336, 60 N. W. 652, holding that service upon an attorney without reading the citation to him was insufficient.

Intention to use affidavit.— Plaintiff is entitled to notice that an affidavit is to be used upon the hearing of a motion. Meyer Bros. Drug Co. *v.* Malm, 47 Kan. 762, 28 Pac. 1011.

61. Thus in Michigan, in proceedings to dissolve an attachment, the citation is to be served at least three days before the return-day (Cleland *v.* Clark, 111 Mich. 336, 69 N. W. 652), exclusive of Sunday (St. Ignace First Nat. Bank *v.* Williams Milling Co., 110 Mich. 15, 67 N. W. 976).

62. Guest *v.* Ramsey, 50 Kan. 709, 33 Pac. 17; Quinlan *v.* Danford, 28 Kan. 507; Sterling Mfg. Co. *v.* Hough, 49 Nebr. 618, 68 N. W. 1019.

63. Sterling Mfg. Co. *v.* Hough, 49 Nebr. 618, 68 N. W. 1019.

Notice one day after levy.— Where a defendant intends to make a motion to discharge an attachment, if he gives plaintiff notice of his intended motion a day after the attachment was levied, which is of course before judgment, such notice is reasonable within the meaning of the statute requiring it. Kirk *v.* Stevenson, 59 Ohio St. 556, 53 N. E. 49.

Ten days' notice of motion to vacate attachment where there is no statute regulating such rule is sufficient. Blake *v.* Sherman, 12 Minn. 420.

Notice held sufficiently certain.— Where a notice of a motion to vacate a writ of attachment recited the hearing for the "next special or adjourned term" of the district court of Olmstead county, "to be held, etc., on the 28th day of January, 1867," it was not void for uncertainty. Blake *v.* Sherman, 12 Minn. 420.

64. Freeborn *v.* Glazer, 10 Cal. 337; Andrews *v.* Schofield, 27 N. Y. App. Div. 90, 50 N. Y. Suppl. 132; Marietta First Nat. Bank *v.* Brunswick Chemical Works, 3 Silv. Supreme (N. Y.) 61, 6 N. Y. Suppl. 318, 25 N. Y. St. 830, 17 N. Y. Civ. Proc. 229 [*affirming* 5 N. Y. Suppl. 824, and *affirmed* in 119 N. Y. 645, 23 N. E. 1149, 29 N. Y. St. 993]; Weehawken Wharf Co. *v.* Knickerbocker Coal Co., 24 Misc. (N. Y.) 683, 53 N. Y. Suppl. 982 [*reversing* 22 Misc. (N. Y.) 768, 49 N. Y. Suppl. 1150, 22 Misc. (N. Y.) 559, 49 N. Y. Suppl. 1001]; Lipscomb *v.* Rice, 47 S. C. 14, 24 S. E. 925; Cupit *v.* Park City Bank, 11 Utah 427, 37 Pac. 564, 40 Pac. 707.

65. Andrews *v.* Schofield, 27 N. Y. App. Div. 90, 50 N. Y. Suppl. 132; Walts *v.* Nichols, 32 Hun (N. Y.) 276; Lipscomb *v.* Rice, 47 S. C. 14, 24 S. E. 925.

66. **For forms** of motion to dissolve attachments see West *v.* Woolfolk, 21 Fla. 189; Kilpatrick *v.* O'Connell, 62 Md. 403.

67. Heyn *v.* Farrar, 36 Mich. 258, where it was held that proceedings to dissolve, taken

and should specify and point out explicitly the defects complained of;[68] but an attachment may be vacated for a jurisdictional defect in the original affidavit, although the motion specifies no irregularity[69] or assigns erroneous reasons.[70]

(B) *Denying Grounds Alleged in Affidavit For Attachment.* A petition in support of an application for the dissolution of an attachment based upon the falsity of the grounds upon which such attachment was issued must deny the existence of the facts alleged in the affidavit.[71] Where the facts stated in the affidavit

before a circuit court commissioner, need not be entitled in the original cause.

Objection that the moving papers were improperly entitled cannot be taken for the first time on appeal. Walts *v.* Nichols, 32 Hun (N. Y.) 276.

68. *California.*— Freeborn *v.* Glazer, 10 Cal. 337.

Kansas.— Payne *v.* Kansas City First Nat. Bank, 16 Kan. 147; Ferguson *v.* Smith, 10 Kan. 396.

Maryland.— Kilpatrick *v.* O'Connell, 62 Md. 403.

Michigan.— Osborne *v.* Robbins, 10 Mich. 277.

Montana.— Omaha Upholstering Co. *v.* Chauvin-Fant Furniture Co., 18 Mont. 468, 45 Pac. 1087, holding that it was not enough to state that the motion would be made on the ground that the writ was improperly issued, or to refer for the grounds to the affidavits filed.

New York.— Kloh *v.* New York Fertilizer Co., 86 Hun (N. Y.) 266, 33 N. Y. Suppl. 343, 67 N. Y. St. 85; Kahle *v.* Muller, 57 Hun (N. Y.) 144, 11 N. Y. Suppl. 26, 32 N. Y. St. 448; Rothschild *v.* Mooney, 13 N. Y. Suppl. 125, 36 N. Y. St. 565; MacDonald *v.* Kieferdorf, 18 N. Y. Suppl. 763, 46 N. Y. St. 176, 22 N. Y. Civ. Proc. 105.

Tennessee.— Waggoner *v.* St. John, 10 Heisk. (Tenn.) 503.

Washington.— Windt *v.* Banniza, 2 Wash. 147, 26 Pac. 189.

Wisconsin.— Hubbard *v.* Haley, 96 Wis. 578, 71 N. W. 1036.

Reason for rule.— A motion to dismiss founded on any defects that might be amended should specify the grounds so that the plaintiff may have an opportunity to amend. Ferguson *v.* Smith, 10 Kan. 396; Waggoner *v.* St. John, 10 Heisk. (Tenn.) 503.

Amendment of rule to show cause by adding new ground.— A motion to amend a rule to show cause why an attachment should not be dissolved, by adding a new ground, may be allowed even after the trial of the rule has commenced, where no issue has been joined in the case and where the additional ground is based on matter apparent on the face of the petition, and its allowance is not calculated to delay the trial of the rule or to take the other parties by surprise. Brinegar *v.* Griffin, 2 La. Ann. 154.

Effect of failure to distinguish where part of debt not due.— A motion to quash an attachment is in the nature of a general demurrer, and the rule is that where a pleader attempts to state two causes of action and fails as to one, the general demurrer to the whole complaint must be overruled. Hence, if a motion to quash does not distinguish between that part of the debt due and the part not due, the motion as to the whole will properly be denied, if the writ on its face is sufficient. Hubbard *v.* Haley, 96 Wis. 578, 71 N. W. 1036.

Effect of urging non-jurisdictional reason. — Where defendant in a foreign attachment moves to quash on the ground that he was resident, but also cites in his petition to quash a reason not going to the jurisdiction of the court, he is not precluded by urging such non-jurisdictional reason from claiming a dissolution. Turner *v.* Larkin, 12 Pa. Super. Ct. 284, 7 Del. Co. (Pa.) 543.

Right to set up insufficiency and falsity of affidavit in same motion.— Under S. D. Comp. Laws, § 5011, a defendant may unite in the same motion as a ground for discharging an attachment that the affidavit is insufficient in form or substance, and is in fact untrue. Wilcox *v.* Smith, 4 S. D. 125, 55 N. W. 1107.

Waiver of objections not raised on motion. — When an attorney appears and moves to quash an attachment, he must urge all the objections he intends to make in support of his motion, and he will be considered as having waived other objections at least for technical errors. Norton *v.* Dow, 10 Ill. 459. See also Walts *v.* Nichols, 32 Hun (N. Y.) 276.

Objection for failure to specify too late on appeal.— Objections to a motion to vacate on the ground that the moving papers do not show that the moving creditors had obtained any valid attachment, and that the particular irregularity in the attachment is not specified therein, cannot be made for the first time in an appellate court. MacDonald *v.* Kieferdorf, 18 N. Y. Suppl. 763, 46 N. Y. St. 176, 22 N. Y. Civ. Proc. 105.

Where it appears that grounds assigned in the motion were bad, and it does not appear on what ground the quashing took place, an order quashing the attachment is erroneous. Dawson *v.* Miller, 20 Tex. 171, 70 Am. Dec. 380.

69. Weehawken Wharf Co. *v.* Knickerbocker Coal Co., 24 Misc. (N. Y.) 683, 53 N. Y. Suppl. 982.

70. Bruce *v.* Cook, 6 Gill & J. (Md.) 345.

71. Stock *v.* Reynolds, 121 Mich. 356, 80 N. W. 289; Bane *v.* Keys, 115 Mich. 244, 73 N. W. 230; Patterson *v.* Goodrich, 31 Mich. 225.

Denial in the alternative.— In a petition to dissolve an attachment a denial that de-

upon which the attachment was granted are *prima facie* sufficient to justify the issue thereof, and defendant fails to make any explanation of the same in his motion to vacate, the attachment will not be disturbed.[72]

(c) *Description of Property Attached.* An application for the dissolution of an attachment should show that defendant's property was attached, the jurisdiction of the officer depending on such facts;[73] and should describe the same,[74] since the sufficiency of description goes to the question of the court's jurisdiction, and no order respecting the property could be made unless the same be known.[75]

(III) *Request For Restoration.* Upon application to dissolve an attachment, it has been held that it is not necessary that the petitioner ask for restoration of the property.[76]

(IV) *Verification.* Verification of a motion has been held to be unnecessary[77] although proper.[78]

f. Supporting Affidavits — (1) *In General.* Where the application to vacate is based on evidence *dehors* the record it is usually supported by affidavits.[79]

fendant has assigned, disposed of, or concealed his property is not demurrable. Ionia First Nat. Bank *v.* Steele, 81 Mich. 93, 45 N. W. 579.

Denial in conjunctive.— A petition by defendant denying "that he has assigned, disposed of, and that he is about to assign, dispose of, and conceal, his property, with intent to defraud his creditors, or that he has made any fraudulent disposition whatever of his property with said intent" is bad as being in the conjunctive. Bane *v.* Keys, 115 Mich. 244, 73 N. W. 230.

72. Wickham *v.* Stern, 9 N. Y. Suppl. 803, 28 N. Y. St. 154, 18 N. Y. Civ. Proc. 63; Marietta First Nat. Bank *v.* Bushwick Chemical Works, 5 N. Y. Suppl. 824 [*affirmed* in 53 Hun (N. Y.) 635, 3 Silv. Supreme (N. Y.) 61, 6 N. Y. Suppl. 318, 25 N. Y. St. 830, 17 N. Y. Civ. Proc. 229]; Pach *v.* Orr, 1 N. Y. Suppl. 760, 17 N. Y. St. 367, 15 N. Y. Civ. Proc. 176.

73. Osborne *v.* Robbins, 10 Mich. 277.

74. Macumber *v.* Beam, 22 Mich. 395; Nelson *v.* Hyde, 10 Mich. 521; Osborne *v.* Robbins, 10 Mich. 277; Chandler *v.* Nash, 5 Mich. 409.

75. Nelson *v.* Hyde, 10 Mich. 521 (where it was held that a petition stating simply that "property to the value of," etc., "was attached and is now in the possession of the sheriff" was defective as to description); Osborne *v.* Robbins, 10 Mich. 277.

76. Smith *v.* Collins, 41 Mich. 173, 2 N. W. 177.

77. Wm. W. Kendall Boot, etc., Co. *v.* August, 51 Kan. 53, 32 Pac. 635.

78. Osborne *v.* Robbins, 10 Mich. 277, procedure before circuit court commissioner.

79. *Arkansas.*— Holliday *v.* Cohen, 34 Ark. 707.

California.— Barbieri *v.* Ramelli, 84 Cal. 174, 24 Pac. 113.

Colorado.— Wehle *v.* Kerbs, 6 Colo. 167.

District of Columbia.—Barbour *v.* Paige Hotel Co., 2 App. Cas. (D. C.) 174; Robinson *v.* Morrison, 2 App. Cas. (D. C.) 105.

Florida.— Weston *v.* Jones, 41 Fla. 188, 25 So. 888, written oath by defendant that the allegations of plaintiff's affidavit were untrue, either as to the debt or sum demanded, or as to the special cause assigned for granting the attachment.

Indian Territory.— Martin *v.* Berry, 1 Indian Terr. 399, 37 S. W. 835; Barton *v.* Ferguson, 1 Indian Terr. 263, 37 S. W. 49.

Kansas.— Wm. W. Kendall Boot, etc., Co. *v.* August, 51 Kan. 53, 32 Pac. 635; Meyer Bros. Drug Co. *v.* Malm, 47 Kan. 762, 28 Pac. 1011; Hillyer *v.* Biglow, 47 Kan. 473, 28 Pac. 150.

Maryland.— Lambden *v.* Bowie, 2 Md. 334.

Montana.— Newell *v.* Whitwell, 16 Mont. 243, 40 Pac. 866.

Nebraska.— Jordan *v.* Dewey, 40 Nebr. 639, 59 N. W. 88; Omaha Hardware Co. *v.* Duncan, 31 Nebr. 217, 47 N. W. 846.

New York.— National Broadway Bank *v.* Barker, 128 N. Y. 603, 27 N. E. 1029, 38 N. Y. St. 920 [*affirming* 14 N. Y. Suppl. 529, 38 N. Y. St. 597, 20 N. Y. Civ. Proc. 338]; Hodgman *v.* Barker, 128 N. Y. 601, 27 N. E. 1029, 40 N. Y. St. 773 [*affirming* 60 Hun (N. Y.) 156, 14 N. Y. Suppl. 574, 38 N. Y. St. 578, 20 N. Y. Civ. Proc. 341]; Ruppert *v.* Haug, 87 N. Y. 141, 62 How. Pr. (N. Y.) 364; Hamerschlag *v.* Cathoscope Electrical Co., 16 N. Y. App. Div. 185, 44 N. Y. Suppl. 668; Belmont *v.* Sigua Iron Co., 12 N. Y. App. Div. 441, 42 N. Y. Suppl. 122; McDonald *v.* Sterling, 5 N. Y. App. Div. 489, 38 N. Y. Suppl. 1081; Chambers, etc., Glass Co. *v.* Roberts, 4 N. Y. App. Div. 20, 38 N. Y. Suppl. 301, 73 N. Y. St. 668; Thalheimer *v.* Hays, 42 Hun (N. Y.) 93; Morgan *v.* Avery, 7 Barb. (N. Y.) 656, 2 Code Rep. (N. Y.) 91; Grob *v.* Metropolitan Collecting Agency, 30 Misc. (N. Y.) 214, 63 N. Y. Suppl. 513; Simon *v.* Kugler Syndicate, 68 N. Y. Suppl. 1128; Thames, etc., Mar. Ins. Co. *v.* Dimick, 22 N. Y. Suppl. 1096, 51 N. Y. St. 41; Dietlin *v.* Egan, 19 N. Y. Suppl. 392, 22 N. Y. Civ. Proc. 398; Rothschild *v.* Mooney, 13 N. Y. Suppl. 125, 36 N. Y. St. 565; Leiser *v.* Rosman, 10 N. Y. Suppl. 415, 32 N. Y. St. 739; National Park Bank *v.* Whitmore, 7 N. Y. St. 456; Lawson *v.* Lawson, 12 N. Y. Civ. Proc. 437; Houghton *v.* Ault, 8 Abb. Pr. (N. Y.) 89 note, 16 How. Pr. (N. Y.) 77 [*overruling* Conklin *v.* Dutcher, 5 How.

Such affidavits must contain sufficient to put in issue the allegations of the affidavit for attachment,[80] but must not go to the merits of the cause of action and defense.[81] They should, moreover, set out the facts on which the motion is based

Pr. (N. Y.) 386, Code Rep. N. S. (N. Y.) 49]; Chaine *v.* Wilson, 8 Abb. Pr. (N. Y.) 78; Barry *v.* Bockover, 6 Abb. Pr. (N. Y.) 374; Potter *v.* Kitchen, 6 Abb. Pr. (N. Y.) 374 note; New York, etc., Bank *v.* Codd, 11 How. Pr. (N. Y.) 221; Bank of Commerce *v.* Rutland, etc., R. Co., 10 How. Pr. (N. Y.) 1.

North Carolina.— Hale *v.* Richardson, 89 N. C. 62; Palmer *v.* Bosher, 72 N. C. 371; Toms *v.* Warson, 66 N. C. 417; Evans *v.* Andrews, 52 N. C. 117.

Ohio.— Seville *v.* Wagner, 46 Ohio St. 52, 18 N. E. 430.

Oklahoma.— Carnahan *v.* Gustine, 2 Okla. 399, 37 Pac. 594.

Oregon.— Watson *v.* Loewenberg, 34 Oreg. 323, 56 Pac. 289.

Pennsylvania.—Fernau *v.* Butcher, 113 Pa. St. 292, 6 Atl. 67.

South Carolina.—Addison *v.* Sujette, (S. C. 1897) 27 S. E. 631; Kerchner *v.* McCormac, 25 S. C. 461; Claussen *v.* Easterling, 19 S. C. 515; Bates *v.* Killian, 17 S. C. 553; Havis *v.* Trapp, 2 Nott & M. (S. C.) 130.

South Dakota.— Finch *v.* Armstrong, 9 S. D. 255, 68 N. W. 740; Wilcox *v.* Smith, 4 S. D. 125, 55 N. W. 1107; Hornick Drug Co. *v.* Lane, 1 S. D. 129, 45 N. W. 329.

Utah.— Barnhart *v.* Foley, 11 Utah 191, 39 Pac. 823.

Washington.— Hansen *v.* Doherty, 1 Wash. 461, 25 Pac. 297.

Wisconsin.— Davidson *v.* Hackett, 49 Wis. 186, 5 N. W. 459.

Wyoming.— Sundance First Nat. Bank *v.* Mooreroft Ranch Co., 5 Wyo. 50, 36 Pac. 821; Wearne *v.* France, 3 Wyo. 273, 21 Pac. 703.

United States.— Jenks *v.* Richardson, 71 Fed. 365; Perry *v.* Sharpe, 8 Fed. 15, both cases construing Ohio statute.

Canada.— Smith *v.* Niagara Harbour, etc., Co., 6 U. C. Q. B. O. S. 555; Fisher *v.* Beach, 4 U. C. Q. B. O. S. 118.

Motion without affidavit insufficient.— A verified motion on information and belief, without any affidavit for the dissolution of an attachment, the affidavit for which is a positive declaration under oath of the facts therein alleged, is insufficient; and it is not erroneous to exclude parol testimony offered by defendant in support of the motion. Barnhart *v.* Foley, 11 Utah 191, 39 Pac. 823. See also Powell *v.* Cummins, 7 Ky. L. Rep. 361, holding that unless the ground for an attachment is controverted by the affidavit of defendant entered of record, no proof is necessary to show the ground.

Verified answer may be used as affidavit so far as its contents are pertinent. Nelson *v.* Munch, 23 Minn. 229.

In New Jersey an inquiry was made under a rule to show cause why the writ should not be quashed and affidavits taken in pursuance of a rule. Baldwin *v.* Flagg, 43 N. J. L. 495; Shadduck *v.* Marsh, 21 N. J. L. 434; Morrel *v.* Fearing, 20 N. J. L. 670; Day *v.* Bennett, 18 N. J. L. 287. But under the act of Mar. 10, 1893, no provision is made for a contest as to the truth of the affidavits whereon an order awarding an attachment against a debtor has been made; and if such affidavits are sufficient to support such an order they cannot be questioned by counter-affidavits tending to show their falsity. New York Mercantile Nat. Bank *v.* Pequonnock Nat. Bank, 58 N. J. L. 300, 33 Atl. 474.

80. *Kentucky.*— Chiles *v.* Shaw, 13 Ky. L. Rep. 143.

North Carolina.— Evans *v.* Andrews, 52 N. C. 117.

Oregon.— Watson *v.* Loewenberg, 34 Oreg. 323, 56 Pac. 289.

Pennsylvania.— Netter *v.* Hosch, 1 Pa. Co. Ct. 452.

South Dakota.—Hornick Drug Co. *v.* Lane, 1 S. D. 129, 45 N. W. 329.

Washington.— Hansen *v.* Doherty, 1 Wash. 461, 25 Pac. 297.

United States.— Jenks *v.* Richardson, 71 Fed. 365, construing Ohio statute.

Effect of failure to file affidavits.—Where the facts with reference to the allegations of the affidavit are within the knowledge of a defendant, and he does not present any counter-affidavits in support of his motion to vacate, but rests upon that upon which the attachment was granted, plaintiff is entitled to the benefit of all legitimate inferences from the facts shown. Stewart *v.* Lyman, 62 N. Y. App. Div. 182, 70 N. Y. Suppl. 936 [*following* Globe Yarn Mills *v.* Bilbrough, 2 Misc. (N. Y.) 100, 21 N. Y. Suppl. 2, 49 N. Y. St. 702].

Denials should be as direct and positive as if the affidavit were in answer to a complaint for an ordinary action, and must be tested by the same rules of pleading. To allege that defendant is not about to assign, secrete, and dispose of any property with intent to delay and defraud his creditors is in effect to admit that he is about to do any one of the acts mentioned, but not all of them conjointly. Such a denial raises no issue, and the attachment should be sustained on the grounds set forth in that portion of plaintiff's affidavit thus attempted to be traversed. Hanson *v.* Doherty, 1 Wash. 461, 25 Pac. 297.

Affidavit sufficiently traversing indebtedness.— An affidavit by a defendant denying that he was at the time of the filing of the attachment affidavit indebted to plaintiff to the amount named, or any part thereof, sufficiently traverses the affidavit for attachment as to the amount demanded. Weston *v.* Jones, 41 Fla. 188, 25 So. 888.

81. Lawson *v.* Lawson, 12 N. Y. Civ. Proc. 437.

Aider of affidavit for attachment by defendant's affidavit.— On motion to dissolve an attachment against an absconding debtor, affidavits put in by defendant on his motion

and are insufficient if they contain merely defendant's conclusion of law drawn therefrom.[82]

(II) *Traversing, Explaining, or Avoiding Plaintiff's Evidence.* After plaintiff has filed his affidavit or other evidence to sustain the averment made by him to obtain the issue of the attachment writ, defendant may in some jurisdictions file such affidavits or other evidence as he desires or relies upon to traverse, explain, or avoid the case made by plaintiff's evidence.[83]

g. Opposing Affidavits[84] — (I) *In General.* Where an application to discharge or vacate an attachment may be made upon motion supported by affidavit, plaintiff is allowed to file affidavits in opposition to such motion and in support of his attachment,[85] but such course is not permissible where the motion to vacate is

may be considered by the court to supply a defect in the affidavit for attachment. Thus an objection that the attachment affidavit did not show positively whether defendant was concealed or had absconded was held to be met by defendant's affidavits from which it appeared that he had in fact absconded. Reg. *v.* Stewart, 8 Ont. Pr. 297.

82. Omaha Hardware Co. *v.* Duncan, 31 Nebr. 217, 47 N. W. 846, where it was held that if defendant desires to set up a defense that the alleged fraudulent transfer was merely a mortgage to secure a valid indebtedness, his affidavit should state the facts tending to show how and for what the indebtedness was incurred, and it is not sufficient to allege merely a valid indebtedness.

83. Carson *v.* Getchell, 23 Minn. 571; Nelson *v.* Munch, 23 Minn. 229; Jordan *v.* Dewey, 40 Nebr. 639, 59 N. W. 88.

84. For form of counter-affidavit by attaching creditor to oppose motion to quash see Robinson *v.* Morrison, 2 App. Cas. (D. C.) 105.

85. *California.*— Barbieri *v.* Ramelli, 84 Cal. 174, 24 Pac. 113; Cahen *v.* Mahoney, (Cal. 1886) 12 Pac. 300.

District of Columbia.— Robinson *v.* Morrison, 2 App. Cas. (D. C.) 105.

Indian Territory.— Martin *v.* Berry, 1 Indian Terr. 399, 37 S. W. 835; Barton *v.* Ferguson, 1 Indian Terr. 263, 37 S. W. 49.

Montana.— Newell *v.* Whitwell, 16 Mont. 243, 40 Pac. 866.

New York.— Trow's Printing, etc., Co. *v.* Hart, 85 N. Y. 500; Godfrey *v.* Godfrey, 75 N. Y. 434; Heilbronn *v.* Herzog, 17 N. Y. App. Div. 416, 45 N. Y. Suppl. 268; Hamerschlag *v.* Cathoscope Electrical Co., 16 N. Y. App. Div. 185, 44 N. Y. Suppl. 668; Hallock *v.* Van Camp, 55 Hun (N. Y.) 1, 8 N. Y. Suppl. 588, 28 N. Y. St. 337; Rowles *v.* Hoare, 61 Barb. (N. Y.) 266; Genin *v.* Tompkins, 12 Barb. (N. Y.) 265; Morgan *v.* Avery, 7 Barb. (N. Y.) 656, 2 Code Rep. (N. Y.) 91; Buell *v.* Van Camp, 2 Silv. Supreme (N. Y.) 379, 6 N. Y. Suppl. 365, 24 N. Y. St. 866; Haebler *v.* Bernharth, 58 N. Y. Super. Ct. 165, 9 N. Y. Suppl. 725; St. Amant *v.* De Beixcedon, 3 Sandf. (N. Y.) 703; Peck *v.* Brooks, 31 Misc. (N. Y.) 48, 64 N. Y. Suppl. 546 [*affirmed* in 51 N. Y. App. Div. 640, 64 N. Y. Suppl. 1145]; Acker *v.* Saynisch, 25 Misc. (N. Y.) 415, 54 N. Y. Suppl. 937; Herman *v.* Bailey, 20 Misc. (N. Y.) 94, 45 N. Y. Suppl. 88; Gwalter *v.* New York Seal Plush, etc., Co., 19 N. Y. Suppl. 49, 46 N. Y. St. 137, 22 N. Y. Civ. Proc. 214; MacDonald *v.* Kieferdorf, 18 N. Y. Suppl. 763, 22 N. Y. Civ. Proc. 105; Pach *v.* Orr, 1 N. Y. Suppl. 760, 17 N. Y. St. 367, 15 N. Y. Civ. Proc. 176; Lawson *v.* Lawson, 12 N. Y. Civ. Proc. 437; Coffin *v.* Stitt, 5 N. Y. Civ. Proc. 261; Gasherie *v.* Apple, 14 Abb. Pr. (N. Y.) 64; Hill *v.* Bond, 22 How. Pr. (N. Y.) 272; Furman *v.* Walter, 13 How. Pr. (N. Y.) 348; New York, etc., Bank *v.* Codd, 11 How. Pr. (N. Y.) 221; Conklin *v.* Dutcher, 5 How. Pr. (N. Y.) 386, Code Rep. N. S. (N. Y.) 49; Gilbert *v.* Tompkins, Code Rep. N. S. (N. Y.) 16, 2 Edm. Sel. Cas. (N. Y.) 232; Cammann *v.* Tompkins, Code Rep. N. S. (N. Y.) 12, 2 Edm. Sel. Cas. (N. Y.) 227.

Ohio.— Baer *v.* Otto, 34 Ohio St. 11; Garner *v.* White, 23 Ohio St. 192.

South Carolina.— Addison *v.* Sujette, (S. C. 1895) 27 S. E. 631.

South Dakota.— Pierie *v.* Berg, 7 S. D. 578, 64 N. W. 1130.

Wisconsin.— Davidson *v.* Hackett, 49 Wis. 186, 5 N. W. 459.

Canada.— Reg. *v.* Stewart, 8 Ont. Pr. 297.

In Kentucky the code formerly authorized affidavits to be used in opposition to the motion to discharge an attachment when such motion was based upon affidavits. Talbot *v.* Pierce, 14 B. Mon. (Ky.) 158. The code as amended, however, does not contain any provision which authorizes the use of affidavits as evidence on the trial of attachment. Newton *v.* West, 3 Metc. (Ky.) 24.

In New Jersey, upon defendant obtaining a rule to show cause why an attachment should not be quashed, leave may be given to both parties to take affidavits. Moore *v.* Richardson, (N. J. 1900) 47 Atl. 424.

Where plaintiff fails to avail himself of the opportunity to file an affidavit contradicting the statements of defendant's affidavit, or stating other facts, it is generally held that defendant's affidavit must be taken as establishing the truth of what it contains. Barbieri *v.* Ramelli, 84 Cal. 174, 24 Pac. 113. It has been held, however, that the affidavit by defendant in support of his motion to vacate being the evidence of a party in interest, the court may refuse to credit it, although it is denied in general terms and not specifically by the opposing affidavit of plaintiff. Dietlin *v.* Egan, 19 N. Y. Suppl. 392, 22 N. Y.

made upon the original papers.[86] The new proof which plaintiff is allowed to use in opposition to such motion is, as a rule, limited to affidavits tending to sustain any of the grounds for the attachment, and no other,[87] except where defendant relies upon a discharge in bankruptcy, or a discharge or exoneration in insolvency proceedings, in which cases plaintiff cannot deny the discharge, but can only present matter in avoidance of it.[88] In opposition to a motion to vacate attachment plaintiff may read counter-affidavits to contradict or explain the moving papers,

Civ. Proc. 398. Where defendants move to vacate an attachment on the ground that plaintiff has no cause of action, it is not necessary that plaintiff should file rebutting affidavits in order to have the benefit of the rule that the court will not on such motion vacate the attachment unless the facts are undisputed. He may rely upon the allegations of the complaint for that purpose. Brown *v.* Wigton, 18 N. Y. Suppl. 490, 45 N. Y. St. 135.

86. Trow's Printing, etc., Co. *v.* Hart, 85 N. Y. 500 [*affirming* 9 Daly (N. Y.) 413]; Steuben County Bank *v.* Alberger, 75 N. Y. 179, 56 How. Pr. (N. Y.) 345 [*reversing* 55 How. Pr. (N. Y.) 481]; Yates *v.* North, 44 N. Y. 271; Ladenburg *v.* Commercial Bank, 87 Hun (N. Y.) 269, 33 N. Y. Suppl. 821, 67 N. Y. St. 466 [*reversing* 32 N. Y. Suppl. 873, 24 N. Y. Civ. Proc. 234, and *affirmed* in 146 N. Y. 406, 42 N. E. 543]; Fox *v.* Mays, 46 N. Y. App. Div. 1, 61 N. Y. Suppl. 295; Kahle *v.* Muller, 57 Hun (N. Y.) 144, 11 N. Y. Suppl. 26, 32 N. Y. St. 448; Head *v.* Wollner, 53 Hun (N. Y.) 615, 6 N. Y. Suppl. 916, 25 N. Y. St. 645; Fisher *v.* Dougherty, 42 Hun (N. Y.) 167; Sutherland *v.* Bradner, 34 Hun (N. Y.) 519, 7 N. Y. Civ. Proc. 90, 1 How. Pr. N. S. (N. Y.) 188; Smith *v.* Arnold, 33 Hun (N. Y.) 484; Kibbe *v.* Wetmore, 31 Hun (N. Y.) 424; Rowles *v.* Hoare, 61 Barb. (N. Y.) 266; Appleton *v.* Speer, 57 N. Y. Super. Ct. 119, 6 N. Y. Suppl. 511, 25 N. Y. St. 816; Nevada Bank *v.* Cregan, 17 Misc. (N. Y.) 241, 40 N. Y. Suppl. 1065; Ferguson *v.* Commonwealth Rubber Co., 38 N. Y. Suppl. 375, 74 N. Y. St. 31; Thames, etc., Mar. Ins. Co. *v.* Dimick, 22 N. Y. Suppl. 1096, 51 N. Y. St. 41; Pach *v.* Orr, 1 N. Y. Suppl. 760, 17 N. Y. St. 367, 15 N. Y. Civ. Proc. 176 [*modified* in 112 N. Y. 670, 20 N. E. 415, 20 N. Y. St. 980]; Lawson *v.* Lawson, 12 N. Y. Civ. Proc. 437; Brewer *v.* Tucker, 13 Abb. Pr. (N. Y.) 76; Dickinson *v.* Benham, 10 Abb. Pr. (N. Y.) 390, 19 How. Pr. (N. Y.) 410 [*affirmed* in 12 Abb. Pr. (N. Y.) 158, 20 How. Pr. (N. Y.) 343]; Wilson *v.* Britton, 6 Abb. Pr. (N. Y.) 33; Hill *v.* Bond, 22 How. Pr. (N. Y.) 272; Lansingburgh Bank *v.* McKie, 7 How Pr. (N. Y.) 360; White *v.* Featherstonhaugh, 7 How. Pr. (N. Y.) 357; Conklin *v.* Dutcher, 5 How. Pr. 386, Code Rep. N. S. (N. Y.) 49; Cammann *v.* Tompkins, Code Rep. N. S. (N. Y.) 227, 2 Edm. Sel. Cas. 227.

Affidavit identifying affidavits on which attachment granted.— It is proper to permit an affidavit to be read upon a motion to dissolve identifying the affidavits on which the attachment was granted. Hallock *v.* Van Camp, 55 Hun (N. Y.) 1, 8 N. Y. Suppl. 588, 28 N. Y. St. 337.

Effect of affidavit by lienor showing existence of lien.— Where motion to vacate an attachment is made upon the original papers by a party having a lien upon property attached, an affidavit by such lienor, simply showing the existence of his lien, does not make the motion one "founded upon proof by affidavit" so as to allow the attachment creditor to support his affidavits by new proof. The lienor's affidavit merely establishes a preliminary fact necessary to be shown to give jurisdiction, and the motion to vacate is founded on the papers on which the attachment was granted. Steuben County Bank *v.* Alberger, 75 N. Y. 179, 56 How. Pr. (N. Y.) 345.

Effect of affidavit excusing delay and showing right to move.— Where the affidavits of an assignee of property moving to dissolve an attachment thereon are confined simply to showing his right to move, and excusing delay in moving, affidavits in support of the attachment cannot be read. Trow's Printing, etc., Co. *v.* Hart, 85 N. Y. 500 [*affirming* 9 Daly (N. Y.) 413, and *following* Steuben County Bank *v.* Alberger, 75 N. Y. 179, 56 How. Pr. (N. Y.) 345].

Where an attachment debtor delays moving to vacate the attachment for over eighteen months it is not substantial error for the court to permit plaintiff to read opposing affidavits as to occurrences in the action since the granting of the attachment. Haebler *v.* Bernharth, 58 N. Y. Super. Ct. 165, 9 N. Y. Suppl. 725.

87. Chambers, etc., Glass Co. *v.* Roberts, 4 N. Y. App. Div. 20, 38 N. Y. Suppl. 301, 73 N. Y. St. 668; Ives *v.* Holden, 14 Hun (N. Y.) 402; Acker *v.* Saynisch, 25 Misc. (N. Y.) 415, 54 N. Y. Suppl. 937; Herman *v.* Bailey, 20 Misc. (N. Y.) 94, 45 N. Y. Suppl. 88; MacDonald *v.* Kieferdorf, 18 N. Y. Suppl. 763, 46 N. Y. St. 176, 22 N. Y. Civ. Proc. 105; Lawson *v.* Lawsou, 12 N. Y. Civ. Proc. 437; New York, etc., Bank *v.* Codd, 11 How. Pr. (N. Y.) 221; Myers *v.* Whiteheart, 24 S. C. 196.

88. Lawson *v.* Lawson, 12 N. Y. Civ. Proc. 437.

Assignment for benefit of creditors.— Although opposing affidavits to support an attachment by aiding the original papers on which the attachment was granted are inadmissible, yet affidavits in opposition will be allowed where there has been a change in the relation or condition of the party since the original application was made, such as a general assignment for the benefit of creditors.

but he cannot read such affidavits to remedy defects in the papers on which the attachment was granted.[89]

(II) *In Rebuttal.* Where defendant is required to file affidavits explaining or avoiding the case made by plaintiff's evidence, the latter is usually required to file in a reasonable time thereafter such affidavits or other evidence as is applicable in rebuttal.[90]

(III) *Of Cause of Action*—(A) *In General.* In some jurisdictions a defendant, upon filing an affidavit denying some material allegation of the attachment affidavit,[91] may compel plaintiff by rule to file an affidavit showing his cause of action,[92] or the attachment will be dissolved.[93] Such affidavit should be explicit and should state with due particularity the facts constituting the ground of action.[94]

(B) *Amending or Filing Supplementary Affidavit.* According to some decisions where plaintiff is ruled to show his cause of action and his affidavit is insufficient to sustain the attachment he cannot amend[95] or file supplementary affidavits;[96] but in others it has been held that it is within the discretion of the court to allow an amendment[97] or the filing of a supplementary affidavit.[98]

Dickinson *v.* Benham, 12 Abb. Pr. (N. Y.) 158, 20 How. Pr. (N. Y.) 343.

89. Yates *v.* North, 44 N. Y. 271.

An insufficient averment as to non-residence of defendant in plaintiff's affidavit may be supplied by additional affidavits upon motion supported by affidavits to vacate the attachment. Herman *v.* Bailey, 20 Misc. (N. Y.) 94, 45 N. Y. Suppl. 88.

Failure to object to new proof introduced by plaintiff is a waiver thereof. Chambers, etc., Glass Co. *v.* Roberts, 4 N. Y. App. Div. 20, 38 N. Y. Suppl. 301, 73 N. Y. St. 668; Kibbe *v.* Wetmore, 31 Hun (N. Y.) 424.

Waiver by accepting costs.— In Fisher *v.* Dougherty, 42 Hun (N. Y.) 167, on a motion to set aside a warrant of attachment, the court made an order permitting plaintiff to amend his proceeding, or file new affidavits *nunc pro tunc*, upon paying costs to defendant, which costs were paid and accepted. It was held that defendant having accepted the costs could not be heard on appeal to complain of the action of the court below.

90. Jordan *v.* Dewey, 40 Nebr. 639, 59 N. W. 88.

91. Netter *v.* Hosch, 1 Pa. Co. Ct. 452, in foreign attachment.

92. Shadduck *v.* Marsh, 21 N. J. L. 434; Hallowell *v.* Tenney Canning Co., 16 Pa. Super. Ct. 60; Blair *v.* Osborne, 5 Pa. Dist. 278, 17 Pa. Co. Ct. 545; Graham *v.* Canton, etc., R. Co., 25 Wkly. Notes Cas. (Pa.) 65; Rowland *v.* Red Cross Packing Co., 15 Wkly. Notes Cas. (Pa.) 468; McCulley *v.* Chisholm, 19 Phila. (Pa.) 337, 45 Leg. Int. (Pa.) 236; Brock *v.* Brock, 17 Phila. (Pa.) 156, 42 Leg. Int. (Pa.) 170; Ferris *v.* Carlton, 8 Phila. (Pa.) 549; James *v.* Tenney Co., 23 Pa. Co. Ct. 400, 6 Lack. Leg. N. (Pa.) 155; Lett *v.* Thurber Wyland Co., 18 Pa. Co. Ct. 525; Hartman *v.* Wallach, 17 Pa. Co. Ct. 88; Talhelm *v.* Hoover, 4 Pa. Co. Ct. 172; Netter *v.* Hosch, 1 Pa. Co. Ct. 452.

93. Hartman *v.* Wallach, 17 Pa. Co. Ct. 88.

Discharge of rule upon return of no property.—A rule to show cause why an attachment should not be dissolved was obtained before the sheriff returned the writ. Before the hearing the sheriff made return that defendant had no property which the sheriff could attach. It was held that the rule should be discharged, since the court need not dissolve an attachment which had no lien, and did not affect defendant's rights. Goldstein *v.* Sondheim, 3 Kulp (Pa.) 212.

94. McCulley *v.* Chisholm, 19 Phila. (Pa.) 337, 45 Leg. Int. (Pa.) 236; Graham *v.* Canton, etc., R. Co., 25 Wkly. Notes Cas. (Pa.) 65.

Statement of transaction upon which suit founded and designation of property.— In a foreign attachment on real estate an affidavit to show cause, which fails to state fully the transaction upon which the suit is founded and to designate particularly the land alleged to be owned by defendant, is insufficient. Blair *v.* Osborne, 5 Pa. Dist. 278, 17 Pa. Co. Ct. 545.

Specification of amount of credits "as near as he can ascertain."— In an action by foreign attachment on a *quantum meruit* for service rendered, when plaintiff specifies in his affidavit of cause the exact sum earned by him, and avers that he cannot state the precise credits on the account because the evidences of them are in the possession of defendants, but gives the amount "as near as he can ascertain," the attachment will not be dissolved for this reason. Lett *v.* Thurber Wyland Co., 18 Pa. Co. Ct. 525.

95. Shumway *v.* Webster, 24 Wkly. Notes Cas. (Pa.) 336.

96. Eldridge *v.* Robinson, 4 Serg. & R. (Pa.) 548; James *v.* Tenney Co., 23 Pa. Co. Ct. 400, 6 Lack. Leg. N. (Pa.) 155.

97. McCulley *v.* Chisholm, 19 Phila. (Pa.) 337, 45 Leg. Int. (Pa.) 236; Brock *v.* Brock, 17 Phila. (Pa.) 156, 42 Leg. Int. (Pa.) 170.

98. When court bound to consider second affidavit.— Where plaintiff in a foreign attachment files an affidavit of cause of action, which is defective in not stating jurisdictional facts as to non-residence of defendant, and after the rule has been once on the argument list and continued without a hearing,

h. Hearing and Determination — (i) *Form of Trial* — (a) *By Court or Jury.* It is the usual practice for the court or officer to whom a motion to vacate an attachment is made to hear the same without a jury, whether the motion is based on the original papers or on defects not apparent,[99] and in some jurisdictions such trial is, it seems, the only proper method.[1] In some jurisdictions, however, the court may for its better information and satisfaction frame and submit proper issues to the jury,[2] and there are cases in which it ought so to do.[3]

(b) *By Reference.*[4] The court may order a reference to determine the facts in some cases, as where a defendant in attachment, on the ground of non-residence, moves for a discharge on the ground of being a resident;[5] where the

plaintiff files a second affidavit of cause of action identical with the first with the exception of an additional averment as to non-residence of defendant, the court is bound to consider the second affidavit, and it is not within its discretionary power to dissolve the attachment because of the insufficiency of the first affidavit. Hallowell *v.* Tenney Canning Co., 16 Pa. Super. Ct. 60 [*reversing* James *v.* Tenney Co., 23 Pa. Co. Ct. 400, 6 Lack. Leg. N. (Pa.) 153].

99. *Alabama.*— Harmon *v.* Jenks, 84 Ala. 74, 4 So. 260.

Arkansas.—Holliday *v.* Cohen, 34 Ark. 707.

Kentucky.— Talbot *v.* Pierce, 14 B. Mon. (Ky.) 158.

Louisiana.— Allen *v.* Champlin, 32 La. Ann. 511; Salter *v.* Duggan, 4 La. Ann. 280; Read *v.* Ware, 2 La. Ann. 498.

Maryland.— Ferrall *v.* Farnen, 67 Md. 76, 8 Atl. 819; Hardesty *v.* Campbell, 29 Md. 533; Gover *v.* Barnes, 15 Md. 576; Lambden *v.* Bowie, 2 Md. 334.

Michigan.— Genesee County Sav. Bank *v.* Michigan Barge Co., 52 Mich. 164, 17 N. W. 790, 18 N. W. 206; Chandler *v.* Nash, 5 Mich. 409.

Nebraska.— Grimes *v.* Farrington, 19 Nebr. 44, 26 N. W. 618.

North Carolina.— Pasour *v.* Lineberger, 90 N. C. 159.

Pennsylvania.— Walls *v.* Campbell, 125 Pa. St. 346, 23 Wkly. Notes Cas. (Pa.) 506, 508, 17 Atl. 422; Meyers *v.* Rauch, 4 Pa. Dist. 331; Slingluff *v.* Sisler, 23 Pa. Co. Ct. 540.

Washington.— Windt *v.* Banniza, 2 Wash. 147, 26 Pac. 189.

Wyoming.— Wearne *v.* France, 3 Wyo. 273, 21 Pac. 703.

Practice does not conflict with constitutional right to jury trial.— In Wearne *v.* France, 3 Wyo. 273, 21 Pac. 703, it was held that neither the provision in the United States constitution for a jury trial "in suits at common law" nor Wyo. Rev. Stat. § 2517, providing that issues of fact in actions for the recovery of money only or specific real or personal property shall be tried by jury entitles a defendant to a trial by jury of a motion to discharge an attachment.

1. Harmon *v.* Jenks, 84 Ala. 74, 4 So. 260; Holliday *v.* Cohen, 34 Ark. 707; Walls *v.* Campbell, 23 Wkly. Notes Cas. (Pa.) 506; Windt *v.* Banniza, 2 Wash. 147, 26 Pac. 189. See also Claflin *v.* Steenbock, 18 Gratt. (Va.) 842, where it was held that if, on a motion to abate an attachment, plaintiff refuses to express any desire as to whether the issues of fact should be tried by a jury, and defendant desires the issues tried by the court, it is the duty of the court to hear and decide the motion without a jury.

2. Holliday *v.* Cohen, 34 Ark. 707; Stewart *v.* Katz, 30 Md. 334; Howard *v.* Oppenheimer, 25 Md. 350; Pasour *v.* Lineberger, 90 N. C. 159; Matter of Leonard, 3 How. Pr. (N. Y.) 312 (judgment on ground of absconding, etc., motion alleging residence).

3. Pasour *v.* Lineberger, 90 N. C. 159.

Right to demand jury.— In Florida, upon the tender of a written oath by defendant denying the allegations of plaintiff's affidavit and upon demand of either party a jury shall be summoned from the body of the county to try the issue joined. Weston *v.* Jones, 41 Fla. 188, 25 So. 888. See also Stringer *v.* Dean, 61 Mich. 196, 27 N. W. 886 (holding that in the case of affidavits supporting a motion to vacate, if plaintiff desires to contest the facts relied upon by defendant as shown in such affidavits, he has the right to frame an issue unless waived, and to try the same before a jury); Moore *v.* Richardson, (N. J. 1900) 47 Atl. 424 (holding that if there is a question of fact as to existence of a claim for which attachment will lie, plaintiff is entitled to go to a jury upon it, and the lien will not be vacated).

Where question one of doubt.— In Shrewsbury *v.* Pearson, 1 McCord (S. C.) 331, a motion to set aside a foreign attachment was based on affidavits that defendant returned on the day and before the attachment issued; and the court in its discretion, considering the question one of doubt, denied the motion. It was held that under such circumstances the issues should be tried by a jury.

4. **Order of reference on overruling motion on papers improper.**— It is erroneous for an order overruling a motion to vacate an attachment upon the papers with leave to renew to provide for a reference of all the papers and affidavits to a referee, giving each party the right to examine their clients and introduce other testimony, the same to be reported back by the referee with his opinion thereon, since there is no motion pending and no question of fact referred. Woodward *v.* Musgrave, 14 N. Y. App. Div. 291, 43 N. Y. Suppl. 830.

5. Killian *v.* Washington, 2 Code Rep. (N. Y.) 78.

question of the validity of an assignment is involved;[6] or where the depositions taken under a rule to show cause are voluminous.[7]

(II) *Issues Determinable.* Upon the hearing of a motion to dissolve an attachment, based upon a denial of the grounds alleged in the affidavit therefor, the question presented for consideration is whether or not the attachment ought to have been issued, and this must be determined from the evidence in support of or opposed thereto,[8] and the court upon the hearing of such motion will not, as a rule, inquire into the merits of the action.[9]

6. Carter *v.* Barton, 2 Indian Terr. 99, 48 S. W. 1017.

7. Netter *v.* Hosch, 1 Pa. Co. Ct. 452.

8. *Indian Territory.*— Barton *v.* Ferguson, 1 Indian Terr. 263, 37 S. W. 49.

Kansas.— Doggett *v.* Bell, 32 Kan. 298, 4 Pac. 292; Bundren *v.* Denn, 25 Kan. 430.

Michigan.— Carver *v.* Chapell, 70 Mich. 49, 37 N. W. 879; Sheldon *v.* Stewart, 43 Mich. 574, 5 N. W. 1067; Folsom *v.* Teichner, 27 Mich. 107.

Minnesota.— Drought *v.* Collins, 20 Minn. 374; Nelson *v.* Gibbs, 18 Minn. 541.

Nebraska.— Nebraska Moline Plow Co. *v.* Fuehring, 52 Nebr. 541, 72 N. W. 1003; Citizens State Bank *v.* Baird, 42 Nebr. 219, 60 N. W. 551; Hamilton *v.* Johnson, 32 Nebr. 730, 49 N. W. 703.

New Jersey.— Brundred *v.* Del Hoyo, 20 N. J. L. 328.

New York.— Allen *v.* Meyer, 73 N. Y. 1.

Pennsylvania.— Burke *v.* Halloway, 18 Phila. (Pa.) 271, 43 Leg. Int. (Pa.) 280.

South Carolina.— Myers *v.* Whiteheart, 24 S. C. 196; Wheeler *v.* Degnans, 2 Nott & M. (S. C.) 323.

That plaintiff believed he had a good and legal cause is immaterial, however well founded such belief may have appeared to him to be. Folsom *v.* Teichner, 27 Mich. 107; Bisbee *v.* Bowden, 55 N. J. L. 69, 25 Atl. 855; Brundred *v.* Del Hoyo, 20 N. J. L. 328. See also Likens *v.* Clark, 26 N. J. L. 207; Weber *v.* Weitling, 18 N. J. Eq. 441; Claflin *v.* Steenbock, 18 Gratt. (Va.) 842; Davidson *v.* Hackett, 49 Wis. 186, 5 N. W. 459.

9. *California.*— See Beaudry *v.* Vache, 45 Cal. 3.

Idaho.— Mason *v.* Lieuallen, (Ida. 1895) 39 Pac. 1117.

Kansas.—Standard Implement Co. *v.* Lansing Wagon Works, 58 Kan. 125, 48 Pac. 638; Doggett *v.* Bell, 32 Kan. 298, 4 Pac. 292; Bundrem *v.* Denn, 25 Kan. 430; Stone *v.* Boone, 24 Kan. 337.

Louisiana.— Herrmann *v.* Amedee, 30 La. Ann. 393; Miller *v.* Chandler, 29 La. Ann. 88; Macarty *v.* Lepaullard, 4 Rob. (La.) 425; Turner *v.* Collins, 1 Mart. N. S. (La.) 369; Fisher *v.* Taylor, 2 Mart. (La.) 113.

Maryland.— Mayer *v.* Soyster, 30 Md. 402; Clarke *v.* Meixsell, 29 Md. 221; Dickinson *v.* Barnes, 3 Gill (Md.) 485; Boarman *v.* Patterson, 1 Gill (Md.) 372.

Michigan.— Stock *v.* Reynolds, 121 Mich. 356, 80 N. W. 289; S. K. Martin Lumber Co. *v.* Menominee Cir. Judge, 116 Mich. 354, 74 N. W. 649; Carver *v.* Chapell, 70 Mich. 49, 37 N. W. 879; Sheldon *v.* Stewart, 43 Mich. 574, 5 N. W. 1067; Folsom *v.* Teichner, 27 Mich. 107.

Minnesota.—Drought *v.* Collins, 20 Minn. 374; Nelson *v.* Gibbs, 18 Minn. 541; Pierse *v.* Smith, 1 Minn. 82.

Montana.— Omaha Upholstering Co. *v.* Chauvin-Fant Furniture Co., 18 Mont. 468, 45 Pac. 1087; Newell *v.* Whitwell, 16 Mont. 243, 40 Pac. 866.

Nebraska.— McDonald *v.* Marquardt, 52 Nebr. 820, 73 N. W. 288; Geneva Nat. Bank *v.* Bailor, 48 Nebr. 866, 67 N. W. 865; Standard Stamping Co. *v.* Hetzel, 44 Nebr. 105, 62 N. W. 247; Landauer *v.* Mack, 43 Nebr. 430, 61 N. W. 597 [*overruling* 39 Nebr. 8, 57 N. W. 555]; Quigley *v.* McEvony, 41 Nebr. 73, 59 N. W. 767; Hamilton *v.* Johnson, 32 Nebr. 730, 49 N. W. 703; Olmstead *v.* Rivers, 9 Nebr. 234, 2 N. W. 366.

Nevada.— Kuehn *v.* Paroni, 20 Nev. 203, 19 Pac. 273.

New Jersey.—State *v.* Spring Lake, 58 N. J. L. 136, 32 Atl. 77; Phillipsburgh Bank *v.* Lackawanna R. Co., 27 N. J. L. 206; Likens *v.* Clark, 26 N. J. L. 207; Shadduck *v.* Marsh, 21 N. J. L. 434; Brundred *v.* Del Hoyo, 20 N. J. L. 328; Day *v.* Bennett, 18 N. J. L. 287; Branson *v.* Shinn, 13 N. J. L. 250; New York City Bank *v.* Merrit, 13 N. J. L. 131; Weber *v.* Weitling, 18 N. J. Eq. 441; Middleton *v.* Steward, 9 N. J. L. J. 174.

New York.— Allen *v.* Meyer, 73 N. Y. 1; Goodyear *v.* Commercial F. Ins. Co., 58 N. Y. App. Div. 611, 68 N. Y. Suppl. 756; Thorn *v.* Alvord, 54 N. Y. App. Div. 638, 67 N. Y. Suppl. 1147 [*affirming* 32 Misc. (N. Y.) 456, 66 N. Y. Suppl. 587]; Kelly *v.* Baker, 26 N. Y. App. Div. 217, 49 N. Y. Suppl. 973; Romeo *v.* Garofalo, 25 N. Y. App. Div. 191, 49 N. Y. Suppl. 114 [*affirming* 21 Misc. (N. Y.) 166, 47 N. Y. Suppl. 91]; Goldmark *v.* Magnolia Metal Co., 28 N. Y. App. Div. 264, 51 N. Y. Suppl. 68; Furbush *v.* Nye, 17 N. Y. App. Div. 325, 45 N. Y. Suppl. 214; Kirby *v.* Colwell, 81 Hun (N. Y.) 385, 30 N. Y. Suppl. 880, 63 N. Y. St. 134; Peck *v.* Brooks, 31 Misc. (N. Y.) 48, 64 N. Y. Suppl. 546 [*affirmed* in 51 N. Y. App. Div. 640, 64 N. Y. Suppl. 1145]; Reedy Elevator Co. *v.* American Grocery Co., 23 Misc. (N. Y.) 520, 51 N. Y. Suppl. 874; Brown *v.* Wigton, 18 N. Y. Suppl. 490, 45 N. Y. St. 135; Sterns Paper Co. *v.* Johnson, 18 N. Y. Suppl. 490, 44 N. Y. St. 916; Lowenstein *v.* Salinger, 17 N. Y. Suppl. 70, 42 N. Y. St. 414; Lawson *v.* Lawson, 12 N. Y. Civ. Proc. 437; Foley *v.* Virtue, 8 Abb. Pr. N. S. (N. Y.) 407; Lawrence *v.* Jones, 15 Abb. Pr. (N. Y.) 110;

(III) *Right to Open and Close.* The order of argument follows the burden of proof[10] and accordingly attachment plaintiff is entitled to open and close.[11]

(IV) *Evidence* — (A) *Burden of Proof.* Although there are some decisions to the effect that after an affidavit has been made for an attachment some *prima facie* proof must be made by defendant that the facts sworn to are untrue in order to throw the burden of proving their truth on plaintiff,[12] yet the general rule is to the effect that the burden is upon attachment plaintiff to support the grounds of the attachment, where the same are properly denied by defendant,[13]

Boscher *v.* Roullier, 4 Abb. Pr. (N. Y.) 396.

Ohio.— Kentucky Northern Bank *v.* Nash, 1 Handy (Ohio) 153, 12 Ohio Dec. (Reprint) 75.

Oklahoma.— Carnahan *v.* Gustine, 2 Okla. 399, 37 Pac. 594.

Pennsylvania.—Fisher *v.* Fisher, 2 Woodw. (Pa.) 321; Hintermeister *v.* Ithaca Organ, etc., Co., 3 Kulp (Pa.) 490; Burke *v.* Halloway, 18 Phila. (Pa.) 271, 43 Leg. Int. (Pa.) 280.

South Carolina.—Addison *v.* Sujette, (S. C. 1897) 27 S. E. 631; Wheeler *v.* Degnans, 2 Nott & M. (S. C.) 323.

Texas.— C. B. Carter Lumber Co. *v.* De Grazier, 3 Tex. App. Civ. Cas. § 176.

Utah.— Northwestern Wheel, etc., Co. *v.* Salt Lake City Copper Mfg. Co., 11 Utah 404, 40 Pac. 702.

Virginia.— Claflin *v.* Steenbock, 18 Gratt. (Va.) 842.

Washington.— Sheppard *v.* Guisler, 10 Wash. 41, 38 Pac. 759.

United States.— Jenks *v.* Richardson, 71 Fed. 365, construing Ohio statute.

The merits may be inquired into where the moving papers are hopelessly bad (Story *v.* Arthur, 35 Misc. (N. Y.) 244, 71 N. Y. Suppl. 776), where it is certain that the complaint is so defective that plaintiff cannot recover (Goodyear *v.* Commercial F. Ins. Co., 58 N. Y. App. Div. 611, 68 N. Y. Suppl. 756. *Compare* Kohler *v.* Agassiz, 99 Cal. 9, 33 Pac. 741), or where the facts are undisputed and a legal conclusion certain (Lowenstein *v.* Salinger, 17 N. Y. Suppl. 70, 42 N. Y. St. 414).

10. Burden of proof see *infra*, XV, D, 2, h, (IV), (A).

11. Johnson *v.* Stockham, 89 Md. 368, 43 Atl. 943; Jordan *v.* Dewey, 40 Nebr. 639, 59 N. W. 88; Dolan *v.* Armstrong, 35 Nebr. 339, 53 N. W. 132; Olds Wagon Co. *v.* Benedict, 25 Nebr. 372, 41 N. W. 254; Hilton *v.* Ross, 9 Nebr. 406, 2 N. W. 862; Gibson *v.* McLaughlin, 1 Browne (Pa.) 292; Wright *v.* Rambo, 21 Gratt. (Va.) 158. *Compare* Citizens State Bank *v.* Baird, 42 Nebr. 219, 60 N. W. 551, where the soundness of this rule was questioned and the court inclined to the view that the right to open and close should rest within the discretion of the court.

12. Simons *v.* Jacobs, 15 La. Ann. 425; Henderson *v.* Travis, 6 La. Ann. 174; Offutt *v.* Edwards, 9 Rob. (La.) 90; Brumgard *v.* Anderson, 16 La. 341; Adams *v.* Day, 14 La. 503; Moore *v.* Angiolette, 12 Mart. (La.) 532.

13. *Kansas.*— Wm. W. Kendall Boot, etc., Co. *v.* August, 51 Kan. 53, 32 Pac. 635; Guest *v.* Ramsey, 50 Kan. 709, 33 Pac. 17; Champion Mach. Co. *v.* Updyke, 48 Kan. 404, 29 Pac. 573; Mitchell *v.* Carney, 41 Kan. 139, 21 Pac. 158; Wichita Wholesale Grocery Co. *v.* Records, 40 Kan. 119, 19 Pac. 346; Becker *v.* Langford, 39 Kan. 35, 17 Pac. 648; McPike *v.* Atwell, 34 Kan. 142, 8 Pac. 118; Green *v.* Embry, 18 Kan. 320; Robinson *v.* Melvin, 14 Kan. 484.

Maryland.— Pitts Agricultural Works *v.* Smelser, 87 Md. 493, 40 Atl. 56.

Michigan.— McMorran *v.* Moore, 113 Mich. 101, 71 N. W. 505; Cottrell *v.* Hatheway, 108 Mich. 619, 66 N. W. 590; Rickel *v.* Strelinger, 102 Mich. 41, 60 N. W. 307; Iosco County Sav. Bank *v.* Barnes, 100 Mich. 1, 58 N. W. 606; Gore *v.* Ray, 73 Mich. 385, 41 N. W. 329; Genesee County Sav. Bank *v.* Michigan Barge Co., 52 Mich. 164, 17 N. W. 790, 18 N. W. 206; Powers *v.* O'Brien, 44 Mich. 317, 6 N. W. 679; Brown *v.* Blanchard, 39 Mich. 790; Folsom *v.* Teichner, 27 Mich. 107; Macumber *v.* Beam, 22 Mich. 395.

Minnesota.—Jones *v.* Swank, 51 Minn. 285, 53 N. W. 634.

Nebraska.— Geneva Nat. Bank *v.* Bailor, 48 Nebr. 866, 67 N. W. 865; Citizens State Bank *v.* Baird, 42 Nebr. 219, 60 N. W. 551; Jordan *v.* Dewey, 40 Nebr. 639, 59 N. W. 88; Dolan *v.* Armstrong, 35 Nebr. 339, 53 N. W. 132; Olds Wagon Co. *v.* Benedict, 25 Nebr. 372, 41 N. W. 254; Steele *v.* Dodd, 14 Nebr. 496, 16 N. W. 909; Hilton *v.* Ross, 9 Nebr. 406, 2 N. W. 862; Tallon *v.* Ellison, 3 Nebr. 63; Ellison *v.* Tallon, 2 Nebr. 14.

New Jersey.— Day *v.* Bennett, 18 N. J. L. 287.

New York.—New Rochelle Coal, etc., Co. *v.* McGraw, 3 N. Y. App. Div. 252, 38 N. Y. Suppl. 353, 73 N. Y. St. 678; West Side Bank *v.* Meehan, 20 N. Y. Suppl. 766, 49 N. Y. St. 606.

Ohio.— Coston *v.* Paige, 9 Ohio St. 397; Bradley *v.* Wacker, 13 Ohio Cir. Ct. 530; Willenger *v.* Bramsche, 7 Ohio Cir. Ct. 208; Morton *v.* Sterrett, 3 Ohio Dec. (Reprint) 173, 4 Wkly. L. Gaz. 132; Union Rolling Mill Co. *v.* Packard, 1 Ohio Cir. Dec. 46; McAllister *v.* Davey, 7 Ohio S. & C. Pl. Dec. 354, 5 Ohio N. P. 274.

Pennsylvania.— Hall *v.* Kintz, 2 Pa. Dist. 615, 13 Pa. Co. Ct. 24; Wells *v.* Hogan, 2 Pa. Dist. 98; Lycoming Rubber Co. *v.* Evans, 8 Kulp (Pa.) 35; Strobel, etc., Co. *v.* Lowenstein, 6 Kulp (Pa.) 476; Terry *v.* Knoll, 3 Kulp (Pa.) 272; Miller *v.* Paine, 2 Kulp (Pa.) 304; Easterline *v.* Jones, 2 Kulp (Pa.)

by a preponderance of the evidence,[14] and where, upon a sufficient denial of the ground of the attachment, plaintiff fails to sustain such burden of proof the attachment should be dissolved.[15]

(B) *Admissibility* — (1) Motion Based on Original Papers. Upon an application for the dissolution of an attachment for defects apparent in the proceedings, the court is limited to the consideration of the papers of record in the case,[16] and if no error appears on the face of the record the court should refuse to vacate or quash the attachment.[17] Defendant by moving on the original papers is deemed to have conceded all the averments of fact contained in the affidavit,

121; Butcher *v.* Fernau, 1 Kulp (Pa.) 401; Adams *v.* Bailey, 17 Wkly. Notes Cas. (Pa.) 399; Bradley *v.* Harker, 15 Wkly. Notes Cas. (Pa.) 403; Matthews *v.* Dalsheimer, 10 Wkly. Notes Cas. (Pa.) 371; Gaulbert *v.* Atwater, 2 Wkly. Notes Cas. (Pa.) 644; Sowers *v.* Leiby, 4 Pa. Co. Ct. 223; Seldner *v.* Whann, 2 Chest. Co. Rep. (Pa.) 383; Easterline *v.* Jones, 1 Chest. Co. Rep. (Pa.) 490; Sutton *v.* McAskie, 1 Chest. Co. Rep. (Pa.) 489; Holland *v.* Atzerodt, 1 Walk. (Pa.) 237.

South Carolina.— Lipscomb *v.* Rice, 47 S. C. 14, 24 S. E. 925.

South Dakota.—Chaffee *v.* Runkel, 11 S. D. 333, 77 N. W. 583; Park *v.* Armstrong, 9 S. D. 269, 68 N. W. 739; Foley-Wadsworth Implement Co. *v.* Porteous, 8 S. D. 74, 65 N. W. 429; Jones *v.* Meyer, 7 S. D. 152, 63 N. W. 773; Wilcox *v.* Smith, 4 S. D. 125, 55 N. W. 1107; Wyman *v.* Wilmarth, 1 S. D. 172, 46 N. W. 190; Noyes *v.* Lane, 1 S. D. 125, 45 N. W. 327.

Utah.— Deseret Nat. Bank *v.* Little, 13 Utah 265, 44 Pac. 930; Godbe-Pitts Drug Co. *v.* Allen, 8 Utah 117, 29 Pac. 881.

Virginia.— Burruss *v.* Trant, 88 Va. 980, 14 S. E. 845; Sublett *v.* Wood, 76 Va. 318; Wright *v.* Rambo, 2 Gratt. (Va.) 158.

Washington.— Bender *v.* Rinker, 21 Wash. 633, 59 Pac. 503.

See 5 Cent. Dig. tit. "Attachment," § 862.

14. Dolan *v.* Armstrong, 35 Nebr. 339, 53 N. W. 132; Chambers, etc., Glass Co. *v.* Roberts, 4 N. Y. App. Div. 20, 38 N. Y. Suppl. 301, 73 N. Y. St. 668; Rosenzweig *v.* Wood, 30 Misc. (N. Y.) 297, 63 N. Y. Suppl. 447; Walton *v.* Chadwick, 6 Misc. (N. Y.) 293, 26 N. Y. Suppl. 789, 58 N. Y. St. 145; Weill *v.* Malone, 15 N. Y. Suppl. 492, 39 N. Y. St. 899; Kerchner *v.* McCormac, 25 S. C. 461; Bender *v.* Rinker, 21 Wash. 633, 59 Pac. 503.

A mere reiteration of the general statements of the original affidavit in the language of the statute, or a statement of mere opinion or belief, is not sufficient. Jones *v.* Swank, 51 Minn. 285, 53 N. W. 634.

15. *Kansas.*— Conner *v.* Rice County, 20 Kan. 575.

Louisiana.— Palmer *v.* Hightower, 47 La. Ann. 17, 16 So. 560.

Michigan.— Gore *v.* Ray, 73 Mich. 385, 41 N. W. 329.

Nebraska.—Grimes *v.* Farrington, 19 Nebr. 44, 26 N. W. 618; Hilton *v.* Ross, 9 Nebr. 406, 2 N. W. 862; Ellison *v.* Tallon, 2 Nebr. 14.

New York.— McGrath *v.* Sayer, 19 N. Y. App. Div. 321, 46 N. Y. Suppl. 113.

Ohio.— Willenger *v.* Bramsche, 7 Ohio Cir. Ct. 208.

Pennsylvania.— Netter *v.* Harding, 6 Pa. Dist. 169; Butcher *v.* Fernau, 1 Kulp (Pa.) 401; Holland *v.* Atzerodt, 1 Walk. (Pa.) 237.

South Carolina.—Lipscomb *v.* Rice, 47 S. C. 14, 24 S. E. 925; Blake *v.* Hawkes, 2 Hill (S. C.) 631.

South Dakota.— Wilcox *v.* Smith, 4 S. D. 125, 55 N. W. 1107.

Where the evidence leaves the facts in doubt the court will not interfere. Blake *v.* Hawkes, 2 Hill (S. C.) 631; Shrewsbury *v.* Pearson, 1 McCord (S. C.) 331.

16. *Indiana.*— Cooper *v.* Reeves, 13 Ind. 53.

Mississippi.— Spear *v.* King, 6 Sm. & M. (Miss.) 276.

Pennsylvania.—Fernau *v.* Butcher, 113 Pa. St. 292, 6 Atl. 67; Crawford *v.* Stewart, 38 Pa. St. 34; Singerly *v.* Dewees, 6 Pa. Dist. 92, 19 Pa. Co. Ct. 80.

Texas.— Hill *v.* Cunningham, 25 Tex. 25.

West Virginia.—Tingle *v.* Brison, 14 W. Va. 295.

Additional affidavits cannot be filed with the clerk to take the place of the original where the court has already considered a motion to quash affidavits, attachment, and garnishment. Teutonia Loan, etc., Co. *v.* Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419.

The court will not go behind the facts of the papers themselves unless the objection embrace some feature connected with the execution or filing of the affidavit. Deering *v.* Warren, 1 S. D. 35, 44 N. W. 1068.

What papers admissible.— On the trial of a motion to quash a writ of attachment on the ground that it was improperly issued, by reason of being made returnable to a court in another county than the one in which it was issued, the affidavit, bond, and writ of attachment, the affidavit of claim to the property levied on and the claim bond, the pleas of defendant in the attachment suit and an agreement of all the parties in interest as to the manner in which the writ was levied, tending to show that the writ was made so returnable through a clerical mistake and that the defect had been waived, are admissible in evidence. Carter *v.* O'Bryan, 105 Ala. 305, 16 So. 894.

17. Fernau *v.* Butcher, 113 Pa. St. 292, 6 Atl. 67; Crawford *v.* Stewart, 38 Pa. St. 34; Singerly *v.* Dewees, 6 Pa. Dist. 92, 19 Pa. Co. Ct. 80; Hill *v.* Cunningham, 25 Tex. 25.

and the fair inferences to be drawn therefrom, to be true for the purposes of the motion.[18]

(2) Motion Based on Evidence Dehors Record. On the hearing of a motion to dissolve or vacate an attachment based upon other than the original papers, both parties are entitled to present all the facts to enable the court to decide whether the ground upon which the warrant was issued in fact existed.[19] Defendant may introduce any evidence tending to show an improper issue of the writ,[20] and plaintiff may introduce any evidence tending to sustain grounds originally alleged for the issue of the attachment, but his evidence, whether by affidavit or otherwise, is limited to such grounds.[21]

(v) *Continuances.* It is within the discretion of the judge or court hearing an application for the dissolution of an attachment to grant or refuse an application for a continuance of such hearing.[22]

18. Phillips *v.* Wortendyke, 31 Hun (N. Y.) 192; Weehawken Wharf Co. *v.* Knickerbocker Coal Co., 24 Misc. (N. Y.) 683, 53 N. Y. Suppl. 982; Condouris *v.* Imperial Turkish Tobacco, etc., Co., 3 Misc. (N. Y.) 66, 22 N. Y. Suppl. 690, 51 N. Y. St. 772. See also Wright *v.* Smith, 19 Tex. 297.

No intendment prejudicial to plaintiff can be made upon a motion to quash for a defective or insufficient affidavit. Calhoun *v.* Cozzens, 3 Ala. 21.

Presumption that credit has not expired.— A motion upon the papers to vacate an attachment in an action for the price of goods sold on credit will not be granted on the ground that the term for which credit was given has not yet expired in the absence of an affirmative showing of that fact. No presumption that such credit has not expired will be indulged. Steele *v.* Raphael, 13 N. Y. Suppl. 664, 37 N. Y. St. 623.

19. Chambers, etc., Glass Co. *v.* Roberts, 4 N. Y. App. Div. 20, 38 N. Y. Suppl. 301, 73 N. Y. St. 668.

Showing nature and character of demand. — On the hearing of a rule to show cause why an attachment, alleged to have been issued on a cause of action for which the issue of the process was not authorized by law, should not be dissolved, the court should receive facts showing the real nature and character of the demand sought to be enforced in support of or for the discharge of the rule. Rich *v.* Thornton, 69 Ala. 473.

Omission of acts required to validate assignment for benefit of creditors.—The omission to do any of the acts required by the statute which render valid an assignment for the benefit of creditors is not available, upon motion to sustain an attachment as against the assignment except so far as such circumstances bear upon the question of fraudulent intent. Place *v.* Miller, 6 Abb. Pr. N. S. (N. Y.) 178.

20. Burgess *v.* Clark, 3 Ind. 250 (evidence that party is a resident of another territory admissible in defense of attachment proceedings sued out under domestic attachment laws); Thomas *v.* Dundas, 31 La. Ann. 184 (evidence that affidavit on which writ issued is false); Carver *v.* Chapell, 70 Mich. 49, 37 N. W. 879 (evidence that property alleged to have been secreted with intent to defraud was exempt from execution, or that it did not belong to defendant); Bown *v.* Blanchard, 39 Mich. 790 (defendant may be examined as to his intentions, and evidence is admissible to show that plaintiff in attachment had been secured by collaterals); Hyde *v.* Nelson, 11 Mich. 353 (testimony of defendant that at the time of the attachment he did not know that he was owing any one held admissible as bearing upon an intent to defraud); Union Rolling Mill Co. *v.* Packard, 1 Ohio Cir. Dec. 46 (attachment debtor may testify as to intention in conveying his property).

Plaintiff's attempt to settle or compromise claim.— In Finlay Brewing Co. *v.* Prost, 111 Mich. 635, 70 N. W. 137, it was held that the fact that plaintiff's cause was based on the fraudulent conduct of defendant does not render admissible evidence of an attempt by plaintiff to settle or compromise his claim.

Evidence held irrelevant but not prejudicial to plaintiff.— On motion to dissolve an attachment issued on the grounds that defendant had disposed of property with intent to defraud creditors, and that the debt to plaintiff was fraudulently contracted, the admission of evidence that land levied on under the attachment was defendant's homestead, although irrelevant, is not prejudicial to plaintiff. Carver *v.* Chapell, 70 Mich. 49, 37 N. W. 879.

21. **Limitation of new proof in affidavits in opposition to motion** see *supra*, XV, D, 2, g.

Proof of specific act of immorality of defendant not admissible to impeach his credibility.—Where an attachment was issued on the ground that defendant was about to convert his property into money with intent to defraud his creditors, it was held that, on motion to dissolve, the fact that defendant once dealt, or was supposed to have dealt, in counterfeit money should not be considered. Ball *v.* Lignoski, 24 La. Ann. 484.

22. Hanna *v.* Barrett, 39 Kan. 446, 18 Pac. 497; Wells *v.* Danford, 28 Kan. 487; Carson *v.* Getchell, 23 Minn. 571.

Even after commencing his decision a judge can continue the hearing of a motion to dissolve an attachment upon the application of a party against whom the decision was made. Hanna *v.* Barrett, 39 Kan. 446, 18 Pac. 497.

(VI) *Order Granting or Denying Application.*[23] In a proper case the order may vacate an attachment in part and sustain it in part,[24] and an order vacating the attachment may impose terms.[25] In an order vacating an attachment it is unnecessary to insert directions as to the manner of redelivery, unless such directions are called for by special circumstances.[26] The necessity of setting out findings[27] or reciting affidavits employed on the hearing[28] is dependent on circumstances.

i. Rehearing. After an order for the discharge of an attachment the judge making the same may, upon proper application of plaintiff and showing that such order was obtained by perjury and fraud, grant a rehearing upon such motion to ascertain whether the former ruling was induced by such unlawful means, and if he shall so determine, he may rescind his order dissolving the attachment and overrule the motion therefor;[29] but a reargument will not be

Continuance proper to enable plaintiff to prove mistake in date of attachment. Snelling *v.* Bryce, 41 Ga. 513.

23. For forms of orders dissolving an attachment see West *v.* Woolfolk, 21 Fla. 189; Ellsworth *v.* Scott, 3 Abb. N. Cas. (N. Y.) 9.

24. Portion of debt due.— Upon a rule for the dissolution of an attachment upon the ground that the whole of the debt sued for was not due at the time of the issue of the writ, it has been held that the attachment should be sustained as to the portion of the debt then due. Lewis *v.* Lehman, 5 Pa. Dist. 364.

Where moving party has interest in part only of property.—Where a motion to vacate is made by one who has acquired an interest in a part only of the property attached, the relief should be limited to vacating the attachment as to such part. Trow's Printing, etc., Co. *v.* Hart, 85 N. Y. 500.

Where defendant's remedy is confined to the discharge of the attachment or to the release of the property attached, it has been held that such attachment cannot be released or discharged as to a portion of the attached property. Royal Ins. Co. *v.* Noble, 5 Abb. Pr. N. S. (N. Y.) 54.

25. Where apparent grounds existed.— It has been held that upon dissolving an attachment issued on the ground of fraud, the condition may be imposed that defendant will bring no action on the bond where apparent grounds existed justifying the application for such attachment by plaintiff (Nyack, etc., Gas-Light Co. *v.* Tappan Zee Hotel Co., 2 Silv. Supreme (N. Y.) 564, 6 N. Y. Suppl. 113, 24 N. Y. St. 723; Rigney *v.* Tallmadge, 17 How. Pr. (N. Y.) 556; Quay *v.* Robbins, 1 Wkly. Notes Cas. (Pa.) 154. And see Bruce *v.* Coleman, 1 Handy (Ohio) 515, 12 Ohio Dec. (Reprint) 265), and such attachment was made in good faith (Quay *v.* Robbins, 1 Wkly. Notes Cas. (Pa.) 154).

Defendant not non-resident.— When a foreign attachment is quashed upon its appearing by deposition that defendants therein were in the county when the writ issued, although not staying, no terms should be imposed as to appearance or acceptance of service of summons by them. Burns *v.* Bowers, 3 Wkly. Notes Cas. (Pa.) 64.

Insufficiency of affidavit.— Where attachment creditors who have caused their executions to be levied by the same sheriff on goods subject to a prior attachment move for its vacation on the ground of the insufficiency of the affidavit, it is error to insert as a condition upon vacating the same that the sheriff's fees in such attachment be paid by the applicants. Union Distilling Co. *v.* Union Pharmaceutical Co., 56 N. Y. Super. Ct. 417, 6 N. Y. Suppl. 539.

26. Ellsworth *v.* Scott, 3 Abb. N. Cas. (N. Y.) 9.

Presumption as to operation of dissolution where two writs levied on same property.— Where two writs of attachment issued in the same action are levied on the same property, an order of dissolution will be held to have dissolved both attachments, in the absence of proof that it was intended to be limited to one writ only. Pennsylvania Mortg. Invest. Co. *v.* Gilbert, 18 Wash. 667, 52 Pac. 246.

27. Necessity of setting out findings.— It is unnecessary for the lower court to set forth in its judgment on a motion to vacate an attachment the findings of fact on which it based its judgment, unless it be claimed that the court erred in applying the law to the facts as found, in which case it is the court's duty to set out the findings of fact. Millhiser *v.* Balsley, 106 N. C. 433, 11 S. E. 314.

Special findings after dissolution on the merits.— After an attachment has been dissolved upon a full hearing on the merits, there is no necessity that upon request, sustained by affidavits, additional special findings should be made, and it is not error to strike such affidavits from the files on motion. Standard Stamping Co. *v.* Hetzel, 44 Nebr. 105, 62 N. W. 247.

28. It is proper to refuse to recite replying affidavits in an order denying a motion to vacate an attachment where no leave to submit such affidavits has been asked for or granted, since the submission of such affidavits without leave is improper. Ferguson *v.* Commonwealth Rubber Co., 38 N. Y. Suppl. 375, 74 N. Y. St. 31.

29. Guernsey *v.* Cherryvale First Nat. Bank, (Kan. 1901) 65 Pac. 250. See also Love *v.* Young, 69 N. C. 65.

granted merely upon the ground that certain subsequent acts of defendant tend to show the alleged fraud.[30]

j. Second Motion. The right to make a second motion where the first has been denied[31] or withdrawn[32] ordinarily rests in the discretion of the court, but in New York a motion may be made, without leave of court, to dismiss an attachment upon affidavits, although a motion to vacate the attachment founded upon the original papers has been made and denied.[33]

3. By Plea in Abatement — a. In General. An application for the dissolution of an attachment upon grounds other than those apparent of record is usually made by a plea in abatement, or by a plea in the nature of a plea in abatement.[34]

30. Webb *v.* Groom, 6 Rob. (N. Y.) 532.

31. Adams *v.* Lockwood, 30 Kan. 373, 2 Pac. 626, where it was said that such motions are rarely granted.

Motion by assignee after overruling of similar motion by defendant.— The right of a defendant or his assignee to lawfully move to vacate an attachment against defendant's property will not, it is held, allow such a motion by the assignee, similar motions already made by defendant having been denied. Strauss *v.* Vogt, 24 N. Y. Suppl. 483, 23 N. Y. Civ. Proc. 251.

Effect of overruling motion by assignee upon right of successor to move.—Where the statutory assignee of a defendant in attachment has moved to dissolve the same, and such motion has been overruled, a similar motion by his successor without leave of court may properly be stricken from the files. Hillyer *v.* Biglow, 47 Kan. 473, 28 Pac. 150.

Where party proceeds upon distinct property interest and right.— It has been held in some jurisdictions that the doctrine that a motion once denied cannot be renewed as a matter of right and without leave of court, except upon facts arising subsequently to the decision, does not apply to a case where a party proceeds in a second motion upon a distinct property interest and right from that involved in the first motion, and the fact that a party has made a prior motion to vacate an attachment upon the ground that it is an obstruction to the enforcement of a judgment and execution and was defeated thereon does not preclude a second motion to vacate the attachment on the ground that it was a cloud upon the alleged title to realty of the moving party, and this although such party might have proceeded on the first motion upon this ground also. Steuben County Bank *v.* Alberger, 83 N. Y. 274, 61 How. Pr. (N. Y.) 227.

32. Hoobler *v.* Howland, 19 Ky. L. Rep. 1473, 43 S. W. 486.

33. Hawkins *v.* Pakas, 44 N. Y. App. Div. 395, 60 N. Y. Suppl. 1108; Thalheimer *v.* Hays, 42 Hun (N. Y.) 93. See also National Park Bank *v.* Whitmore, 7 N. Y. St. 456.

34. *Alabama.*— Drakford *v.* Turk, 75 Ala. 339; Fitzsimmons *v.* Howard, 69 Ala. 590; Rich *v.* Thornton, 69 Ala. 473; Dryer *v.* Abercrombie, 57 Ala. 497; Watson *v.* Auerbach, 57 Ala. 353; Brown *v.* Coats, 56 Ala. 439; Hall *v.* Brazelton, 46 Ala. 359.

Arkansas.— Edmondson *v.* Carnall, 17 Ark. 284; Melvin *v.* Steamboat General Shields, 15 Ark. 207; Steam Boat Napoleon *v.* Etter, 6 Ark. 103.

Colorado.— Worrall *v.* Hare, 1 Colo. 91.

Georgia.— Baldwin *v.* Rodgers, 74 Ga. 815.

Illinois.— Givens *v.* St. Louis Merchants' Nat. Bank, 85 Ill. 442; McCrosky *v.* Leach, 63 Ill. 61; House *v.* Hamilton, 43 Ill. 185; Reaugh *v.* McConnel, 36 Ill. 373; Moeller *v.* Quarrier, 14 Ill. 280; White *v.* Williams, 10 Ill. 25; White *v.* Wilson, 10 Ill. 21; Crandall *v.* Birge, 61 Ill. App. 234; Pettingill *v.* Drake, 14 Ill. App. 424.

Indiana.— Fleming *v.* Dorst, 18 Ind. 493; Foster *v.* Dryfus, 16 Ind. 158; McFarland *v.* Birdsall, 14 Ind. 126; Cooper *v.* Reeves, 13 Ind. 53; Collins *v.* Nichols, 7 Ind. 447.

Kentucky.— Moore *v.* Hawkins, 6 Dana (Ky.) 289.

Massachusetts.— Cooke *v.* Gibbs, 3 Mass. 193.

Mississippi.— Smith *v.* Mulhern, 57 Miss. 591; Roach *v.* Brannon, 57 Miss. 490; McClanahan *v.* Brack, 46 Miss. 246; Cocke *v.* Kuykendall, 41 Miss. 65; Thompson *v.* Raymon, 7 How. (Miss.) 186.

Missouri.— Searcy *v.* Platte County, 10 Mo. 269; Graham *v.* Bradbury, 7 Mo. 281; Swan *v.* O'Fallon, 7 Mo. 231; Mense *v.* Osbern, 5 Mo. 544; Sharkey *v.* Williams, 20 Mo. App. 681.

New Mexico.— Staab *v.* Hersch, 3 N. M. 153, 3 Pac. 248, answer without oath.

North Carolina.— Leak *v.* Moorman, 61 N. C. 168; Cherry *v.* Nelson, 52 N. C. 141; Evans *v.* Andrews, 52 N. C. 117.

Pennsylvania.— Com. *v.* Klein, 13 Pa. Super. Ct. 528; Hotchkiss *v.* Pinney, 10 Pa. Dist. 219, 25 Pa. Co. Ct. 65; Meyers *v.* Rauch, 4 Pa. Dist. 331.

Rhode Island.— Kelley *v.* Force, 16 R. I. 628, 18 Atl. 1037.

Tennessee.— McCown *v.* Drake, 7 Heisk. (Tenn.) 447; Straus *v.* Weil, 5 Coldw. (Tenn.) 120; Kendrick *v.* Davis, 3 Coldw. (Tenn.) 524; Harris *v.* Taylor, 3 Sneed (Tenn.) 536, 67 Am. Dec. 576; Isaacks *v.* Edwards, 7 Humphr. (Tenn.) 464, 46 Am. Dec. 86; Doran *v.* O'Neal, (Tenn. Ch. 1896) 37 S. W. 563; Tarbox *v.* Tonder, 1 Tenn. Ch. 163.

Texas.— City Nat. Bank *v.* Cupp, 59 Tex. 268; Hill *v.* Cunningham, 25 Tex. 25; Wright *v.* Smith, 19 Tex. 297; Messner *v.* Hutchins, 17 Tex. 597; Mallette *v.* Ft. Worth Pharmacy Co., 21 Tex. Civ. App. 267, 51 S. W. 859; C. B. Cones, etc., Mfg. Co. *v.* Rosenbaum,

There are, however, jurisdictions where objections based on facts outside the record may be raised by motion.[35]

b. Effect of Failure to File Plea. Where defendant in an attachment suit makes no plea to the affidavit, he thereby confesses the matters stated therein.[36]

c. Time of Filing. With regard to the time of filing a plea in abatement or traverse, it may be stated generally that in the absence of express provision the usual rule[37] as to filing of dilatory pleas applies,[38] and such plea or traverse should be filed at the earliest opportunity, usually the first or return-term,[39] and before an answer or plea to the merits,[40] but it has been held that plead-

(Tex. Civ. App. 1898) 45 S. W. 333; Caldwell *v.* Lamkin, 12 Tex. Civ. App. 29, 33 S. W. 316; Waples-Platter Grocer Co. *v.* Basham, 9 Tex. Civ. App. 638, 29 S. W. 1118.

Vermont.— Kelly *v.* Paris, 10 Vt. 261, 33 Am. Dec. 199.

West Virginia.— Miller *v.* Fewsmith Lumber Co., 42 W. Va. 323, 26 S. E. 175; Stevens *v.* Brown, 20 W. Va. 450; Tingle *v.* Brison, 14 W. Va. 295; Middleton *v.* White, 5 W. Va. 572.

Wisconsin.— Rice *v.* Wolff, 65 Wis. 1, 26 N. W. 181; Dierolf *v.* Winterfield, 24 Wis. 143.

Canada.— Offay *v.* Offay, 26 U. C. Q. B. 363; Reg. *v.* Stewart, 8 Ont. Pr. 297.

35. See *supra*, XV, D, 2, a, (II).

36. Hill *v.* Bell, 111 Mo. 35, 19 S. W. 959 (failure of one of two defendants in attachment to file plea); Musgrove *v.* Mott, 90 Mo. 107, 2 S. W. 214.

37. See, generally, ABATEMENT AND REVIVAL, 1 Cyc. 130.

38. Banks *v.* Hunt, 70 Ga. 741; Archer *v.* Claflin, 31 Ill. 306; Crandall *v.* Birge, 61 Ill. App. 234; Hamilton *v.* McClelland, 33 Mo. 315.

39. Banks *v.* Hunt, 70 Ga. 741; Foster *v.* Higginbotham, 49 Ga. 263; Pool *v.* Perdue, 44 Ga. 454; Irvin *v.* Howard, 37 Ga. 18; Neal *v.* Bookout, 30 Ga. 40; Decatur Bank *v.* Berry, 3 Humphr. (Tenn.) 590; Sloo *v.* Powell, Dall. (Tex.) 407. *Compare* Gallatin First Nat. Bank *v.* Wallace, (Tex. Civ. App. 1901) 65 S. W. 392, where it was held that a plea in abatement filed more than a year after suit begun and after an answer to the merits came too late.

In Illinois a plea to the affidavit for an attachment of a dilatory character should be interposed at the first term, providing the declaration is filed at least ten days before the commencement of such term. Archer *v.* Claflin, 31 Ill. 306; Crandall *v.* Birge, 61 Ill. App. 234.

In Missouri, where a suit in attachment is brought upon a demand not yet due, a plea in abatement to the affidavit must be filed within the first two or the first six days of the return-term as the case may be. Hamilton *v.* McClelland, 33 Mo. 315.

Wis. Stat. § 2745, gives the right of traverse to defendant if he exercises it within ten days after notice of the issue of a writ of attachment against his property, or within a time in which he may answer the complaint in the action. Braunsdorf *v.* Fellner, 69 Wis. 334, 34 N. W. 121.

After continuance.— A general imparlance being nothing more than a continuance, a plea in abatement denying the facts stated in the affidavit, being for matter which existed before the continuance, comes too late after such imparlance. Archer *v.* Claflin, 31 Ill. 306.

Upon appearance and replevy of property. — In Chambers *v.* Haley, Peck (Tenn.) 159, it was held that defendant in an action commenced by attachment is entitled to his plea in abatement upon his appearing and replevying the attached property.

40. Meggs *v.* Shaffer, Hard. (Ky.) 65; Malone *v.* Lindsley, 1 Phila. (Pa.) 288; Gallatin First Nat. Bank *v.* Wallace, (Tex. Civ. App. 1901) 65 S. W. 392. *Contra,* Kennedy *v.* Mitchell, 4 Fla. 457, where defendant was allowed to plead in abatement to an attachment at any time during the proceedings, as well after as before his plea to the merits. *Compare* Lindsley *v.* Malone, 23 Pa. St. 24, where it was held that the alleged grounds for attachment could not be traversed by a plea in abatement after an ineffectual motion to quash, and an appearance in the suit.

An application to remove a cause to the federal court is not such an appearance as will debar defendants of the right to put in issue the grounds of the attachment. Freidlander *v.* Pollock, 5 Coldw. (Tenn.) 490. *Compare* Corbitt *v.* Delaware Farmers' Bank, 114 Fed. 602, where the court, in administering the attachment law of Virginia, held that the removal of a cause from the state to the federal court did not prevent defendant from moving to abate the attachment.

After an affidavit has been amended, defendant should be given an opportunity to plead in abatement to it. Archer *v.* Claflin, 31 Ill. 306.

Necessity for filing pleas at rules before right to plead in abatement is lost.— If defendant desires to avail himself of the provision of W. Va. Code, c. 125, § 21, which permits a plea in abatement and in bar at the same time, he must file his pleas at rules before his right to plead in abatement is lost, and he cannot plead in abatement under said statute or the general law after he has pleaded in bar, or after an office judgment has been confirmed against him. Delaplain *v.* Armstrong, 21 W. Va. 211.

Waiver dependent upon order of filing pleas.— In Rhode Island a plea in abatement is not waived by filing at the same time, but subsequently in order, a plea to the merits or an affidavit of merits in compliance with

ing in bar before a plea in abatement is disposed of does not waive the plea in abatement.[41]

d. Requisites and Sufficiency of Plea — (i) *In General.* A plea in abatement of an attachment should be framed with accuracy and precision and be certain to every intent.[42] It should put in issue all the material allegations of the affidavit,[43] and specify the defects complained of.[44] It should also pray that the attachment be quashed.[45]

(ii) *Verification* — (A) *Necessity.* In some jurisdictions the plea or answer denying the grounds of attachment as set forth in the affidavit must be verified by proper oath.[46] In other jurisdictions, however, it is held not necessary that the

a rule of court. A plea to the merits first in order filed is, however, a waiver of all subsequent pleas in abatement, the general rule of practice in this respect not being varied by the local practice. Gardner *v.* James, 5 R. I. 235.

41. Parker *v.* Brady, 56 Ga. 372; Hawkins *v.* Albright, 70 Ill. 87; Bates *v.* Crow, 57 Miss. 676; Coombs Commission Co. *v.* Block, 130 Mo. 668, 32 S. W. 1139 (reviewing earlier cases where a contrary rule was followed). *Contra*, Blue Grass Canning Co. *v.* Wardman, 103 Tenn. 179, 52 S. W. 137; Waggoner *v.* St. John, 10 Heisk. (Tenn.) 503. But see Chattanooga Third Nat. Bank *v.* Foster, 90 Tenn. 735, 18 S. W. 267, where it was held that a plea in abatement denying the fact of non-residence was not waived by appearance and defense on the merits.

When a plea in abatement is overruled on demurrer or stricken out, it is no waiver of the benefit of such plea to plead to the merits. Chambers *v.* Haley, Peck (Tenn.) 159.

42. Clark *v.* Latham, 25 Ark. 16, where it was held that a plea in abatement denying that the bond was approved by the clerk before it was issued was not sufficient, but that it should have described the bond as the attachment bond.

Craving oyer of attachment, affidavit, or bond.— In Alabama it has been held that a plea in abatement to an attachment, and to the affidavit or bond on which it is founded, must crave oyer of them and set them out (Richards *v.* Bestor, 90 Ala. 352, 8 So. 30; Tommey *v.* Gamble, 66 Ala. 469; Garner *v.* Johnson, 22 Ala. 494; Goldsticker *v.* Stetson, 21 Ala. 404; Banks *v.* Lewis, 4 Ala. 599; Findlay *v.* Pruitt, 9 Port. (Ala.) 195), so that the court will be able to judge whether the objection is sustained (Garner *v.* Johnson, 22 Ala. 494; Banks *v.* Lewis, 4 Ala. 599), and for failure so to do the plea will be demurrable (Tommey *v.* Gamble, 66 Ala. 469; Goldsticker *v.* Stetson, 21 Ala. 404).

Pendency of bankruptcy proceedings.— A plea in abatement on the ground of the pendency of bankruptcy proceedings should aver that such proceedings were pending at the time of the plea pleaded. Lewis *v.* Higgins, 52 Md. 614.

43. *Colorado.*— Weble *v.* Kerbs, 6 Colo. 167.

Illinois.— McFarland *v.* Claypool, 128 Ill. 397, 21 N. E. 587; Walker *v.* Welch, 13 Ill. 674; Lord *v.* Babel, 16 Ill. App. 434.

Mississippi.—Ross *v.* Fowler, 42 Miss. 293; James *v.* Dowell, 7 Sm. & M. (Miss.) 333; Garrett *v.* Tinnen, 7 How. (Miss.) 465.

Missouri.— Cayce *v.* Ragsdale, 17 Mo. 32; Sauerwein *v.* Renard Champagne Co., 68 Mo. App. 29; Houston *v.* Woolley, 37 Mo. App. 15.

Tennessee.— Roheson *v.* Hunter, 90 Tenn. 242, 16 S. W. 466; Cooke *v.* Richards, 11 Heisk. (Tenn.) 711; Klepper *v.* Powell, 6 Heisk. (Tenn.) 503; Cain *v.* Jennings, 3 Tenn. Ch. 131.

Wisconsin.— Armstrong *v.* Blodgett, 33 Wis. 284.

44. Mohr *v.* Chaffe, 75 Ala. 387; Fitzsimmons *v.* Howard, 69 Ala. 590.

Need not deny specifically and separately each statement of affidavit.—An answer traversing plaintiff's affidavit need not deny specifically and separately each fact stated by plaintiff's affidavit, but a general denial in the usual form will be sufficient. Armstrong *v.* Blodgett, 33 Wis. 284, where it was held that an answer saying that each and every allegation of the affidavit is untrue and was untrue at the time said affidavit was made, and denying the existence at the time the affidavit was made of any or all material facts stated therein, is good.

45. Mantz *v.* Hendley, 2 Hen. & M. (Va.) 308.

In Arkansas a plea in abatement in a suit begun by attachment is not bad on demurrer because it prays judgment both of the declaration and writ, the matter set up in the plea being to the entire proceedings and not to so much only as is a proceeding *in rem*. Edmondson *v.* Carnall, 17 Ark. 284.

Where the declaration is a necessary part of the writ, a plea in abatement may conclude with a prayer of judgment of the writ. Brigham *v.* Este, 2 Pick. (Mass.) 420 [*citing* Ilsley *v.* Stubbs, 5 Mass. 280].

Conclusion of plea.— A plea traversing facts alleged in the affidavit properly concludes to the country. Ridgway *v.* Smith, 17 Ill. 33; Boon *v.* Rahl, 1 Heisk. (Tenn.) 12.

46. *Indiana.*— Bradley *v.* State Bank, 20 Ind. 528. But see Excelsior Fork Co. *v.* Lukens, 38 Ind. 438 [*followed* in McGuirk *v.* Cummings, 54 Ind. 246], holding that an answer denying the existence of the ground of attachment being in bar of the attachment proceeding, and not in abatement of the writ, need not be sworn to.

Kentucky.— Brewer *v.* Spalding, 11 Ky. L. Rep. 307.

Missouri.— Irwin *v.* Evans, 92 Mo. 472, 4

traverse to the truth of the affidavit which is the foundation of the attachment should be sworn to.[47]

(B) *Requisites and Sufficiency.* An affidavit verifying a plea in abatement must be positive as to the truth of the facts contained in the plea, and should leave nothing to be concluded by inference or intendment.[48]

e. Amendment of Plea. A plea in abatement may be amended in matter of form after it is filed.[49]

f. Withdrawal of Plea. Where a plea in abatement entered to an action commenced by attachment is withdrawn after return of process duly served, such withdrawal will not vitiate the lien of the attachment.[50]

g. Similiter or Replication to Plea. If the ground of the attachment is denied by a negative plea, plaintiff has the right, although it may not be his duty, to signify his acceptance of the issue tendered by the plea, and this acceptance may be signified at law by a *similiter* and in equity by a replication in the nature of a *similiter*.[51]

h. Hearing and Determination — (I) *Time of Hearing.* Where an issue is formed upon a plea or answer traversing the attachment affidavit, such issue, according to some decisions, may be tried before the trial on the merits;[52] accord-

S. W. 693; Sharkey *v.* Williams, 20 Mo. App. 681.

Tennessee.—Wrompelmeir *v.* Moses, 3 Baxt. (Tenn.) 467; Trabue *v.* Higden, 4 Coldw. (Tenn.) 620; Seifried *v.* People's Bank, 2 Tenn. Ch. 17.

Texas.— Chevallier *v.* Williams, 2 Tex. 239.

Wisconsin.— Braunsdorf *v.* Fellner, 69 Wis. 334, 34 N. W. 121; Howitt *v.* Blodgett, 61 Wis. 376, 21 N. W. 292.

As to verification of pleadings, generally, see PLEADING.

Waiver of verification.— Such requirement may be waived by failure to make the objection before going to trial. Bradley *v.* State Bank, 20 Ind. 528; Braunsdorf *v.* Fellner, 69 Wis. 334, 34 N. W. 121. See also Kirby *v.* Corning, 54 Wis. 599, 12 N. W. 69.

47. Ouzts *v.* Seabrook, 47 Ga. 359; Ripley *v.* Astec Min. Co., 6 N. M. 415, 28 Pac. 773.

48. Wrompelmeir *v.* Moses, 3 Baxt. (Tenn.) 467, holding that verification upon "knowledge, information, and belief" of affiant is insufficient.

Unnecessary to set out knowledge of the facts or means of knowledge.—A verification to a plea in abatement of an attachment in the following language: "This affiant, attorney for the defendant, upon his oath, says that the allegations contained in the foregoing plea are true," is sufficient. It is not necessary for affiant to set out and show that he has a knowledge of the facts stated or the means of his knowledge. Irwin *v.* Evans, 92 Mo. 472, 4 S. W. 693. See also Braunsdorf *v.* Fellner, 69 Wis. 334, 34 N. W. 121, where it was held that when a traversed fact is necessarily within defendant's knowledge, a verification that defendant "has read the foregoing special answer, and that the same is true," is sufficient without adding thereto the words "to his own knowledge."

By whom made.— Defendant's attorney can, by leave of court, file a plea in abatement, and also make the affidavit. Irwin *v.* Evans, 92 Mo. 472, 4 S. W. 693.

49. Trabue *v.* Higden, 4 Coldw. (Tenn.) 620.

Not permissible after demurrer sustained. — Amendment should not be permitted to pleas in abatement of the affidavit after a demurrer sustained. Livengood *v.* Shaw, 10 Mo. 273. See also Cayce *v.* Ragsdale, 17 Mo. 32.

50. Claflin *v.* Sylvester, 99 Mo. 276, 12 S. W. 508.

51. Cheatham *v.* Pearce, 89 Tenn. 668, 15 S. W. 1080.

Replication to plea of pendency of former suit.— Where the pendency of a former suit, founded on the same cause of action is pleaded in abatement of an attachment suit, it is good matter for replication to the plea that the former attachment was issued by a person who was not a regular deputy clerk and had no authority to issue it. Minniece *v.* Jeter, 65 Ala. 222.

52. Price *v.* Bescher, 12 Heisk. (Tenn.) 372; Robb *v.* Parker, 4 Heisk. (Tenn.) 58. See also Davidson *v.* Hackett, 45 Wis. 208; Main *v.* Bell, 33 Wis. 544, which hold that it is irregular to try the main action while a traverse of the attachment is pending.

Defendant need not plead to merits till disposition of plea in abatement. Coombs Commission Co. *v.* Block, 130 Mo. 668, 32 S. W. 1139.

Disposition of main action.— It is not necessary to wait until the determination of the traverse to the affidavit before rendering judgment by default in the main action. Ripley *v.* Astec Min. Co., 6 N. M. 415, 28 Pac. 773. But see Rowley *v.* Cummings, 1 Sm. & M. (Miss.) 340, holding that where defendant in attachment pleaded in abatement, plaintiff demurred, and defendant joined in the demurrer, it was error to render final judgment against defendant as on default without disposing of the demurrer.

Where a motion to dissolve on account of the insufficiency of the attachment bond, and issues on the traverse, to be decided by a

ing to other decisions it may be tried either before or with the main case.[53] Still other decisions hold that such issue should be tried with the issues in the principal cause.[54]

(II) *Matters Determinable.* Upon a plea traversing the grounds of the attachment, the sole issue to be decided is as to the existence of the facts asserted by plaintiff's affidavit as grounds of attachment, and denied by defendant.[55] The merits of plaintiff's case are not the subject of inquiry.[56]

(III) *Evidence*—(A) *Burden of Proof.* Where the facts set out in the attachment affidavit are properly put in issue the burden of proof rests upon plaintiff to prove the existence of the facts as alleged[57] by a preponderance of evidence.[58]

(B) *Admissibility.* Upon the trial of the issue formed by a plea in abatement or traverse of the grounds of the attachment, the evidence admissible is confined on the part of defendant to sustaining the allegations of his plea or traverse and on the part of plaintiff to sustaining the grounds originally alleged in his affidavit for the issue of such attachment.[59]

jury, are pending at the same time, it is discretionary with the court as to which shall be disposed of first. Forbes *v.* Porter, 25 Fla. 362, 6 So. 62.

53. Parker *v.* Brady, 56 Ga. 372. See also Lite *v.* Overton, 12 Heisk. (Tenn.) 675, where it was held that when a plea in abatement is filed to an ancillary attachment it is not erroneous to refuse to try such issue separately from those on the merits, when all the issues are ready for submission to the jury and can be tried together without delay.

54. Weston *v.* Jones, 41 Fla. 188, 25 So. 888; Hecht *v.* Feldman, 153 Ill. 390, 39 N. E. 121; Excelsior Fork Co. *v.* Lukens, 38 Ind. 438; Maple *v.* Burnside, 22 Ind. 139; Bradley *v.* State Bank, 20 Ind. 528; Foster *v.* Dryfus, 16 Ind. 158.

Advancement of trial of issue.— Under Ill. Rev. Stat. c. 110, § 18, providing for the trial of attachment issues at the first term, it is discretionary with the court to advance the trial of such issue and direct such trial out of its order on the docket. Page *v.* Dillon, 61 Ill. App. 282.

55. *Georgia.*— Baldwin *v.* Rodgers, 74 Ga. 815.

Illinois.—Schwabacker *v.* Rush, 81 Ill. 310; House *v.* Hamilton, 43 Ill. 185.

Mississippi.— Roach *v.* Brannon, 57 Miss. 490; Cocke *v.* Kuykendall, 41 Miss. 65; Groves *v.* Bailey, 24 Miss. 588; Funk *v.* McCullough, 24 Miss. 481.

Missouri.— Sauer *v.* Behr, 49 Mo. App. 86.

New Mexico.— Ripley *v.* Astec Min. Co., 6 N. M. 415, 28 Pac. 773.

Wisconsin.— Teweles *v.* Lins, 98 Wis. 453, 74 N. W. 122; Eureka Steam Heating Co. *v.* Sloteman, 67 Wis. 118, 30 N. W. 241; Littlejohn *v.* Jacobs, 66 Wis. 600, 29 N. W. 545; Miller *v.* McNair, 65 Wis. 452, 27 N. W. 333.

Adjustment of cross-demands.— It is not within the scope of the issue under a traverse of the affidavit for an attachment, to establish and adjust cross-demands between the parties. Teweles *v.* Lins, 98 Wis. 453, 74 N. W. 122.

56. Chouteau *v.* Boughton, 100 Mo. 406, 13 S. W. 877; Sauerwein *v.* Renard Champagne Co., 68 Mo. App. 29; State *v.* Heckart, 62 Mo. App. 427; Littlejohn *v.* Jacobs, 66 Wis. 600, 29 N. W. 545.

Neither the belief of plaintiff nor the grounds of such belief have anything to do with the rightfulness of the issue of an attachment and are not in issue upon a plea in abatement or traverse of the grounds. Roach *v.* Brannon, 57 Miss. 490; Dider *v.* Courtney, 7 Mo. 500; Chenault *v.* Chapron, 5 Mo. 438; Davidson *v.* Hackett, 49 Wis. 186, 5 N. W. 459.

57. *Colorado.*—Drake *v.* Avanzini, 20 Colo. 104, 36 Pac. 846; Miller *v.* Godfrey, 1 Colo. App. 177, 27 Pac. 1016.

Georgia.— Kenney *v.* Wallace, 87 Ga. 724, 13 S. E. 744; Baldwin *v.* Rodgers, 74 Ga. 815; Oliver *v.* Wilson, 29 Ga. 642.

Illinois.— Jaycox *v.* Wing, 66 Ill. 182; Ridgway *v.* Smith, 17 Ill. 33; Wells *v.* Parrott, 43 Ill. App. 656.

Indiana.— Bradley *v.* State Bank, 20 Ind. 528; McFarland *v.* Birdsall, 14 Ind. 126.

Kentucky.— Calk *v.* Chiles, 9 Dana (Ky.) 265; Reynolds *v.* Wright, 18 Ky. L. Rep. 1017, 38 S. W. 861, 39 S. W. 424; Senour *v.* Maschinot, 17 Ky. L. Rep. 575, 31 S. W. 481; Crow *v.* Straus, 14 Ky. L. Rep. 206; Rapp *v.* Shoemaker, 11 Ky. L. Rep. 401.

Mississippi.— Roach *v.* Brannon, 57 Miss. 490.

Missouri.— Crow *v.* Marshall, 15 Mo. 499; Jacob Furth Grocery Co. *v.* May, 78 Mo. App. 323; Noyes *v.* Cunningham, 51 Mo. App. 194; Steinwender *v.* Creath, 44 Mo. App. 356; Rheinhart *v.* Grant, 24 Mo. App. 154; Stewart *v.* Cabanne, 16 Mo. App. 517.

New Mexico.— Ripley *v.* Astec Min. Co., 6 N. M. 415, 28 Pac. 773.

Texas.— Gallatin First Nat. Bank *v.* Wallace, (Tex. Civ. App. 1901) 65 S. W. 392.

Wisconsin.— Messersmith *v.* Devendorf, 54 Wis. 498, 11 N. W. 906; Lord *v.* Devendorf, 54 Wis. 491, 11 N. W. 903, 41 Am. Rep. 58.

58. Waring *v.* Fletcher, 152 Ind. 620, 52 N. E. 203.

59. Bowers *v.* Ross, 55 Miss. 213; Barney *v.* Scherling, 40 Miss. 320; Blackwell *v.* Fry,

(iv) *Trial by Jury.* The issue on a plea in abatement or traverse of the grounds of the attachment should be tried by jury unless such trial be waived by the parties.[60]

(v) *Verdict.* Upon trial of an issue of an attachment resulting in favor of defendant the jury should render a formal verdict for defendant before the court quashes the attachment.[61]

(vi) *Judgment.* Where the plea in abatement is sustained the proper judgment would seem to be that the suit abate, and that defendant recover costs.[62]

E. Effect of Dissolution — 1. In General. A dissolution of an attachment is a final adjudication of all questions arising in the attachment proceedings unless an appeal therefrom is taken in due time,[63] and as regards the property attached the parties are put in the same position as if no attachment had issued.[64]

2. On Main Action — a. Where Attachment Is Ancillary. Where an attachment is merely ancillary, the dissolution thereof does not terminate the main action which may proceed to judgment, notwithstanding the dissolution, provided the court has jurisdiction of the subject-matter and of the person of defendant.[65]

49 Mo. App. 638; Bucks *v.* Moore, 36 Mo. App. 529; Rainwater *v.* Faconesowich, 29 Mo. App. 26; Freidlander *v.* Pollock, 5 Coldw. (Tenn.) 490.

Declarations and admissions of defendant. — With regard to the admissibility of admissions or declarations by defendant as to his intentions, etc., it may be stated that while such declarations or admissions are usually admissible in behalf of plaintiff as being admissions against interest (Perryman *v.* Pope, 102 Ga. 502, 31 S. E. 37; Brady *v.* Parker, 67 Ga. 636; Enders *v.* Richards, 33 Mo. 598; Tucker *v.* Frederick, 28 Mo. 574, 75 Am. Dec. 139; Burr *v.* Mathers, 51 Mo. App. 470; Gries *v.* Blackman, 30 Mo. App. 2), they are not admissible in defendant's favor (Perryman *v.* Pope, 102 Ga. 502, 31 S. E. 37; Tucker *v.* Frederick, 28 Mo. 574, 75 Am. Dec. 139), at least where not made contemporaneously with the issue of the attachment (Perryman *v.* Pope, 102 Ga. 502, 31 S. E. 37 [*citing* Brady *v.* Parker, 67 Ga. 636]). It has been held, however, that in an attachment on the ground of fraudulent conveyance or assignment to hinder and delay creditors, the declarations accompanying the making of a deed alleged to be fraudulent are admissible as explanatory of the character and motive of the act, and where plaintiff gave the deed in evidence it could not be objected that plaintiff was making his own declarations evidence for himself. Potter *v.* McDowell, 31 Mo. 62.

60. Barney *v.* Scherling, 40 Miss. 320; Hart *v.* Kanady, 33 Tex. 720; Miller *v.* Fewsmith Lumber Co., 42 W. Va. 323, 26 S. E. 175; Stevens *v.* Brown, 20 W. Va. 450; Capeheart *v.* Dowery, 10 W. Va. 130.

Right to trial by jury on filing plea after dismissing motion. — A garnishee and claimant, who has elected to try his case before the court upon a motion to quash an attachment, has the right after the evidence has been partly taken to dismiss his motion and by filing a plea to try the same question before a jury. Ferrall *v.* Farnen, 67 Md. 76, 8 Atl. 819.

61. Towle *v.* Lamphere, 8 Ill. App. 399, holding, however, that a failure so to do is not a cause for reversal.

Assessment of damages. — A plea traversing the allegations of the affidavit being a plea in abatement and subject to the incidents of such a plea, it is the duty of the jury trying the issue formed by such a plea, if they find the plea untrue, to assess the plaintiff's damages. Boggs *v.* Bindskoff, 23 Ill. 66.

Separate findings. — It is the better practice for the jury to make separate findings on each ground of attachment charged in the affidavit. Rothschild *v.* Lynch, 76 Mo. App. 339.

62. *Arkansas.* — Hellman *v.* Fowler, 24 Ark. 235.

Colorado. — Worrall *v.* Hare, 1 Colo. 91.

Illinois. — Lawrence *v.* Steadman, 49 Ill. 270; Stix *v.* Dodds, 6 Ill. App. 27; Bachman *v.* Dodds, 6 Ill. App. 25.

Missouri. — Hill *v.* Bell, 111 Mo. 35, 19 S. W. 959.

New Mexico — Staab *v.* Hersch, 3 N. M. 153, 3 Pac. 248.

Where upon the issue of an attachment against two persons upon allegations that one was a non-resident, and that the other was about to depart from the state, one only of the defendants pleaded in abatement that he was not about to depart, a judgment for plaintiff is proper upon finding the issue on the plea against defendant. Moeller *v.* Quarrier, 14 Ill. 280.

63. Danforth *v.* Rupert, 11 Iowa 547.

64. Eikel *v.* Hanscom, 3 Tex. App. Civ. Cas. § 473.

65. *Arkansas.* — Ferguson *v.* Glidewell, 48 Ark. 195, 2 S. W. 711.

Florida. — Baars *v.* Gordon, 21 Fla. 25; Loring *v.* Wittich, 16 Fla. 617.

Illinois. — Schulenberg *v.* Farwell, 84 Ill. 400.

Indiana. — Hartford L. Ins. Co. *v.* Bryan, 25 Ind. App. 406, 58 N. E. 262.

Iowa. — Elliott *v.* Mitchell, 3 Greene (Iowa) 237; Carothers *v.* Click, Morr. (Iowa) 54.

b. Where Attachment Is Basis of Jurisdiction — (I) *In General.* Where, however, a suit is commenced by attachment, and the attachment is essential to the jurisdiction of the court, the dissolution of the attachment will carry with it the main suit.[66]

(II) *Debt Not Due.* Where an attachment sued out for a debt not yet due is dissolved, this will ordinarily operate as a termination of the whole proceedings;[67] although it has been held that if the attachment is dissolved merely for a technical defect, the court should exercise a sound discretion as to whether the action should be dismissed or not;[68] and, that if not dismissed, plaintiff should be required to immediately correct, by amendment or otherwise, the defects in the

Kansas.— Stapleton *v.* Orr, 43 Kan. 170, 23 Pac. 109; Bundrem *v.* Denn, 25 Kan. 430; Boston *v.* Wright, 3 Kan. 227.

Michigan.— Gray *v.* York, 44 Mich. 415, 6 N. W. 874.

Missouri.— Peery *v.* Platte, 39 Mo. 404; Tootle *v.* Lysaght, 65 Mo. App. 139.

Nebraska.—Dayton Spice-Mills Co. *v.* Sloan, 49 Nebr. 622, 68 N. W. 1040.

South Carolina.— Cureton *v.* Dargan, 16 S. C. 619.

Tennessee.— Nashville *v.* Wilson, 88 Tenn. 407, 12 S. W. 1082; Dougherty *v.* Kellum, 3 Lea (Tenn.) 643; Kruger *v.* Slayton, 11 Heisk. (Tenn.) 726; Robb *v.* Parker, 4 Heisk. (Tenn.) 58.

Texas.— Focke *v.* Hardeman, 67 Tex. 173, 2 S. W. 363; Sydnor *v.* Totham, 6 Tex. 189.

66. *Arkansas.*— Ward *v.* Carlton, 26 Ark. 662; McDonald *v.* Smith, 24 Ark. 614; Hellman *v.* Fowler, 24 Ark. 235; Edmondson *v.* Carnall, 17 Ark. 284; Childress *v.* Fowler, 9 Ark. 159; Delano *v.* Kennedy, 5 Ark. 457.

Illinois.— Lawrence *v.* Steadman, 49 Ill. 270.

Louisiana.— Watson *v.* Simpson, 15 La. Ann. 709.

Mississippi.— Lewenthall *v.* Mississippi Mills, 55 Miss. 101.

Nebraska.— Dayton Spice-Mills Co. *v.* Sloan, 49 Nebr. 622, 68 N. W. 1040.

Tennessee.— Kruger *v.* Stayton, 11 Heisk. (Tenn.) 726; Sherry *v.* Divine, 11 Heisk. (Tenn.) 722.

Texas.—Merchants' Mut. Ins. Co. *v.* Brower, 38 Tex. 230; Gayoso Sav. Inst. *v.* Burrow, 37 Tex. 88.

Wisconsin.— Morrison *v.* Ream, 1 Pinn. (Wis.) 244.

67. *Kansas.*—Voorhis *v.* Michaelis, 45 Kan. 255, 25 Pac. 592; Clark *v.* Montfort, 37 Kan. 756, 15 Pac. 899; Bundrem *v.* Denn, 25 Kan. 430.

Massachusetts.— O'Hare *v.* Downing, 130 Mass. 16.

Missouri.— Knapp *v.* Joy, 9 Mo. App. 575; Grier *v.* Fox, 4 Mo. App. 522.

Nebraska.— Dayton Spice-Mills Co. *v.* Sloan, 49 Nebr. 622, 68 N. W. 1040.

Ohio.—Ramsay *v.* Overaker, 1 Disn. (Ohio) 569, 12 Ohio Dec. (Reprint) 801; Heidenheimer *v.* Ogborn, 1 Disn. (Ohio) 351, 12 Ohio Dec. (Reprint) 665.

Texas.—Moore *v.* Corley, (Tex. App. 1890) 16 S. W. 787; Cox *v.* Reinhardt, 41 Tex. 591.

Virginia.— Wingo *v.* Purdy, 87 Va. 472, 12 S. E. 970.

Washington.— Augir *v.* Foresman, (Wash. 1900) 63 Pac. 201.

Wisconsin.— Gowan *v.* Hanson, 55 Wis. 341, 13 N. W. 238.

See also Cheatham *v.* Pearce, 89 Tenn. 668, 15 S. W. 1080, and Pigue *v.* Young, 85 Tenn. 263, 1 S. W. 889, in which cases it was held that in a suit, by original attachment, for a debt not yet due, no decree will be given for the debt, when the attachment is defeated by plea in abatement, and the prematurity of the suit for the debt is interposed as a defense by answer.

Contra, Light *v.* Isear, 28 S. C. 440, 6 S. E. 284.

Effect of failure of clerk to forward notice of dissolution.— If a statutory provision, which requires the clerk of the court in which a suit is pending to forward to the register of deeds a certificate that an attachment of real estate in a certain county has been dissolved, where it appears of record that such attachment has been dissolved, applies to the case of an attachment made before the act took effect and dissolved afterward, the failure of the clerk to forward such certificate to the register does not continue the attachment in force in favor of the attaching creditor, no third person having acquired any rights under it. O'Hare *v.* Downing, 130 Mass. 16.

Effect of commencement of garnishee proceedings.— Where a traverse has been sustained to an affidavit for attachment on a debt not yet due, the fact that garnishee proceedings have been instituted does not affect the rule that the dissolution of the attachment in such case terminates the whole proceeding. Gowan *v.* Hanson, 55 Wis. 341, 13 N. W. 238.

Where part of claim is due.—Where an attachment is commenced on notes, some of which are not due, and the plea in abatement is sustained, if the petition states a good cause of action on the matured notes, the suit may be dismissed in the appellate court as to the notes not due and judgment rendered on the notes due when suit was brought, where the findings upon the different notes are separate and distinct. Knapp *v.* Joy, 9 Mo. App. 575.

68. Pierce *v.* Myers, 28 Kan. 364; Ramsay *v.* Overaker, 1 Disn. (Ohio) 569, 12 Ohio Dec. (Reprint) 801.

attachment proceedings, so as to make them correspond with the law governing actions and attachment proceedings instituted on claims not yet due.[69] It has also been held that when a suit is brought with an attachment upon a debt not due, and upon the maturity thereof an amendment is filed showing the facts and that the debt is overdue, the main suit should not be dismissed merely because attachment was quashed.[70]

c. Where Jurisdiction of Person Is Acquired Otherwise Than by Attachment. Where a party makes a general appearance in the action,[71] or where summons is duly served on him,[72] the dismissal of the attachment will not carry the main cause with it, but if service of process is relied on to prevent the dismissal, it must appear that there was a valid service.[73]

d. Where Writ Is Quashed by Agreement. Where suit is brought by attachment, and the writ is quashed by agreement that the cause shall be tried upon its merits, and the same is so tried, the suit should not be dismissed.[74]

e. Under Special Statutory Provisions. A personal judgment may be rendered against defendant in attachment, notwithstanding the dismissal thereof, if service is had or notice given, in accordance with the provisions of a statute which authorizes the trial of the main action, notwithstanding the dismissal of the attachment, when notice of the attachment is served personally on defendant at least ten days before final judgment.[75] So, the dissolution or quashing of the attachment will not carry with it the main action, if it is expressly provided by statute that the suit shall proceed as if commenced by summons,[76] or, where a statute provides that in case defendant resides in the county the court shall proceed in the case as if there had been a summons regularly served, notwithstanding the dismissal of the attachment, provided defendant resides in the county.[77]

69. Pierce *v.* Myers, 28 Kan. 364.

70. Panhandle Nat. Bank *v.* Still, 84 Tex. 339, 19 S. W. 479; Arnold *v.* Willis, 68 Tex. 268, 4 S. W. 485.

71. *Florida.*— Kennedy *v.* Mitchell, 4 Fla. 457.

Georgia.— King *v.* Randall, 95 Ga. 449, 22 S. E. 683; Hickson *v.* Brown, 92 Ga. 225, 17 S. E. 1035; Bruce *v.* Conyers, 54 Ga. 678.

Maryland.— Randle *v.* Mellen, 67 Md. 181, 8 Atl. 573.

Missouri.— Peery *v.* Platte, 39 Mo. 404.

Pennsylvania.— Bayersdorfer *v.* Hart, 13 Phila. (Pa.) 192, 36 Leg. Int. (Pa.) 434.

Texas.— Green *v.* Hill, 4 Tex. 465.

United States.— Goldsborough *v.* Orr, 8 Wheat. (U. S.) 217, 5 L. ed. 600.

Contra, Borland *v.* Kingsbury, 65 Mich. 59, 31 N. W. 620 [*overruling* Hills *v.* Moore, 40 Mich. 210].

72. *Mississippi.*— Bates *v.* Crow, 57 Miss. 676.

New York.— Bump *v.* Danehy, 12 N. Y. Suppl. 901, 36 N. Y. St. 114.

Pennsylvania.— Fernan *v.* Butcher, 113 Pa. St. 292, 6 Atl. 67 [*affirming* 1 Cook (Pa.) 401]; White *v.* Thielens, 106 Pa. St. 173; Biddle *v.* Black, 99 Pa. St. 380; Hall *v.* Kintz, 2 Pa. Dist. 16, 12 Pa. Co. Ct. 90; Butcher *v.* Fernau, 1 Kulp (Pa.) 401; Sharpless *v.* Ziegler, 8 Wkly. Notes Cas. (Pa.) 190; McCallum *v.* Hodder, 2 Wkly. Notes Cas. (Pa.) 185; Bayersdorfer *v.* Hart, 13 Phila. (Pa.) 192, 36 Leg. Int. (Pa.) 434.

Tennessee.— Nashville *v.* Wilson, 88 Tenn. 407, 12 S. W. 1082.

Texas.— Campbell *v.* Wilson, 6 Tex. 379; Rice *v.* Powell, Dall. (Tex.) 413.

73. Nashville *v.* Wilson, 88 Tenn. 407, 12 S. W. 1082; Sherry *v.* Divine, 11 Heisk. (Tenn.) 722.

74. Ross *v.* Allen, 67 Ill. 317. See also Smith *v.* Warden, 35 N. J. L. 346.

75. Hodnett *v.* Stone, 93 Ga. 645, 20 S. E. 43; Daniel *v.* Hochstadter, 73 Ga. 144; Hendrix *v.* Cawthorn, 71 Ga. 742; Buice *v.* Lowman Gold, etc., Min. Co., 64 Ga. 769; Parker *v.* Brady, 56 Ga. 372; Camp *v.* Cahn, 53 Ga. 558. See also King *v.* Randall, 95 Ga. 449, 22 S. E. 683, where it was said that while the present statute (Ga. Code, § 3328) does not provide in terms that where the notice required has been given, a declaration shall not be dismissed because the attachment may have been dismissed, the same rule has been followed in cases arising under it.

An acknowledgment of service by the defendant's attorney is sufficient to authorize a judgment *in personam* against defendant in attachment. The attorney is presumed to be authorized to acknowledge service, unless the contrary appears by competent proof. Hendrix *v.* Cawthorn, 71 Ga. 742.

This statute has no application when the court to which the attachment is returnable has no jurisdiction of that class of attachments. Rome First Nat. Bank *v.* Ragan, 92 Ga. 333, 18 S. E. 295.

76. Stix *v.* Dodds, 6 Ill. App. 27; Buchman *v.* Dodds, 6 Ill. App. 25; Evans *v.* Saul, 8 Mart. N. S. (La.) 247; Sompeyrac *v.* Estrada, 8 Mart. (La.) 722; Owens *v.* Johns, 59 Mo. 89; Staab *v.* Hersch, 3 N. M. 153, 3 Pac. 248.

77. Brackett *v.* Brackett, 61 Mo. 221; Peery *v.* Harper, 42 Mo. 131; Sharpless *v.*

3. In Respect to Attached Property — a. Effect on Lien. Where an attachment is dissolved the lien on the property seized thereunder is vacated[78] and if by judicial sale a fund has been substituted in place of the property the lien on the fund is thereby discharged.[79]

b. Return of Property — (i) *Necessity For.* Ordinarily on the dissolution of an attachment all property attached should be returned to defendant, whether the dissolution be by operatien of a final judgment in defendant's favor or by special proceedings for the purpose of obtaining an order of dissolution had in advance of a trial on the merits,[80] and if it has been sold defendant is entitled to the proceeds arising therefrom.[81] The rule applies, although the attachment is

Ziegler, 92 Pa. St. 467. See also S. K. Martin Lumber Co. *v.* Menominee Cir. Judge, 116 Mich. 354, 74 N. W. 649, where it was held, that under 2 How. Anno. Stat. Mich. § 8026, the court has the power to require the entry of appearance by defendant in attachment, although the attachment be dissolved.

78. Harrow *v.* Lyon, 3 Greene (Iowa) 157; Ranft *v.* Young, 21 Nev. 401, 32 Pac. 490; Goldstein *v.* Sondheim, 3 Kulp (Pa.) 212; Johnson *v.* Edson, 2 Aik. (Vt.) 299.

79. Goldstein *v.* Sondheim, 3 Kulp (Pa.) 212.

80. *Alabama.*— Sherrod *v.* Davis, 17 Ala. 312.

Arkansas.— Jackman *v.* Anderson, 33 Ark. 414.

California.— Hamilton *v.* Bell, 123 Cal. 93, 55 Pac. 758.

Iowa.— Brown *v.* Harris, 2 Greene (Iowa) 505, 52 Am. Dec. 535.

Kansas.— Miller *v.* Dixon, 2 Kan. App. 445, 42 Pac. 1014.

Massachusetts.— Martin *v.* Bayley, 1 Allen (Mass.) 381; Clap *v.* Bell, 4 Mass. 99.

Michigan.— Orr *v.* Keyes, 37 Mich. 385.

Missouri.— State *v.* Fitzpatrick, 64 Mo. 185.

New York.— Day *v.* Bach, 87 N. Y. 56; Lawlor *v.* Magnolia Metal Co., 2 N. Y. App. Div. 552, 38 N. Y. Suppl. 36, 74 N. Y. St. 465; Moore *v.* Somerindyke, 1 Hilt. (N. Y.) 199.

Nevada.— Ranft *v.* Young, 21 Nev. 401, 32 Pac. 490.

North Carolina.— Devries *v.* Summit, 86 N. C. 126.

Texas.— Hamilton *v.* Kilpatrick, (Tex. Civ. App. 1895) 29 S. W. 819; Gasquet *v.* Collins, 57 Tex. 340.

Vermont.— Lovejoy *v.* Lee, 35 Vt. 430; Dewey *v.* Fay, 34 Vt. 138; Jones *v.* Wood, 30 Vt. 268; Felker *v.* Emerson, 17 Vt. 101.

Wisconsin.— Keith *v.* Armstrong, 65 Wis. 225, 26 N. W. 445.

Property conveyed pending proceeding.— The rule requiring the return of property to the attachment debtor on dissolution of attachment has no application where he has conveyed the property pending the attachment. The property should be delivered to the rightful owner. State *v.* Fitzpatrick, 64 Mo. 185; Jackson *v.* Burnett, 119 N. C. 195, 25 S. E. 868.

Where suit pending against officer for conversion.— An order will not be granted directing the sheriff to deliver attached property to defendant, where an action is pending to recover the value of the property from the sheriff, for a conversion thereof in refusing to deliver it until his fees and charges were paid. Hall *v.* U. S. Reflector Co., 4 N. Y. Civ. Proc. 148.

Where title to property disputed.— Although an attachment was properly discharged as to one of two defendants, on the ground that he was not liable for the debt sued on, yet, as his claim to be the sole owner was traversed, and a separate issue thus made, he was not entitled to take possession of the goods until that issue was tried. Berry *v.* Callahan, 15 Ky. L. Rep. 539. So the rule cannot be invoked where goods sold are attached by creditors and replevied by the seller, and an agreement entered into between the attaching creditors, the defendant in attachment, the sheriff, and the intervener, that all their several rights should be adjudicated in the replevin suit, and where judgment was rendered in the sheriff's favor. Camp *v.* Schuster, 51 Mo. App. 403.

Redelivery not necessary.— Where a mortgagee of chattels had them attached, and then arranged with the officer to hold the property by virtue of the mortgage as well as under the attachment, the property, upon the discharge of the attachment, was, in legal contemplation, in the possession of the mortgagee, who might sue a trespasser for meddling therewith. Hackett *v.* Manlove, 14 Cal. 85. It has also been held that if defendant's assignee for the benefit of creditors had before dissolution of the attachment replevied the property from the officer, the possession of the assignee would constitute a defense to any action brought by the defendant against the officer for non-delivery. Clark *v.* Lamoreux, 70 Wis. 508, 36 N. W. 393.

81. York *v.* Sanborn, 47 N. H. 403; Day *v.* Bach, 87 N. Y. 56; Devries *v.* Summit, 86 N. C. 126. See also Goldsmith *v.* Stetson, 39 Ala. 183.

The court has no right to direct the proceeds to be paid on the judgment of attaching plaintiff recovered in the main action. Petty *v.* Lang, 81 Tex. 238, 16 S. W. 999.

Effect of special agreement between defendant and attaching officer.— Where an officer who had made an attachment of bank bills refused to return them to the owner upon dissolution of the attachment, unless the owner would agree that he might retain a part of them, as a pretended reward for

quashed for defects in the affidavit and bond,[82] and in the absence of any statutory provision to the contrary, it is the duty of the officer to return the property to attachment defendant. notwithstanding an appeal is taken or other proceedings in error instituted.[83]

(II) *Order For Redelivery.* An order for redelivery of the property on dissolution of the attachment need not recite directions as to the manner of redelivery, unless this is called for by special circumstances.[84]

(III) *Time and Manner of Making Return.* Where an attachment has been dissolved, the officer holding the property should return the same promptly.[85] A mere notice of the relinquishment of the attachment does not amount to a return.[86] If property attached belongs to two cotenants, the return to either will be sufficient.[87]

(IV) *Effect of Second Attachment Where Property Is Not Returned.* If on the dissolution of an attachment the attaching creditor does not make a formal delivery of the property to the attachment debtor, a second attachment will not revive the lien created by the first attachment.[88]

4. On Rights of Other Attaching Creditors, Interveners, or Execution Creditors. In some of the states the attachment is for the benefit of all creditors who file claims thereunder, who thus acquire liens relating back to the reception of the writ by the officer,[89] and under such provisions their rights will be unaffected by the dismissal of the original attachment because of defects in the papers,[90] or by a discontinuance by agreement out of court by the attaching creditor and the debtor.[91] The dismissal of an attachment suit operates as a release of the prop-

finding them, it was held that such agreement was the result of duress and was not binding, and that the owner might recover the money so retained. Lovejoy *v.* Lee, 35 Vt. 430.

Payment without order of court.—While it is safer for the clerk upon the dissolution of an attachment to have an order of court made, directing the disposition of moneys placed in his hands by the sheriff as the proceeds of the sale of the property attached, yet he does not render himself liable to plaintiff by a payment without such an order, to attachment defendant if such payment is made in good faith and without notice of plaintiff's intention to appeal and continue his attachment lien by supersedeas. Danforth *v.* Rupert, 11 Iowa 547.

82. Petty *v.* Lang, 81 Tex. 238, 16 S. W. 999.

83. Loveland *v.* Alvord Consol. Quartz Min. Co., 76 Cal. 562, 18 Pac. 682; Brown *v.* Harris, 2 Greene (Iowa) 506, 52 Am. Dec. 535; Becker *v.* Steele, 41 Kan. 173, 21 Pac. 169; Miller *v.* Dixon, 2 Kan. App. 445, 42 Pac. 1014; Ranft *v.* Young, 21 Nev. 401, 32 Pac. 490. See also Sherrod *v.* Davis, 17 Ala. 312.

In Minnesota plaintiff, by appealing from the order dissolving the writ and giving bond for a stay, may suspend the operation of the order, and such suspension will relate back to the date thereof, so that if the officer still has the property his right to hold it is restored. Nevertheless, upon the dissolution of the writ the officer is not to retain the property to enable plaintiff to appeal from the order dissolving it and give a stay bond. Ryan Drug Co. *v.* Peacock, 40 Minn. 470, 42 N. W. 298.

In Nebraska the act of Feb. 17, 1873, provides that when an order discharging an attachment is made, and any party affected thereby shall except thereto, the court or judge shall fix the number of days, not to exceed twenty, in which such party may file a petition in error, during which time the property attached shall be held by the sheriff or other officer. Under this statute, if no undertaking is given within the required period, the officer must deliver the property to the person entitled thereto. Adams County Bank *v.* Morgan, 26 Nebr. 148, 41 N. W. 993; State *v.* Cunningham, 9 Nebr. 146, 1 N. W. 1011.

84. Ellsworth *v.* Scott, 3 Abb. N. Cas. (N. Y.) 9.

85. A delay of two months is unreasonable. Rice *v.* Wolff, 4 Ohio S. & C. Pl. Dec. 265; Clark *v.* Lamoreux, 70 Wis. 508, 36 N. W. 393.

86. Becker *v.* Bailies, 44 Conn. 167.

87. Gassett *v.* Sargeant, 26 Vt. 424.

88. Anderson *v.* Land, 5 Wash. 493, 32 Pac. 107, 34 Am. St. Rep. 875.

89. Trentman *v.* Wiley, 85 Ind. 33; Ryan *v.* Burkam, 42 Ind. 507 [*citing* Shirk *v.* Wilson, 13 Ind. 129].

Failure to show intention to proceed independently.— Where a creditor files a complaint, affidavit, and undertaking, and there is anything in the record which shows an intention to file under the original proceeding, and not commence an independent action, the creditor will be held to have become a party to the original action. Ryan *v.* Burkam, 42 Ind. 507.

90. Fee *v.* Moore, 74 Ind. 319. *Compare* Olney *v.* Shepherd, 8 Blackf. (Ind.) 146.

91. Cummins *v.* Blair, 18 N. J. L. 151.

erty claimed by an intervener and if he wishes to be quieted in his title he must have recourse to a direct action.[92] It does not, however, affect the lien of an execution in favor of a third person upon the same property.[93]

5. On Liability on Release or Forthcoming Bonds. According to the weight of authority, the dissolution of an attachment does not impair the liability on a release or forthcoming bond.[94]

6. On Right to Maintain Subsequent Proceedings. Where a suit is commenced by attachment, the effect of a judgment of nonsuit is nothing more than a quashing of the attachment, and leaves the party at liberty to commence *de novo*. It does not bar further proceedings.[95] So if the creditor at the same time sues his debtor in different courts on separate debts, alleging the same grounds for attachment in each case, a discharge of the attachment in one case does not bar the attachment in the other, although the evidence in the two cases be exactly the same,[96] and where an attachment has been quashed because the court out of which it was issued had no jurisdiction to issue it, that decision can in no way preclude some other court from sustaining a similar attachment, whether antecedently or subsequently issued.[97] But where an attachment has been dissolved on the ground of insufficiency of the affidavits, no subsequent proceedings based on such affidavits can be had.[98]

F. Effect of Refusal to Dissolve Attachment. The refusal of a motion to vacate an attachment conclusively establishes the truth of the allegations on which the attachment issued.[99] The question whether there was ground for issuing the attachment is settled, and cannot be reviewed by a jury, either on the trial of the issue to determine whether the debt is due or in a separate proceeding,[1] nor can the court again enter upon the question of its dissolution after making an order denying the motion to dissolve the attachment.[2] Nevertheless, a judgment refusing to dissolve an attachment does not determine the status of the property, or in other words it does not determine whether or not the property was exempt from attachment, the only issue involved being whether or not the grounds stated in the affidavit for attachment are true.[3]

G. Appeal — 1. Right of Appeal. Reference should be had to the statutes of the particular state to determine the appealability of an order dissolving or refusing to dissolve an attachment. In some states such an order is not reviewable on appeal,[4] at least until final judgment has been rendered in the main

92. Meyers *v.* Birotte, 41 La. Ann. 745, 6 So. 607.

93. Drs. K. & K. U. S. Medical, etc., Assoc. *v.* Post, etc., Job Printing Co., 58 Mich. 487, 25 N. W. 477.

94. McCombs *v.* Allen, 82 N. Y. 114; Wyman *v.* Hallock, 4 S. D. 469, 57 N. W. 197. See also Inman *v.* Strattan, 4 Bush (Ky.) 445; Hazelrigg *v.* Donaldson, 2 Metc. (Ky.) 445; Billingsley *v.* Harris, 79 Wis. 103, 48 N. W. 108. *Contra*, Gass *v.* Williams, 46 Ind. 253.

95. Bates *v.* Jenkins, 1 Ill. 411.

96. Steinharter *v.* Wolfstein, 13 Ky. L. Rep. 871.

97. Johnson *v.* Stockham, 89 Md. 368, 43 Atl. 943.

98. Teutonia Loan, etc., Co. *v.* Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419.

99. Com. *v.* Sisler, 196 Pa. St. 147, 46 Atl. 420; Slingluff *v.* Sisler, 196 Pa. St. 121, 46 Atl. 419; Walls *v.* Campbell, 125 Pa. St. 346, 23 Wkly. Notes Cas. (Pa.) 506, 508, 17 Atl. 422; Sheppard *v.* Guisler, 10 Wash. 41, 38 Pac. 759. See also Johnson *v.* Bartek, 56 Nebr. 422, 76 N. W. 878.

Effect of judgment in vacation.—A judgment in vacation refusing to dismiss an attachment, in proceedings had in accordance with a statute providing that the judge to which an attachment may be made returnable, may in vacation, upon ten days' notice to the attaching creditor, hear testimony upon the question, and if of opinion that the attachment was sued out without sufficient cause, may quash or dismiss the attachment, is not final and does not supersede defendant's right to make defense at the trial, in term, against the attachment in any respect. Dunlap *v.* Dillard, 77 Va. 847.

1. Slingluff *v.* Sisler, 196 Pa. St. 121, 46 Atl. 419.

2. Sheppard *v.* Guisler, 10 Wash. 41, 38 Pac. 759.

3. Johnson *v.* Bartek, 56 Nebr. 422, 76 N. W. 878.

4. *Alabama.*— Stanton *v.* Heard, 100 Ala. 515, 14 So. 359.

Indiana.— Abbott *v.* Zeigler, 9 Ind. 511.

Maryland.— Hagerstown First Nat. Bank *v.* Weckler, 52 Md. 30 [*citing* Mitchell *v.* Chesnut, 31 Md. 521; Baldwin *v.* Wright, 3 Gill (Md.) 241].

action,[5] unless the order appealed from shows that the attachment is set aside for want of power to grant it or upon some ground involving jurisdiction.[6] Statutes of other states permit an appeal from such an order.[7]

2. REVIEW ON APPEAL. A court of error before reversing the decision of an inferior court upon a question of fact involved in a motion to discharge an attachment should be satisfied that it was clearly erroneous.[8] It will not reverse such decision where the evidence is conflicting.[9]

H. Reinstatement — 1. IN GENERAL. It has been held proper for a court when convinced of its error in quashing an attachment[10] to set aside its order

Oregon.— Van Voorhies *v.* Taylor, 24 Oreg. 247, 33 Pac. 380; Sheppard *v.* Yocum, 11 Oreg. 234, 3 Pac. 824.

Pennsylvania.— Hoppes *v.* Houtz, 133 Pa. St. 34, 19 Atl. 312.

Tennessee.— Jacobi *v.* Schloss, 7 Coldw. (Tenn.) 385.

See also APPEAL AND ERROR, 2 Cyc. 610.

In Georgia, if a writ of error lies at all to a decision dissolving an attachment issued against a fraudulent debtor, it is an ordinary and not a "fast" writ. Kenney *v.* Wallace, 87 Ga. 506, 13 S. E. 554.

5. Simpson *v.* Kirschbaum, 43 Kan. 36, 22 Pac. 1018 [*following* Snavely *v.* Abbott Buggy Co., 36 Kan. 106, 12 Pac. 522]; Noyes *v.* Phipps, 9 Kan. App. 887, 58 Pac. 1007; Lynn *v.* Stark, 6 Ky. L. Rep. 585; Osborne *v.* Farmers' Mach. Co., 114 Mo. 579, 21 S. W. 837; State *v.* Smith, 105 Mo. 6, 16 S. W. 1052; Walser *v.* Haley, 61 Mo. 445; Jones *v.* Snodgrass, 54 Mo. 597; Davis *v.* Perry, 46 Mo. 449; Hull *v.* Beard, 80 Mo. App. 200; Strauss *v.* Boden, 62 Mo. App. 664.

6. Catlin *v.* Ricketts, 91 N. Y. 668. See also Haebler *v.* Bernharth, 115 N. Y. 459, 22 N. E. 167, 26 N. Y. St. 230.

7. *Florida.*— Jeffreys *v.* Coleman, 20 Fla. 536.

Louisiana.— Bayne *v.* Cusimano, 50 La. Ann. 361, 23 So. 361.

Minnesota.— Gale *v.* Seifert, 39 Minn. 171, 39 N. W. 69; Davidson *v.* Owens, 5 Minn. 69.

New Jersey.— The determination of a circuit court or court of common pleas quashing or refusing to quash a writ of attachment is reviewable in the supreme court by certiorari, and the judgment thereon may be taken to the court of errors by writ of error. Bisbee *v.* Bowden, 55 N. J. L. 69, 25 Atl. 855 [*citing* Walker *v.* Anderson, 18 N. J. L. 217].

Ohio.— Findlay Rolling Mill Co. *v.* National Bank of Commerce, 57 Ohio St. 115, 48 N. E. 508; Watson *v.* Sullivan, 5 Ohio St. 42.

Wisconsin.— Adkins *v.* Loucks, 107 Wis. 587, 83 N. W. 934.

Wyoming.— C. D. Smith Drug Co. *v.* Casper Drug Co., 5 Wyo. 510, 40 Pac. 979, 42 Pac. 213; Sundance First Nat. Bank *v.* Moorcroft Ranch Co., 5 Wyo. 50, 36 Pac. 821.

8. Harrison *v.* King, 9 Ohio St. 388; C. D. Smith Drug Co. *v.* Casper Drug Co., 5 Wyo. 510, 40 Pac. 979, 42 Pac. 213.

9. *Arkansas.*— Blass *v.* Lee, 55 Ark. 329, 18 S. W. 186.

California.—Slosson *v.* Glosser, (Cal. 1896) 46 Pac. 276.

Georgia.— Rahn *v.* Hull, 94 Ga. 303, 21 S. E. 567; O'Connor *v.* Donaldson, 92 Ga. 342, 17 S. E. 270.

Kansas.— Guest *v.* Ramsey, 50 Kan. 709, 33 Pac. 17; Champion Mach. Co. *v.* Updyke, 48 Kan. 404, 29 Pac. 573; Curtis *v.* Davis, 44 Kan. 144, 24 Pac. 50; Urquhart *v.* Smith, 5 Kan. 447.

Kentucky.— Porter *v.* Sparks, 19 Ky. L. Rep. 1211, 43 S. W. 220; Stewart *v.* Pettit, 15 Ky. L. Rep. 654; Haynes *v.* Wiley, 12 Ky. L. Rep. 299, 2 S. W. 681; Rapp *v.* Shoemaker, 11 Ky. L. Rep. 401.

Michigan.— Genesee County Sav. Bank *v.* Michigan Barge Co., 52 Mich. 164, 17 N. W. 790, 18 N. W. 206.

Minnesota.— Mankato First Nat. Bank *v.* Buchan, 76 Minn. 54, 78 N. W. 878; Rosenberg *v.* Burnstein, 60 Minn. 18, 61 N. W. 684; Pennsylvania Finance Co. *v.* Hursey, 60 Minn. 17, 61 N. W. 672; Winona First Nat. Bank *v.* Randall, 38 Minn. 382, 37 N. W. 799; Blandy *v.* Raguet, 14 Minn. 243.

Nebraska.— Sterling Mfg. Co. *v.* Hough, 49 Nebr. 618, 68 N. W. 1019; Geneva Nat. Bank *v.* Bailor, 48 Nebr. 866, 67 N. W. 865; Nebraska Moline Plow Co. *v.* Klingman, 48 Nebr. 204, 66 N. W. 1101; Darst *v.* Levy, 40 Nebr. 593, 58 N. W. 1130; Whipple *v.* Hill, 36 Nebr. 720, 55 N. W. 227, 38 Am. St. Rep. 742, 20 L. R. A. 313; Feder *v.* Solomon, 26 Nebr. 266, 42 N. W. 1; Holland *v.* Commercial Bank, 22 Nebr. 571, 36 N. W. 113.

Wisconsin.— Curtis *v.* Hoxie, 88 Wis. 41, 59 N. W. 581 [*citing* Lord *v.* Devendorf, 54 Wis. 491, 11 N. W. 903, 41 Am. Rep. 58; Rice *v.* Jerenson, 54 Wis. 248, 11 N. W. 549]; Cohen *v.* Burr, 6 Wis. 200.

Presumptions.—Where on appeal the record does not contain all of the evidence before the court on a motion to dissolve an attachment, it will be presumed that the order dissolving the attachment was based upon sufficient evidence. Cochrane *v.* Bussche, 7 Utah 233, 26 Pac. 294.

10. Insufficient grounds for vacating order of dissolution.—The fact that defendant confessed judgments to corporations in which its officers were interested and immediately on the dissolution of plaintiff's attachment gave a mortgage security to creditors, in which it refused to include plaintiff, is no ground for vacating the order of dissolution, it not appearing that defendant was insolvent or contemplated an assignment for creditors. Sundance First Nat. Bank *v.* Moorcroft Ranch Co., 5 Wyo. 50, 36 Pac. 821.

doing so, and thereby reinstate the same at the same term at which it was rendered,[11] or even when final judgment is rendered;[12] and on appeal the higher court may, upon a proper record, review the actions of the trial court, and if need be direct the latter to set aside an order quashing the writ and reinstate the attachment.[13]

2. EFFECT OF. Where an attachment after dissolution is reinstated, the lien thereof is of the same force and effect as if there had been no order of dissolution,[14] subject to the restriction that the property has not been sold in the meantime and the proceeds distributed.[15]

Appeal from reinstatement.—Affidavits filed by a defendant in support of his motion for the reinstatement of an attachment which were improper for the consideration of the court will not be considered on appeal from an order restoring the attachment lien. Pach *v.* Orr, 1 N. Y. Suppl. 760, 17 N. Y. St. 367, 15 N. Y. Civ. Proc. 176.

11. Adams *v.* Evans, (Miss. 1896) 19 So. 834; Woldert *v.* Nedderhut Packing Provision Co., 18 Tex. Civ. App. 602, 46 S. W. 378.

12. Woldert *v.* Nedderhut Packing Provision Co., 18 Tex. Civ. App. 602, 46 S. W. 378.

Amendment of judgment on merits by reinstating attachment.— Where a suit commenced by attachment was dissolved on motion, no appeal taken therefrom by plaintiff, and a judgment subsequently rendered in his favor on the merits in which no mention was made of the attachment, it was held that such judgment could not be amended by reinstating the attachment. Givens *v.* Caudle, 34 La. Ann. 1025.

13. Wetherow *v.* Croslin, 24 La. Ann. 128; Wirt *v.* Dinan, 44 Mo. App. 583; Carpenter *v.* Decatur First Nat. Bank, (Tex. 1892) 20 S. W. 130; Eilers *v.* Forbes, (Tex. Civ. App. 1895) 32 S. W. 709. See, however, Eikel *v.* Hanscom, 3 Tex. App. Civ. Cas. § 473, where the court of appeals held that it was without authority to reinstate the attachment although the same was erroneously quashed.

Procedure on reversal of order quashing the attachment.—Where an order quashing an attachment was reversed, it was held that the cause should be remanded with instructions to render a judgment foreclosing the attachment lien as if the original motion to quash had been overruled. Evans *v.* Lawson, 64 Tex. 199.

Proof of reinstatement of lien by removal of dissolution proceedings to supreme court.—An alleged copy of a writ of certiorari issued to review proceedings resulting in the dissolution of an attachment, which is not attested by any public officer, is not of itself competent proof of the reinstatement of the attachment lien by the removal of the dissolution proceedings to the supreme court. Jaycox *v.* Balch, 98 Mich. 160, 57 N. W. 100.

14. Cabell *v.* Patterson, 98 Ky. 520, 17 Ky. L. Rep. 836, 32 S. W. 746; Gillig *v.* George C. Treadwell Co., 148 N. Y. 177, 42 N. E. 590; Haebler *v.* Myers, 132 N. Y. 363, 30 N. E. 963, 44 N. Y. St. 403, 28 Am. St. Rep. 589, 15 L. R. A. 588; Clark *v.* Smith, 57 N. Y. App. Div. 524, 68 N. Y. Suppl. 39; King *v.* Harris, 30 Barb. (N. Y.) 471; Friede *v.* Wiessenthanner, 27 Misc. (N. Y.) 518, 58 N. Y. Suppl. 336 [*reversing* 56 N. Y. Suppl. 399]; Pach *v.* Gilbert, 9 N. Y. Suppl. 548, 30 N. Y. St. 486, 18 N. Y. Civ. Proc. 262 [*affirming* 7 N. Y. Suppl. 336, 26 N. Y. St. 247, 17 N. Y. Civ. Proc. 399, and *affirmed* in 124 N. Y. 612, 27 N. E. 391, 37 N. Y. St. 218]; Pach *v.* Orr, 1 N. Y. Suppl. 760, 17 N. Y. St. 367, 15 N. Y. Civ. Proc. 176 [*modified* in 112 N. Y. 670, 20 N. E. 415, 20 N. Y. St. 980]; Carpenter *v.* Decatur First Nat. Bank, (Tex. 1892) 20 S. W. 130 [*distinguishing* Blum *v.* Addington, (Tex. 1888) 9 S. W. 82]; Renton *v.* St. Louis, 1 Wash. Terr. 215; U. S. Bank *v.* Washington Bank, 6 Pet. (U. S.) 8, 8 L. ed. 299. See also Eilers *v.* Forbes, (Tex. Civ. App. 1895) 32 S. W. 709; Brasher *v.* Cuchia, 4 Tex. Civ. App. 690, 24 S. W. 85.

Effect of reversal of decree after two years.—In Harrow *v.* Lyon, 3 Greene (Iowa) 157, it is held that a reversal of a decree dissolving an attachment after it has been allowed to rest for two years will not revive the attachment lien.

Trial of right of property after order to quash set aside.— On the trial of the right of property on which creditors had levied an attachment, claimant answered joining issue on the merits and filed the necessary bond. An order quashing the attachment was made in the original action, but on appeal the order was reversed and after the mandate of the supreme court reinstating the attachment and foreclosing the lien secured thereby had been received by the court which made the order quashing the attachment, claimant filed a plea in abatement setting up that the attachment had been quashed, that this replevin bond had been thereby discharged, and that therefore the action to try the right to the property should be dismissed. It was held that it was error to sustain the plea, since the parties were in the same position as if no order quashing the attachment had been made. Carpenter *v.* Decatur First Nat. Bank, (Tex. 1892) 20 S. W. 130 [*distinguishing* Blum *v.* Addington, (Tex. 1888) 9 S. W. 82].

15. Haebler *v.* Myers, 132 N. Y. 363, 30 N. E. 963, 44 N. Y. St. 403, 28 Am. St. Rep. 589, 15 L. R. A. 588; Pach *v.* Gilbert, 124 N. Y. 612, 27 N. E. 391, 37 N. Y. St. 218;

XVI. PROCEEDINGS IN THE MAIN ACTION.

A. Notice — 1. Necessity For — a. To Authorize Judgment Against Property — (I) *In General.* It is a principle of natural justice that a man must have notice of some sort before his property shall be bound by a judicial sentence.[16] Therefore it is essential to the jurisdiction of the court in attachment proceedings that defendant be served with notice, either personally or by some other mode given by law in lieu of personal service.[17]

(II) *Seizure of Property as Constructive Notice.* Under some statutes no provision is made for actual notice to defendant, the seizure of the property being deemed sufficient notice to all parties interested therein to come forward and assert their rights. Where this is the case the seizure stands in place of personal service and authorizes a judgment against the property without any other notice;[18] but it is essential that the seizure be legal, otherwise the proceeding

Pach *v.* Orr, 20 N. E. 415, 20 N. Y. St. 980; Clark *v.* Smith, 57 N. Y. App. Div. 524, 68 N. Y. Suppl. 39.

16. See, generally, Judgments; Process.

17. *Alabama.*—Wilmerding *v.* Corbin Banking Co., 126 Ala. 268, 28 So. 640.

Georgia.— New England Mortg. Security Co. *v.* Watson, 99 Ga. 733, 27 S. E. 160; Smith *v.* Brown, 96 Ga. 274, 23 S. E. 849; Levy *v.* Millman, 7 Ga. 167.

Illinois.— Firebaugh *v.* Hall, 63 Ill. 81; Haywood *v.* Collins, 60 Ill. 328.

Kansas.— Chicago, etc., R. Co. *v.* Campbell, 5 Kan. App. 423, 49 Pac. 321.

Louisiana.— Kræutler *v.* U. S. Bank, 12 Rob. (La.) 461; Hoey *v.* Pepper, 5 Rob. (La.) 119; Love *v.* Dickson, 7 Mart. N. S. (La.) 160; Cochran *v.* Smith, 2 Mart. N. S. (La.) 552; Stockton *v.* Hasluck, 10 Mart. (La.) 472.

Maryland.— Brent *v.* Taylor, 6 Md. 58; Stone *v.* Magruder, 10 Gill & J. (Md.) 383, 32 Am. Dec. 177.

Massachusetts.—Almy *v.* Wolcott, 13 Mass. 73.

Michigan.— Pearson *v.* Creslin, 16 Mich. 281; King *v.* Harrington, 14 Mich. 532.

Mississippi.— Ridley *v.* Ridley, 24 Miss. 648; Edwards *v.* Toomer, 14 Sm. & M. (Miss.) 75.

New Hampshire.— Kittredge *v.* Emerson, 15 N. H. 227.

New Mexico.— Holzman *v.* Martinez, 2 N. M. 271.

Tennessee.— Brown *v.* Brown, 2 Sneed (Tenn.) 431.

Vermont.— Middlebury Bank *v.* Edgerton, 30 Vt. 182.

Effect of failure to give prescribed notice where there has been a valid seizure of property see *infra*, XVI, A, 1, a, (III).

Notice as an essential part of a valid levy see *supra*, X, H, 1, a, (III).

Ancillary attachment — Service in main action.—Where the attachment is merely ancillary to an action, the levy thereof gives no jurisdiction to render judgment without a service of summons sufficient to give jurisdiction in the main action. Boorum *v.* Ray, 72 Ind. 151; Barber *v.* Morris, 37 Minn. 194, 33 N. W. 559, 5 Am. St. Rep. 836; Heffner *v.* Gunz, 29 Minn. 108, 12 N. W. 342; Walker *v.* Cottrell, 6 Baxt. (Tenn.) 257; Maxwell *v.* Lea, 6 Heisk. (Tenn.) 247; Ingle *v.* McCurry, 1 Heisk. (Tenn.) 26; Cox *v.* North Wisconsin Lumber Co., 82 Wis. 141, 51 N. W. 1130.

Where service in main action.— Where an attachment writ is sued out in aid of an action of assumpsit, further service thereof on defendant is not necessary, if there was personal service in the original suit. Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. 695; Rutledge *v.* Stribling, 26 Ill. App. 353; Cleland *v.* Tavernier, 11 Minn. 194.

Where a second writ issues in the same suit it is not necessary that any additional notice be given. Brose *v.* Doe, 2 Ind. 666.

After remand of cause.—Where a defendant in an attachment suit has appeared and had a judgment against him reversed and remanded, no additional notice to him of the proceedings is necessary. Reaugh *v.* McConnel, 36 Ill. 373.

After material amendment of petition.— Where an amendment is made to the petition materially changing the cause of action, a new notice of publication must be given, and a judgment rendered without new notice is void. Stewart *v.* Anderson, 70 Tex. 588, 8 S. W. 295.

Tennessee — Original attachment.—Under the Tennessee act of 1871, c. 134, providing that in cases commenced by original attachment, a summons might also issue on application of plaintiff, if such summons issued it became the leading process and the levy became merely an ancillary attachment; but if the summons were not served and the attachment were levied on the property the case proceeded as in other cases of original attachment. Bivins *v.* Matthews, 7 Baxt. (Tenn.) 256.

18. *Alabama.*— Hadley *v.* Bryars, 58 Ala. 139; Grier *v.* Campbell, 21 Ala. 327; Campbell *v.* Doss, 17 Ala. 401; King *v.* Bucks, 11 Ala. 217; Thompson *v.* Allen, 4 Stew. & P. (Ala.) 184. Under the Alabama act of 1833, it was not necessary that notice be given to a non-resident defendant in attachment where the judgment was not rendered until after the expiration of six months from the issue of the attachment. Miller *v.* McMillan, 4

would operate to deprive defendant of his property without due process of law. A judgment rendered without either personal service or a valid levy is a mere nullity.[19]

(III) *Effect of Failure to Give Notice*—(A) *As Rendering Proceedings Erroneous.* Failure to give the prescribed notice is a ground for abating the writ,[20] dismissing the suit,[21] or reversing[22] or setting aside in direct proceedings[23] the judgment rendered therein.

(B) *As Rendering Judgment Void.* As to whether a judgment rendered without the required notice to defendant, where there has been a valid seizure of property, is void or merely voidable, the cases are in conflict. In some jurisdictions it has been held that the court acquires jurisdiction over the property by a valid levy thereupon, and its judgment in regard thereto is binding until reversed on appeal or set aside in some direct proceeding for that purpose.[24] But the

Ala. 527; Murray *v.* Cone, 8 Port. (Ala.) 250; Bickerstaff *v.* Patterson, 8 Port. (Ala.) 245.

Georgia.— Baker *v.* Aultman, 107 Ga. 339, 33 S. E. 423, 73 Am. St. Rep. 132; McCrory *v.* Hall, 104 Ga. 666, 30 S. E. 881; Smith *v.* Brown, 96 Ga. 274, 23 S. E. 849; Craig *v.* Fraser, 73 Ga. 246.

Louisiana.— Oliver *v.* Gwin, 17 La. 28.

Mississippi.— Calhoun *v.* Ware, 34 Miss. 146; Bias *v.* Vance, 32 Miss. 198; Ridley *v.* Ridley, 24 Miss. 648.

Tennessee.— Swan *v.* Roberts, 2 Coldw. (Tenn.) 153; Cheatham *v.* Trotter, Peck (Tenn.) 198.

Texas.— Cloud *v.* Smith, 1 Tex. 611; Sutherland *v.* De Leon, 1 Tex. 250, 46 Am. Dec. 100.

Vermont.— See Beech *v.* Abbott, 6 Vt. 586.

Judicial attachment — Publication not necessary.— Where a so-called judicial attachment is sued out after an unsuccessful attempt to obtain personal service upon defendant service by publication is not required. Briggs *v.* Smith, 13 Tex. 269.

Tennessee — Action ex delicto.— In Boggess *v.* Gamble, 3 Coldw. (Tenn.) 148, it was held that an ancillary attachment, lawfully issued and duly levied on defendant's property in an action of tort, had the same effect as an original attachment and authorized a judgment against the property without personal service. But see Barber *v.* Denning, 4 Sneed (Tenn.) 266, where the contrary was held under an earlier statute.

19. *Alabama.*— Grier *v.* Campbell, 21 Ala. 327.

Arkansas.— Richmond *v.* Duncan, 4 Ark. 197.

Georgia.— Baker *v.* Aultman, 107 Ga. 339, 33 S. E. 423, 73 Am. St. Rep. 132; McCrory *v.* Hall, 104 Ga. 666, 30 S. E. 881; New England Mortg. Security Co. *v.* Watson, 99 Ga. 733, 27 S. E. 160; Smith *v.* Brown, 96 Ga. 274, 23 S. E. 849.

Iowa.— Cooper *v.* Smith, 25 Iowa 269; Judah *v.* Stephenson, 10 Iowa 493.

Mississippi.— Bias *v.* Vance, 32 Miss. 198.

Ohio.— Endel *v.* Leibrock, 33 Ohio St. 254.

Pennsylvania.— Noble *v.* Thompson Oil Co., 79 Pa. St. 354, 21 Am. Rep. 66.

What constitutes a legal seizure see *supra*, X, H.

Property seized not defendant's.—Where the record in an attachment against a nonresident showed that the property attached was not the property of defendant a judgment rendered thereon is a nullity. Skinner *v.* Moore, 19 N. C. 138, 30 Am. Dec. 155.

A simulated levy on property to which defendant has no claim of right will not have the effect of constructive notice, so as to authorize the court to render judgment. Grier *v.* Campbell, 21 Ala. 327.

The summoning of a garnishee indebted to defendant constitutes a seizure of property sufficient to operate as constructive notice (Thompson *v.* Allen, 4 Stew. & P. (Ala.) 184); but where the service of an original attachment is only made by the summons of a garnishee, it is erroneous to render judgment against defendant in attachment, until the garnishee has admitted a debt due or property in his hands, or until a final judgment has been rendered against him for his default (Bratton *v.* McGlothlen, 20 Ala. 146).

Levy on exempt property belonging to defendant will bring him into court, although the property be released on account of the exemption. Hadley *v.* Bryars, 58 Ala. 139. See, generally, EXEMPTIONS.

20. Nelson *v.* Swett, 4 N. H. 256; Burwell *v.* Lafferty, 76 N. C. 383.

21. Bland *v.* Schott, 5 Mo. 213.

22. Rumbough *v.* White, 11 Heisk. (Tenn.) 260. See also Ridley *v.* Ridley, 24 Miss. 648.

23. Drysdale *v.* Biloxi Canning Co., 67 Miss. 534, 7 So. 541.

24. Shea *v.* Shea, 154 Mo. 599, 55 S. W. 869, 77 Am. St. Rep. 779; Johnson *v.* Gage, 57 Mo. 160; Kane *v.* McCown, 55 Mo. 181; Freeman *v.* Thompson, 53 Mo. 183; Hardin *v.* Lee, 51 Mo. 241; Simmons *v.* Missouri Pac. R. Co., 19 Mo. App. 542; Rachman *v.* Clapp, 50 Nebr. 648, 70 N. W. 259; Darnell *v.* Mack, 46 Nebr. 740, 65 N. W. 805 [*overruling* Wescott *v.* Archer, 12 Nebr. 345, 11 N. W. 491, 577]; Cochran *v.* Loring, 17 Ohio 409; Paine *v.* Mooreland, 15 Ohio 435, 45 Am. Dec. 585. But see Winningham *v.* Trueblood, 149 Mo. 572, 51 S. W. 399; Larwill *v.* Burke, 19 Ohio Cir. Ct. 449; Pratt *v.* Sherman, 4 Ohio Dec. (Reprint) 14, 1 Clev. L. Rec. 14.

A defect in the original notice returned not found in a proceeding in attachment in a justice's court goes only to the jurisdiction

weight of authority, if not of reason, is to the effect that the jurisdiction acquired by the seizure of the property is not to pass absolutely upon the rights of the parties but only to pass upon such rights after defendant has been given an opportunity to appear and defend; and where this view is maintained, a judgment rendered without the notice prescribed by law against a defendant who has not appeared is deemed absolutely void and open to collateral attack.[25]

b. To Authorize Personal Judgment. To authorize a judgment binding on defendant's person, where he has not appeared, it is essential that he shall have been served personally or by some mode equivalent to personal service.[26]

2. Mode and Sufficiency. Questions relating to the mode and sufficiency of service on defendant in attachment proceedings are as a rule governed by the

of the person and does not prevent the court from rendering judgment against the property. Johnson *v.* Dodge, 19 Iowa 106.

Cases criticized.— The cases of Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931; Beech *v.* Abbott, 6 Vt. 586; and Williams *v.* Stewart, 3 Wis. 773, have been frequently relied on as sustaining this doctrine, but a study of these decisions fails to show such a holding. In regard to the first-named case, the supreme court of Virginia in Dorr *v.* Rohr, 82 Va. 359, 365, 3 Am. St. Rep. 106, said: "The case of Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931, has no application to the question before us. It was not decided in that case that a judgment where there is an attachment, a seizure of the *res*, is good, though no other notice be given, for there the attachment was issued and notice was published 'according to law;' but the point decided was, that a judgment rendered in attachment proceedings which are irregular merely cannot be impeached collaterally." But *compare* Voorhees *v.* Jackson, 10 Pet. (U. S.) 449, 9 L. ed. 490. In Beech *v.* Abbott, 6 Vt. 586, the proceedings appear to have been in accordance with the statutory requirements and the point decided was that a judgment rendered without actual notice to defendant was not void as being contrary to natural justice. In Williams *v.* Stewart, 3 Wis. 773, a defective publication was made and defendant thereafter appeared in the proceeding.

25. *Alabama.*—Wilmerding *v.* Corbin Banking Co., 126 Ala. 268, 28 So. 640; Pullman Palace Car Co. *v.* Harrison, 122 Ala. 149, 25 So. 697, 82 Am. St. Rep. 68.

Colorado.— Great West Min. Co. *v.* Woodmas Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204.

Georgia.— Levy *v.* Millman, 7 Ga. 167, the statute expressly providing that the proceedings should be void unless the prescribed notice were given.

Illinois.— Firebaugh *v.* Hall, 63 Ill. 81; Haywood *v.* Collins, 60 Ill. 328.

Michigan.— Savidge *v.* Padgham, 105 Mich. 257, 63 N. W. 295; Trowbridge *v.* Bullard, 81 Mich. 451, 45 N. W. 1012; Nugent *v.* Nugent, 70 Mich. 52, 37 N. W. 706; Steere *v.* Vanderberg, 67 Mich. 530, 35 N. W. 110; King *v.* Harrington, 14 Mich. 532. And see Adams *v.* Abram, 38 Mich. 304.

Mississippi.— Edwards *v.* Toomer, 14 Sm. & M. (Miss.) 75.

Tennessee.— Byram *v.* McDowell, 15 Lea (Tenn.) 581; Bains *v.* Perry, 1 Lea (Tenn.) 37; Finley *v.* Gaut, 8 Baxt. (Tenn.) 148; Murry *v.* Conner, 4 Baxt. (Tenn.) 220; Nashville, etc., R. Co. *v.* Todd, 11 Heisk. (Tenn.) 549; Ogg *v.* Leinart, 1 Heisk. (Tenn.) 40; Ingle *v.* McCurry, 1 Heisk. (Tenn.) 26; Riley *v.* Nichols, 1 Heisk. (Tenn.) 16; Rogers *v.* Rush, 4 Coldw. (Tenn.) 272; Brown *v.* Brown, 2 Sneed (Tenn.) 431.

Texas.— Stewart *v.* Anderson, 70 Tex. 588, 8 S. W. 295; Raquet *v.* Nixon, Dall. (Tex.) 386.

Virginia.— Dorr *v.* Rohr, 82 Va. 359, 3 Am. St. Rep. 106.

West Virginia.— Haymond *v.* Camden, 22 W. Va. 180.

Wisconsin.—Barth *v.* Loeffelholtz, 108 Wis. 562, 84 N. W. 846.

Suit not commenced until process served.— In Sanford *v.* Dick, 17 Conn. 213, it was held that the levy of the attachment was not the commencement of the action so as to prevent the statute of limitations from becoming a bar, and that defendant was not before the court until served with summons as provided by statute.

26. *Alabama.* — Exchange Nat. Bank *v.* Clement, 109 Ala. 270, 19 So. 814.

Connecticut.— Waterman *v.* A. & W. Sprague Mfg. Co., 55 Conn. 554, 12 Atl. 240.

Georgia.— Reeves *v.* Chattahoochee Brick Co., 85 Ga. 477, 11 S. E. 837; Carithers *v.* Venable, 52 Ga. 389; Ross *v.* Edwards, 52 Ga. 24.

Kentucky.—Harris *v.* Adams, 2 Duv. (Ky.) 141; Payne *v.* Witherspoon, 14 B. Mon. (Ky.) 217.

Massachusetts.— Spurr *v.* Scoville, 3 Cush. (Mass.) 578.

Michigan.— Rolfe *v.* Dudley, 58 Mich. 208, 24 N. W. 657.

New Mexico.— Holzman *v.* Martinez, 2 N. M. 271.

Vermont.— Woodruff *v.* Taylor, 20 Vt. 65.

Virginia.— O'Brien *v.* Stephens, 11 Gratt. (Va.) 610.

West Virginia.—Hall *v.* Lowther, 22 W. Va. 570.

United States.— St. Clair *v.* Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. ed. 222; Wyman *v.* Russell, 4 Biss. (U. S.) 307, 30 Fed. Cas. No. 18,115.

See, generally, Judgments; Process; and *infra*, XVI, D, 2.

same principles that control service of process in other proceedings, and consequently will be treated elsewhere in this work.[27]

B. Appearance — 1. RIGHT TO APPEAR. Where special bail was required and attachment was regarded as original process to enforce appearance, defendant in attachment could not plead until he had filed such bail,[28] and where the statute required the replevy of property taken under an attachment to enforce appearance the execution of the replevy bond was a condition to the right to plead.[29] Where the practice of requiring bail no longer exists, or the attachment is not regarded as the leading process, defendant may appear and defend the action without giving bond or other security to discharge the attachment.[30] The time within which defendant may appear is a matter depending for the most part upon the terms of the statutes.[31]

2. WHAT CONSTITUTES — a. In General. The same acts will ordinarily constitute an appearance in actions begun or aided by attachment as in other suits.[32]

27. See, generally, PROCESS.

28. Williams *v.* Haselden, 10 Rich. (S. C.) 55; Offay *v.* Offay, 26 U. C. Q. B. 363; Reg. *v.* Stewart, 8 Ont. Pr. 297. See also Boyd *v.* Buckingham, 10 Humphr. (Tenn.) 433.

Waiver.— If, however, plaintiff permitted defendant to appear and plead without requiring special bail, and afterward replied to the plea or joined issue thereupon, he waived the objection. Callender *v.* Duncan, 2 Bailey (S. C.) 454.

Plea in abatement without special bail.— In Abbott *v.* Warriner, 7 Blackf. (Ind.) 573, it was held that under the statute defendant in attachment must put in special bail in order to enable him to plead in bar, but that this requirement did not exist as a condition to pleading in abatement.

Appearance for defendant by third person. — In Georgia, under a statute of 1816, when an attachment issued against an absent person, any one was authorized to act as his friend, to give good special bail, and to plead and defend the suit by himself or attorney. Smith *v.* Gettinger, 3 Ga. 140. Special bail and a plea to the action ought to be received in behalf of defendant in an attachment issued against him as an absconding debtor, notwithstanding he did not, when called, appear in person or by attorney, but another appeared and offered himself as special bail to replevy the attached effects. Smith *v.* Pearce, 6 Munf. (Va.) 585.

29. Alexander *v.* Taylor, 62 N. C. 36; Barry *v.* Sinclair, 61 N. C. 7; Britt *v.* Patterson, 31 N. C. 197.

30. *Georgia.*— Thompson *v.* Wright, 22 Ga. 607; Reid *v.* Moore, 12 Ga. 368; Smith *v.* Gettinger, 3 Ga. 140.

Maryland.— Lambden *v.* Bowie, 2 Md. 334.

Mississippi.— Rowley *v.* Cummings, 1 Sm. & M. (Miss.) 340.

New Jersey.— Heckscher *v.* Trotter, 48 N. J. L. 419, 5 Atl. 581.

North Carolina.— Stephenson *v.* Todd, 63 N. C. 368; Holmes *v.* Sackett, 63 N. C. 58.

Tennessee.— Boyd *v.* Buckingham, 10 Humphr. (Tenn.) 433.

United States.— Gibson *v.* Scull, Hempst. (U. S.) 36, 10 Fed. Cas. No. 5,405*a*, construing Arkansas statute.

Defendant need not ask leave of the court to defend, nor can the court impose terms at any stage of the case, when such leave would not have been required or terms imposed had the suit been commenced by ordinary summons personally served. Thompson *v.* Thomas, 11 Mich. 274.

31. **At any time before final judgment.**— In Georgia defendant may appear and defend at any time before final judgment is rendered against him. Cooley *v.* Abbey, 111 Ga. 439, 36 S. E. 786; Richmond, etc., R. Co. *v.* Mitchell, 95 Ga. 78, 22 S. E. 124; Kimball *v.* Nicol, 58 Ga. 175.

Judgment must be final.—Within the statute authorizing defendant in foreign attachment to cause an appearance to be entered for him "before judgment obtained," the judgment must be final; hence defendant may cause an appearance to be entered for him after judgment entered for default of appearance and the issue of a writ of inquiry, since the judgment is not final and complete till the writ is executed. Manuel *v.* Mississippi, etc., R. Co., 2 Miles (Pa.) 398.

Time for appearance and answer after judicial attachment.—When a citation for personal service has been returned "not found" and a judicial attachment has issued as a substitute therefor, defendant has the same time for appearance and answer after the judicial attachment as he would after personal service. Gray *v.* Smith, 17 Tex. 389.

Where notice by publication.— The publication of notice in attachment being intended as a substitute for personal service, defendant has the same time in which to serve notice of retainer and to plead after the filing of the affidavit of such publication as he has after the return of a writ personally served. Wells *v.* Walsh, 25 Mich. 344; Thompson *v.* Thomas, 11 Mich. 274. See, generally, PROCESS.

32. See, generally, APPEARANCES, 3 Cyc. 503 *et seq.*

Giving a bond to release the attached property or dissolve the attachment is usually regarded as an appearance to the merits. See *supra*, XIII, E, 4, f, (II).

b. Appearance to Contest Attachment. As a general rule defendant in attachment may appear specially for the purpose of contesting the attachment proceedings without giving the court jurisdiction over his person;[33] but in some jurisdictions an appearance to question the validity of the attachment is deemed to be a general appearance.[34]

3. Effect of. The fact that an action is begun or aided by attachment does not vary the rule that a general appearance by defendant gives the court jurisdiction to render a personal judgment against him[35] and operates as a waiver of such

33. *Alabama.* — Exchange Nat. Bank *v.* Clement, 109 Ala. 270, 19 So. 814; Moore *v.* Dickerson, 44 Ala. 485.

Arkansas.— Gooch *v.* Jeter, 5 Ark. 383.

California.— Glidden *v.* Packard, 28 Cal. 649.

Florida. — Marshall *v.* Ravisies, 22 Fla. 583.

Illinois.— Johnson *v.* Buell, 26 Ill. 66.

Indiana.—Carson *v.* The Steam-Boat Talma, 3 Ind. 194.

Louisiana.— Meritz *v.* Marks, 26 La. Ann. 740; Billiu *v.* White, 15 La. Ann. 624; Bonner *v.* Brown, 10 La. Ann. 334.

Michigan.— Freer *v.* White, 91 Mich. 74, 51 N. W. 807.

Nebraska. — Coffman *v.* Brandhoeffer, 33 Nebr. 279, 50 N. W. 6.

New Mexico.— Holzman *v.* Martinez, 2 N. M. 271.

New York.— Wood *v.* Furtick, 17 Misc. (N. Y.) 561, 40 N. Y. Suppl. 687; Monette *v.* Chardon, 16 Misc. (N. Y.) 165, 37 N. Y. Suppl. 2, 72 N. Y. St. 135. See also Tiffany *v.* Lord, 65 N. Y. 310; Camp *v.* Tibbetts, 2 E. D. Smith (N. Y.) 20, 3 Code Rep. (N. Y.) 45.

Oregon.— Meyer *v.* Brooks, 29 Oreg. 203, 44 Pac. 281, 54 Am. St. Rep. 790; Belknap *v.* Charlton, 25 Oreg. 41, 34 Pac. 758.

Pennsylvania.— Williamson *v.* McCormick, 126 Pa. St. 274, 17 Atl. 591; Turner *v.* Larkin, 12 Pa. Super. Ct. 284; Warren Sav. Bank *v.* Silverstein, 15 Pa. Co. Ct. 584; Spettigue *v.* Hutton, 9 Pa. Co. Ct. 156.

Tennessee.— Sherry *v.* Divine, 11 Heisk. (Tenn.) 722; Boon *v.* Rahl, 1 Heisk. (Tenn.) 12.

Texas.— Raquet *v.* Nixon, Dall. (Tex.) 386.

Virginia.— Petty *v.* Frick Co., 86 Va. 501, 10 S. E. 886.

Washington.— Rodolph *v.* Mayer, 1 Wash. Terr. 133.

United States.—McGillin *v.* Claflin, 52 Fed. 657, construing Ohio statute.

Appearance specially in garnishment proceedings by a defendant who has not been served does not give jurisdiction over his person in the main action. State *v.* Cordes, 87 Wis. 373, 58 N. W. 771; Beaupre *v.* Brigham, 79 Wis. 436, 48 N. W. 596. See also Kilpatrick *v.* O'Connell, 62 Md. 403.

34. *Georgia.*— Hickson *v.* Brown, 92 Ga. 225, 17 S. E. 1035.

Iowa.—Wood *v.* Young, 38 Iowa 102; Chittenden *v.* Hobbs, 9 Iowa 417; Winchester *v.* Cox, 3 Greene (Iowa) 575. But an appearance to set aside a sheriff's sale of the attached property, is not "an appearance for any purpose connected with the suit" within the meaning of Iowa Rev. Stat. § 2840, subs. 3. Osborn *v.* Cloud, 21 Iowa 238.

Kansas.— Greenwell *v.* Greenwell, 26 Kan. 530.

Kentucky.— Duncan *v.* Wickliffe, 4 Metc. (Ky.) 118; Bradford *v.* Gillaspie, 8 Dana (Ky.) 67.

Missouri.—Withers *v.* Rodgers, 24 Mo. 340; Evans *v.* King, 7 Mo. 411; Whiting *v.* Budd, 5 Mo. 443.

Oklahoma.— Raymond *v.* Nix, 5 Okla. 656, 49 Pac. 1110.

Wisconsin.— Madison First Nat. Bank *v.* Greenwood, 79 Wis. 269, 45 N. W. 810, 48 N. W. 421.

Wyoming.— Roy *v.* Union Mercantile Co., 3 Wyo. 417, 26 Pac. 996.

35. *Alabama.*— Balkum *v.* Reeves, 98 Ala. 460, 13 So. 524; Stephens *v.* Adams, 93 Ala. 117, 9 So. 529.

Delaware.— Bellah *v.* Hilles, (Del. 1899) 43 Atl. 89.

Georgia.— Earle *v.* Sayre, 99 Ga. 617, 25 S. E. 943; Pitcher *v.* Lowe, 95 Ga. 423, 22 S. E. 678; Hickson *v.* Brown, 92 Ga. 225, 17 S. E. 1035; Hendrix *v.* Cawthorn, 71 Ga. 742; Camp *v.* Cahn, 53 Ga. 558; Joseph *v.* Stein, 52 Ga. 332; Long *v.* Hood, 46 Ga. 225.

Illinois.— Sharpe *v.* Morgan, 144 Ill. 382, 33 N. E. 22; Hughes *v.* Foreman, 78 Ill. App. 460.

Kentucky.— Harper *v.* Bell, 2 Bibb (Ky.) 221.

Louisiana.— Robinson *v.* Drury, 1 Mart. (La.) 206.

Missouri.—Whitman Agricultural Assoc. *v.* National R., etc., Assoc., 45 Mo. App. 90.

New Jersey.— Goldmark *v.* Magnolia Metal Co., 65 N. J. L. 341, 47 Atl. 720; Davis *v.* Megroz, 55 N. J. L. 427, 26 Atl. 1009; Anonymous, 9 N. J. L. 224; Blatchford *v.* Conover, 40 N. J. Eq. 205, 1 Atl. 16, 7 Atl. 354.

New York.— Olcott *v.* Maclean, 73 N. Y. 223 [*reversing* 10 Hun (N. Y.) 277].

Pennsylvania.—Wing *v.* Bradner, 162 Pa. St. 72, 29 Atl. 291; Blyler *v.* Kline, 64 Pa. St. 130; Lindsley *v.* Malone, 23 Pa. St. 24.

South Carolina.—Arnold *v.* Frazier, 5 Strobh. (S. C.) 33; Callender *v.* Duncan, 2 Bailey (S. C.) 454.

Tennessee.— Chattanooga Third Nat. Bank *v.* Foster, 90 Tenn. 735, 18 S. W. 267.

Texas.— Shirley *v.* Byrnes, 34 Tex. 625; Kennedy *v.* Morrison, 31 Tex. 207; Campbell *v.* Wilson, 6 Tex. 379; Green *v.* Hill, 4 Tex. 465.

Virginia.— Fisher *v.* March, 26 Gratt. (Va.) 765.

prior irregularities as go to the jurisdiction of the person only and not to that of the subject-matter.[36]

C. Pleadings — 1. Declaration or Complaint — a. Necessity For. As a general rule a declaration, bill, or complaint is as necessary in an attachment case as in any other suit.[37]

b. Time of Filing. The time within which the declaration or complaint must be filed is a question depending upon the statutes and rules of practice in the various jurisdictions.[38]

West Virginia.— Mahany *v.* Kephart, 15 W. Va. 609.

Wisconsin.— Blackwood *v.* Jones, 27 Wis. 498; Williams *v.* Stewart, 3 Wis. 773.

United States.— Maxwell *v.* Stewart, 21 Wall. (U. S.) 71, 22 Wall. (U. S.) 77, 22 L. ed. 564 (construing New Mexico statute); L'Engle *v.* Gates, 74 Fed. 513.

For full discussion of the effect of a general appearance see Appearances, 3 Cyc. 500 *et seq.*

36. *Alabama.*— Rosenberg *v.* H. B. Claflin Co., 95 Ala. 249, 10 So. 521; Chastain *v.* Armstrong, 85 Ala. 215, 3 So. 788; Peebles *v.* Weir, 60 Ala. 413; Burroughs *v.* Wright, 3 Ala. 43.

California.— Hammond *v.* Starr, 79 Cal. 556, 21 Pac. 971.

Georgia.— Buice *v.* Lowman Gold, etc., Min. Co., 64 Ga. 769; Camp *v.* Cahn, 53 Ga. 558; Reynolds *v.* Jordan, 19 Ga. 436.

Illinois.— Clayburg *v.* Ford, 3 Ill. App. 542.

Louisiana.— Enders *v.* The Steamer Henry Clay, 8 Rob. (La.) 30.

Mississippi.— Barrow *v.* Burbridge, 41 Miss. 622; Richard *v.* Mooney, 39 Miss. 357.

Missouri.— Winningham *v.* Trueblood, 149 Mo. 572, 51 S. W. 399; Payne *v.* Snell, 3 Mo. 409; Jacobs *v.* Western Fertilizer, etc., Works, 9 Mo. App. 575.

New York.— Tuller *v.* Beck, 108 N. Y. 355, 15 N. E. 396 [*affirming* 46 Hun (N. Y.) 519]; Catlin *v.* Moss, 2 N. Y. Civ. Proc. 201.

Oregon.— White *v.* Thompson, 3 Oreg. 115.

South Carolina.— Ellison *v.* Gordon, Harp. (S. C.) 436; Harrison *v.* Casey, 1 Brev. (S. C.) 390.

Tennessee.— Taylor *v.* Badoux, (Tenn. Ch. 1899) 58 S. W. 919.

Texas.— Douglass *v.* Neil, 37 Tex. 528; Green *v.* Hill, 4 Tex. 465.

Wisconsin.— Madison First Nat. Bank *v.* Greenwood, 79 Wis. 269, 45 N. W. 810, 48 N. W. 421; Williams *v.* Stewart, 3 Wis. 773.

United States.— Creighton *v.* Kerr, 20 Wall. (U. S.) 8, 22 L. ed. 309 (construing Colorado statute); Barry *v.* Foyles, 1 Pet. (U. S.) 311, 7 L. ed. 157 (construing Maryland statute).

And see, generally, Appearances, 3 Cyc. 514 *et seq.*

When failure to serve process not waived. —When the statute provides that unless service be made within a specified time the attachment shall fail, a failure to make service within the statutory period is not waived by appearance. Blossom *v.* Estes, 84 N. Y. 614; Rhode Island Hospital Trust Co. *v.* Keeney, 1 N. D. 411, 48 N. W. 341.

37. Penn *v.* Edwards, 42 Ala. 655; Jones *v.* Howard, 42 Ala. 483; Daniel *v.* Hochstadter, 73 Ga. 144; Beck *v.* Irby, 36 Miss. 188.

Affidavit for attachment serving in lieu of a complaint see *supra*, VII, D, 3.

In Maryland the filing with the clerk of a short note setting forth the cause of action is a substitute for the declaration in attachment proceedings. Spear *v.* Griffin, 23 Md. 418; Trasher *v.* Everhart, 3 Gill & J. (Md.) 234. Where, in an action of attachment, the declaration containing the money counts and the special counts on the contract was filed, this was sufficient compliance with the statute requiring the filing of a short note in support of the affidavit. Dirickson *v.* Showell, 79 Md. 49, 28 Atl. 896.

Ancillary attachment.— Where an attachment is brought in aid of an action of assumpsit, there is but one action pending, and only one declaration is necessary, even though the clerk has entered the attachment on the docket as a separate suit. Roberts *v.* Dunn, 71 Ill. 46.

38. *Alabama.*— The complaint is required to be filed within the first three days of the return-term (Perkerson *v.* Snodgrass, 85 Ala. 137, 4 So. 752); but where the demand is not due at the time the attachment is sued out the complaint need not be filed until the first term of the court after such cause of action falls due (Jones *v.* Holland, 47 Ala. 732; Beckwith *v.* Baldwin, 12 Ala. 720). The provision as to time of filing is regarded, however, as directory only. Perkerson *v.* Snodgrass, 85 Ala. 137, 4 So. 752.

Georgia.— The declaration in a case commenced by attachment in a court of record must be filed at the return-term of the writ (Russell *v.* Faulkner, 89 Ga. 818, 15 S. E. 756; Sutton *v.* Gunn, 86 Ga. 652, 12 S. E. 979; De Leon *v.* Heller, 77 Ga. 740; Mayer *v.* Brooks, 74 Ga. 526; Banks *v.* Hunt, 70 Ga. 741; Jaffray *v.* Purtell, 66 Ga. 226; Taylor *v.* Bell, 62 Ga. 158; Birdsong *v.* Brooks, 7 Ga. 88); but this is not necessary where the action is in a justice's court (Mayer *v.* Brooks, 74 Ga. 526). In this state the statute is imperative, and a failure to file at the prescribed time will avoid the proceeding unless such failure arose from circumstances entirely beyond plaintiff's control. Failure to file the declaration until the term succeeding that to which the attachment was returnable was not excused by the failure of the officer to make an actual return of the attachment at or before the return-term, especially as his delay was acquiesced in by plaintiff; nor was it an excuse that one of

c. Sufficiency. Questions as to the form and sufficiency of such pleadings are, in the main, governed by the general principles applicable to other proceedings.[39] The complaint must of course state the cause of action,[40] and where the suit is begun by attachment the declaration must set forth the cause of action specified in the affidavit on which the proceeding is based.[41] Where reference is made to the attachment papers the complaint will be construed in connection with them,[42] and it is not usually necessary to transcribe in the complaint all matters recited in the affidavit or bond.[43] Where the attachment has issued preliminary to the institution of the action, it is required in some jurisdictions that the complaint shall allege the fact of such issue.[44]

plaintiff's attorneys, a member of a firm, was prevented by providential cause from attending court during most of the term, each member of the firm being plaintiff's counsel, and he being entitled to the services of the one present. Russell *v.* Faulkner, 89 Ga. 818, 15 S. E. 756. Where, however, the court just before adjourning passed a consent order dispensing with the calling of the appearance docket, and giving defendants time to plead until next term, in consequence of which a declaration was not filed at the return-term, but subsequently gave this order an equitable construction so as to sustain the attachment, and no harm appeared to have been done defendant, the action of the court was held to be within its discretion, and was not interfered with. Rock Island Paper Mills Co. *v.* Todd, 37 Ga. 667.

Illinois.— The declaration must be filed at or before the return-term (Kirk *v.* Elmer H. Dearth Agency, 171 Ill. 207, 49 N. E. 413; Lawver *v.* Langhans, 85 Ill. 138; Stoddard *v.* Miller, 29 Ill. 291; Craft *v.* Turney, 25 Ill. 324; Collins *v.* Tuttle, 24 Ill. 623; White *v.* Hogue, 18 Ill. 150; Plato *v.* Turrill, 18 Ill. 273) and a failure to file at the return-term is ground for dismissing the suit at the next term (Stoddard *v.* Miller, 29 Ill. 291).

Michigan.— The declaration is required to be filed within twenty days after the return of the writ; but where defendant does not appear and take advantage of plaintiff's failure to file his declaration in time, such failure is merely an irregularity which is cured by a subsequent filing. Smith *v.* Runnells, 94 Mich. 617, 54 N. W. 375.

New Jersey.—The declaration must be filed within thirty days after the return of the writ. Watson *v.* Noblett, 65 N. J. L. 506, 47 Atl. 438.

Pennsylvania.— Plaintiff in foreign attachment must file his declaration before the return-day of the writ in order to authorize judgment for want of an appearance. Melloy *v.* Deal, 124 Pa. St. 161, 16 Atl. 747, 23 Wkly. Notes Cas. (Pa.) 289 [*affirming* 3 Pa. Co. Ct. 553]; Cleary *v.* Evans, 6 Pa. Co. Ct. 33. But see Thompson *v.* Owen, 8 Kulp (Pa.) 36. And under the Pennsylvania act of May 12, 1897, if plaintiff fail to file his statement within one year after the issue of the writ, the proceeding abates. Seymour *v.* Fulton, 9 Pa. Dist. 611, 14 York Leg. Rec. (Pa.) 37.

Texas.—Where plaintiff in an attachment suit fails to file his petition until after the writ is issued the attachment will be discharged and treated as a nullity. Wooster *v.* McGee, 1 Tex. 17.

Failure to file in time not ground for quashing writ.— In a suit commenced by attachment a failure to file a declaration in time is no ground for quashing the writ, although in some cases it might be ground of nonsuit or plea in abatement. Toby *v.* Bowen, 3 Ark. 352.

Proof of filing.—While the indorsement by the clerk of the fact of filing a complaint in an attachment suit is conclusive evidence, at any time after judgment, that it was filed, it is not, either before or after judgment, the exclusive evidence of that fact; but when the complaint is found with the original file of the papers in the cause from which it must be transcribed when the final record is made up forming part thereof, and there is no countervailing proof, the fact of filing is satisfactorily shown. Betancourt *v.* Eberlin, 71 Ala. 461.

39. See, generally, PLEADING; EQUITY.

40. Dean *v.* Oppenheimer, 25 Md. 368.

41. Tunnison *v.* Field, 21 Ill. 108; Galloway *v.* Holmes, 1 Dougl. (Mich.) 330; McNulty *v.* Batty, 2 Pinn. (Wis.) 53. See also Hawks *v.* Fabre, 3 N. C. 345.

Variance.—Where the cause of action set out in the attachment was in the nature of a promissory note of the date of June 1, 1862, and the short note described the cause of action as a promissory note, bearing date June 1, 1867, the variance was fatal. Browning *v.* Pasquay, 35 Md. 294.

42. King *v.* Thompson, 59 Ga. 380.

43. Reynolds *v.* Bell, 3 Ala. 57; Cox *v.* Peoria Mfg. Co., 42 Nebr. 660, 60 N. W. 933. But see H. B. Claflin Co. *v.* Simon, 18 Utah 153, 55 Pac. 376.

Need not pray for attachment.—To authorize an attachment it is not necessary that the petition in the action should contain a prayer therefor, where the proper affidavit and bond are given. Harbour-Pitt Shoe Co. *v.* Dixon, 22 Ky. L. Rep. 1169, 60 S. W. 186; De Caussey *v.* Baily, 57 Tex. 665; Holden *v.* Meyer, 1 Tex. App. Civ. Cas. § 829.

Texas — Need not be sworn to.— It is not necessary in attachment that the petition should be sworn to if the affidavit on which the attachment issued contains the substantive traversable matter of the petition. Seawell *v.* Lowery, 16 Tex. 47; Holden *v.* Meyer, 1 Tex. App. Civ. Cas. § 829; Fechheimer *v.* Ball, 1 Tex. App. Civ. Cas. § 766.

44. Wilson *v.* Stricker, 66 Ga. 575; Kolb *v.* Cheney, 63 Ga. 688; Mehring *v.* Charles,

d. Amendments. Plaintiff in attachment will usually be allowed to amend his pleadings, as in other actions, without affecting the attachment, provided such amendment will not change the cause of action.[45] Thus amendments have been allowed adding new counts for the same cause of action;[46] correcting a defective statement of the cause of action;[47] correcting a misstatement as to the amount claimed;[48] correcting a mistake as to the venue of the

58 Ga. 377; Page *v.* Smith, 13 Oreg. 410, 10 Pac. 833.

Necessity of alleging grounds for attachment see *supra*, VII, D, 7, c, (v), (H).

Sufficient identification of attachment.— A declaration on an account, for the amount specified in an attachment, alleged that plaintiffs in the declaration were plaintiffs in an attachment then pending in the superior court, that the attachment had been levied on a lot of groceries as defendants' property, fully described in the sheriff's return on the attachment, which was then in the clerk's office of such court, and prayed judgment against the attached property, and also a general judgment. It was held that the declaration sufficiently identified the attachment. Guckenheimer *v.* Day, 74 Ga. 1.

Failure to aver issue not ground of demurrer.— The failure of plaintiff in an attachment in equity against an absent defendant to aver that an attachment had issued is no ground for demurrer to the bill. O'Brien *v.* Stephens, 11 Gratt. (Va.) 610.

45. *California.*— Hammond *v.* Starr, 79 Cal. 556, 21 Pac. 971.

Georgia.— Irvin *v.* Howard, 37 Ga. 18.

New Hampshire.—Page *v.* Jewett, 46 N. H. 441.

Ohio.— Constable *v.* White, 1 Handy (Ohio) 44, 12 Ohio Dec. (Reprint) 18.

Oregon.— Meyer *v.* Brooks, 29 Oreg. 203, 44 Pac. 281, 54 Am. St. Rep. 790.

Tennessee.— Lookout Bank *v.* Susong, 90 Tenn. 590, 18 S. W. 389.

Texas.— Mayer *v.* Walker, 82 Tex. 222, 17 S. W. 505; Pearce *v.* Bell, 21 Tex. 688; Woldert *v.* Nedderhut Packing Provision Co., 18 Tex. Civ. App. 602, 46 S. W. 378; Gibbs *v.* Petree, 7 Tex. Civ. App. 526, 27 S. W. 685.

Utah.—Barton *v.* South Jordan Co-operative Mercantile, etc., Inst., 10 Utah 346, 37 Pac. 576.

Vermont.—Austin *v.* Burlington, 34 Vt. 506; Lowry *v.* Cady, 4 Vt. 504, 24 Am. Dec. 628.

United States.— Hard *v.* Stone, 5 Cranch C. C. (U. S.) 503, 11 Fed. Cas. No. 6,046, construing Maryland statute.

Where part of claim not due.—Where an attachment is sued out for several debts, some of which are not due, the allegations in the petition as to when the debts will mature may be amended at any time before trial without affecting the validity of the writ. Donnelly *v.* Elser, 69 Tex. 282, 6 S. W. 563.

Substitution of foreign judgment.—Where a suit on an account was commenced by attachment in Louisiana, and one for the same cause of action was at the same time carried on and prosecuted to final judgment in the courts of Mississippi, it was held that the judgment thus obtained in Mississippi could be substituted by way of amendment, as the cause of action in the Louisiana court, in place of the account so as to maintain the attachment. Wright *v.* White, 14 La. Ann. 583.

Amendment after judgment.— A declaration in an attachment suit, which describes defendant as "defendant in attachment," sets out the note which is the evidence of the debt, and alleges that an attachment has been issued thereon, concluding with a prayer for process, may be amended even after judgment. Kolb *v.* Cheney, 63 Ga. 688.

In federal courts.—At least in the absence of some positive rule of state practice, the power of the federal courts to allow amendments is the same in attachment suits as in others. The supreme court will not revise a judgment in an attachment suit for error in allowing amendments more rigorously than one in an ordinary action would be revised, unless perhaps when some local statute is shown to have been violated. Tilton *v.* Cofield, 93 U. S. 163, 23 L. ed. 858. The allowance by a circuit court of the United States of an amendment to a declaration, the effect of which is the same as though allowed in a state court, is conclusive evidence against the defendant that the cause of action stated therein is identical with that stated in the original declaration, within the requirement of Mass. Pub. Stat. c. 167, § 85; and he cannot plead the variance as discharging an attachment made under the original declaration. Russia Cement Co. *v.* Le Page Co., 174 Mass. 349, 55 N. E. 70.

46. Miller *v.* Clark, 8 Pick. (Mass.) 412; Mendes *v.* Freiters, 16 Nev. 388.

Filing special counts.—After the issue of an attachment on a declaration containing the common counts plaintiff may amend the declaration by filing special counts. Sims *v.* Stribler, 14 Wkly. Notes Cas. (Pa.) 29.

47. Boyd *v.* Beville, 91 Tex. 439, 44 S. W. 287; Tarkinton *v.* Broussard, 51 Tex. 550; Nevada Co. *v.* Farnsworth, 89 Fed. 164.

48. Neptune Ins. Co. *v.* Montell, 8 Gill (Md.) 228.

Petition demanding too little.—Where the affidavit for attachment and the writ both state the correct amount of plaintiff's claim, the petition, which by mistake demands a less sum, may be amended after the issue of the writ to support the attachment. Greer *v.* Richardson Drug Co., 1 Tex. Civ. App. 634, 20 S. W. 1127. See also La Force *v.* Schiff-Lewin Co., (Tex. Civ. App. 1894) 29 S. W. 77.

Increasing amount beyond that claimed in affidavit.— It is not proper to allow an amendment increasing the amount of the

cause;[49] striking out parties[50] and adding new ones.[51] It is not permissible, however, to amend so as to set up a new cause of action, and an amendment of this nature, if allowed, will usually operate as a discharge of the attachment.[52]

2. PLEA OR ANSWER. The rules governing the plea or answer to the action — as distinguished from the attachment proceeding — are for the most part the same as those applicable to other actions.[53]

claim beyond that stated in the affidavit (Casey, etc., Mfg. Co. *v.* Dalton Ice Co., 94 Ga. 407, 20 S. E. 333); but the allowance of such an amendment will not vacate the attachment where plaintiff takes judgment for no greater sum than that originally claimed (Laighton *v.* Lord, 29 N. H. 237), or, upon obtaining judgment for the increased amount, directs the sheriff to levy only for the amount of his original claim (Cutler *v.* Lang, 30 Fed. 173).

49. Perry *v.* Mulligan, 58 Ga. 479.

50. Starr *v.* Mayer, 60 Ga. 546, amendment correcting misjoinder of a defendant against whom the attachment did not issue. But see Hodges *v.* New York Ninth Nat. Bank, 54 Md. 406, where it was said that an amendment correcting a misjoinder of defendants quashed the attachment.

51. Hamilton *v.* Lamphear, 54 Conn. 237, 7 Atl. 19 (adding plaintiff); Walters *v.* Smith, 21 Ky. L. Rep. 1635, 55 S. W. 904 (adding defendant).

Substituting new plaintiff.—Where an action is begun by attachment, sued out by the equitable owner of a chose in action, and the declaration is erroneously filed in his name, it may be amended by putting upon record the party in whom is the legal title; and this will not necessitate a change in the affidavit or bond. Tully *v.* Herrin, 44 Miss. 626. But see Fargo *v.* Cutshaw, 12 Ind. App. 392, 39 N. E. 532, where it was held that the substitution of a new plaintiff dissolved the attachment.

Changing character in which plaintiff sues.—An amendment to the declaration, filed after levy, alleging that plaintiff sues for the use of another who has purchased the claims since the levy, does not dissolve the attachment. Epstin *v.* Levenson, 79 Ga. 718, 4 S. E. 328. But see Hagerty *v.* Hughes, 4 Baxt. (Tenn.) 222, where it was held that an attachment issued in aid of an action by a husband, as such, for malpractice to his wife, was abandoned by amending the declaration so that the action stood as one by him as administrator for the use of his children.

New Jersey statute not applicable to attachments.—Where, in proceedings under section 6 of the attachment law against one of several joint debtors, defendant appears and pleads nonjoinder of the other debtors, plaintiff cannot amend and join the omitted defendants, as section 37 of the practice act provides for amendment only in an action "commenced by summons." Thayer *v.* Treat, 39 N. J. L. 150.

52. *Georgia.*— Cox *v.* Henry, 113 Ga. 259, 38 S. E. 856; Green *v.* Jackson, 66 Ga. 250; Mississippi Cent. R. Co. *v.* Plant, 58 Ga. 167.

Massachusetts.— Freeman *v.* Creech, 112 Mass. 180; Fairfield *v.* Baldwin, 12 Pick. (Mass.) 388.

Minnesota.— Heidel *v.* Benedict, 61 Minn. 170, 63 N. W. 490, 52 Am. St. Rep. 592, 31 L. R. A. 422.

Ohio.— Smead *v.* Crisfield, 1 Handy (Ohio) 573, 12 Ohio Dec. (Reprint) 18; Putnam *v.* Loeb, 2 Ohio Cir. Ct. 110 [*affirmed* in 26 Cinc. L. Bul. 352].

Texas.— Boyd *v.* Beville, 91 Tex. 439, 44 S. W. 287; Parks *v.* Young, 75 Tex. 278, 12 S. W. 986; Lutterloh *v.* McIlhenny Co., 74 Tex. 73, 11 S. W. 1063.

Where judgment taken for original cause only.— In Laighton *v.* Lord, 29 N. H. 237, it was held that an amendment by agreement of parties inserting a new cause of action would not dissolve the attachment as against subsequently attaching creditors, where judgment was taken only for the cause of action contained in the writ.

Where character of complaint not determinable.— If a complaint is plainly in tort it cannot be amended to contract so as to validate an attachment previously issued in the action; but where the complaint is so indefinite and uncertain that its real character cannot be determined, and the facts of the case are such as would sustain an action upon contract, the complaint can be amended so as to uphold the attachment, even against a subsequent attachment. Suksdorff *v.* Bigham, 13 Oreg. 369, 12 Pac. 818.

Who may attack the attachment.—An attachment was levied on the goods of A. Subsequently A made mortgages on such goods to other creditors. Thereafter the petition in the attachment case was amended so as to state a different cause of action. On motion to discharge in the attachment case, the attachment was held good, and it was further held that the mortgagees could not, in an independent action, attack the attachment. Nagle *v.* Omaha First Nat. Bank, 57 Nebr. 552, 77 N. W. 1074.

Priority of intervening liens.—Where the original petition stated no ground of liability against a defendant, an amended petition alleging such liability will not take precedence of liens of other creditors who have attached since the filing of the original petition. Bauer *v.* Deane, 33 Nebr. 487, 50 N. W. 431.

53. See, generally, PLEADING; EQUITY.

Manner of contesting the attachment see *supra*, XV, D.

Time of filing where demand not due.— Under Mo. Rev. Code (1855), p. 257, § 64, in an attachment suit upon a demand not yet due the plea to the merits may be filed at any time before the demand matures. Hamilton *v.* McClelland, 33 Mo. 315.

D. Judgment — 1. Where No Personal Jurisdiction Acquired — a. In General. By a valid seizure of defendant's property and the giving of such notice as is required by law[54] the court acquires jurisdiction to render judgment against the attached property.[55] To authorize a judgment, where there is no jurisdiction of defendant's person, it must be made to appear that all the requisite preliminary proceedings have been taken in accordance with law and established facts,[56] plaintiff must establish his demand by proof,[57] and, under some statutes, before a judgment will be given for the sale of the attached property, plaintiff must give security conditioned to make restitution in case defendant shall thereafter appear and prevail in the action.[58]

54. **Necessity for notice** see *supra*, XVI, A, 1, a.

55. *Illinois.*— Smith *v.* Yargo, 28 Ill. App. 594.

Maryland.— Dawson *v.* Contee, 22 Md. 27; Walters *v.* Munroe, 17 Md. 501.

New York.— Grevell *v.* Whiteman, 32 Misc. (N. Y.) 279, 65 N. Y. Suppl. 974.

Tennessee.— Swan *v.* Roberts, 2 Coldw. (Tenn.) 153; Cheatham *v.* Trotter, Peck (Tenn.) 198.

Texas.— Thomson *v.* Shackelford, 6 Tex. Civ. App. 121, 24 S. W. 980.

See also *supra*, VII, B; and, generally, Judgments; Process.

Effect of prior levies.— An attachment levied upon land of defendant is sufficient to authorize a judgment by default against him on the claim sued on, although there have been prior levies which will exhaust the property. Perry *v.* Mendenhall, 57 N. C. 157.

Effect of subsequent personal service.— Where the court has acquired jurisdiction over the property by levy and constructive notice, judgment may properly be rendered against the same notwithstanding a subsequent personal service on defendant (Giddings *v.* Squier, 4 Mackey (D. C.) 49); but defendant may be permitted to come in as a matter of favor upon payment of costs and disbursements, the judgment being allowed to stand as security (Duche *v.* Voisin, 18 Abb. N. Cas. (N. Y.) 358).

Maryland —When judgment becomes final. — Under the Maryland statutes a judgment of condemnation *nisi* becomes final by operation of law at the expiration of the term at which it is entered. Western Nat. Bank *v.* National Union Bank, 91 Md. 613, 46 Atl. 960.

Louisiana —Absentees.—For the Louisiana practice regarding proceedings against absentees see Absentees, 1 Cyc. 201.

56. *Alabama.*— Moore *v.* Dickerson, 44 Ala. 485.

Michigan.— Woolkins *v.* Haid, 49 Mich. 299, 13 N. W. 598.

New Mexico.— Holzman *v.* Martinez, 2 N. M. 271.

Virginia.—Watts *v.* Robertson, 4 Hen. & M. (Va.) 442.

Wisconsin.— Hibbard *v.* Pettibone, 8 Wis. 270.

After a cause has been continued the continuance must be set aside before judgment by default is taken at the same term. Gray *v.* Smith, 17 Tex. 389.

Necessity for record to show notice.— To sustain a judgment by default against a defendant in attachment who has not appeared or been personally served, it is necessary that the record should show that the required notice has been given.

Alabama.—Wilmerding *v.* Corbin Banking Co., 126 Ala. 268, 28 So. 640; Meyer *v.* Keith, 99 Ala. 519, 13 So. 500; Diston *v.* Hood, 83 Ala. 331, 3 So. 746; Brinsfield *v.* Austin, 39 Ala. 227.

Delaware.— Johnson *v.* Layton, 5 Harr. (Del.) 252.

Illinois.— Haywood *v.* Collins, 60 Ill. 328; Haywood *v.* McCrory, 33 Ill. 459; Vairin *v.* Edmonson, 10 Ill. 270; Baldwin *v.* Ferguson, 35 Ill. App. 393.

Indiana.—Foyles *v.* Kelso, 1 Blackf. (Ind.) 215.

Mississippi.— Tupper *v.* Cassell, 45 Miss. 352.

See, generally, Judgments; Process.

Wisconsin — Interlocutory judgment.— It was error to render judgment for plaintiffs in an action commenced by attachment, where they entered the default of defendant and sued out their writ of inquiry to assess damages without having previously taken an interlocutory judgment. Hibbard *v.* Pettibone, 8 Wis. 270.

Assessment of damages — Evidence.— Under the Pennsylvania act of Apr. 9, 1870, authorizing the prothonotary to assess the damages on evidence produced to him or on the affidavit of plaintiff or some other person cognizant of the transaction, a judgment by default, rendered without the production of the required evidence, is erroneous. Seymour *v.* Fulton, 9 Pa. Dist. 611, 14 York Leg. Rec. (Pa.) 37.

Necessity for return of attachment writ.— Under some statutes it has been held that the return of the attachment writ is not a prerequisite to a judgment by default. Cousins *v.* Alworth, 44 Minn. 505, 47 N. W. 169, 10 L. R. A. 504; Wallace *v.* Scholl, 9 Pa. Super. Ct. 284.

Necessity to call defendant.— Where defendant could not appear without first putting in bail and he did not do this, it was unnecessary to call and formally default him before rendering judgment. Harlow *v.* Beckle, 1 Blackf. (Ind.) 237.

57. Jackson *v.* McElroy, 2 Bush (Ky.) 132; Harris *v.* Adams, 2 Duv. (Ky.) 141; Stephenson *v.* Giberson, 1 Cranch C. C. (U. S.) 319, 22 Fed. Cas. No. 13,372.

58. Harris *v.* Adams, 2 Duv. (Ky.) 141; Allen *v.* Brown, 4 Metc. (Ky.) 342; Mears

b. Operation and Effect — (i) *Binding Only on Property.* As has been stated heretofore, no personal judgment can be rendered against defendant in attachment unless he has appeared or has been served with process.[59] Where the court has acquired jurisdiction of the property but not of the person the judgment can bind nothing except the property levied upon.[60] If the property attached proves insuffieient to satisfy plaintiff's claim no other property can be taken,[61] and plaintiff must sue on the original indebtedness to reeover the balance.[62] Such judgment will have no effect in another state as a personal judgment against the debtor,[63] and is not an evidence of indebtedness on which an action can be maintained.[64]

v. Adreon, 31 Md. 229; Brien *v.* Pittman, 12 Leigh (Va.) 379; Watts *v.* Robertson, 4 Hen. & M. (Va.) 442.

After expiration of the time within which defendant may appear and contest, such security is unnecessary and a decree will not be opened on the ground that it was not given. Wallace *v.* Forrest, 2 Harr. & M. (Md.) 261; Ross *v.* Austin, 4 Hen. & M. (Va.) 502.

59. See *supra*, XVI, A, 1, b.

60. *Alabama.*— Soulard *v.* Vacuum Oil Co., 109 Ala. 387, 19 So. 414; Exchange Nat. Bank *v.* Clement, 109 Ala. 270, 19 So. 814.

Arkansas.—Wilson *v.* Spring, 38 Ark. 181.

California.— Brown *v.* Campbell, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314.

Georgia.— Reeves *v.* Chattahoochee Brick Co., 85 Ga. 477, 11 S. E. 837; Parker *v.* Brady, 56 Ga. 372.

Illinois.— Conn *v.* Caldwell, 6 Ill. 531.

Iowa.— Banta *v.* Wood, 32 Iowa 469; Johnson *v.* Dodge, 19 Iowa 106; Hedrick *v.* Brandon, 9 Iowa 319; Doolittle *v.* Shelton, 1 Greene (Iowa) 272; Wilkie *v.* Jones, Morr. (Iowa) 97.

Louisiana.— Herber *v.* Abbott, 39 La. Ann. 1112, 3 So. 259; Broughton *v.* King, 2 La. Ann. 569.

Missouri.— Bryant *v.* Duffy, 128 Mo. 18, 30 S. W. 317; Johnson *v.* Holley, 27 Mo. 594.

Nebraska.— Darnell *v.* Mack, 46 Nebr. 740, 65 N. W. 805.

New Jersey.— Davis *v.* Megroz, 55 N. J. L. 427, 26 Atl. 1009; Schenck *v.* Griffin, 38 N. J. L. 462.

New York.—Ward *v.* Boyce, 152 N. Y. 191, 46 N. E. 180, 36 L. R. A. 549; Fitzsimmons *v.* Marks, 66 Barb. (N. Y.) 333; Goodkind *v.* Strickland, 3 Daly (N. Y.) 420; Thomas *v.* Merchants' Bank, 9 Paige (N. Y.) 216; Bates *v.* Delavan, 5 Paige (N. Y.) 299.

Ohio.— Oil Well Supply Co. *v.* Koen, 64 Ohio St. 422, 60 N. E. 603.

Pennsylvania.— Smith *v.* Eyre, 149 Pa. St. 272, 26 Wkly. Notes Cas. (Pa.) 314, 24 Atl. 288; Coleman's Appeal, 75 Pa. St. 441; Borden *v.* American Surety Co., 2 Pa. Dist. 245.

South Carolina.—White *v.* Floyd, Speers Eq. (S. C.) 351.

Vermont.— Woodruff *v.* Taylor, 20 Vt. 65.

Virginia.— O'Brien *v.* Stephens, 11 Gratt. (Va.) 610.

West Virginia.— Mahany *v.* Kephart, 15 W. Va. 609.

Wisconsin.— Jones *v.* Spencer, 15 Wis. 583; Atchinson *v.* Rosalip, 3 Pinn. (Wis.) 288, 4 Chandl. (Wis.) 12.

United States.— Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931 (construing Tennessee statute); Wyman *v.* Russell, 4 Biss. (U. S.) 307, 30 Fed. Cas. No. 18,115 (construing Indiana statute); Westerwelt *v.* Lewis, 2 McLean (U. S.) 511, 29 Fed. Cas. No. 17,446 (construing Illinois statute).

Judgment in defendant's favor operates to discharge the attachment. See *supra*, XII, A, 1.

Attachment against boat.—In a proceeding by attachment against a boat where no person is made defendant, the judgment must be *in rem* against the boat. Hartman *v.* Stone, 19 Ark. 639; Case *v.* Maffitt, 19 Ark. 645; The Steam Boat Tom Bowling *v.* Hough, 5 Blackf. (Ind.) 188.

61. *Iowa.*— Mayfield *v.* Bennett, 48 Iowa 194.

Ohio.— Oil Well Supply Co. *v.* Koen, 64 Ohio St. 422, 60 N. E. 603.

Pennsylvania.— Smith *v.* Eyre, 149 Pa. St. 272, 26 Wkly. Notes Cas. (Pa.) 314, 24 Atl. 288.

South Carolina.— Stanley *v.* Stanley, 35 S. C. 94, 14 S. E. 675.

Wisconsin.— Glover *v.* Rawson, 3 Pinn. (Wis.) 226, 3 Chandl. (Wis.) 249.

Plaintiff holding mortgage on other property.— The fact that plaintiff held a mortgage upon lands other than those attached to secure the claim sued upon does not vary the rule that the judgment binds only the attached property, or render the mortgaged property liable to be subjected to the judgment in the attachment proceeding. Banta *v.* Wood, 32 Iowa 469.

In Louisiana it was held in an early case that, under the peculiar statutes of that state, a defendant, even though he had neither appeared nor been personally notified, could be held personally liable for the balance not covered by the property attached. Hill *v.* Bowman, 14 La. 445.

62. Bliss *v.* Heasty, 61 Ill. 338.

Not a bar to subsequent action.—A judgment in attachment when defendant does not appear will not be a bar to the subsequent suit for the same cause, unless followed by payment or the sale of the property seized in due course of law. Roose *v.* McDonald, 23 Ind. 157.

63. Earthman *v.* Jones, 2 Yerg. (Tenn.) 483; Fisher *v.* March, 26 Gratt. (Va.) 765.

64 *Illinois.*— Manchester *v.* McKee, 9 Ill. 511.

Maine.—Eastman *v.* Wadleigh, 65 Me. 251, 20 Am. Rep. 695.

(II) *Effect of Rendering General Judgment.* Some statutes contemplate the rendition of a judgment, personal in form, even where no jurisdiction has been obtained over defendant's person,[65] and it seems that such judgment will not be deemed void in any case;[66] but whatever the form of the judgment it can have no effect further than to bind the property attached.[67]

(III) *Conclusiveness.* Where the court has acquired jurisdiction of the property, its judgment is conclusive with respect thereto until reversed or set aside in a direct proceeding, and cannot be collaterally attacked on the ground of irregularities in the proceedings.[68]

Missouri.— Smith *v.* McCutchen, 38 Mo. 415.

New Jersey.—Schenck *v.* Griffin, 38 N. J. L. 462; Miller *v.* Dungan, 36 N. J. L. 21.

Pennsylvania.— Darrach *v.* Wilson, 2 Miles (Pa.) 116.

South Carolina.— White *v.* Floyd, Speers Eq. (S. C.) 351.

65. Meyer *v.* Keith, 99 Ala. 519, 13 So. 500; Hitchcock *v.* Hahn, 60 Mich. 459, 27 N. W. 600; Seawell *v.* Williams, 2 Overt. (Tenn.) 272; Wilson *v.* Zeigler, 44 Tex. 657.

66. *Colorado.*— Brown *v.* Tucker, 7 Colo. 30, 1 Pac. 221.

Maine.— Parker *v.* Prescott, 86 Me. 241, 29 Atl. 1007.

Minnesota.— Hencke *v.* Twomey, 58 Minn. 550, 60 N. W. 667.

Missouri.— Burnett *v.* McCluey, 92 Mo. 230, 4 S. W. 694.

Montana.— State *v.* Eddy, 10 Mont. 311, 25 Pac. 1032.

Nebraska.— Smith *v.* Johnson, 43 Nebr. 754, 62 N. W. 217; Nagel *v.* Loomis, 33 Nebr. 499, 50 N. W. 441.

Ohio.— Cleveland Co-operative Stove Co. *v.* Mehling, 21 Ohio Cir. Ct. 60, 11 Ohio Cir. Dec. 400.

Amendment.— In Mahone *v.* Perkinson, 35 Ga. 207, plaintiff was given leave to amend the judgment by changing the same from a general judgment *in personam* to a judgment *in rem.*

May be corrected nunc pro tunc.— Although, where suit is begun by publication and attachment, judgment will bind only the property attached, a general judgment in such case is nevertheless valid till reversed. It will authorize the issue of a special execution against the property attached, and it is such a judgment as a court would at any reasonable time correct by an entry *nunc pro tunc.* Massey *v.* Scott, 49 Mo. 278.

Personal judgment treated as surplusage.— In an action against a non-resident begun on attachment proceedings without service of process, where the judgment was personal in form and an execution issued generally against defendant's property, but was only levied on the attached real estate, it was held that the order of sale was valid, and the general personal judgment was mere surplusage. Mickey *v.* Stratton, 5 Sawy. (U. S.) 475, 17 Fed. Cas. No. 9,530, 11 Chic. Leg. N. 314. To same effect see Merwin *v.* Hawker, 31 Kan. 222, 1 Pac. 640.

Void personal judgment does not affect foreclosure of lien.— A judgment directing the sale of attached property to satisfy plaintiff's claim is not affected by the fact that the court rendered a void personal judgment against the defendant in the same case. Barelli *v.* Wagner, 5 Tex. Civ. App. 445, 27 S. W. 17.

Effect of issuing general execution.— In an action aided by an attachment, where there is no personal service on defendant and no appearance, it is erroneous to award a general execution (Clymore *v.* Williams, 77 Ill. 618); but where the judgment entered is a general one, with a general execution, and the property levied upon and sold is only that actually seized under the attachment writ, the errors will not render the sale and deed void in a collateral proceeding (Boothe *v.* Estes, 16 Ark. 104; Burnett *v.* McCluey, 92 Mo. 230, 4 S. W. 694).

67. Wilson *v.* Spring, 38 Ark. 181; Feild *v.* Dortch, 34 Ark. 399; Parsons *v.* Paine, 26 Ark. 124; Young *v.* Camphell, 10 Ill. 80; Tabler *v.* Mitchell, 62 Miss. 437; Clark *v.* Holliday, 9 Mo. 711.

Ascertainment of amount due not a personal judgment.— In attachment proceedings the amount of the indebtedness must be ascertained in order to make the proper order for the sale of the attached property. In such a case the court, in ascertaining the amount due, does not proceed against the person, but simply ascertains the amount that shall be adjudged a lien upon the property, or that shall measure the extent of the creditor's claim against it. The statement of the amount in the finding and the decree of the court in such case is not a personal judgment, but is a mere statement of the finding upon one of the questions in the case. Quarl *v.* Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662.

68. *Alabama.*—Martin *v.* Hall, 70 Ala. 421.

California.— Hillman *v.* Griffin, (Cal. 1899) 59 Pac. 194.

Colorado.— Brown *v.* Tucker, 7 Colo. 30, 1 Pac. 221.

Illinois.— Kruse *v.* Wilson, 79 Ill. 233; Gibbons *v.* Bressler, 61 Ill. 110; Littlestone *v.* Goldenberg, 66 Ill. App. 673.

Indiana.—Cornwell *v.* Hungate, 1 Ind. 156.

Kansas.—National Bank *v.* Peters, 51 Kan. 62, 32 Pac. 637.

Kentucky.— Thomas *v.* Mahone, 9 Bush (Ky.) 111; Paul *v.* Smith, 6 Ky. L. Rep. 531.

Maryland.— Henkelman *v.* Smith, 42 Md. 164; Barney *v.* Patterson, 6 Harr. & J. (Md.) 182.

c. Setting Aside Default. Provision is sometimes made by statute for setting aside a default judgment on terms where defendant makes application within a specified time.[69]

2. Where Jurisdiction Acquired Over Person. Where the court has acquired jurisdiction over defendant's person by personal service or his voluntary appearance it is usually proper to render a personal judgment against him.[70]

3. Order For Execution or Sale — a. Necessity For. In some states a judgment for plaintiff in attachment is required to contain an order for special execution against, or sale of, the attached property, and a general judgment and exe-

Missouri.— Union Nat. Bank *v.* State Nat. Bank, 155 Mo. 95, 55 S. W. 989; Attleboro First Nat. Bank *v.* Hughes, 10 Mo. App. 7.

New Jersey.—Schenck *v.* Griffin, 38 N. J. L. 462; Hoppock *v.* Ramsey, 28 N. J. Eq. 413; Brantingham *v.* Brantingham, 12 N. J. Eq. 160; Diehl *v.* Page, 3 N. J. Eq. 143.

New York.— Skinnion *v.* Kelley, 18 N. Y. 355.

North Carolina.—Spillman *v.* Williams, 91 N. C. 483; Harrison *v.* Simmons, 44 N. C. 80; Skinner *v.* Moore, 19 N. C. 138, 30 Am. Dec. 155.

Tennessee.— Walker *v.* Day, 8 Baxt. (Tenn.) 77; Walker *v.* Cottrell, 6 Baxt. (Tenn.) 257; People's Bank *v.* Williams, (Tenn. Ch. 1896) 36 S. W. 983.

Texas.— Texarkana Clothing Co. *v.* Bisco, (Tex. Civ. App. 1897) 40 S. W. 559.

See, generally, Judgments.

69. Underwood *v.* Dollins, 47 Mo. 259; Sloan *v.* Forse, 11 Mo. 126. For a full discussion of this question see Judgments.

In Tennessee, where a defendant in an attachment suit is a non-resident, or has removed himself or property out of the state, the judgment or decree by default may be set aside upon application and good ground shown within twelve months thereafter, so that he may make his defense; but when the issue of the attachment is based upon the ground that he is an absconding debtor, he is precluded from this mode of redress and must seek his remedy on the bond. Bledsoe *v.* Wright, 2 Baxt. (Tenn.) 471; Gill *v.* Wyatt, 6 Heisk. (Tenn.) 58; Patterson *v.* Arnold, 4 Coldw. (Tenn.) 364; State *v.* Hall, 3 Coldw. (Tenn.) 255; Smith *v.* Foster, 3 Coldw. (Tenn.) 139.

Application made by motion.—An application to set aside a judgment by default in an attachment case may be made upon motion supported by petitions or affidavits. Smith *v.* Foster, 3 Coldw. (Tenn.) 139.

Defendant denying interest in attached property.—Where property was levied upon by attachment as the property of non-resident defendants and service was thereafter made upon them by publication and judgment entered for want of an answer, they moved to vacate the judgment and dismiss the action upon affidavits denying that they had any interest in the property. It was held that the court improperly granted the order, for if they had no interest to be protected the vacation of the judgment as to them would be useless. Whitney *v.* Sherin, 74 Minn. 4, 76 N. W. 787.

70. *Alabama.*— Balkum *v.* Reeves, 98 Ala. 460, 13 So. 524; Betancourt *v.* Eberlin, 71 Ala. 461.

Georgia.— Pitcher *v.* Lowe, 95 Ga. 423, 22 S. E. 678; Richmond, etc., R. Co. *v.* Mitchell, 95 Ga. 78, 22 S. E. 124; Hodnett *v.* Stone, 93 Ga. 645, 20 S. E. 43; Sutton *v.* Gunn, 86 Ga. 652, 12 S. E. 979; Jaffray *v.* Purtell, 66 Ga. 226; Buice *v.* Lowman Gold, etc., Min. Co., 64 Ga. 769; Parker *v.* Brady, 56 Ga. 372; Atlantic, etc., R. Co. *v.* Florida Constr. Co., 51 Ga. 241.

Illinois.— Sharpe *v.* Morgan, 144 Ill. 382, 33 N. E. 22; Dernburg *v.* Tefft, 63 Ill. App. 33.

Michigan.— Fletcher *v.* Morrell, 78 Mich. 176, 44 N. W. 133.

Missouri.— Payne *v.* O'Shea, 84 Mo. 129; Whitman Agricultural Assoc. *v.* National R., etc., Assoc., 45 Mo. App. 90.

New Jersey.— Davis *v.* Megroz, 55 N. J. L. 427, 26 Atl. 1009; Thompson *v.* Eastburn, 16 N. J. L. 100.

Texas.— Cloud *v.* Smith, 1 Tex. 611.

Virginia.—Fisher *v.* March, 26 Gratt. (Va.) 765.

United States.— Maxwell *v.* Stewart, 21 Wall. (U. S.) 71, 22 Wall. (U. S.) 77, 22 L. ed. 564.

Appearance as giving jurisdiction to render a personal judgment see *supra*, XVI, B, 3.

Binds all defendant's property.—Where jurisdiction is obtained of defendant's person a general judgment rendered in the action is binding on all of defendant's property. Brownwell, etc., Car Co. *v.* Barnard, 139 Mo. 142, 40 S. W. 762.

Where property insufficient — Execution for balance.—In Tennessee, where an attachment is issued simultaneously with the original summons in an action *ex delicto*, and jurisdiction is obtained over defendant's person, if the property attached be not sufficient to pay the judgment execution may issue for the balance. Walker *v.* Cottrell, 6 Baxt. (Tenn.) 257.

Judgment against one of two defendants. — In New Jersey, where a defendant in attachment appears and goes to trial on the merits, the case proceeds as if commenced by summons. Therefore, where a suit had been commenced by attachment upon the property of two defendants and they appeared and joined issue, and no notice of misjoinder was given, it was held that there was no error in rendering judgment against one only of the defendants. Elliott *v.* Bodine, 59 N. J. L. 567, 36 Atl. 1038.

cution releases the lien of the attachment;[71] but in the absence of any express statutory requirement therefor such an order, although customarily made, is not generally regarded as essential, and the lien of the attachment is not discharged by a general judgment and execution.[72]

b. Sufficiency. The order should direct the sale of so much of the attached property as is sufficient to satisfy the judgment[73] and should describe such prop-

71. Emery *v.* Royal, 117 Ind. 299, 20 N. E. 150; Wright *v.* Manns, 111 Ind. 422, 12 N. E. 160; U. S. Mortgage Co. *v.* Henderson, 111 Ind. 24, 12 N. E. 88; Sannes *v.* Ross, 105 Ind. 558, 5 N. E. 699; Smith *v.* Scott, 86 Ind. 346; Lowry *v.* McGee, 75 Ind. 508; Gass *v.* Williams, 46 Ind. 253; Sahner *v.* Sahner, 26 Ind. App. 624, 60 N. E. 369; Capital City Dairy Co. *v.* Plummer, 20 Ind. App. 408, 49 N. E. 963; Perry *v.* Mendenhall, 57 N. C. 157; Amyett *v.* Backhouse, 7 N. C. 63; Staunton *v.* Harris, 9 Heisk. (Tenn.) 579.

In New Jersey it is held that where defendant in an attachment suit in which applying creditors have been admitted appears, judgment *in personam* is rendered against him, and execution issues thereon to the sheriff, a sale of land thereunder will only convey the interest of defendant in such land at the time of the entry of judgment. If the creditor desires to avail himself of the title defendant had when the writ of attachment issued he must have his debt, as ascertained by his judgment, embraced in the judgment in the attachment suit, whereupon a sale and conveyance may be made by the auditor, which by the statute shall convey the estate defendant had at the time the writ of attachment was issued. Blatchford *v.* Conover, 40 N. J. Eq. 205, 1 Atl. 16, 7 Atl. 354.

Order for sale of part releases lien on rest. — A personal judgment for plaintiff, with an order for the sale of part of defendant's lands previously attached by plaintiff, releases the attachment lien on land not included in the order. Thomas *v.* Johnson, 137 Ind. 244, 36 N. E. 893.

Tennessee — Effect of taking out fieri facias.—If plaintiff, instead of suing out a writ of venditioni exponas, takes out a fieri facias, he thereby waives the lien of the attachment. Hurst *v.* Liford, 11 Heisk. (Tenn.) 622; Snell *v.* Allen, 1 Swan (Tenn.) 207; Seawell *v.* Williams, 2 Overt. (Tenn.) 273.

72. *Alabama.*—Berney Nat. Bank *v.* Pinckard, 87 Ala. 577, 6 So. 364.

California.— Low *v.* Henry, 9 Cal. 538.

Colorado.— Brown *v.* Tucker, 7 Colo. 30, 1 Pac. 221.

Illinois.— Where an attachment suit is begun in a court of record, the entry of a personal judgment against defendant does not operate to discharge the lien of the attachment (Yarnell *v.* Brown, 170 Ill. 362, 48 N. E. 909, 62 Am. St. Rep. 380 [*reversing* 65 Ill. App. 83]; St. Joseph State Nat. Bank *v.* Union Nat. Bank, 168 Ill. 519, 48 N. E. 82 [*affirming* 68 Ill. App. 25]; Hogue *v.* Corbit, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232); but where the action is in a justice's court the judgment must order the sale of the property attached; otherwise it operates as a dismissal of the attachment (Wasson *v.* Cone, 86 Ill. 46).

Iowa.— Kingsbury *v.* Buchanan, 11 Iowa 387.

Kansas.— Wallach *v.* Wylie, 28 Kan. 138.

Minnesota.— Hencke *v.* Twomey, 58 Minn. 550, 60 N. W. 667.

Mississippi.— Sale *v.* French, 61 Miss. 170, 175, where the court said: "The legal effect of a judgment against the defendant is to condemn the property seized to sale, and though the practice is to make an order of condemnation in the judgment, it is not necessary to do so." See also Van Diver *v.* Buckley, (Miss. 1887) 1 So. 633.

Montana.— State *v.* Eddy, 10 Mont. 311, 25 Pac. 1032.

Ohio.— Coggshall *v.* Marine Bank Co., 63 Ohio St. 88, 57 N. E. 1086; Liebman *v.* Ashbacker, 36 Ohio St. 94.

South Dakota.— Iowa State Sav. Bank *v.* Jacobson, 8 S. D. 292, 66 N. W. 453.

Texas.— Wallace *v.* Bogel, 66 Tex. 572, 2 S. W. 96. But see Cook *v.* Love, 33 Tex. 487.

Virginia.—In O'Brien *v.* Stephens, 11 Gratt. (Ga.) 610 [*followed* in Mahany *v.* Kephart, 15 W. Va. 609], it was held that where defendant appeared the decree might be personal only or might include an order for the sale of the attached property.

Washington.— Pennsylvania Mortg. Invest. Co. *v.* Gilbert, 13 Wash. 684, 43 Pac. 941, 45 Pac. 43.

Wisconsin.— Madison First Nat. Bank *v.* Greenwood, 79 Wis. 269, 45 N. W. 810, 48 N. W. 421.

See 5 Cent. Dig. tit. "Attachment," § 743.

Texas — Where interest in land attached. — Under Sayle's Civ. Stat. Tex. art. 180*a*, an order for the sale of the attached property is necessary only in regard to personalty, and where the attached property consists of an interest in land — such as a leasehold estate — a mere recital of the issue and levy of the attachment is sufficient to preserve the lien without an order of sale. Le Doux *v.* Johnson, (Tex. Civ. App. 1893) 23 S. W. 902.

Missouri — General judgment.— In Missouri, where jurisdiction is obtained over defendant's person, the judgment must be general, and it is error to order the sale of the attached property. Payne *v.* O'Shea, 84 Mo. 129; Maupin *v.* Virginia Lead Min. Co., 78 Mo. 24; Borum *v.* Reed, 73 Mo. 461; Philips *v.* Stewart, 69 Mo. 149; Hubbard *v.* Moss, 65 Mo. 647; Huxley *v.* Harrold, 62 Mo. 516; Jones *v.* Hart, 60 Mo. 351; Kritzer *v.* Smith, 21 Mo. 296; Audenreid *v.* Hull, 45 Mo. App. 202; Holliday *v.* Mansker, 44 Mo. App. 465.

73. Harlow *v.* Becktle, 1 Blackf. (Ind.) 237, where it was further held that an order

erty clearly and definitely.[74] Where a person, not a party to the action, has rights in the attached property, the court, although not having equity jurisdiction, may mold its judgment so as to protect such rights.[75]

for the sale of all the attached property was not erroneous if it were apparent that no injustice would be done thereby.

For form of judgment held to be sufficient as a judgment *in rem* see Griffith *v.* Milwaukee Harvester Co., 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573.

Demands not recoverable in action.—Where plaintiff declared in assumpsit and his writ was in trespass on the case, it was held that demands for which debt or covenant alone would lie could not be recovered in the action; and therefore it was erroneous to order the sale of property for the satisfaction not only of that portion of plaintiff's claim which might properly be recovered, but also for that portion which could not be so recovered. Boarman *v.* Patterson, 1 Gill (Md.) 372.

Where property replevied.— Under Tex Rev. Stat. arts. 213–215, where the attached property has been replevied, it is not error on rendering judgment against the sureties on the replevy bond to also order the foreclosure of the attachment lien. Atkinson *v.* Witte, (Tex. Civ. App. 1900) 54 S. W. 611.

Order for sale of land.— It is error to direct a sale in gross of attached lands, which are separate tracts, and situated in different counties. The judgment should direct a sale by the tract, and only so much as is necessary to satisfy the debt and costs. Starks *v.* Curd, 88 Ky. 164, 10 Ky. L. Rep. 740, 10 S. W. 419.

Sale of land — Erroneous decree.— A decree directing a sale of attached land for cash, unless under very peculiar circumstances, which directs payment of the money to the creditor and conveyance of the land to the purchaser before the sale shall have been reported to and confirmed by the court, is erroneous. Brien *v.* Pittman, 12 Leigh (Va.) 379.

Where legal title held by trustees.—Where only the equitable title to attached realty is held by defendant, the land will not be sold in the absence of the trustees who hold the legal title. They must either be served with process, or if non-residents an order of publication or for service without the state must issue against them and be duly published or served. Chapman *v.* Pittsburgh, etc., R. Co., 18 W. Va. 184.

Kentucky — When sale of land ordered.— In Kentucky the court cannot regularly order the sale of attached land until plaintiff files an affidavit that defendant has not personal property sufficient to satisfy plaintiff's claim (Davidson *v.* Simmons, 11 Bush (Ky.) 330; Jackson *v.* McElroy, 2 Bush (Ky.) 132); but the making of an order of sale before such affidavit is filed does not make the judgment void or affect the lien of the attachment (Fremd *v.* Ireland, 17 Ky. L. Rep. 1140, 33 S. W. 89).

Louisiana — Need not decree privilege.— To entitle an attachment creditor to be paid out of the property attached, it is not essential that the judgment should decree a privilege upon the property. A judgment decreeing that the debt be paid out of the property attached is equivalent to a judgment decreeing a privilege. Harmon *v.* Juge Fils, 6 La. Ann. 768.

74. Beall *v.* Barclay, 10 B. Mon. (Ky.) 261; Hillman *v.* Werner, 9 Heisk. (Tenn.) 586; Staunton *v.* Harris, 9 Heisk. (Tenn.) 579.

Sufficient order.— Where two mules were levied upon, it was held that, on judgment for plaintiff, an order for a special execution against the attached property was proper without making a specific order for each. Meincke *v.* Bracksieck, 14 Mo. App. 315.

Failure to describe land.— Where a judgment directed a sale of half of a city lot attached, without stating which half, and the return of the attachment also failed to show which half was attached, it was held that parol evidence was not admissible to show that fact, and the judgment was void for uncertainty. Porter *v.* Byrne, 10 Ind. 146, 71 Am. Dec. 305. Where a judgment foreclosing an attachment lien and an order of sale issued thereunder describes the land to be sold simply as part of designated lots, without identifying the part, a sale under the same is void. McDonald *v.* Red River County Bank, 74 Tex. 539, 12 S. W. 235.

Sufficient description of land.— It has been held that a judgment which recited the land attached to be all of defendant's one third interest in the south side addition to the city of G, in W county sufficiently described the property to fix the lien thereupon, where the petition described the land by metes and bounds as containing thirty-eight and sixty-eight one-hundredths acres, and alleged that the owner platted the same into lots and blocks, styled the "South Side Addition to Georgetown, Texas," and defendant in his pleading admitted that the South Side Addition constituted all the land specified in complainant's petition. Glasscock *v.* Price, (Tex. Civ. App. 1898) 45 S. W. 415.

Oregon.— Imperfect description does not discharge lien.—Where property has been attached, the fact that the judgment and order of sale contained an imperfect description of the property did not operate as a discharge of the lien of attachment. Gerdes *v.* Sears, 13 Oreg. 358, 10 Pac. 631.

75. Blue Grass Canning Co. *v.* Wardman, 103 Tenn. 179, 52 S. W. 137; Walker *v.* Houston, (Tex. Civ. App. 1895) 29 S. W. 1139.

As to priorities in general see *supra*, XII, B.

Where interplea pending.—Where property attached was interpleaded for under the Arkansas act of Jan. 9, 1861, and the judgment went against defendant in the original suit, it should be against him with an order

4. AMOUNT OF RECOVERY. Where no jurisdiction has been obtained over defendant's person, a judgment in attachment, for a greater amount than that claimed in the affidavit, with interest,[76] is usually regarded as erroneous,[77] although not absolutely void;[78] but the recovery of a less amount than that claimed in the affidavit will not invalidate the attachment.[79] Where personal jurisdiction has been obtained it seems that plaintiff's recovery is not limited by the amount claimed in the affidavit.[80]

5. TIME OF ENTRY — a. Judgment by Default. Usually it is not permissible to enter a final judgment by default against a defendant in attachment who has not been personally served until the lapse of a specified time after the execution of the writ;[81] but it seems that a judgment rendered before such time has elapsed is erroneous only and not void.[82]

b. Where Action on Immatured Demand. Where, by statute, attachment is

of execution against the property attached in the event the interplea should be determined in favor of plaintiff. Adams *v.* Hobbs, 27 Ark. 1.

76. Right to interest.— It is not erroneous to add interest to the amount claimed in the affidavit if the debt be of a nature to carry interest. Empire Car-Roofing Co. *v.* Macey, 115 Ill. 390, 3 N. E. 417; Henrie *v.* Sweasey, 5 Blackf. (Ind.) 273; Rose *v.* Palmer, 74 Mich. 332, 41 N. W. 1080; Briggs *v.* Lane, 1 Tex. App. Civ. Cas. § 961. But see George *v.* Blue, 3 Call (Va.) 455; Moody *v.* Athens First Nat. Bank, (Tex. Civ. App. 1899) 51 S. W. 523.

77. Forsyth *v.* Warren, 62 Ill. 68; Hobson *v.* Emporium Real Estate, etc., Co., 42 Ill. 306; Hichins *v.* Lyon, 35 Ill. 150; Rowley *v.* Berrian, 12 Ill. 198; Henrie *v.* Sweasey, 5 Blackf. (Ind.) 273; Rose *v.* Palmer, 74 Mich. 332, 41 N. W. 1080 (where it was held that if judgment were taken for a greater amount than that claimed in the affidavit, and plaintiff did not remit the excess, mandamus would lie to compel the granting of a new trial).

Demand not included in affidavit.—The application for an attachment stated that the indebtedness arose upon a contract, whereby the defendants were to sell certain merchandise delivered to them, and account for and pay over the proceeds to the applicants. It was held that a demand for money advanced to defendants could not properly be included in the judgment. Renard *v.* Hargous, 2 Duer (N. Y.) 540.

Demands not existing at time of levy.— The creditor and debtor cannot by agreement increase creditor's claim by including in the judgment demands not in existence at the time of the levy. Oconto Co. *v.* Esson, (Wis. 1901) 87 N. W. 855.

Amount claimed in notice by publication.— Where defendant is summoned by publication but does not appear, judgment cannot be rendered for an amount greater than that claimed in the publication. Alpine Cotton Mills *v.* Weil, 129 N. C. 452, 40 S. E. 218.

Kansas — Judgment for costs.—Where, in an attachment action, the judgment is for the recovery of so much money with the costs of the action and the sale of the attached property, the judgment for costs is a lien on the attached property and may be enforced by an order of sale. Merwin *v.* Hawker, 31 Kan. 222, 1 Pac. 640.

Texas — Damages and costs of suit.— Under the Texas statutes, although a writ of attachment be issued for the amount of the debt only, the judgment ordering the sale may include enough to satisfy damages and the costs of suit. The same rule applies as in the foreclosure of mortgage and other liens. Piggott *v.* Schram, 64 Tex. 447.

78. Palmer *v.* Riddle, 180 Ill. 461, 54 N. E. 227, where it was held that such a judgment was admissible in a collateral proceeding.

79. De Stafford *v.* Gartley, 15 Colo. 32, 24 Pac. 580; Williams *v.* Louisiana Lumber Co., 105 La. 99, 29 So. 491; Dirickson *v.* Showell, 79 Md. 49, 28 Atl. 896; Lee *v.* Tinges, 7 Md. 215. And see Dawson *v.* Brown, 12 Gill & J. (Md.) 53.

80. Creighton *v.* Kerr, 1 Colo. 509; Pew *v.* Yoare, 12 Mich. 16. But see Tilton *v.* Cofield, 2 Colo. 392.

81. *Alabama.*— Central Min., etc., Co. *v.* Stoven, 45 Ala. 594; Standifer *v.* Toney, 43 Ala. 70; Letondal *v.* Huguenin, 26 Ala. 552.

Delaware.— Geylin *v.* De Villeroi, 2 Houst. (Del.) 203.

Maryland.— Walters *v.* Munroe, 17 Md. 501.

Mississippi.— Saffaracus *v.* Bennett, 6 How. (Miss.) 277.

Pennsylvania.— Lane *v.* White, 140 Pa. St. 99, 21 Atl. 437; Wallace *v.* Scholl, 9 Pa. Super. Ct. 284; Artman *v.* Adams, 11 Wkly. Notes Cas. (Pa.) 339; Shuster *v.* Bonner, 7 Wkly. Notes Cas. (Pa.) 17.

Tennessee.— Rumbough *v.* White, 11 Heisk. (Tenn.) 260; Sorrels *v.* Wiley, 6 Heisk. (Tenn.) 318; Claybrook *v.* Wade, 7 Coldw. (Tenn.) 555; Swan *v.* Roberts, 2 Coldw. (Tenn.) 153; Porter *v.* Partee, 7 Humphr. (Tenn.) 168.

Wisconsin — First default.— In Slaughter *v.* Bevans, 1 Pinn. (Wis.) 348, it was held that the entry of the first default in attachment without publication of notice, or before proof of publication was filed, was not error.

82. Morey *v.* Hoyt, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611; Calhoun *v.* Ware, 34 Miss. 146; Porter *v.* Partee, 7 Humphr. (Tenn.) 168. See, generally, JUDGMENTS.

allowed to issue for an immatured demand,[83] judgment cannot be rendered in the action, without defendant's consent or express statutory authority, until the demand matures.[84] Where the immatured portion of the demand sued upon becomes due before the trial of the cause it may properly be included in the judgment.[85]

XVII. PROCEEDINGS IN AID OF ATTACHMENT.

A. In General. Provision is commonly made by statute for proceedings to aid and supplement the remedy by attachment, the most usual of these being the process of garnishment.[86] In some jurisdictions the court has power to compel defendant to make disclosure as to property which the sheriff has been unable to seize, and to order it delivered to the sheriff,[87] and sometimes the attaching officer is authorized by statute to sue for and collect promissory notes and other evidences of indebtedness attached by him.[88] In New York it has been held

83. **Right to attachment where demand not due** see *supra*, VI, D.

84. *Alabama.*— Jones *v.* Holland, 47 Ala. 732; Allen *v.* Claunch, 7 Ala. 788; Ware *v.* Todd, 1 Ala. 199.

Iowa.— Crew *v.* McClung, 4 Greene (Iowa) 153.

Kansas.— Miller *v.* Wichita Overall, etc., Mfg. Co., 53 Kan. 75, 35 Pac. 799.

Missouri.— Hamilton *v.* McClelland, 33 Mo. 315.

Nebraska.— Cox *v.* Peoria Mfg. Co., 42 Nebr. 660, 60 N. W. 933.

New Mexico.— Staab *v.* Hersch, 3 N. M. 153, 3 Pac. 248.

Tennessee.— Howell *v.* Cobb, 2 Coldw. (Tenn.) 104, 88 Am. Dec. 591.

Texas.— Rabb *v.* White, (Tex. Civ. App. 1898) 45 S. W. 850; King *v.* Frazer, 2 Tex. App. Civ. Cas. § 788; Mack *v.* James, 1 Tex. App. Civ. Cas. § 547.

Wisconsin.— Rice *v.* Jerenson, 54 Wis. 248, 11 N. W. 549.

Wyoming.— Crain *v.* Bode, 5 Wyo. 255, 39 Pac. 747.

See 5 Cent. Dig. tit. "Attachment," § 742.

Error not waived by offer to pay debt.— Error in rendering a judgment in attachment before the debt became due is not waived by defendant's offer, on the day of the rendition of the judgment, to pay the debt. Crain *v.* Bode, 5 Wyo. 255, 39 Pac. 747.

It is only by virtue of the attachment act that an action can be maintained on a claim not due; and where the attachment issues against one only of two joint defendants on such a demand, the action is premature as to the other and a judgment by default is erroneous as to him. Terry *v.* Curd, etc., Mfg. Co., 66 Miss. 394, 6 So. 229.

Effect of quashing attachment.—Where an attachment is issued for a debt not yet due, such being the only method of proceeding to collect the debt, the action fails when the attachment is quashed; but if the debt matures pending the decision of the attachment plaintiff may amend his petition and by that means succeed in his action for the debt. Culbertson *v.* Cabeen, 29 Tex. 247.

85. Devlan *v.* Wells, 65 N. J. L. 213, 47 Atl. 467; Rollins *v.* Kahn, 66 Wis. 658, 29 N. W. 640.

86. See, generally, GARNISHMENT.

In New York there is no proceeding technically known as garnishment, but the statutes regulating attachments contain provisions designed to accomplish the same ends as the ordinary garnishment proceedings, and it has been deemed expedient to treat such matters under that title.

87. Lutz *v.* Aylesworth, 66 Iowa 629, 24 N. W. 245; Bivins *v.* Harris, 8 Nev. 153; Senter *v.* Mitchell, 5 McCrary (U. S.) 147, 16 Fed. 206 (construing Arkansas statute).

State statutes applicable to federal courts. — The remedies given by state law to suitors in the state courts, supplementary to writs of attachment for discovery of the debtor's property, are applicable to suitors in the federal courts, and may be enforced at law or in equity, according as the state law provides. Senter *v.* Mitchell, 5 McCrary (U. S.) 147, 16 Fed. 206, construing Arkansas statute.

Defendant need not incriminate himself.— Defendant cannot be compelled to answer a question which would subject him to a criminal prosecution. Brannon *v.* Ruddy, 8 Pa. Co. Ct. 176.

California — Cannot order surrender of property.— The provision of Cal. Code Civ. Proc. § 545, to the effect that defendant may also be required to attend the examination of a garnishee for the purpose of giving information respecting his property, does not look to the entry of an order directing him to surrender property in his own possession, but merely to give such information, under oath or otherwise, as will facilitate the examination of the garnishee. *Ex p.* Rickleton, 51 Cal. 316.

New Jersey — Auditor cannot compel discovery.—Where an attachment defendant has appeared under New Jersey Revision, p. 48, § 38, without giving bond, the auditor appointed has no power to proceed under section 46 for the discovery of other property of defendant. Jackson *v.* Johnson, 51 N. J. L. 457, 17 Atl. 959.

88. Rohrer *v.* Turrill, 4 Minn. 407, promissory notes fraudulently assigned.

Actions for disturbance of the sheriff's possession see *supra*, XIII, C, 8.

Books of account are not such evidence of

that the sheriff may sue to set aside a fraudulent transfer by the attachment debtor.[89]

B. Equitable Relief. While it is not usually the duty of a court of equity to aid an attaching creditor until all his legal remedies are exhausted,[90] yet equity will intervene where it is clear that plaintiff's only remedy is equitable.[91] Thus, where proper grounds for interference are shown, equity will afford the attaching creditor relief against fraudulent conveyances;[92] will entertain a bill for an accounting[93] or to remove clouds from a title;[94] will grant an injunction to prevent the debtor from committing waste upon attached land,[95] or in some cases

debts that the seizure of them by an officer under an attachment will enable him to maintain an action therefor. Brower *v.* Smith, 17 Wis. 410.

Right to set off counter-indebtedness.— In an action by the sheriff to collect a note in which attachment debtor is payee, the maker may set off a counter-indebtedness of attachment debtor. Nicholls *v.* Hill, 42 S. C. 28, 19 S. E. 1017.

Missouri — Notice as condition precedent. — Where the sheriff brings an action under Mo. Rev. Code (1855), p. 250, § 41, to collect a promissory note attached by him, the notice required by section 39 to be given to the obligors is not a condition precedent to the bringing of the action, the statutory requirements in that regard being merely directory. Choate *v.* Noble, 31 Mo. 341.

South Carolina —Where motion to vacate pending.— An action by a sheriff, under S. C. Code, § 254, on a note seized on attachment, is not premature because brought while a motion to vacate the attachment is pending. Nicholls *v.* Hill, 42 S. C. 28, 19 S. E. 1017.

89. Harding *v.* Elliott, 91 Hun (N. Y.) 502, 36 N. Y. Suppl. 648, 71 N. Y. St. 599, 25 N. Y. Civ. Proc. 294.

Actions by the officer or creditor to recover property or debts in hands of third person under the New York statutes see GARNISHMENT.

90. Pearce *v.* Jennings, 94 Ala. 524, 10 So. 511; Secor *v.* Witter, 39 Ohio St. 218; Endel *v.* Leibrock, 33 Ohio St. 254. In McPherson *v.* Snowden, 19 Md. 197, the court was doubtful whether a court of equity had power to pass any order to aid or perfect the remedy by attachment, where for any cause it was not full and complete, such remedy being purely statutory and the jurisdiction being exclusively in a court of law.

91. Kimbro *v.* Clark, 17 Nebr. 403, 22 N. W. 788; Falconer *v.* Freeman, 4 Sandf. Ch. (N. Y.) 565; Secor *v.* Witter, 39 Ohio St. 218; Rowan *v.* Union Arms Co., 36 Vt. 124.

Alabama — Equitable attachment.—When a creditor files a bill in equity against his debtor under the Alabama act of 1846, giving an attachment in chancery in certain cases, the jurisdiction of the court is not limited to the condemnation of the property seized under the attachment. If the court has once rightfully obtained jurisdiction it may render the same effectual to complainant's relief by sending out its process, upon a proper application, or widening the sphere of its action, so as to embrace and subject property enough to satisfy his demand. Shearer *v.* Loftin, 26 Ala. 703.

92. *New Hampshire.*— Dodge *v.* Griswold, 8 N. H. 425.

New Jersey.— Francis *v.* Lawrence, 48 N. J. Eq. 508, 22 Atl. 259; Curry *v.* Glass, 25 N. J. Eq. 108; Robert *v.* Hodges, 16 N. J. Eq. 299; Williams *v.* Michenor, 11 N. J. Eq. 520; Hunt *v.* Field, 9 N. J. Eq. 36, 57 Am. Dec. 365.

New Mexico.— Talbott *v.* Randall, 3 N. M. 226, 5 Pac. 533.

New York.— Mechanics', etc., Bank *v.* Dakin, 51 N. Y. 519; Falconer *v.* Freeman, 4 Sandf. Ch. (N. Y.) 565.

Wisconsin.— Evans *v.* Laughton, 69 Wis. 138, 33 N. W. 573; Nassauer *v.* Techner, 65 Wis. 388, 27 N. W. 40; Breslauer *v.* Geilfuss, 65 Wis. 377, 27 N. W. 47.

See, generally, CREDITORS' SUITS; FRAUDULENT CONVEYANCES.

Before service of writ.— In Quarl *v.* Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662, it was held that a creditor contemplating the service of his writ of attachment had a right to invoke the aid of equity to have a fraudulent assignee's title overthrown and all questions of ownership settled.

Missouri — Need not exhaust remedies at law.— Under Mo. Rev. Stat. (1889), § 571, an attaching creditor, who by reason of the levy of the attachment has acquired a lien on the property, may maintain an action to set aside any fraudulent conveyance or other lien without first exhausting his remedies at law. Bangs Milling Co. *v.* Burns, 152 Mo. 350, 53 S. W. 923; Mansur, etc., Implement Co. *v.* Jones, 143 Mo. 253, 45 S. W. 41; Ridenour-Baker Grocery Co. *v.* Monroe, 142 Mo. 165, 43 S. W. 633; Woodson *v.* Carson, 135 Mo. 521, 35 S. W. 1005, 37 S. W. 197; Boland *v.* Ross, 120 Mo. 208, 25 S. W. 524; Morgan Mach. Co. *v.* Ranch, 84 Mo. App. 514; Seymour Mfg. Co. *v.* Sheahan, 13 Mo. App. 577; Lackland *v.* Smith, 5 Mo. App. 153. So, too, in New York, where the suit is brought by the sheriff without joining the attachment plaintiff, under N. Y. Code Civ. Proc. §§ 655, 677.

93. Rowan *v.* Union Arms Co., 36 Vt. 124. See, generally, ACCOUNTS AND ACCOUNTING, 1 Cyc. 416 *et seq.*

94. Voss *v.* Murray, 50 Ohio St. 19, 32 N. E. 1112. See, generally, QUIETING TITLE.

95. Camp *v.* Bates, 11 Conn. 51, 27 Am. Dec. 707; Moulton *v.* Stowell, 16 N. H. 221.

to prevent the sale of the attached property under a void judgment;[96] but a suit in equity cannot be maintained in aid of an attachment at law where it has been decided in a prior suit, to which complainant was a party, that his attachment was ineffectual to give him any lien.[97]

XVIII. WRONGFUL ATTACHMENT.

A. Under Irregular or Void Process — 1. Liability Where Process Is Irregular. Where an attachment is irregular or merely voidable, it will nevertheless protect attachment plaintiff, or other parties acting under it, until set aside,[98] but after it has been set aside it affords no protection to the party at whose interest it was issued. He becomes a trespasser *ab initio* by relation.[99]

2. Liability Where Process Is Void. Where an attachment is for any reason void [1] attachment plaintiff will be a trespasser *ab initio* and liable to attachment defendant for any damages resulting therefrom,[2] and there is no necessity for setting it aside before bringing an action for acts done under it.[3]

3. Proceedings to Enforce Liability — a. Nature and Form of Action. An action for damages against one causing property to be taken under a void attachment has been held to be in substance an action for trespass *de bonis asportatis*.[4] It has been held, however, that where the writ is merely irregular or voidable, an action on the case is the proper and the only remedy.[5]

96. Wood *v.* Stanberry, 21 Ohio St. 142; Blum *v.* Schram, 58 Tex. 524.

97. Montgomery *v.* McDermott, 99 Fed. 502.

98. Day *v.* Bach, 87 N. Y. 56.

99. McFadden *v.* Whitney, 51 N. J. L. 391, 18 Atl. 62; Day *v.* Bach, 87 N. Y. 56; Kerr *v.* Mount, 28 N. Y. 659; Lyon *v.* Yates, 52 Barb. (N. Y.) 237.

1. **Want of jurisdiction for absence of affidavit.**— An attachment without an affidavit therefor is void and plaintiff is liable as a trespasser thereunder for the seizure and sale of property, and that too although the actual trespass may have been committed by the attaching officer. Norman *v.* Horn, 36 Mo. App. 419.

Where first name of attachment defendant is fictitious.— Where an attachment issues against the property of a person whose first name appears on the face thereof as fictitious, the attachment and all proceedings thereunder are absolutely void, and attachment plaintiff will be liable for the conversion thereof. Patrick *v.* Solinger, 9 Daly (N. Y.) 149.

Writ issued without allowance by judge.— Parties who instruct a sheriff to levy a writ of attachment issued by the clerk without an allowance thereof by the judge are liable as trespassers for the acts thereunder, for as to such parties the writ so issued is void. Merritt *v.* St. Paul, 11 Minn. 223.

2. *Alabama.*— Stetson *v.* Goldsmith, 30 Ala. 602, 31 Ala. 649.

Illinois.— Thomas *v.* Hinsdale, 78 Ill. 259.

Kansas.— Gregory Grocery Co. *v.* Beaton, (Kan. App. 1900) 62 Pac. 732.

Minnesota.— Merritt *v.* St. Paul, 11 Minn. 223.

Missouri.— Norman *v.* Horn, 36 Mo. App. 419.

New Jersey.— McFadden *v.* Whitney, 51 N. J. L. 391, 18 Atl. 62.

New York.— Day *v.* Bach, 87 N. Y. 56; Wehle *v.* Butler, 61 N. Y. 245; Kerr *v.* Mount, 28 N. Y. 659; Vose *v.* Wood, 26 Hun (N. Y.) 486; Sprague *v.* Parsons, 12 Daly (N. Y.) 392, 6 N. Y. Civ. Proc. 26, 14 Abb. N. Cas. (N. Y.) 320; Patrick *v.* Solinger, 9 Daly (N. Y.) 149.

Oregon.— Morrison *v.* Crawford, 7 Oreg. 472.

Tennessee.— Stewart *v.* Roberts, 1 Yerg. (Tenn.) 386.

Texas.—Mississippi Mills *v.* Meyer, 83 Tex. 433, 18 S. W. 748; Punchard *v.* Taylor, 23 Tex. 424.

See 5 Cent. Dig. tit. "Attachment," § 1307.

If void attachments secured by different parties are levied at the same time, all the parties are liable as trespassers. Wehle *v.* Butler, 61 N. Y. 245; Vose *v.* Woods, 26 Hun (N. Y.) 486.

3. Day *v.* Bach, 87 N. Y. 56.

Where process is void and is afterward set aside, attachment plaintiff is liable for injuries caused by the negligence of the attaching officer. In such case the officer is his agent or servant, and he is liable for any injury to the goods caused by the officer's negligence or careless acts while such goods are in his possession. Kerr *v.* Mount, 28 N. Y. 659.

4. Kerr *v.* Mount, 28 N. Y. 659; Stewart *v.* Roberts, 1 Yerg. (Tenn.) 386.

5. Bach *v.* Cook, 21 Ark. 571. See also Hayden *v.* Shed, 11 Mass. 500, where it is held that case and not trespass is the proper action for one whose goods have been attached upon a writ which was afterward abated, because another suit was pending for the same cause of action.

b. Parties. Where several persons place void writs in the hands of an officer and have them levied at the same time, they may be sued either jointly[6] or severally.[7]

c. Pleadings. There is no necessity of alleging malice or want of probable cause,[8] nor is it necessary to allege the place of levy.[9] If the action is based on the ground that the attachment was void it will not be sufficient as showing this fact to allege that the attachment was illegal, unauthorized, and void.[10] So, if the basis of the action is that the attachment was irregularly sued out, it will not be sufficient to allege merely that it was vacated.[11]

d. Matters of Defense and in Mitigation — (I) *Subsequent Seizure by Attachment Plaintiff.* It has been held that where property is seized under a void attachment, a subsequent seizure thereof by attachment plaintiff under valid process, whether a second writ of attachment or an execution, and application of the property so seized to the payment of the owner's debt without his consent, cannot be shown either in defense or in mitigation of damages for the wrongful attachment.[12]

(II) *Subsequent Seizure by Third Person.* It has been held, however, that where property is taken by the wrongful act of one person, its subsequent seizure upon process issued in favor of another against the owner, by which it is appropriated to the payment of his debt, is a circumstance which may be received in mitigation of the liability of the wrong-doer.[13]

(III) *Return of Property.* If the property has been returned and retained by the owner, this may be shown in mitigation of damages,[14] but not in bar of the action for the wrong.[15]

B. Under Regular Process — 1. Right of Action — a. Irrespective of Statutory Authority. It has been held in many cases that no action lies, in the absence of express or implied statutory authority, for injuries caused by the mere wrongful suing out of an attachment,[16] but that to give a cause of action it is

6. Wehle *v.* Butler, 61 N. Y. 245; Vose *v.* Woods, 26 Hun (N. Y.) 486.

7. Wehle *v.* Butler, 61 N. Y. 245.

8. Sprague *v.* Parsons, 12 Daly (N. Y.) 392, 6 N. Y. Civ. Proc. 26, 14 Abb. N. Cas. (N. Y.) 320.

9. Vose *v.* Woods, 26 Hun (N. Y.) 486, holding that such an allegation will not vitiate the complaint.

10. Sprague *v.* Parsons, 13 Daly (N. Y.) 553 [*affirming* 12 Daly (N. Y.) 392, 6 N. Y. Civ. Proc. 26, 14 Abb. N. Cas. (N. Y.) 320], holding this to be a statement of a conclusion of law not a statement of fact.

11. It might have been vacated for error upon a question of fact upon opposing affidavits, and, unless unauthorized or irregular, an action for damages not brought upon the undertaking could not be maintained. It should be shown that the attachment was vacated for irregularity. Sprague *v.* Parsons, 13 Daly (N. Y.) 553.

12. Tiffany *v.* Lord, 65 N. Y. 310; Wehle *v.* Butler, 61 N. Y. 245; Lyon *v.* Yates, 52 Barb. (N. Y.) 237; Otis *v.* Jones, 21 Wend. (N. Y.) 394; Hanmer *v.* Wilsey, 17 Wend. (N. Y.) 91.

The rule is not altered by the fact that an offer was made to restore the property on discovering that the first attachment was invalid. Hanmer *v.* Wilsey, 17 Wend. (N. Y.) 91. "By procuring a sale on legal process, the defendant cannot be better off than he would be if he had offered to restore the property to the plaintiff. And yet no tender will, at the common law, either bar an action for a tort, or take away the right to full compensation." Otis *v.* Jones, 21 Wend. (N. Y.) 394, 396.

In Oregon the rule is not so stringent. While attachment plaintiff cannot make a complete defense by showing that he caused a subsequent valid writ to be levied on the property for the owner's debt, and that it was applied to such debt, this may nevertheless be shown in mitigation of damages. Morrison *v.* Crawford, 7 Oreg. 472.

13. Wehle *v.* Butler, 61 N. Y. 245; Wehle *v.* Spelman, 25 Hun (N. Y.) 99, 100, where it is said: "But to be attended with that effect it is essential that the person under whose process such seizure may be made shall not be in collusion with the wrong-doer, or a participator with him in the commission of the original wrongful act."

14. McFadden *v.* Whitney, 51 N. J. L. 391, 18 Atl. 62; Lyon *v.* Yates, 52 Barb. (N. Y.) 237.

15. Kerr *v.* Mount, 28 N. Y. 659. See also Hanmer *v.* Wilsey, 17 Wend. (N. Y.) 91.

16. *Alabama.*— McKellar *v.* Couch, 34 Ala. 336. See also Benson *v.* McCoy, 36 Ala. 710. But see *infra*, note 19.

Georgia.— Wilcox *v.* McKenzie, 75 Ga. 73; Sledge *v.* McLaren, 29 Ga. 64.

Iowa.— Frantz *v.* Hanford, 87 Iowa 469, 54 N. W. 474; Tallant *v.* Burlington Gaslight Co., 36 Iowa 262.

also essential that the process should have been sued out maliciously and without probable cause.[17] In a few states, however, the contrary rule prevails.[18]

b. When Authorized by Statute. In a majority of states statutes have been enacted under which at least actual damages are recoverable for injuries sustained by an attachment which is merely wrongful, and the procedure by which such

Massachusetts.— Lindsay *v.* Larned, 17 Mass. 190.

Nebraska.— Jones *v.* Fruin, 26 Nebr. 76, 42 N. W. 283. See also Storz *v.* Finklestein, 48 Nebr. 27, 66 N. W. 1020, 30 L. R. A. 644. But see McReady *v.* Rogers, 1 Nebr. 124, 93 Am. Dec. 333, which apparently sustains the opposite doctrine.

New Jersey.— McFadden *v.* Whitney, 51 N. J. L. 391, 18 Atl. 62.

New York.— Hess *v.* Hess, 117 N. Y. 306, 22 N. E. 956, 27 N. Y. St. 346.

North Carolina.— Williams *v.* Hunter, 10 N. C. 545, 14 Am. Dec. 597. But see *infra*, note 17.

Ohio.— Zigler *v.* Russell, 2 Ohio Dec. (Reprint) 518, 3 West. L. Month. 424; Withan *v.* Hubbell, 4 Ohio Dec. (Reprint) 75, Clev. L. Rec. 1.

Oregon.— Mitchell *v.* Silver Lake Lodge, 29 Oreg. 294, 45 Pac. 798.

Pennsylvania.— See McCullough *v.* Grishobber, 4 Watts & S. (Pa.) 201, an action for an abuse of process, but which sustains the doctrine stated in the text.

Tennessee.— Sloan *v.* McCracken, 7 Lea (Tenn.) 626; Smith *v.* Eakin, 2 Sneed (Tenn.) 456; Smith *v.* Story, 4 Humphr. (Tenn.) 168.

Virginia.—Young *v.* Gregorie, 3 Call (Va.) 446, 2 Am. Dec. 556.

Wisconsin.— Collins *v.* Shannon, 67 Wis. 441, 30 N. W. 730. See also Veitch *v.* Cebell, 105 Wis. 260, 81 N. W. 411, 76 Am. St. Rep. 912, a garnishment case which clearly sustains the rule stated in the text.

United States.— Preston *v.* Cooper, 1 Dill. (U. S.) 589, 19 Fed. Cas. No. 11,395. See also Stewart *v.* Sonneborn, 98 U. S. 187, 25 L. ed. 116, an action for wrongful institution of bankruptcy proceedings, which strongly supports the rule stated in the text.

17. From the earliest period, it has been uniformly held that there is no right of action growing out of a criminal prosecution or of an arrest of the person in a civil action, in the absence of malice and want of probable cause, however much the party may have been injured thereby. *A fortiori* it would seem that there can be no right of action for injuries caused by a mere wrongful seizure of property, which the law accounts the lesser injury of the two. See Stewart *v.* Sonneborn, 98 U. S. 187, 25 L. ed. 116, and the dissenting opinion in Wilson *v.* Outlaw, 1 Minor (Ala.) 367.

In North Carolina, where it was formerly held that no action would lie for injuries caused by an attachment unless sued out wrongfully and without probable cause (Williams *v.* Hunter, 10 N. C. 545, 14 Am. Dec. 597), it has been held in subsequent decisions that an action might be maintained if the attachment was sued out without probable cause, although without malice (Kirkham *v.* Coe, 46 N. C. 423; Abrams *v.* Pender, 44 N. C. 260). It is not easy to determine whether a statute, then in force, requiring attachment plaintiff to give a bond had any effect on the decisions or not. In the first of the two decisions cited no reference was made to any statute, but in the latter it might with some degree of plausibility be argued that the court considered that a statute requiring attachment plaintiff to give a bond to pay all damages caused by the attachment if "wrongfully sued out" imposed a liability on him for such damages, independently and exclusively of the bond. In Kirkham *v.* Coe, 46 N. C. 423, 429, the court said: "The bond which the Statute requires is to provide against wrongfully suing out the attachment, which does not embrace the idea of malice, except so far as it may have a tendency to aggravate the wrong of causing loss to another, by having his property seized without probable cause."

18. Horn *v.* Bayard, 11 Rob. (La.) 259. See also Steinhardt *v.* Leman, 41 La. Ann. 835, 6 So. 665; Barrimore *v.* McFeely, 32 La. Ann. 1179; Dickinson *v.* Maynard, 20 La. Ann. 66, 96 Am. Dec. 379; Phelps *v.* Coggeshall, 13 La. Ann. 440; Biggs *v.* D'Aquin, 13 La. Ann. 21; Sanders *v.* Hughes, 2 Brev. (S. C.) 495; Half *v.* Curtis, 68 Tex. 640, 643, 5 S. W. 451, where it is said: "The rule that an action to recover actual damages for the wrongful suing out and levy of a writ of attachment must be based on the attachment bond has never been recognized in this State. The constant practice has been to permit the recovery of actual damages on a counter claim or plea in reconvention whenever it appeared that the writ was wrongfully sued out and levied, and so without basing the defendant's pleadings on the attachment bond." See also Cox *v.* Trent, (Tex. Civ. App. 1896) 34 S. W. 764; Kaufman *v.* Armstrong, 74 Tex. 65, 11 S. W. 1048; Kauffman *v.* Babcock, 67 Tex. 241, 2 S. W. 878; Craddock *v.* Goodwin, 54 Tex. 578; Reed *v.* Samuels, 22 Tex. 114, 73 Am. Dec. 253; Bateman *v.* McCreight, 2 Tex. Unrep. Cas. 309.

Reconvention or counter-claim in principal action.— In Louisiana and Texas such damages are also recoverable in the principal action by way of reconvention or counter-claim. Bloch *v.* His Creditors, 46 La. Ann. 1334, 16 So. 267; Offutt *v.* Edwards, 9 Rob. (La.) 90. See also Culbertson *v.* Cabeen, 29 Tex. 247; Reed *v.* Samuels, 22 Tex. 114, 73 Am. Dec. 253; Walcott *v.* Hendrick, 6 Tex. 406.

damages are to be recovered is prescribed either expressly or by implication.[19] In other jurisdictions the statutes are not so broad, and to authorize a recovery, while malice is not necessary, it is essential that the attachment should have been sued out without probable cause as well as wrongfully.[20]

2. ELEMENTS OF LIABILITY — a. In General. A suit cannot be maintained because of the suing out of an attachment unless it was wrongful.[21] According to a number of decisions, moreover, the fact that the attachment was applied for and issued creates no cause of action, unless the same was actually levied, although the issue may have been wrongful;[22] and it has also been held that no action for

19. *Alabama.*—Birmingham Dry Goods Co *v.* Finley, 122 Ala. 534, 26 So. 138; Hundley *v.* Chadick, 109 Ala. 575, 19 So. 845; McLane *v.* McTighe, 89 Ala. 411, 8 So. 70; Jackson *v.* Smith, 75 Ala. 97; City Nat. Bank *v.* Jeffries, 73 Ala. 183; Pollock *v.* Gantt, 69 Ala. 373, 44 Am. Rep. 519; Durr *v.* Jackson, 59 Ala. 203; Floyd *v.* Hamilton, 33 Ala. 235; McCullough *v.* Walton, 11 Ala. 492.

Louisiana.— Phelps *v.* Coggeshall, 13 La. Ann. 440.

Mississippi.— Barney *v.* Scherling, 40 Miss. 320; Feld *v.* Portwood, (Miss. 1890) 7 So. 492.

Ohio.— Bruce *v.* Coleman, 1 Handy (Ohio) 515, 12 Ohio Dec. (Reprint) 265.

Tennessee.— Renkert *v.* Elliott, 11 Lea (Tenn.) 235.

Good faith or want of probable cause.— Good faith or the absence of it on the part of attachment plaintiff (Birmingham Dry Goods Co. *v.* Finley, 122 Ala. 534, 26 So. 138), or the question of want of probable cause in suing out the issue is immaterial and has no bearing on the liability of attachment plaintiff in such cases (Barney *v.* Scherling, 40 Miss. 320). See also cases cited *supra*, this note.

Wrongful and oppressive attachment.— Under Ind. Rev. Stat. § 937, which requires the giving of a bond conditioned to prosecute the proceeding in attachment to effect and pay all damages which may be sustained by defendant, if the proceeding shall be "wrongful and oppressive," the proceeding must have been wrongful and oppressive to render attachment plaintiff liable for damages. Uppinghouse *v.* Mundel, 103 Ind. 238, 2 N. E. 719. But the attachment will be conclusively presumed to be wrongful and oppressive when it has been dissolved (Waring *v.* Fletcher, 152 Ind. 620, 52 N. E. 203); or where final judgment in the main suit is rendered in favor of attachment defendant (Trentman *v.* Wiley, 85 Ind. 33).

20. McCormick Harvesting Mach. Co. *v.* Colliver, 75 Iowa 559, 39 N. W. 892; Nordhaus *v.* Peterson, 54 Iowa 68, 6 N. W. 77; Levy *v.* Fleischner, 12 Wash. 15, 40 Pac. 384; Iowa Code (1897), §§ 3885, 3887; Ballinger's Anno. Codes Stats. Wash. (1897), §§ 5355, 5357; W. Va. Code (1899), p. 522, § 194.

In Kentucky, a statute which provides that if property be attached without good cause for suing it out the owner may, in an action against attachment plaintiff, recover damages for the wrongful seizure and for the sale thereof, if the property be sold, and that in such case plaintiff shall not be held to prove or allege malice on the part of defendant, authorizes an action where an attachment was issued without good cause for suing it out. Mitchell *v.* Mattingly, 1 Metc. (Ky.) 237. It is to be noted that the action provided for by this statute is not on the attachment bond. Another Kentucky statute (Bullitt's Code Ky. p. 223, § 198) provides for the giving of a bond conditioned to pay damages caused by the attachment "if it be wrongfully obtained." By the same terms of this statute it would be sufficient to give a cause of action that the attachment was wrongfully sued out.

Under these statutes, if there is reasonable cause to believe the grounds upon which the attachment was issued to be true, actual damages are recoverable. Hurlbut *v.* Hardenbrook, 85 Iowa 606, 52 N. W. 510; Seattle Crockery Co. *v.* Haley, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156.

The true issue is whether defendant as a reasonable, prudent, and careful man had good reason to believe and did believe that the allegations of the attachment affidavit were true. Drummond *v.* Stewart, 8 Iowa 341.

21. City Nat. Bank *v.* Jeffries, 73 Ala. 183; Sibley *v.* Fernie, 22 La. Ann. 163; Murphy *v.* Redler, 16 La. Ann. 1; Gallagher *v.* Goldfrank, 75 Tex. 562, 12 S. W. 964.

If an attachment is maintained there can be no cause of action for damages. Gusman *v.* De Poret, 33 La. Ann. 333; Bell *v.* Leathers [Loque Dig. La. 63].

The fact that the writ was sued out vexatiously or maliciously will not give any cause of action, unless the prosecution was groundless. There must be an unlawful act before the good or bad faith with which the act was done can become a material inquiry. Calhoun *v.* Hannan, 87 Ala. 277, 6 So. 291; Jackson *v.* Smith, 75 Ala. 97; City Nat. Bank *v.* Jeffries, 73 Ala. 183.

What law governs.— In an action for the wrongful suing out of an attachment in another state, the question whether the attachment was in fact wrongful or not must be determined by the laws of the state where it was obtained. Wiley *v.* Traiwick, 14 Tex. 662.

22. **Necessity of actual levy.**— Biering *v.* Galveston First Nat. Bank, 69 Tex. 599, 7 S. W. 90; Johnson *v.* King, 64 Tex. 226; Woods *v.* Huffman, 64 Tex. 98.

Sufficiency of constructive possession.— Defendant in an attachment which is wrongfully sued out may recover damages for being wrongfully dispossessed from the property, al-

wrongful attachment will lie where the levy is fatally defective, and for that reason amounts to no levy.[23]

b. Under What Circumstances Attachment Is Considered Wrongful. An attachment may be said to be wrongfully sued out where no debt exists;[24] where no grounds for attachment exist;[25] where, in some cases it seems, no grounds for attachment exist as to part of the debt;[26] where sued out before the debt is

though it may not have been taken by the officer into actual possession, if the levy was such as to place it in the custody of the law. Rice *v.* Miller, 70 Tex. 613, 8 S. W. 317, 8 Am. St. Rep. 630.

Sufficiency of levy without actual seizure. — If an officer with a purpose of attaching personal property obtains access to and control of it, the attachment is complete, the possession of the owner is disturbed, and an action of trespass *de bonis asportatis* will lie in his behalf if the attachment was unauthorized. Morse *v.* Hurd, 17 N. H. 246.

23. Sioux Valley State Bank *v.* Kellog, 81 Iowa 124, 46 N. W. 859. To the same effect see Graham *v.* Reno, 5 Colo. App. 330, 38 Pac. 835.

Where the levy of an attachment is invalid, for failure to give defendant notice of the levy, although the supposed levy has been entered in the encumbrance book, defendant cannot set up as a counter-claim damages sustained by him from such levy. Sioux Valley State Bank *v.* Kellog, 81 Iowa 124, 46 N. W. 859.

In Alabama, however, in Flournoy *v.* Lyon, 70 Ala. 308, it is held that injury to the credit of defendant in attachment may result from the wrongful or vexatious suing out of the writ, although there was no levy, and may be recovered as special damages in an action on the bond; but unless there was a levy defendant could not be driven to the trouble and expense of defending the suit, and could not subject plaintiff to liability for damages on account of such trouble and expense when caused by his voluntary appearance without a levy. On principle this decision seems to be correct, for it is readily conceivable that great injury to the business of a debtor might result from the wrongful suing out of an attachment although it was not levied.

24. Where an attachment is issued against a person who is not indebted to the attachment plaintiff, or against whom the attachment plaintiff has no valid claim, it is wrongfully sued out. McLane *v.* McTighe, 89 Ala. 411, 8 So. 70; Tucker *v.* Adams, 52 Ala. 254; Lockhart *v.* Woods, 38 Ala. 631; Steen *v.* Ross, 22 Fla. 480; King *v.* Kehoe, 91 Iowa 91, 58 N. W. 1071; Harger *v.* Spofford, 46 Iowa 11; Wetherell *v.* Sprigley, 43 Iowa 41; Young *v.* Broadbent, 23 Iowa 539; Petty *v.* Lang, 81 Tex. 238, 16 S. W. 999; Farrar *v.* Talley, 68 Tex. 349, 4 S. W. 558; Smith *v.* Morgan, (Tex. Civ. App. 1900) 56 S. W. 950. The class of debts or claims herein mentioned is not to be confused, however, with debts which have not matured, as attachments therefor are allowed in certain cases. See *supra*, VI, D.

Filing an amended petition setting up a subsequently accruing indebtedness does not avoid liability. Young *v.* Broadbent, 23 Iowa 539.

Good faith of attachment plaintiff does not affect the application of this rule. Tucker *v.* Adams, 52 Ala. 254.

Non-existence of debt when attachment sued out. — In attachment against a non-resident on a note, defendant answered, denying the execution of the note, whereupon plaintiff amended its petition by adding a second count for money loaned defendant, in which it alleged that such count was for the same cause of action set out in the original action, and that the money was due when suit was commenced. The jury found for plaintiff on the second count. It was held that the attachment was not wrongful on the ground that no indebtedness existed at the time it was issued, as alleged in the original petition. Cawker City State Bank *v.* Jennings, 89 Iowa 230, 56 N. W. 494.

Wrongful refusal to allow a credit. — Similarly, it has been held that where plaintiff's agent presented to defendant a bill, which the latter offered to pay if a certain undisputed credit were allowed thereon, and the agent refused the offer and immediately attached defendant's property the attachment was wrongful, and that damages were properly awarded therefor. Feld *v.* Portwood, (Miss. 1890) 7 So. 492.

25. Where no grounds for attachment exist. — An attachment is wrongful or "improper," within the meaning of a statute making attachment plaintiff liable for injuries caused by such attachment, where the ground alleged in the affidavit for attachment is untrue, or is not one of the grounds enumerated by statute which must exist before the attachment can be allowed. Steen *v.* Ross, 22 Fla. 480. The mere fact that plaintiff's claim is a just one does not entitle him to an attachment. Nordhaus *v.* Peterson, 54 Iowa 68, 6 N. W. 77; Drummond *v.* Stewart, 8 Iowa 341; Gens *v.* Hargadine, 56 Mo. App. 245; Sprague *v.* Parsons, 12 Daly (N. Y.) 392, 6 N. Y. Civ. Proc. 26, 14 Abb. N. Cas. (N. Y.) 320; Zechman *v.* Haak, 85 Wis. 656, 56 N. W. 158. See also Mississippi Mills *v.* Meyer, 83 Tex. 433, 18 S. W. 748. The claim may be just and the attachment wrongful, and even wilfully wrongful. The demand may be entirely true, and the suing out of the attachment may be wrongful, and even malicious. Nordhaus *v.* Peterson, 54 Iowa 68, 6 N. W. 77.

26. Where no grounds of attachment exist as to part of debt. — It has been held that an attachment issued for a claim which is the aggregate of several distinct claims constitut-

due;[27] where dissolved on the merits;[28] where the amount sued for is less than five dollars (under a statutory provision forbidding an attachment to issue for the enforcement of a claim less than five dollars);[29] or where attachment plaintiff's debt is amply secured,[30] or he refuses to accept reasonable security.[31] But it seems that an attachment cannot be said to be wrongfully sued out where part only of the debt for which the attachment is issued does not exist;[32] or where the attachment is dissolved for irregularities or informalities in the proceedings.[33] Neither will an action for wrongful attachment lie where the attachment is dissolved or quashed for

ing separate causes of action is wrongful, if the ground of attachment alleged does not exist as to any one or more of such claims. Estlow *v.* Hanna, 75 Mich. 218, 42 N. W. 812; Mayer *v.* Zingre, 18 Nebr. 458, 25 N. W. 727. See also Wilson *v.* Harvey, 52 How. Pr. (N. Y.) 126, where it is held that the joinder of a cause of action, for which an attachment cannot issue if standing alone, with one for which it might be issued, is ground for vacating the same. See also, generally, *supra*, XV. See also Stiff *v.* Fisher, 85 Tex. 556, 22 S. W. 577, where it is held that in a case where it does not appear that the claim consists of one indivisible cause of action or several distinct causes of action the attachment is wrongful when grounds for attachment exist only as to a small part of the claim.

Where the claim is a running account, consisting of many items, an attachment issued in a suit thereon will not be wrongful merely because no ground for attachment exists as to the value of a few of the items. Mackey *v.* Hyatt, 42 Mo. App. 443, assigning as a reason for this the fact that the claim cannot be split up into suits on each item, because an action on any part of it would bar an action on the balance.

27. Where attachment is sued out before the debt is due.—As hitherto shown, attachments may be sued out under certain circumstances before the debt is due. If, however, these circumstances do not exist, the suing out of an attachment before the debt is due will of course be wrongful. See *supra*, VI, D.

28. Where attachment is dissolved on the merits.—Where, on an issue as to the truth of the facts alleged as the ground for attachment, there is a finding in favor of defendant and the attachment is dismissed, this is conclusive in a subsequent proceeding to recover damages caused thereby that the attachment was wrongfully obtained (Boatwright *v.* Stewart, 37 Ark. 614; Mitchell *v.* Mattingly, 1 Metc. (Ky.) 237; Miller *v.* McCrory, 3 Ky. L. Rep. 774; Freeman *v.* Young, 3 Rob. (N. Y.) 666), unless the judgment is appealed from and undetermined (Peck *v.* Hotchkiss, 52 How. Pr. (N. Y.) 226).

29. Gaddis *v.* Lord, 10 Iowa 141.

Effect of recovery of less than five dollars.—Where the claim in the suit in which the attachment was sued out is for more than five dollars, the attachment is not wrongful merely because a less amount than five dollars is recovered. Bradley *v.* McCall, 2 Greene (Iowa) 214.

30. Drummond *v.* Stewart, 8 Iowa 341.

31. Clements *v.* McCain, (Tex. Civ. App. 1899) 49 S. W. 122.

Rule criticized.— It is a matter of no small difficulty, however, to understand the reason on which these conclusions are based. The right given by statutes when a debt exists and there are grounds for attachment to sue out the writ is unqualified, and it can make no possible difference whether the party's debt is secured or not, or whether he has refused security. Richardson *v.* Probst, 103 Iowa 241, 72 N. W. 521.

32. Where part of debt for which attachment is issued does not exist.— An action upon an attachment bond for wrongful attachment is not warranted merely because the attachment is sued out for a greater amount than is due. Marx *v.* Leinkauff, 93 Ala. 453, 9 So. 818; Waring *v.* Fletcher, 152 Ind. 620, 52 N. E. 203.

Where the disparity between the debt due and that for which the attachment was sued out is so great as to manifest an intention to abuse the remedy afforded by the extraordinary process of attachment, an action for both vexatious and wrongful use of the writ might possibly lie. Marx *v.* Leinkauff, 93 Ala. 453, 9 So. 818.

33. Where attachment dissolved for irregularity in proceedings.—An attachment is not wrongful, within the meaning of statutes authorizing a recovery of damages resulting from wrongful attachments, merely because it is dissolved on account of defects in the form of the proceedings, or for mere omissions, irregularities, or informalities in the issue of the writ.

Alabama.— Sharpe *v.* Hunter, 16 Ala. 765.

Arkansas.— Boatwright *v.* Stewart, 37 Ark. 614.

Florida.— See Steen *v.* Ross, 22 Fla. 480, where the term "improperly" is used in the statute instead of "wrongfully."

Louisiana.— Garretson *v.* Zacharie, 8 Mart. N. S. (La.) 481; Hathcock *v.* Gray, 22 La. Ann. 472.

Nebraska.— Jandt *v.* Deranleau, 57 Nebr. 497, 78 N. W. 22; Storz *v.* Finklestein, 50 Nebr. 177, 69 N. W. 856; Eaton *v.* Barscherer, 5 Nebr. 469.

Texas.— Petty *v.* Lang, 81 Tex. 238, 16 S. W. 999; Baines *v.* Ullmann, 71 Tex. 529, 9 S. W. 543.

Dissolution for defects in the affidavit does not of itself give an action for wrongful attachment. Sharpe *v.* Hunter, 16 Ala. 765; Boatwright *v.* Stewart, 37 Ark. 614; Petty *v.* Lang, 81 Tex. 238, 16 S. W. 999; Baines *v.* Ullmann, 71 Tex. 529, 9 S. W. 543. *Contra,*

the failure of the officer to perform his duty.[34] In some jurisdictions, voluntary abandonment or dismissal of an attachment renders the attaching creditor and surety responsible for damages for the wrongful suing out of the writ;[35] in others, however, it is not to be inferred that the attachment was wrongfully sued out from the voluntary dismissal of the suit.[36] There is also some conflict of authority as to the effect of the discharge of an attachment on the giving of bond by defendant.[37] It has been held that the fact that defendant at the time the attachment was sued out had no property liable to attachment does not make the attachment wrongful, but evidence thereof might be admissible as tending to show matters of vexation on the part of plaintiff suing it out.[38]

3. Accrual of Right of Action — a. As Depending Upon Dissolution of the Attachment. Under some statutes the mere dissolution of the attachment gives a right of action,[39] and it is not necessary to wait till the determination of the

Lobenstein *v.* Hymson, 90 Tenn. 606, 18 S. W. 250; Castro *v.* Whitlock, 15 Tex. 437.

Where an attachment is dissolved because of prior liens on the attached property, the attachment is not for that reason necessarily wrongful, but the dismissal is *prima facie* evidence of that fact in a suit on the bond. Miller *v.* McCrory, 3 Ky. L. Rep. 774.

34. Offterdinger *v.* Ford, 92 Va. 636, 24 S. E. 246.

35. Sannes *v.* Ross, 105 Ind. 558, 5 N. E. 699; Vurpillat *v.* Zehner, 2 Ind. App. 397, 28 N. E. 556; Steinhardt *v.* Leman, 41 La. Ann. 835, 6 So. 665; Cox *v.* Robinson, 2 Rob. (La.) 313; Dean *v.* Stephenson, 61 Miss. 175. See also Kinsey *v.* Wallace, 36 Cal. 462 (where it was held that dismissal under agreement that each party should pay his own costs is such a termination as will enable attachment defendant to bring suit for a wrongful and malicious attachment); Zeigler *v.* David, 23 Ala. 127 (where it was held that in debt on a bond conditioned to indemnify the obligee for all costs and damages he may sustain by the wrongful suing out of a writ of seizure from the chancery court, the transcript of the record of the chancery suit, showing the dismissal of the bill for want of prosecution, is *prima facie* evidence that the writ was wrongfully obtained).

Taking a personal judgment alone is equivalent to a dismissal of attachment proceedings within the rule above mentioned. Sannes *v.* Ross, 105 Ind. 558, 5 N. E. 699.

The consent of defendant to plaintiff's discontinuance does not preclude defendant from bring a subsequent suit for damages for the wrongful attachment. Spaulding *v.* Wallett, 10 La. Ann. 105.

36. Nockles *v.* Eggspieler, 47 Iowa 400; Collins *v.* Bingham, 22 Ohio Cir. Ct. 533; Frank *v.* Tatum, (Tex. Civ. App. 1894) 26 S. W. 900.

The mere failure to prosecute a suit in chancery connected with an attachment is not a forfeiture of the bond required to be given by the statute. The bond is not conditioned for the successful prosecution of the suit, but that the order for the attachment has not been wrongfully obtained. Unless, therefore, the order was wrongfully procured and without just cause, there is no breach of the bond. Pettit *v.* Mercer, 8 B. Mon. (Ky.) 51.

Voluntary dismissal for inability to produce evidence. — In an action on an attachment bond, the fact that the attachment has been dismissed, owing to the inability of plaintiff therein to supply a record, the original being burned, is held to be no evidence that the original attachment was wrongful, and plaintiff shall give only legal costs taxable on the dismissal of the attachment suit. Cooper *v.* Hill, 3 Bush (Ky.) 219.

37. **In Indiana,** where an attachment is dissolved by filing a bond for the restitution of the property under a statute declaring that when this is done "the attachment shall be discharged," the party so executing the bond in legal effect waives his right to assert that the attachment proceedings were wrongful. Bick *v.* Long, 15 Ind. App. 503, 44 N. E. 555.

In Minnesota, where an attachment is dissolved by the voluntary act of defendant in executing the bond provided for by statute, and no opportunity is given to the opposite party to test the validity of the attachment in the same proceeding, although no reason appears why it might not have been done, an action for wrongful attachment cannot be maintained. Rachelman *v.* Skinner, 46 Minn. 196, 48 N. W. 776.

In Ohio it is held with much better reason that the execution by defendant in attachment of the redelivery bond provided for by the statute cannot be regarded as an admission of record that the order of attachment was rightfully obtained, and cannot be set up as a bar to his right of action on the attachment undertaking. Alexander *v.* Jacoby, 23 Ohio St. 358, where it is said: "The interests of a party may imperatively require that his property shall be released from a wrongful attachment without delay," and he should be allowed therefore to procure a discharge of the attachment by executing the proper undertaking without abandoning his right of redress for the injury already done.

38. Troy *v.* Rogers, 113 Ala. 131, 20 So. 999.

39. *Indiana.*—Waring *v.* Fletcher, 152 Ind. 620, 52 N. E. 203; Harper *v.* Keys, 43 Ind. 220.

Kansas.— Kerr *v.* Reece, 27 Kan. 469; McLaughlin *v.* Davis, 14 Kan. 168.

main action before instituting proceedings for redress.[40] It is nevertheless the rule under many statutes that before any right of action can arise from the wrongful suing out of an attachment the attachment must be dissolved.[41] This is not the rule, however, in those jurisdictions where damages caused by wrongful attachment are considered proper matter to be set up in the main action by way of counter-claim, set-off, or reconvention, in cases where a recovery is sought by this procedure,[42] or in jurisdictions where there is a controlling statute to the contrary.[43]

b. As Depending Upon Termination of Main Action in Defendant's Favor. Where a final judgment has been rendered in the main action in defendant's favor, there can be no doubt that a cause of action has accrued in his favor for injuries caused by the attachment in all jurisdictions where actions for wrongful attachment, either on or independently of the attachment bond, may be maintained.[44] This it has been held is true, notwithstanding the fact that defendant did not controvert the grounds of attachment by plea in abatement or otherwise.[45] As regards the necessity of a final judgment, the statutes have been so

Louisiana.— McDaniel *v.* Gardner, 34 La. Ann. 341.

New York.— Freeman *v.* Young, 3 Rob. (N. Y.) 666. *Compare* Peck *v.* Hotchkiss, 52 How. Pr. (N. Y.) 226, which seems to maintain the contrary view.

Pennsylvania.— Berwald *v.* Ray, 165 Pa. St. 192, 30 Atl. 727.

Dismissal of appeal from judgment on plea in abatement.—An action will lie on the attachment bond where an appeal from the judgment on the plea in abatement in the attachment suit is dismissed. State *v.* Gage, 52 Mo. App. 464.

Vacating order of attachment.—Where the assignee of a claim for damages of one whose property has been attached brings an action to recover damages therefor after the attachment has been vacated, and subsequently to the bringing of the action the order vacating the attachment is vacated, which last order was by a subsequent order vacated, the action is not prematurely brought. Epstein *v.* U. S. Fidelity, etc., Co., 29 Misc. (N. Y.) 295, 60 N. Y. Suppl. 527.

40. Kerr *v.* Reece, 27 Kan. 469.

41. *Kansas.*— Baker *v.* Skinner, 63 Kan. 83, 64 Pac. 981.

Kentucky.— Nolle *v.* Thompson, 3 Metc. (Ky.) 121. See also Watts *v.* Hurst, 22 Ky. L. Rep. 1703, 61 S. W. 261.

Nebraska.—Eckman *v.* Hammond, 27 Nebr. 611, 43 N. W. 397.

North Carolina.— Kramer *v.* Thomson-Houston Electric Light Co., 95 N. C. 277.

Pennsylvania.— Gunnis *v.* Cluff, 111 Pa. St. 512, 4 Atl. 920; Shaw *v.* Folkers, 12 Wkly. Notes Cas. (Pa.) 518. But see Harbert *v.* Gormley, 115 Pa. St. 237, 8 Atl. 415, which holds that no action can be brought until final determination of the action, which is a step further than taken by the two Pennsylvania decisions just cited. The statute however, has been changed by the Pennsylvania act of May 24, 1887, under which plaintiff is required to pay damages if the attachment he quashed, dissolved, or ended.

Tennessee.— Sloan *v.* McCracken, 7 Lea (Tenn.) 626.

42. Waugenheim *v.* Graham, 39 Cal. 169; Rumsey *v.* Robinson, 58 Iowa 225, 12 N. W. 243; Town *v.* Bringolf, 47 Iowa 133; Stadler *v.* Parmlee, 10 Iowa 23; Reed *v.* Chubb, 9 Iowa 178; Tynberg *v.* Cohen, 76 Tex. 409, 13 S. W. 315; Punchard *v.* Taylor, 23 Tex. 424; Walcott *v.* Hendrick, 6 Tex. 406; Michigan Stove Co. *v.* Waco Hardware Co., 22 Tex. Civ. App. 293, 54 S. W. 357; Davis *v.* Rawlins, 1 Tex. App. Civ. Cas. § 17. See *infra*, XVIII, B, 6, c, (I), (B), (C).

In Texas, where an attachment defendant is allowed to reconvene or counter-claim damages arising from a wrongful attachment in the main action, it has been held that a cause of action in his behalf arises at the very instant the seizure is made under the attachment (Torrey *v.* Schneider, 74 Tex. 116, 11 S. W. 1068), and that an independent action may be maintained on the attachment bond as soon as the seizure is made (Jordan *v.* Meyer, 90 Tex. 544, 39 S. W. 1081).

43. **In Alabama** Civ. Code (1896), § 565, provides that at any time within three years of the suing out of the attachment, before or after the suit is determined, defendant may commence suit on the bond and recover damages actually sustained, if the attachment was wrongfully sued out.

In Iowa, where it is provided by statute that attachment defendant need not wait "until the principal suit is determined" before suing on the bond, the right of action accrues on the bond as soon as attachment defendant is disturbed in the possession of his property by the levy of the writ. Campbell *v.* Chamberlain, 10 Iowa 337.

44. Trentman *v.* Wiley, 85 Ind. 33; State *v.* Goodhue, 74 Mo. App. 162; Dunning *v.* Humphrey, 24 Wend. (N. Y.) 31; Kennedy *v.* Meacham, 18 Fed. 312.

Judgment of nonsuit.—A judgment of nonsuit in an attachment suit, if unappealed from, is final, and constitutes a forfeiture of the attachment bond. Hibbs *v.* Blair, 14 Pa. St. 413. To the same effect see McDaniel *v.* Gardner, 34 La. Ann. 341.

45. State *v.* Beldsmeier, 56 Mo. 226; State *v.* Goodhue, 74 Mo. App. 162. *Contra*, Bear *v.* Marx, 63 Tex. 298.

construed in a number of jurisdictions as to require a final judgment in defendant's favor in the main action as a condition precedent to his right to recover damages therefor. In these jurisdictions the mere dissolution of an attachment without more would give the attachment defendant no right of action.[46]

4. Persons Entitled to Recover[47] — a. Attachment Defendant. Defendant in attachment is entitled to recover for the attachment, if it be wrongful, unless he has divested himself of all interest in the attached property before the attachment. If he has done this he has no right of action.[48]

b. Officer Levying Attachment. Ordinarily, it is apprehended, attachment bonds are conditioned to pay damages for injuries suffered by attachment defendant only, and in consequence no other person has a right of action thereon. In several states, however, the statutory bond is broad enough to include injuries to the levying officer.[49]

c. Garnishees. Where a bond is conditioned to pay all damages that may accrue to defendant or any garnishee, defendant may maintain an action thereon to the use of any garnishee who has been damaged;[50] otherwise, however, where attachment defendant is the only obligee named in the bond.[51]

5. Persons Liable — a. In General. A corporation as well as a natural person may become liable for wrongful attachment and for exemplary as well as actual

46. Hahn *v.* Seifert, 64 Mich. 647, 31 N. W. 564 (under a statute requiring a bond conditioned to pay all damages sustained by reason of the issuing of the attachment if plaintiff shall fail to recover judgment in attachment); Crandall *v.* Rickley, 25 Minn. 119 (under a statute requiring a bond conditioned that "if the defendant recovers judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment"); Harbert *v.* Gormley, 115 Pa. St. 237, 8 Atl. 415 (under a statute (act Mar. 17, 1869) requiring an attachment bond conditioned that if plaintiff fails to prosecute his action with effect and recover judgment against defendant, he shall pay the latter all legal costs and damages which he may sustain by reason of the attachment; but this statute is materially changed by the act of May 24, 1887. See *infra*, note 86); Maxwell *v.* Griffith, 20 Wash. 106, 54 Pac. 938 (under Wash. Laws (1893), p. 119, § 1, subd. 4, authorizing an appeal from an order refusing to discharge an attachment, and subdivision 1, providing that an appeal from a final judgment should bring up for review any order in the same action made before or after judgment, which is held to repeal by implication 2 Hill's Code Wash. § 295, providing that any action may be brought on an attachment bond after a dissolution without waiting for final judgment).

47. Parties entitled to sue see *infra*, XVIII, B, 6, e, (I).

Right of assignees in bankruptcy and assignees for benefit of creditors to sue see *infra*, XVIII, B, 6, e, (I), (B).

Right to sue of stranger whose property has been wrongfully seized see *supra*, XIV, A, 6, a, (I).

48. Allen *v.* Champlin, 32 La. Ann. 511; Watts *v.* Shropshire, 12 La. Ann. 797 (in which cases defendant had sold the property before attachment); State *v.* Hill, 60 Mo. App. 130 (where defendant, a member of a partnership and a minor, had divested himself of all interest in the partnership assets prior to the attachment by disaffirming his obligations as a partner, on the ground of minority).

49. Thus, where the condition of the bond is that plaintiff shall pay all damages and costs that may accrue to any officer by reason of any act under the writ done by him in compliance with the directions of plaintiff, such condition is not limited in its application to acts done by the sheriff in the seizure of the property, but will warrant a recovery by him on the bond when, after selling perishable property, he pays the proceeds to plaintiff, on the promise of the latter to refund if he should not be entitled thereto, and is subsequently compelled to again pay the amount of such proceeds to a successful interpleader. State *v.* Finke, 66 Mo. App. 238. So, where an attachment bond is conditioned for the payment of costs in case plaintiff fail to recover, it was held that the sheriff could recover thereon the expenses of keeping the property attached. Read *v.* Williams, 95 Ga. 108, 22 S. E. 213.

On the other hand, a bond conditioned to pay all "damages sustained by any person by reason of the suing out" an attachment has been held not to inure to the benefit of the sheriff who levied the attachment and took care of the property. Mitchell *v.* Chancellor, 14 W. Va. 22.

50. Barnes *v.* Webster, 16 Mo. 258, 57 Am. Dec. 232.

Costs.— The garnishee cannot recover by suit upon an attachment bond any expenses that might properly have been adjudged in his favor as costs in the garnishment proceeding, unless he shows that they were so adjudged. State *v.* Bick, 36 Mo. App. 114.

51. Rothermel *v.* Marr, 98 Pa. St. 285.

damages,[52] although it has been held that a county cannot become liable.[53] An attaching creditor is not liable for acts of nonfeasance or misfeasance committed by the attaching officer, unless he directs or participates in the wrong,[54] or ratifies and confirms it after becoming aware of it.[55] The same rule applies with regard to the sureties on his bond.[56]

b. Sureties on Attachment Bond. The liability of a surety on an attachment bond is created by and rests alone on the stipulations of the bond. He has a right to stand on the very terms of his contract, and his liability will not be extended beyond the fair import of the words used;[57] his liability is one not to be extended by implication, nor will it be inferred that he has agreed to do more than that which is fairly expressed in the bond.[58] It is a consequence of the rule stated that the sureties can be subjected to liability on the bond only in reference

52. Jefferson County Sav. Bank *v.* Eborn, 84 Ala. 529, 4 So. 386; Western News Co. *v.* Wilmarth, 33 Kan. 510, 6 Pac. 786; Emerson *v.* Skidmore, 7 Tex. Civ. App. 641, 25 S. W. 671.

53. Reed *v.* Howell County, 125 Mo. 58, 28 S. W. 177, 46 Am. St. Rep. 466. See also Ashland County *v.* Stahl, 48 Wis. 593, 4 N. W. 752, where this question was discussed but not decided.

54. Burt *v.* Decker, 64 Iowa 106, 19 N. W. 873; Michels *v.* Stork, 44 Mich. 2, 5 N. W. 1034; Blanchard *v.* Brown, 42 Mich. 46, 3 N. W. 246; Baesly *v.* Johnson, 10 Heisk. (Tenn.) 413; Abbott *v.* Kimball, 19 Vt. 551, 47 Am. Dec. 708. *Contra*, McReady *v.* Rogers, 1 Nebr. 124, 93 Am. Dec. 333, which case it seems, however, proceeds on the erroneous theory that when it is determined that no grounds of attachment lie attachment plaintiff and all concerned with him in the levy of the writ are trespassers *ab initio*.

55. Abbott *v.* Kimball, 19 Vt. 551, 47 Am. Dec. 708.

This doctrine has been applied in cases where the attaching officer converts the property (Dawson *v.* Baum, 3 Wash. Terr. 464, 19 Pac. 46) or wrongfully sells it without notifying defendent (Abbott *v.* Kimball, 19 Vt. 551, 47 Am. Dec. 708); where he fails to serve the writ properly, or to give defendant an opportunity to select such property as he is entitled to under the statutory exemption (Michels *v.* Stork, 44 Mich. 2, 5 N. W. 1034); or where injuries result from the officer's neglect in not taking suitable care of the attached property (Abbott *v.* Kimball, 19 Vt. 551, 47 Am. Dec. 708).

56. Dawson *v.* Baum, 3 Wash. Terr. 464, 19 Pac. 46.

57. *Alabama.*— Crofford *v.* Vassar, 95 Ala. 548, 10 So. 350.

California.— Elder *v.* Kutner, 97 Cal. 490, 32 Pac. 563; McDonald *v.* Fett, 49 Cal. 354.

Illinois.— Weir *v.* Dustin, 32 Ill. App. 388.

Indiana.— Waring *v.* Fletcher, 152 Ind. 620, 52 N. E. 203.

Kentucky.— Martin *v.* Turpin, 22 Ky. L. Rep. 424, 57 S. W. 459.

Maryland.— Furness *v.* Read, 63 Md. 1.

Nebraska.— Hopewell *v.* McGrew, 50 Nebr. 789, 70 N. W. 397.

Nevada.— Quillen *v.* Arnold, 12 Nev. 234.

Pennsylvania.— Rothermel *v.* Marr, 98 Pa. St. 285.

Tennessee.— Smith *v.* Eakin, 2 Sneed (Tenn.) 456.

Virginia.— Davis *v.* Com., 13 Gratt. (Va.) 139.

Contribution.—Where the sureties on attachment bond paid a judgment for all damages accruing up to the final discharge of the attachment and filed a petition against the sureties on the bond in error for contribution *pro rata*, it was held, on demurrer, that the two sets of sureties were not cosureties, and that there was no right of subrogation or contribution. Bradford *v.* Mooney, 2 Cinc. Super. Ct. 468.

Effect of condition not required by statute. — Any condition included in the bond, as taken by the clerk, which goes beyond the conditions required by statute and the fiat of the judge, is void, and should be treated as surplusage. The bond, however, may be enforced to the extent of its lawful conditions. Ranning *v.* Reeves, 2 Tenn. Ch. 263.

Right to set aside judgment irregularly obtained.— It has been held that if judgment has been obtained irregularly in the main action, sureties on the attachment bond can have it set aside on a seasonable application, and be allowed to defend on the merits. Jewett *v.* Crane, 35 Barb. (N. Y.) 208, 13 Abb. Pr. (N. Y.) 97.

58. Furness *v.* Read, 63 Md. 1.

Judgment for appraised value of property against sureties.— Under a statute providing "that no greater amount shall be recovered of the said securities, than the appraised value of the property seized by the officer," the court, on a verdict for a greater amount, should render judgment against the principal and sureties for the appraised value, and against the principal for the balance. Holmes *v.* Cooper, 27 Ark. 239.

Statutory modification of rule.—Ind. Rev. Stat. (1897), § 1221, modifies the general rule to the extent only, that if the bond be defective, it is to be read, construed, and enforced the same as if it contained all the conditions and provisions required by the statute. Where the omission, if any, in a bond is so supplied, the bond so read is *strictissimi juris*. Waring *v.* Fletcher, 152 Ind. 620, 52 N. E. 203.

to the particular writ for obtaining which it was given;[59] and they cannot be held liable where the terms of the bond have been changed,[60] or where an amendment is permitted in the action in which the bond was given adding new parties and changing the character of the action.[61] So, it has been held that the surety, by signing an attachment bond, does not become a participant in the seizure or detention of the attached property by the sheriff or liable as a trespasser for such act.[62]

6. Proceedings to Recover For Wrongful Attachment — a. Jurisdiction and Venue. It has been held that an action for wrongfully suing out an attachment in one state may be maintained in another.[63] With regard to the jurisdiction of particular courts, it has been held that an action for a wrongful suing out of an attachment is in effect one for malicious prosecution, that a justice court has no jurisdiction.[64] In relation to venue, it has been held, under a statute providing that an action for a trespass may be prosecuted in the county in which the cause of action accrued, that an action for the wrongful seizure of property under a writ of attachment may be brought in the county where the seizure took place, although none of the defendants are residents of such county, and that a suit on the attachment bond may be maintained in such county.[65]

b. Statute of Limitations. The time when the statute begins to run against the right to recover damages for wrongful attachment depends of course on the character of the remedy by which it is sought to recover. Thus, if the form of procedure is by action on the bond in a jurisdiction where the cause of action is deemed to accrue at the time of the seizure, the statute of limitations will commence to run from that period.[66] If, however, the right to proceed either on or independently of the attachment bond does not accrue until the dissolution of the attachment, or until the final determination of the main action, the statute will of course commence to run only from that time.[67]

59. Faulkner *v.* Brigel, 101 Ind. 329; Rodde *v.* Hollweg, 19 Ind. App. 222, 49 N. E. 282; Erwin *v.* Commercial, etc., Bank, 12 Rob. (La.) 227.

Instances.— If levy is made on the property of a third person instead of that of a person against whom the writ was sued out there can be no liability therefor on the bond. Faulkner *v.* Brigel, 101 Ind. 329; Rodde *v.* Hollweg, 19 Ind. App. 222, 49 N. E. 282; Davis *v.* Com., 13 Gratt. (Va.) 139. So, where plaintiff having obtained an attachment abandoned it and obtained another, but no new bond was executed, the liability of the surety on the bond first given related exclusively to the first attachment. Erwin *v.* Commercial, etc., Bank, 12 Rob. (La.) 227. It has also been held that where an attachment was made against a firm by the firm-name, and a bond was given conditioned to pay the partners "all such damage as they might sustain," no recovery could be had in an action on the bond for damage sustained by one partner for wrongful levy on his individual property. Watts *v.* Rice, 75 Ala. 289; Mason *v.* Rice, 66 Iowa 174, 23 N. W. 384, 19 N. W. 897.

60. Quillen *v.* Arnold, 12 Nev. 234.

61. Furness *v.* Read, 63 Md. 1.

62. McDonald *v.* Fett, 49 Cal. 354. But *compare* McReady *v.* Rogers, 1 Nebr. 124, 93 Am. Dec. 333, where it was held that the surety, if the attachment was wrongful, is not liable only for the damages done to defendant up to the time the attachment was dissolved, but is also liable for the damages if the sheriff after the dissolution of the attachment refused to return the property.

63. Wiley *v.* Traiwick, 14 Tex. 662.

64. Rice *v.* Day, 34 Nebr. 100, 51 N. W. 464.

Presumption as to jurisdiction of court of another state.— In an action on an attachment bond given in another state in a suit, of the subject-matter of which the court of that state had jurisdiction, it will be presumed that the court had jurisdiction to issue the attachment, although no statute of that state authorizing attachment is pleaded. Cunningham *v.* Jacobs, 120 Ind. 306, 22 N. E. 335.

65. Perry *v.* Stephens, 77 Tex. 246, 13 S. W. 984. See also Focke *v.* Blum, 82 Tex. 436, 17 S. W. 770; Blum *v.* Strong, 71 Tex. 321, 6 S. W. 167.

Suit on attachment bond.— Cahn *v.* Bonnett, 62 Tex. 674.

66. Jordan *v.* Meyer, 90 Tex. 544, 39 S. W. 1081.

67. In Kansas an action to recover damages on an attachment bond should be commenced within five years of the final determination of the district court that the order was wrongfully obtained. Baker *v.* Skinner, 63 Kan. 83, 64 Pac. 981.

In Louisiana, where a sequestration bond is set forth in the petition, the action for damages will be considered as *ex contractu* and not barred by the prescription of one

c. Methods of Enforcing Liability[68] — (I) *By Proceedings in Main Action* — (A) *Assessing Damages on Dissolution or Dismissal.* In some jurisdictions upon the dissolution or dismissal of the attachment in proper proceedings for that purpose, the damages sustained by a wrongful attachment may be assessed and a judgment therefor rendered against attachment plaintiff and the sureties on his attachment bond.[69]

(B) *Counter-Claim.* In regard to the right to counter-claim damages caused by a wrongful attachment in the main suit the decisions are not harmonious. Under the statute in one state,[70] if the attachment is issued on a separate petition subsequently to the commencement of the main action, defendant cannot counter-claim damages therein caused by the wrongful issue of the writ.[71] So, where, subsequently to the commencement of the suit by attachment, defendant makes a general assignment, the assignee cannot set up by counter-claim a demand for damages caused by the attachment.[72] On the other hand, where an affidavit and bond for attachment are filed with the petition in the action, and the writ immediately sued out, the right to recover damages sustained by defendant from the wrongful suing out of the writ is a claim held by him at the commencement of the action, within the meaning of the statute, and it may be set up by way of counter-claim in the same action.[73] The fact that the counter-claim was interposed

year, although damages are demanded in the petition for a larger amount than the penalty expressed in the bond. Biggs *v.* D'Aquin, 13 La. Ann. 21.

In Texas an action for wrongful attachment is barred by the two years' statute of limitations. Woods *v.* Huffman, 64 Tex. 98.

68. Owing to the great variety of statutes on the subject, the methods of enforcing liability for injuries caused by wrongful attachments are very numerous. In most jurisdictions, several modes of obtaining redress for such injuries are open to attachment defendant. See *infra*, XVIII, B, 6, c, (I), (II).

69. In Arkansas, when attachment defendant obtains a judgment dissolving the attachment, damages caused thereby may be assessed by the court or jury, and judgment rendered against plaintiff and his sureties on the bond for the amount of damages and costs of the attachment. Sandels & H. Dig. Ark. (1894), § 362. See also Adkins *v.* Lacy, 68 Ark. 170, 56 S. W. 876; Goodbar *v.* Lindsley, 51 Ark. 380, 11 S. W. 577, 14 Am. St. Rep. 54; Holliday *v.* Cohen, 34 Ark. 707.

In Mississippi if the attachment be dissolved on trial of the plea in abatement (Miss. Anno. Code (1892), § 166. See also Marqueze *v.* Sontheimer, 59 Miss. 430; Roach *v.* Brannon, 57 Miss. 490; Fleming *v.* Bailey, 44 Miss. 132), or if plaintiff dismiss the attachment (Dean *v.* Stephenson, 61 Miss. 175; Miss. Anno. Code (1892), § 168), damages shall be assessed by the jury, and judgment rendered against plaintiff and the sureties on the bond for the damages so assessed and the costs of suit; but where the attachment is defeated on the ground that the debt sued on is not due defendant is not entitled to have damages so assessed (Betancourt *v.* Maduel, 69 Miss. 839, 11 So. 111). The issue to be tried and determined by the jury is "whether the said attachment was wrongfully sued out" and not whether the facts stated in the affidavit are actually true or false. Cocke *v.* Kuykendall, 41 Miss. 65, 68.

In Wisconsin, if the trial of the traverse of the affidavit for attachment occurs before the trial of the main action and is decided in favor of defendant, the jury shall assess the damages sustained thereby, which with the costs shall be applied as a set-off to plaintiff's demand, and if in excess of it, or plaintiff fail to recover, the verdict shall be for defendant for the amount due. If the trial be after the trial of the main action the court may impanel a jury or proceed itself to assess such damages, and shall in like manner apply the same when so assessed, with the costs so taxed, as a set-off to plaintiff's demand as established upon the trial, and give judgment accordingly. Wis. Rev. Stat. (1898), § 2746. See also Meshke *v.* Van Doren, 16 Wis. 319. In a very recent decision it was said that in the absence of statutory direction the better practice in attachment suits is to try the main issue first, and in the event that defendant succeeds to take up the trial of the claim for damages. Union Nat. Bank *v.* Cross, 100 Wis. 174, 75 N. W. 992.

Contra, in Hawaii, where damages for wrongfully suing out an attachment cannot be recovered in the attachment suit. Kerr *v.* Hyman, 6 Hawaii 300.

70. Iowa Code (1897), §§ 3570, 3888.

71. Youngerman *v.* Long, 95 Iowa 185, 63 N. W. 674; Reed *v.* Chubb, 9 Iowa 178.

72. Rumsey *v.* Robinson, 58 Iowa 225, 12 N. W. 243.

The reason assigned in both cases is that the cause of action treated as a counter-claim must be held by defendant at the time the suit was commenced in which the counter-claim is interposed. See cases cited *supra*, notes 71, 72.

73. Iowa City Branch State Bank *v.* Morris, 13 Iowa 136; Stadler *v.* Parmlee, 10

merely for delay cannot alter the right of the party to file such a plea. There is no means of determining that the defense is frivolous but by trial.[74] The counter-claim may be based upon the bond when it is joint and several,[75] or upon the cause of action for the wrongful attachment independently of the bond.[76] If the bond is joint, only, attachment defendant cannot counter-claim damages thereon in the main action, because he cannot sue one of the obligors alone.[77] In some states the right to counter-claim damages for wrongful attachment in the main action is maintained, and that too without any such qualification as hitherto mentioned;[78] but in others damages arising from a wrongful attachment cannot be counter-claimed in the main action.[79]

Iowa 23; Reed *v.* Chubb, 9 Iowa 178. See also Town *v.* Bringolf, 47 Iowa 133.

Joinder in prayer for relief by intervener and defendant.— Several days after suit in attachment was begun defendant assigned; the assignee filed a petition of intervention, alleging the wrongful suing out of the attachment and asking for damages on the bond, and he was joined in his prayer by defendant, who pleaded a counter-claim. It was held that as defendant and intervener joined in their prayer for relief, the right to prosecute the counter-claim was given by the section which provides that defendant in attachment may sue on the attachment bond by way of counter-claim and recover damages as in the original action. Ringen Stove Co. *v.* Bowers, 109 Iowa 175, 80 N. W. 318.

What is commencement of action within the rule.—A landlord in an action for rent sued out an attachment, and upon its being quashed filed an amended petition in equity for the foreclosure of the lien under the lease, as a mortgage. It was held that the filing of the amended petition was not the beginning of a new action; hence damages caused to defendant by the attachment could not be pleaded as a counter-claim, as they were not an existing cause of action at the time of the commencement of the suit as required by statute. Youngerman *v.* Long, 95 Iowa 185, 63 N. W. 674.

74. Town *v.* Bringolf, 47 Iowa 133.

75. Stadler *v.* Parmlee, 10 Iowa 23. See also Rumsey *v.* Robinson, 58 Iowa 225, 12 N. W. 243.

76. Stadler *v.* Parmlee, 10 Iowa 23. See also Swan *v.* Smith, 26 Iowa 87, and cases cited *supra*, notes 73, 74.

77. Stadler *v.* Parmlee, 10 Iowa 23.

78. Waugenheim *v.* Graham, 39 Cal. 169 (under a statute defining a counter-claim as a cause of action arising out of the transaction set forth in the complaint or answer as the foundation of plaintiff's claim or defendant's defense, or connected with the subject of the action); Hulf *v.* Curtis, 68 Tex. 640, 5 S. W. 451; Reed *v.* Samuels, 22 Tex. 114, 73 Am. Dec. 253; Michigan Stove Co. *v.* Waco Hardware Co., 22 Tex. Civ. App. 293, 54 S. W. 357 (under statutes providing that whether plaintiff's demand be a debt or unliquidated damages, defendant may plead and set up any counter-claim founded on a cause of action arising out of or incident to or connected with plaintiff's cause of action, and the counter-claim may be pleaded, although arising subsequently to plaintiff's cause of action).

In California it was held that the counter-claim was "connected with the subject of the action." Waugenheim *v.* Graham, 39 Cal. 169.

In Idaho damages resulting from a wrongful attachment were allowed to be counter-claimed where the attachment was dissolved before answer. Willman *v.* Friedman, (Ida. 1894) 38 Pac. 937, under a statute providing that whenever defendant seeks affirmative relief against any party, relating to or depending upon a contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or, by permission of the court, subsequently, a cross-complaint.

In Texas it was said that the damages complained of arose out of a suit instituted by plaintiff. Michigan Stove Co. *v.* Waco Hardware Co., 22 Tex. Civ. App. 293, 54 S. W. 357.

In Wisconsin, in at least one reported decision, it appears that a counter-claim was set up after the dissolution of the attachment, and no question being raised as to its propriety, the supreme court affirmed in part a judgment awarding defendant damages on such counter-claim. Braunsdorf *v.* Fellner, 76 Wis. 1, 45 N. W. 97.

79. **In Kansas** it has been held that a claim for damages for the wrongful suing out of an attachment not based upon the bond is not a proper subject for a counter-claim in the main action, because it is not connected with the foundation or subject of the action within the meaning of the statutes relating to counter-claims. Carver *v.* Shelly, 17 Kan. 472.

In Kentucky, under a statute defining a counter-claim as a cause of action in favor of defendant against plaintiff, arising out of the contract or transactions set forth in the petition as the foundation of plaintiff's claim, or connected with the subject of the action, it was held that such damages did not arise out of the contract set forth in the petition, or out of any transaction set forth in the petition, as the foundation of the action. Nolle *v.* Thompson, 3 Metc. (Ky.) 121.

In Missouri it was held in a decision of not very recent date that damages caused by a wrongful attachment cannot be counter-claimed in the main action. Hembrock *v.*

(c) *Reconvention.* In Texas it is well settled that damages caused by a wrongful attachment may be pleaded in reconvention in the action in which the attachment was sued out, and none of the decisions in which this question arises mention any special statutory authorization therefor.[80] In pleading in reconvention defendant may declare either independently of or upon the attachment bond.[81] Under the statute of Louisiana relating to reconvention [82] it has been held that defendant in an action commenced by attachment, if he resides in the same parish as plaintiff, cannot institute a demand in reconvention for damages growing out of the attachment.[83] Nevertheless, in a case where plaintiff in attachment was a non-resident, defendant pleaded in reconvention the damages resulting from the wrongful seizure, and no question was raised as to the propriety of this practice.[84]

(d) *Set-Off.* It has been held that in an action aided by attachment damages on the ground that the attachment was wrongful are not a proper subject of set-off, because not in existence at the commencement of the suit.[85] Again, it has

Stark, 53 Mo. 588, no statute being mentioned or reason assigned for so holding.

Nebraska.— Tessier *v.* Lockwood, 18 Nebr. 167, 24 N. W. 734, under a statute defining a counter-claim as a claim existing in favor of defendant and against plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transactions set forth in the petition as the foundation of plaintiff's claim, or connected with the subject of the action. The court based its ruling on the view that defendant's claim must be one upon which he could at the date of the commencement of the suit maintain an action on his part against plaintiff, and that therefore damages caused by the wrongful attachment could not be counter-claimed.

North Carolina.— Kramer *v.* Thomson-Houston Electric Light Co., 95 N. C. 277, where the court, without paying any special attention to the wording of the statutes relating to counter-claims, held that there could be no cause of action until the action or the provisional remedy in it was determined.

Ohio.— Donnegan *v.* Armour, 3 Ohio Cir. Ct. 432, under a statute the provisions of which are identical with those of the Nebraska statute set out above in this note.

80. Tynberg *v.* Cohen, 76 Tex. 409, 13 S. W. 315; Half *v.* Curtis, 68 Tex. 640, 5 S. W. 451; Schrimpf *v.* McArdle, 13 Tex. 368; Walcott *v.* Hendrick, 6 Tex. 406; South Texas Nat. Bank *v.* Lagrange Oil-Mill Co., (Tex. Civ. App. 1897) 40 S. W. 328; Green *v.* Carlton, 1 Tex. App. Civ. Cas. § 833; Davis *v.* Rawlins, 1 Tex. App. Civ. Cas. § 17.

Injury caused by attachment in another state.—Where plaintiffs brought an action on a claim in Louisiana and sued out a wrongful attachment, and subsequently brought suit on the same claim in Texas, defendants could enter a reconvention plea and set off the damages caused by the wrongful suing out of the attachment. Wiley *v.* Traiwick, 14 Tex. 662.

One of several defendants in attachment may plead in reconvention such damages as he has sustained by such wrongful attachment. Punchard *v.* Taylor, 23 Tex. 424.

Right as affected by replevin of property. — Defendant whose property has been attached may in the attachment action plead in reconvention to recover his damages, although he has replevied the property. Green *v.* Carlton, 1 Tex. App. Civ. Cas. § 833.

Right to consolidate reconvention proceedings with suit on bond.—Where defendant in attachment sues on the bond, afterward pleads the same matter in reconvention to the original suit, and moves to consolidate, the motion should be overruled, as his proper course is to dismiss the suit on the bond. Castro *v.* Whitlock, 15 Tex. 437.

81. Munnerlyn *v.* Alexander, 38 Tex. 125. See also Wallace *v.* Finberg, 46 Tex. 35, where this was done; and cases cited *supra*, note 80.

82. La. Code Prac. art. 375.

83. Coco *v.* Guyral, 36 La. Ann. 293; Davis *v.* Binion, 5 La. Ann. 248. To same effect see Nuzum *v.* Gore, 24 La. Ann. 208.

The reason assigned for this is that such a demand is not only different from the main action but is not necessarily connected with and incidental thereto. Coco *v.* Guyral, 36 La. Ann. 293.

84. Bloch *v.* His Creditors, 46 La. Ann. 1334, 16 So. 267.

Under the terms of the statute it would seem that this practice is permissible; and in other cases pleas of reconvention for damages caused by wrongful attachment were set up without any question as to their propriety, presumably because plaintiff and defendant were not residents of the same parish. Whether they were or were not did not appear. Baldwin *v.* Mumford, 35 La. Ann. 348; Preston *v.* Slocomb, 1 La. Ann. 382; Offutt *v.* Edwards, 9 Rob. (La.) 90.

85. Donnegan *v.* Armour, 3 Ohio Cir. Ct. 432.

In an action of debt it was held that an averment in the answer that plaintiff had obtained and sold the property attached, and praying for damages for its value, should be stricken out. Atkins *v.* Swope, 38 Ark. 528, where the court further said that a means of obtaining satisfaction was provided by statute.

been held that where a suit is commenced by attachment, damages alleged to be sustained by the issue thereof cannot be set off in such action pending a rule to dissolve the attachment.[86]

(II) *By Proceedings Subsequent to Main Action*—(A) *In General.* Where the statute requires plaintiff in attachment to give bond conditioned to pay all damages caused by the attachment, if it be wrongfully sued out, an action may of course be maintained on the bond for such damages as may be occasioned by a breach of the conditions of such bond. Whether the party aggrieved has any other remedy than by an action on the bond for an injury caused by an attachment, which lacks the elements of a malicious attachment, is a proposition in regard to which there is some conflict of authority.[87]

(B) *By Action Independently of Bond.* It is held in a number of states that the sole remedy of the party is by action on the bond.[88] In other states the contrary conclusion has been reached upon the theory that statutes of the character under consideration impose a liability for wrongful attachment, which may be enforced independently of the bond; and they accordingly allow the party aggrieved the option of bringing suit on the bond, or in tort for the wrong.[89]

(C) *By Motion Before Court Passing Upon Original Cause.* In Tennessee defendant in attachment may at his discretion when the attachment has been dismissed, proceed to recover damages by motion before the court that passed upon the original cause.[90]

86. Gunnis *v.* Cluff, 111 Pa. St. 512, 4 Atl. 920; Shaw *v.* Folkers, 12 Wkly. Notes Cas. (Pa.) 518.

In a later Pennsylvania decision it is held that damages caused by wrongful attachment cannot be set off in the main action, because no breach of the bond occurs until final determination of the action, liability on the bond being conditioned upon plaintiff's failure "to prosecute the action commenced by said attachment with effect and recover a judgment against the said defendant." Harbert *v.* Gormley, 115 Pa. St. 237, 8 Atl. 415, construing act of Mar. 17, 1869, which has been materially modified by amendment [act of May 24, 1887], whereby plaintiff's liability is conditioned on his failure to prosecute the attachment with effect, or in case it be quashed, dissolved, or ended.

87. See *infra*, XVIII, B, 6, j, (I), (B).

88. *Iowa.*— Frantz *v.* Hanford, 87 Iowa 469, 54 N. W. 474; Tallant *v.* Burlington Gas-light Co., 36 Iowa 262; McLaren *v.* Hall, 26 Iowa 297; Abbott *v.* Whipple, 4 Greene (Iowa) 320.

Nebraska.— Storz *v.* Finklestein, 48 Nebr. 27, 66 N. W. 1020, 30 L. R. A. 644.

New York.— Day *v.* Bach, 87 N. Y. 56; Sprague *v.* Parsons, 13 Daly (N. Y.) 553.

Ohio.— Withan *v.* Hubbell, 4 Ohio Dec. (Reprint) 75, Clev. L. Rec. 1. *Compare* Botefuhr *v.* Leffingwell, 21 Ohio Cir. Ct. 584, which leans strongly to the contrary view, where it is held that attachment defendant has a right of action against plaintiff, who has been required to give bond that he will pay all damages, although plaintiff does not sign the bond, and although the suing out of the writ was not malicious.

Oregon.— Mitchell *v.* Silver Lake Lodge, 29 Oreg. 294, 45 Pac. 798.

89. Wilson *v.* Outlaw, 1 Minor (Ala.) 367 (which case has, however, long since been discredited; no right of action now exists in Alabama for a merely wrongful attachment independently of the bond. See *supra*, XVIII, B, 1, a); Fry *v.* Estes, 52 Mo. App. 1. See also McLaughlin *v.* Davis, 14 Kan. 168, which it is believed was decided in accordance with the rule stated in the text.

In Alabama a statute, since repealed, which provided that when an original attachment shall have been wrongfully or vexatiously sued out defendant may at any time commence suit against plaintiff and recover any damages which he may have sustained was held to authorize an action on the case for a mere wrongful attachment. Seay *v.* Greenwood, 21 Ala. 491; Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59; Brown *v.* Isbell, 11 Ala. 1009; Kirksey *v.* Jones, 7 Ala. 622.

In Tennessee there is a statute which provides that all wrongs and injuries to the property and person, for which money only is demanded as damages, may be redressed by an action on the facts of the case. This provision, in connection with the statute requiring an attachment bond, is held to authorize an action independently of the bond. Renkert *v.* Elliott, 11 Lea (Tenn.) 235 [*distinguishing* Sloan *v.* McCracken, 7 Lea (Tenn.) 626; Smith *v.* Eakin, 2 Sneed (Tenn.) 456; Smith *v.* Story, 4 Humphr. (Tenn.) 168, which were decided before the enactment of the present code]; Jerman *v.* Stewart, 12 Fed. 266.

90. It is competent for the court in which the bond was executed to ascertain and assess the damages. The motion is an independent suit, and is a substitute for an action at law upon the attachment bond. Macheca *v.* Panesi, 4 Lea (Tenn.) 544. The proceedings under it are distinct from the original cause, although growing out of it. Macheca *v.* Panesi, 4 Lea (Tenn.) 544.

Revival against administrator.— In a mo-

(D) *By Set-Off or Counter-Claim in Subsequent Action.* While it has been held that where an attachment has been dissolved, the damages, if capable of liquidation, may be set off in a subsequent action by plaintiff against defendant on the same cause of action,[91] ordinarily the right to set up such damages by way of a counter-claim or set-off in a subsequent action does not exist especially when the damages are incapable of liquidation.[92]

(E) *Election of Remedies and Use of One Remedy as Bar to Another.* In jurisdictions where exemplary or punitive damages, as well as actual damages, may be recovered in an action on a bond,[93] an action on the bond will, it is apprehended, operate as a bar to an action for malicious attachment; but if, as is the case in most jurisdictions, the bond is held to cover only actual damages, a suit on the bond will not be a bar to an action for malicious attachment.[94] If defendant in attachment counter-claims damages on the bond, a recovery thereon is a bar to a recovery in a subsequent suit of any further damages for the same cause.[95] If several attachments in different actions levied on the same property are all discharged the debtor may elect to bring an action for damages against the obligors on any particular bond.[96] Where a party prosecutes concurrently an action at law on the attachment bond against the principal obligor alone and motions in equity against the principal obligor and his sureties, the court will on its own motion require him to elect whether he will proceed at law or in equity.[97]

tion for damages on an attachment bond it is not essential that there should be a revival against the administrator of a surety who died pending the proceedings. The proceedings could be dismissed as to any surety or allowed to abate as to the estate of one dying. Powers-Taylor Drug Co. *v.* Wafford, (Tenn. Ch. 1899) 53 S. W. 243.

91. Plunkett *v.* Sauer, 12 Wkly. Notes Cas. (Pa.) 362, under a statute requiring a bond conditioned that plaintiff shall pay damages if he fail to prosecute his action with effect and recover judgment against defendant.

92. In Colorado it has been held that where a person to whom a claim is assigned dismisses a suit aided by attachment begun by him and reassigns the claim to the original holder, who sues thereon, defendant cannot counter-claim damages caused by the attachment in the former suit on the attachment bond therein given. Drake *v.* Avanzini, 20 Colo. 104, 36 Pac. 846, where the following reasons were alleged: (1) that plaintiff was not a party to that instrument, and (2) that if he could be held liable for a portion of such damages by reason of being a party in interest in the action, such liability would be a joint one and not available as a counter-claim in an action brought by him to recover an individual indebtedness. And in Esbensen *v.* Hover, 3 Colo. App. 467, 33 Pac. 1008, where the action was for goods sold and delivered, it was held that defendants could not counter-claim damages arising from an excessive levy under a writ of attachment issued therein, because such damages did not arise out of the transaction set forth in the complaint, and was not connected with the subject of the action.

In Dakota it has been held that in an action on an account, an attachment bond given by plaintiffs with sureties in a former action on the same account, conditioned to pay costs and damages if judgment should be rendered for defendants, or, if the attachment should be dissolved, cannot be set up as a counter-claim. Schuster *v.* Thompson, 6 Dak. 10, 50 N. W. 125.

In Wisconsin it has been held that damages for a wrongful attachment, which was sued out without malice and afterward discontinued, cannot be set up as a counter-claim by the debtor in a subsequent action brought against him by the attaching creditor, defendant's remedy being to obtain an assessment of damages in the original action and the rendition of judgment thereon and the issue of an execution on the judgment, or an action on plaintiff's undertaking for the recovery of the judgment. Ashland County *v.* Stahl, 48 Wis. 593, 4 N. W. 752, under a statute changed somewhat by subsequent legislation. See Wis. Rev. Stat. (1898), §§ 2732, 2746.

93. See *infra*, XVIII, B, 6, j, (I), (A), (2).

94. See *infra*, XVIII, B, 6, j. (I), (A), (1); and MALICIOUS PROSECUTION.

95. Davis *v.* Milburn, 4 Iowa 246.

96. Viele *v.* Edwards, 4 Ky. L. Rep. 903.

Where two attachments were levied on the same property, and in the second one defendant reconvened and recovered damages, this did not operate as a bar to an action against the prior attaching creditors for wrongful attachment. Torrey *v.* Schneider, 74 Tex. 116, 11 S. W. 1068.

97. Kendrick *v.* Moss, 104 Tenn. 376, 58 S. W. 127.

But where an attachment defendant brings an action on the bond and also an action against the creditor and the officer who seized the property he cannot be required to elect as to which action he will prosecute, when the petition in the latter action fails to state a cause of action. Jones *v.* Bryant, 10 Ky. L. Rep. 545. It has also been held that the owner of goods wrongfully attached

Where judgment is rendered for attachment defendant on a counter-claim for damages, and the judgment orders, in addition to the payment of damages, the return of the property or the payment of its value in a designated sum, and the damages are paid, but the property is not returned, a suit will lie on the attachment bond for its value as fixed by the judgment.[98]

d. Conditions Precedent to Enforcement of Liability — (I) *Demand.*[99] It is held in some states that it is not necessary to make a demand on the principal in an attachment bond before bringing action against the sureties, as the statute contains no such requirement;[1] but in others no right of action accrues on the bond until a demand of damages therein provided for is made.[2]

(II) *Notice.*[3] It has been held that in proceedings to collect on an attachment bond, whether by rule or by action, notice of the proceedings is necessary.[4]

(III) *Assessment of Damages in Main Action.* Although there is a statute authorizing the assessment of damages in the main action on the dissolution of the attachment, it is not a condition precedent to the right to bring suit on the bond that damages should be so assessed.[5]

(IV) *Judgment Against Attachment Plaintiff in Independent Action.* In determining whether judgment in an independent action against attachment plaintiff is a condition precedent a careful consideration of the statutes under which the bonds are drawn is essential.[6] If the bond is conditioned to pay such damages as may be sustained or caused by the wrongful attachment, it is not necessary that an independent action against attachment plaintiff should be first brought before suing on the bond.[7] On the other hand, if the bond is conditioned to pay such damages as may be awarded or recovered in any suit brought against attachment plaintiff, such suit is a condition precedent to any liability on the

may sue both the officer and plaintiff in the original action after their conversion, and the fact that he has recovered in an action against one is not a bar to an action against the other. Elliott *v.* Hayden, 104 Mass. 180.

98. Morrison *v.* Springfield Engine, etc., Co., 84 Iowa 637, 51 N. W. 183.

99. Demand as a condition precedent, generally, see ACTIONS, 1 Cyc. 694.

1. Epstein *v.* U. S. Fidelity, etc., Co., 29 Misc. (N. Y.) 295, 60 N. Y. Suppl. 527; Seattle Crockery Co. *v.* Haley, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156.

Demand for proceeds of sale.—Where goods held by an agent, and mixed with his own, are attached by the agent's creditors, who know that part are so held, and whose debt was not created on a belief that they were owned by the agent, the owners may maintain conversion, although after the attachment they refused to designate their share or demand the proceeds of the sale thereof. Barnes *v.* Darby, 18 Tex. Civ. App. 468, 44 S. W. 1029.

Putting attaching party in default.— To recover damages for the hire of slaves seized by attachment it was not necessary to put the attaching party in default. But where an attachment was levied on slaves, and with the debtor's consent they remained in the hands of attachment plaintiff to enable the former to recover their value, the latter must be put in default otherwise than by the institution of suit. Cox *v.* Robinson, 2 Rob. (La.) 313.

2. Morgan *v.* Menzies, 60 Cal. 341; Pinney *v.* Hershfield, 1 Mont. 367.

3. **Notice as a condition precedent, generally,** see ACTIONS, 1 Cyc. 693.

4. Thompson *v.* Arnett, (Ky. 1901) 64 S. W. 735.

Notice of the vacation of an order of attachment is not a condition precedent to the maintenance of a suit on the attachment bond. Epstein *v.* U. S. Fidelity, etc., Co., 29 Misc. (N. Y.) 295, 60 N. Y. Suppl. 527, where it was said that orders take effect as of the time when they are made and entered.

5. Boatwright *v.* Stewart, 37 Ark. 614.

6. **Where the cause of action is assigned** after the giving of an undertaking and the assignee is substituted as plaintiff, it is not necessary that defendant before proceeding against the surety on the undertaking for costs attempt to collect them from the original plaintiff, the assignee having by his substitution as plaintiff become primarily liable therefor. Brown *v.* Tidrick, 14 S. D. 248, 85 N. W. 185.

7. *Alabama.*— Herndon *v.* Forney, 4 Ala. 243.

Ohio.— Bruce *v.* Coleman, 1 Handy (Ohio) 515, 12 Ohio Dec. (Reprint) 265.

Pennsylvania.— Hibbs *v.* Blair, 14 Pa. St. 413.

Tennessee.— Jennings *v.* Joiner, 1 Coldw. (Tenn.) 644; Smith *v.* Eakin, 2 Sneed (Tenn.) 456.

Virginia.— Offterdinger *v.* Ford, 92 Va. 636, 24 S. E. 246; Dickinson *v.* McCraw, 4 Rand. (Va.) 158.

Washington.— Seattle Crockery Co. *v.* Haley, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156.

bond.[8] Where the bond is conditioned to pay such damages as are awarded against plaintiff, there is some conflict of authority as to whether a preliminary action against attachment plaintiff is necessary.[9]

(v) *Obtaining Possession of Bond.* Where a right of action has accrued on an attachment bond, attachment defendant need not ask leave of the court to claim possession of the undertaking before he can commence an action thereon.[10]

(vi) *Payment of Damages Caused by Attachment.* To entitle attachment defendant to recover on the bond for damages caused by the attachment it is not necessary that he should have actually paid the damages sustained by him.[11]

e. Parties — (i) *Plaintiffs* — (a) *In General.* Ordinarily, in the absence of any disability, defendant in attachment is the proper party to bring the action, and that too whether the proceedings be independent of or based upon the bond.[12] In jurisdictions, however, where the bond is taken in the name of the state to the use of attachment defendant, the suit should be brought in the name of the state to his use.[13]

(b) *Assignees in Bankruptcy and Assignees For Benefit of Creditors.* It has been held that a bankrupt's right of action on an attachment bond for the wrongful suing out of an attachment passes to the assignee in bankruptcy in so far as the action seeks compensation for injuring, detaining, or converting the property attached, but remains with the bankrupt in so far as the action seeks to recover compensation for injury to the bankrupt's business, reputation, and credit, and vindictive damages for a malicious suing out or abusive use of the attachment.[14] So it has been held that where property is assigned for the benefit of creditors after an attachment and after the acceptance thereof by some of the beneficiaries, and the taking possession of the property by the assignee, the latter

8. Sterling City Gold, etc., Min. Co. *v.* Hughes, 3 Colo. 229; Sterling City Gold, etc., Min., etc., Co. *v.* Cock, 2 Colo. 24; Sledge *v.* Lee, 19 Ga. 411 (the present Georgia statute differs from the one herein construed, in omitting the words "which may be recovered," etc.); Holcomb *v.* Foxworth, 34 Miss. 265 (the statute in Mississippi has been changed so as to omit the words "in any suit or suits which may thereafter be brought for wrongfully suing out the attachment"); Smith *v.* Eakin, 2 Sneed (Tenn.) 456 (where the bond went beyond the requirements of the statute and was in effect of the character mentioned in the text).

9. Some cases hold such action is necessary (Wilson *v.* Isom, 3 Ill. App. 246; McLuckie *v.* Williams, 68 Md. 262, 12 Atl. 1; Offterdinger *v.* Ford, 92 Va. 636, 24 S. E. 246), while others have maintained the contrary view (Churchill *v.* Abraham, 22 Ill. 456; Packer *v.* Phillips, 33 Ill. App. 120).

10. Bruce *v.* Coleman, 1 Handy (Ohio) 515, 12 Ohio Dec. (Reprint) 265. See also Freeman *v.* Young, 3 Rob. (N. Y.) 666, where it was held that when the right to an action on the undertaking given to procure an attachment accrues, it is unnecessary to require the clerk, with whom the undertaking was filed in accordance with the statute, to deliver it to defendant for the purpose of instituting an action on it, but it may be produced on the trial of the action.

11. It is sufficient that attachment plaintiff has imposed them, and that defendant is liable to pay them. Metcalf *v.* Young, 43 Ala. 643; State *v.* Watts, 3 Mo. App. 568.

In California the rule is that counsel fees cannot be recovered until they have actually been paid. Elder *v.* Kutner, 97 Cal. 490, 32 Pac. 563.

12. See, generally, Bonds; Parties.

13. But a petition which does not allege that the state sued may be considered good after verdict if it sets forth sufficiently the title of the party for whose benefit the bond was made, and who is the real party in interest. State *v.* Webster, 53 Mo. 135.

Suit on bond where national bank is obligor — Jurisdiction of state court.—Where a national bank of the state of New York desired to begin proceedings against a person residing in Fulton county, Georgia, and for that purpose gave a bond to pay all damages which defendant might sustain and all costs that might be incurred by him in consequence of suing out an attachment, in the event plaintiff should fail to recover in the case (the surety on the bond being a resident of Fulton county), and thereupon obtained an attachment returnable to the city court of Atlanta, in accordance with the statute, that court had jurisdiction of a suit subsequently brought against the principal and surety on the bond to recover damages arising from the suing out of such attachment. Continental Nat. Bank *v.* Folsom, 78 Ga. 449, 3 S. E. 269.

14. While the bankrupt and his assignee may maintain separate actions and recover, the assignee for the injury to the property, and the bankrupt for the personal tort, yet the aggregate recoveries cannot exceed the amount of the penalty where the action is

is the proper party to maintain an action independently of the bond for injuries caused by a wrongful levy of the attachment.[15] If, however, an attempt is made to enforce the liability for injuries resulting from a wrongful attachment by proceedings on the attachment bond, a different question arises. While it has been held that the assignee may maintain an action on the bond against the principal when the assignment was made prior to the attachment,[16] it has also been held that an action on the bond against the sureties cannot be maintained by the assignee.[17]

(c) *Assignees of Attachment Bond.* The assignee of an attachment bond may sue thereon in his own name, but defendant may have the benefit of any set-off he would have had against the assignor.[18]

(d) *Joinder* — (1) Where All Obligees Have Not Sustained Injury. Ordinarily the attachment bond is conditioned to pay attachment defendant or defendants such damages as he or they may sustain. The decisions are somewhat conflicting as regards the question of proper and necessary parties, where more than one obligee is named in the bond. According to the weight of authority, if one or any number of the obligees less than the whole is injured, the suit on the bond may be brought in the name of all for the benefit of the obligee or obligees injured;[19] and in a number of jurisdictions if one or more of the obligees sustain injury, he or they may sue alone without joining the obligee or obligees who have sustained no injury.[20]

(2) Where All Obligees Have Sustained Injury — (a) Where Injury Is Joint. Where all the obligees named in the bond have a common interest it cannot be doubted that they may join in an action on the bond;[21] and furthermore it is difficult to escape the conclusion that they must join.[22]

(b) Where Each Obligee Has Sustained Individual Injury. If each obligee has

on the bond. Doll *v.* Cooper, 9 Lea (Tenn.) 576.

15. Rock Island Plow Co. *v.* Hill, (Tex. Civ. App. 1895) 32 S. W. 242; Martin-Brown Co. *v.* Henderson, 9 Tex. Civ. App. 130, 28 S. W. 695. In Roby *v.* Meyer, 84 Tex. 386, 19 S. W. 557, it is held that the assignee having taken possession of the property before the attachment, he is the only party who can sue for a wrongful attachment. See also Assignments For Benefit of Creditors, 4 Cyc. 285, note 27.

Assignee for the benefit of creditors may intervene in an attachment suit brought against his assignor prior to the assignment and set up a claim against the plaintiff therein for damages sustained by his assignor by reason of the wrongful suing out of the attachment, and this, although the assignor himself has pleaded the same as a counterclaim. This right is given by a statute authorizing any person interested in any matters in litigation to become a party thereto by joining as plaintiff or defendant. Dunham *v.* Greenbaum, 56 Iowa 303, 9 N. W. 220.

16. Claypoole *v.* Pope, 9 Ohio Cir. Ct. 309.

17. Hopewell *v.* McGrew, 50 Nebr. 789, 70 N. W. 397.

Where after attachment of the individual property of a member of a firm, in an action against him, the firm assigns for the benefit of creditors, and such member conveys to the assignee, for the purposes of the assignment, the property so attached, the assignee defending the attachment in behalf of the creditors cannot recover on the bond the expenses of such defense. Weir *v.* Dustin, 32 Ill. App. 388.

18. State *v.* McHale, 16 Mo. App. 478. See, generally, Assignments, 4 Cyc. 1.

19. Renkert *v.* Elliott, 11 Lea (Tenn.) 235; Sloan *v.* Langert, 6 Wash. 26, 32 Pac. 1015. *Contra*, Heath *v.* Lent, 1 Cal. 410, where it was held that as the property of only one defendant was seized, and as only actual damages were recoverable on the bond, the party whose property was seized had no right of action thereon, but only a right of action for tort.

In Alabama it is held that all the obligees named in the bond must join as plaintiffs for the use of such as claim to have been injured. Painter *v.* Munn, 117 Ala. 322, 23 So. 83, 67 Am. St. Rep. 170; Masterson *v.* Phinizy, 56 Ala. 336.

20. Alexander *v.* Jacoby, 23 Ohio St. 358; Renkert *v.* Elliott, 11 Lea (Tenn.) 235.

Where an attachment is maliciously sued out on a claim against a partnership and levied not only on the partnership effects but on all the property of the only responsible member, resulting in the destruction of the business and the loss of his individual property, and the attachment is made by collusion of another member with the creditor, such responsible member may maintain an action individually therefor. Grimes *v.* Bowerman, 92 Mich. 258, 52 N. W. 751.

21. Alexander *v.* Jacoby, 23 Ohio St. 358. See also Haynes *v.* Knowles, 36 Mich. 407.

22. Renkert *v.* Elliott, 11 Lea (Tenn.) 235.

sustained an injury in his own right, all the obligees may join in an action on the bond,[23] and it has been held that they must join;[24] and that too irrespective of the fact that each obligee employed different counsel to represent his respective interests and incurred separate counsel fees.[25] So it has been laid down without qualification that in an action by one of two joint obligees on a bond to recover the full amount of the bond the other is a necessary party to the action.[26]

(3) OBJECTIONS FOR DEFECTS OF PARTIES. If it appears from the complaint that all the obligees have not been joined as plaintiffs, the objection for this defect must be taken by demurrer, or it will be considered waived; but if the complaint fails to show who are the obligees, and if the bond was in fact payable to others beside plaintiffs, objection may be taken to its introduction in evidence, or a variance may be claimed and proper charges requested.[27]

(II) *DEFENDANTS*—(A) *Joinder of Principal and Sureties.* In an action on an attachment bond the principal alone may be sued,[28] or an action may be brought against the principal and sureties jointly.[29] There cannot, however, be two separate actions at the same time, one against the principal and another against the sureties.[30] Accordingly, a party who prosecutes concurrently these two actions will be put to his election as to which one he will prosecute.[31] There is some conflict of authority as to whether plaintiff in attachment may be joined in an action on the bond when he did not execute it. In some decisions it has been held that this cannot be done.[32] In other jurisdictions, however, it is held

23. Boyd *v.* Martin, 10 Ala. 700.

24. Weedon *v.* Jones, 106 Ala. 336, 17 So. 454.

Amendment.—Where one of the obligees in an attachment bond is not joined as a plaintiff, the complaint may be amended by joining the other obligee, without causing a fatal variance between the original suit and that made by the amendment. Weedon *v.* Jones, 106 Ala. 336, 17 So. 454.

25. Weedon *v.* Jones, 106 Ala. 336, 17 So. 454.

26. King *v.* Kehoe, 91 Iowa 91, 94, 58 N. W. 1071, where the court said: "The amount to which each may be entitled must necessarily be ascertained before either can recover. If each may separately recover, the sureties may be charged above the amount of the bond, or the one last recovering be limited to an amount less than he is entitled to upon the bond." See also Renkert *v.* Elliott, 11 Lea (Tenn.) 235, where this question was not necessary to a decision, but where the court used precisely the same line of reasoning.

27. Painter *v.* Munn, 117 Ala. 322, 23 So. 83, 67 Am. St. Rep. 170.

Objections cannot, however, be made for the first time on appeal that all the obligees of an attachment bond were not joined in an action on it. Powers-Taylor Drug Co. *v.* Wafford, (Tenn. Ch. 1899) 53 S. W. 243. See also APPEAL AND ERROR, 2 Cyc. 687.

28. Cincinnati Fourth Nat. Bank *v.* Mayer, 100 Ga. 87, 26 S. E. 83, where it was said it could be of no possible benefit to a principal in any case to have the surety adjudged jointly liable with him upon the cause of action, because the ultimate liability must in any event fall upon the principal alone. See also Kendrick *v.* Moss, 104 Tenn. 376, 58 S. W. 127.

29. Jennings *v.* Joiner, 1 Coldw. (Tenn.) 644.

Permitting principal to join as defendant. — In an action against the sureties by the assignee of defendant in the attachment for damages, where the principal, who is not made a party, has an unpaid judgment against attachment defendant, obtained in the attachment action, greatly in excess of the alleged damages, and defendant in the attachment is insolvent, the principal may become a party and defend, and, after the principal has been made a party, and has filed a verified answer setting forth all the foregoing facts, the court commits no error in refusing to allow plaintiff to dismiss his action against the principal, so that he may proceed against the sureties alone. Gerson *v.* Hanson, 34 Kan. 590, 9 Pac. 230.

30. **While the obligation of the principal and sureties is joint and several,** still the liability of the sureties must in its final analysis depend upon the liability of the principal. It may occur as a result of separate actions that the principal will be adjudged not liable, while the sureties will be so adjudged. Kendrick *v.* Moss, 104 Tenn. 376, 58 S. W. 127.

31. Kendrick *v.* Moss, 104 Tenn. 376, 58 S. W. 127.

32. Ault *v.* Everitt, 16 Ky. L. Rep. 93; Storz *v.* Finklestein, 48 Nebr. 27, 66 N. W. 1020, 30 L. R. A. 644. See also Smith *v.* Eakin, 2 Sneed (Tenn.) 456, where it was held that where the principal has not signed the bond, which is conditioned to pay such damages as may be awarded and recovered against the principal, the sureties cannot be sued jointly with him on the bond.

The mere fact that attachment plaintiff is liable to the surety for any damage which the surety has suffered because the attach-

that attachment plaintiff is a proper party in an action on the bond, although it was not signed by him.[33]

(B) *Joinder of Several Attaching Creditors.* Where several creditors successively attach or otherwise impound the same fund of their debtor and give separate attachment bonds, they are not liable upon dismissal of their suits for a joint judgment for the damages resulting from the wrongful prosecution of their attachment suits. There is no joint tort by the several attaching creditors, no joint liability between the principals and sureties on the several bonds executed, and no connection between them at the time the attachments were sued out and the damage done.[34]

f. Pleadings — (I) *Of Defendant in Attachment* — (A) *Necessity and Sufficiency of Allegations*[35] — (1) As to Issue and Levy of Writ. Where an independent action is brought to recover for a wrongful attachment, whether on or independently of the attachment bond, the issue of the writ of attachment should be alleged.[36] It has been held, however, that where attachment defendant reconvenes on the attachment bond in the main action such allegation is unnecessary.[37] As regards the levy of an attachment, an examination of the

ment was wrongful does not authorize a party bringing an action on the bond to join him with the sureties. Storz *v.* Finklestein, 48 Nebr. 27, 66 N. W. 1020, 30 L. R. A. 644.

33. Hoskins *v.* White, 13 Mont. 70, 32 Pac. 163. To same effect see State *v.* Hudson, 86 Mo. App. 501, where the bond was not executed by plaintiff, but at his request by two persons, one as principal and the other as surety.

34. Stringfield *v.* Hirsch, 94 Tenn. 425, 29 S. W. 609, 45 Am. St. Rep. 733. See also Farwell *v.* Becker, 129 Ill. 261, 21 N. E. 792, 16 Am. St. Rep. 267, 6 L. R. A. 400. In Miller *v.* Beck, (Iowa 1897) 72 N. W. 553, where attachments by different parties having different interests were simultaneously levied on the same property, and separate attachment bonds were given, it was held that the parties levying the attachments were not joint wrong-doers, and a recovery of damages on the bond of one and the satisfaction of the judgment therefor was no bar to an action on the bond given by another. But in another case, on identically the same state of facts, the court held that the levy of several attachments constituted but a single tort and a single cause of action, for which the attachment creditors were jointly and severally liable. It appearing, however, that the creditors acted without concert in good faith, having cause to believe that grounds of attachment existed, it was held that one of the creditors, who was compelled to satisfy the damages arising from the attachments in an action on the attachment bond given by him, was entitled to contribution from the other creditors who participated in the benefits accruing from the attachment proceedings. Vandiver *v.* Pollak, 107 Ala. 547, 18 So. 180, 54 Am. St. Rep. 118.

35. Depending upon character of remedy. — As hitherto shown (see *supra*, XVIII, B, 6, c) there exists in nearly every state, in addition to the action of malicious attachment elsewhere considered (see Malicious Prosecution), one or more remedies for injuries resulting from an attachment wrongfully, or wrongfully and maliciously, sued out. Thus, one or more of the following methods of procedure have been allowed in nearly all jurisdictions: The assessment of damages by the jury in the main action and rendition of judgment therein on the attachment bond on the adjudication of the wrongfulness of the attachment on a traverse of the affidavit, by plea in abatement, or by counter-affidavits; by set-off, or reconvention, in the main action; by counter-claim on the bond, or on the facts of the case independently of the bond; by a direct action on the bond, or by action on the facts of the case independently of it. The necessary allegations depend in a measure on the character of the remedy.

Establishment of title by writ of entry. — Where an attachment bond contains a provision that plaintiff shall first establish his title by a writ of entry, a declaration in an action on the bond which contains no averment that plaintiff has so established his title is demurrable. Berry *v.* Wasserman, (Mass. 1901) 61 N. E. 228.

36. Failure to object to sufficiency of allegation. — In an action on the bond, plaintiff did not directly allege that a writ of attachment had been issued, but did allege that "in obedience to the writ of attachment issued in said cause, the sheriff levied upon and attached the property of the plaintiff." The objection that the complaint nowhere directly alleges that a writ of attachment was issued, if made at all, must be made in the trial court, and cannot be first raised on an appeal. Hedrick *v.* Osborne, 99 Ind. 143. See, generally, Appeal and Error, 2 Cyc. 474.

37. Castro *v.* Whitlock, 15 Tex. 437, assigning as the reason that in pleading to a suit it is never necessary to aver the previous proceedings in the case, which appear to the court by the record.

decisions in proceedings for wrongful attachment shows that in the majority of cases it is usual to allege a levy,[38] although there seems to be some conflict of authority as to whether a levy is essential to give attachment defendant a cause of action.[39] If unnecessary to a cause of action, it would therefore be unnecessary to allege the issue of the attachment.[40] The pleadings in an action for wrongful attachment should describe the property levied on.[41] or state facts showing an excuse for failure to do so.[42]

(2) As to Execution and Approval of Bond. In an action on an attachment bond it must be alleged that the sureties joined in its execution,[43] and in jurisdictions where plaintiff in attachment must join in the execution of the bond, it would be insufficient to allege that he gave a bond to attachment defendant without alleging that he executed it.[44] But it is not necessary to allege that the undertaking was approved by the clerk who issued the writ.[45]

(3) As to Conditions of Bond and Breach Thereof. If an action to recover for wrongful attachment is brought on the bond[46] the provisions thereof must be set out.[47] The complaint in such an action must also show a breach of

38. See *supra*, note 36; and cases cited *infra*, note 40 *et seq.*

39. See *supra*, XVIII, B, 2, a; and Malicious Prosecution.

40. **Where a recovery may be had, even though there has been no levy** of the attachment, it is held that the levy is a matter of evidence merely to establish the manner and amount of the alleged damage and that it is not necessary to allege it. Dothard *v.* Sheid, 69 Ala. 135.

41. Sanford *v.* Willetts, 29 Kan. 647; Schneider *v.* Ferguson, 77 Tex. 572, 14 S. W. 154.

42. Schneider *v.* Ferguson, 77 Tex. 572, 14 S. W. 154.

Amendment.— Where there is a misnomer of the animal seized under the attachment the petition may be amended by giving the proper name. Sanford *v.* Willetts, 29 Kan. 647.

43. Seattle Crockery Co. *v.* Haley, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156, where it was held that a mere statement that the bond was executed by the principal, without alleging that the sureties joined in its execution, was insufficient, although a copy was set out in the complaint, to which the names of the sureties were appended.

Variance.— In debt on an attachment bond, where the bond set out in the declaration recites that "Robert Cornell and Charles Cornell had, on the day of the date of said writing obligatory, prayed an attachment at the suit of said Robert and Charles Cornell, merchants and partners, using the name of Cornell & Brother," while the bond set out on oyer recites that "John J. Steiner hath, on the day of the date hereof, prayed an attachment at the suit of Robert and Charles Cornell, merchants and partners, using the name of Cornell & Brother," the variance is not material. These recitals do not form an essential portion of the condition of the bond. Dickson *v.* Bachelder, 21 Ala. 699. But a bond with three sureties on which an attachment in aid of an action is sued out is inadmissible to support a plea in the main action in reconvention for damages for wrongful attachment, declaring on an attachment bond with two sureties. Jordan *v.* Meyers, 89 Tex. 233, 34 S. W. 92. So in an action of debt on an attachment bond in which defendant pleaded *non est factum* and the instrument produced was not a bond but a covenant to pay one hundred dollars, or all damages plaintiff might sustain by reason of the issue of the attachment, it was held that, although oyer was not demanded by defendant or set forth, he could object to the variance at the trial, and that such variance was fatal. Rockefeller *v.* Hoysradt, 2 Hill (N. Y.) 616.

44. Church *v.* Campbell, 7 Wash. 547, 35 Pac. 381.

45. Dothard *v.* Sheid, 69 Ala. 135; Sannes *v.* Ross, 105 Ind. 558, 5 N. E. 699.

The obligors would be liable if the bond was actually executed and delivered to the clerk, and received by him and filed before issuing the process. Dothard *v.* Sheid, 69 Ala. 135.

46. **Complaint held to be on bond.**— In an action aided by attachment, a cross petition for wrongful attachment alleged that, when he sued out the writ, plaintiff filed a bond to pay all damages defendant might sustain by the wrongful suing out of the writ, and said bond and writ were made a part of the cross petition. The bondsmen were not made parties, and damages were claimed for a larger amount than the penalty of the bond. It was held that the cross-complaint was nevertheless on the bond, and not a proceeding at common law for maliciously suing out the attachment. Union Mercantile Co. *v.* Chandler, 90 Iowa 650, 57 N. W. 595.

47. Dunn *v.* Crocker, 22 Ind. 324; Bunt *v.* Rheum, 52 Iowa 619, 3 N. W. 667; Ryder *v.* Thomas, 32 Iowa 56.

Annexing a copy of the bond as an exhibit to the pleading is not a compliance with a statute providing that in an action on a bond party must notice its conditions, etc.; but where an answer in an attachment suit setting up a cross demand fails to set forth the con-

the conditions of the bond and must state the facts which constitute the same.[48]

(4) As to Wrongfulness of Attachment — (a) In General. Inasmuch as there can be no recovery for an attachment which is not wrongful, although the motive of the person suing it out may have been malicious,[49] it must follow that whatever may be the form of proceedings adopted in seeking to recover damages for an attachment the pleadings of attachment defendant must show that the attachment was wrongfully sued out.[50] The sufficiency of the allegations on this score depends somewhat on the character of the proceedings in which it is sought to recover damages. In some jurisdictions, in actions on the attachment bond, it would perhaps be sufficient to allege generally that the attachment was "wrongfully" sued out.[51]

(b) Negativing Grounds of Attachment in Express Terms — aa. *In Suit Before Dissolution.* In Alabama, when suit is brought on the attachment bond to recover damages before any adjudication in the main action as to the rightfulness of the attachment — this being the usual practice in this state, and expressly authorized by statute — there is considerable conflict of authority as to the necessity of expressly negativing the existence of grounds for attachment.[52] In another state

ditions of the bond, but only annexes a copy of the bond, the pleading may be amended. Ryder *v.* Thomas, 32 Iowa 56.

Failure to file bond with petition.— Where the petition in an action on an attachment bond states a cause of action, the fact that the bond sued on is not filed with the petition, and no excuse given for not filing it, affords no ground for objection to the introduction of evidence, or for a motion in arrest of judgment. State *v.* Eldridge, 65 Mo. 584.

Reference to bond as being on file.— In pleading a set-off in an attachment suit for damages sustained on the attachment bond, reference in the answer to the bond as being on file is not sufficiently certain. Stadler *v.* Parmlee, 10 Iowa 23.

Setting out statute under which bond was given.—A bond given in attachment proceedings in another state, having been taken by a court having jurisdiction of the subject-matter, is good as a common-law bond, and it is not necessary to set out any statute under which it was taken in order to maintain an action thereon. Cunningham *v.* Jacobs, 120 Ind. 306, 22 N. E. 335.

Where complaint avers that the bond sued on is lost or in the possession of defendant, proof that it is lost is proof of the complaint and justifies secondary evidence. Barnett *v.* Lucas, (Ind. 1901) 61 N. E. 683.

48. Bunt *v.* Rheum, 52 Iowa 619, 3 N. W. 667; Horner *v.* Harrison, 37 Iowa 378; Ryder *v.* Thomas, 32 Iowa 56; Church *v.* Campbell, 7 Wash. 547, 35 Pac. 381. See also Hoshaw *v.* Hoshaw, 8 Blackf. (Ind.) 258.

49. City Nat. Bank *v.* Jeffries, 73 Ala. 183. See also *supra*, XVIII, B, 1, a.

50. *Alabama.*— McCullough *v.* Walton, 11 Ala. 492; Flanagan *v.* Gilchrist, 8 Ala. 620.

Florida.— Steen *v.* Ross, 22 Fla. 480.

Iowa.— Bunt *v.* Rheum, 52 Iowa 619, 3

Iowa.— Bunt *v.* Rheum, 52 Iowa 619, 3 Porter *v.* Wilson, 4 Greene (Iowa) 314.

Mississippi.— Azlin *v.* Lake, 57 Miss. 693.

Nebraska.— Eaton *v.* Bartscherer, 5 Nebr. 469.

51. Azlin *v.* Lake, 57 Miss. 693; Eaton *v.* Bartscherer, 5 Nebr. 469; Bruce *v.* Coleman, 1 Handy (Ohio) 515, 12 Ohio Dec. (Reprint) 265.

In Texas it has been held that in an attachment suit a plea in reconvention, which alleges generally that the attachment was wrongfully sued out, is good on general demurrer, or on an objection to the admissibility of evidence under it to prove the facts from which the conclusion would follow. Black *v.* Drury, 24 Tex. 289.

52. In an early decision it was held sufficient to allege generally that the attachment was wrongfully sued out without any further statement denying the ground or grounds on which it was sued out. Dickson *v.* Bachelder, 21 Ala. 699. This rule was adopted in another decision, where it was alleged that the attachment was sued out wrongfully and maliciously. Gabel *v.* Hammerwell, 44 Ala. 336. Thereafter it was held that in an action on the bond for wrongfully and maliciously suing out an attachment it was necessary to negative the existence of the ground or grounds for the attachment stated in the affidavit. Durr *v.* Jackson, 59 Ala. 203. In the next decision, in point of time, the court, without noticing the one just mentioned, reached a contrary conclusion. Dothard *v.* Sheid, 69 Ala. 135. In later decisions, including some of very recent date, where the complaint alleged that the writ was sued out wrongfully and maliciously, or asked for exemplary damages, it was again held that the complaint must negative the ground or grounds stated in the affidavit (Painter *v.* Munn, 117 Ala. 322, 23 So. 83, 67 Am. St. Rep. 170; Brown *v.* Master, 104 Ala. 451, 16 So. 443; McLane *v.* McTighe, 89 Ala. 411, 8 So. 70; City Nat. Bank *v.* Jeffries, 73 Ala. 183; Flournoy *v.* Lyon, 70 Ala. 308); but in one of them it was denied that there was any necessity for stating that no

it has been held that in counter-claiming damages arising from the wrongful suing out of an attachment, the counter-claim apparently not being based on the bond, it is necessary to negative the truth of the matters stated in the application for the attachment.[53]

bb. *In Suit After Dissolution.* Whether an express denial of grounds for attachment alleged in the affidavit therefor is necessary in an action on an attachment bond, commenced after the dissolution of the attachment, is not altogether clear. So far as the reported decisions show, an attachment will not be considered wrongful merely because it has been dissolved on account of irregularities or informalities in the proceedings.[54] It is evident therefore that a mere statement that the attachment was dissolved does not show that it was wrongful.[55] Again, it has been held, in an action on an attachment bond, that it was insufficient to allege, in the language of the statute describing the terms of the bond, that the writ was "improperly" issued.[56] There are decisions, however, where the attachment was apparently dissolved on the merits, to the effect that in an action on the attachment bond an averment that the suit was not prosecuted to effect and that judgment was rendered dismissing the attachment prevents any inquiry into the truth of the affidavit for attachment,[57] and that the complaint should not deny the truth of the facts stated in the affidavit as grounds for the attachment.[58]

(5) Want of Probable Cause. Whether want of probable cause must be alleged depends upon two considerations: (1) the character of damages sought to be recovered; (2) the provisions of the statutes under which the action is brought. In jurisdictions where no liability for suing out an attachment arises unless it be shown that there was no probable cause therefor,[59] it is of course necessary to allege want of probable cause, although only actual damages are sought or the form of the proceeding is such that only actual damages are recoverable.[60] In most jurisdictions, however, want of probable cause is not a prerequisite to the recovery of such damages, and where they are asked there can be no necessity for alleging it,

statutory grounds existed (Brown *v.* Master, 104 Ala. 451, 16 So. 443). In the latest decision on this question, and in another decision of very recent date, it was held that if exemplary damages are claimed the complaint must allege that the attachment was sued out without the existence of any statutory ground therefor. Hamilton *v.* Maxwell, 119 Ala. 23, 24 So. 769; Schloss *v.* Rovelsky, 107 Ala. 596, 18 So. 71. So in a number of cases in which only actual damages were asked it was held that if the indebtedness was not denied the complaint should in some form negative the existence of any statutory grounds for the suing out of the attachment (Painter *v.* Munn, 117 Ala. 322, 23 So. 83, 67 Am. St. Rep. 170; Crofford *v.* Vassar, 95 Ala. 548, 10 So. 350); and the reason assigned is that the non-existence of the particular ground averred in the affidavit, or of any particular ground, does not render the attachment wrongful (Painter *v.* Munn, 117 Ala. 322, 23 So. 83, 67 Am. St. Rep. 170).

53. Swan *v.* Smith, 26 Iowa 87, the rule in this state differing from that in Alabama in this respect, that an attachment is considered wrongful if the ground stated in the affidavit does not exist.

54. See *supra*, XV, A.

55. And it has been so held in a decision, from which it may be reasonably inferred that it will be sufficient either to allege generally that the attachment was wrongfully sued out or the facts from which this may be inferred. Eaton *v.* Bartscherer, 5 Nebr. 469.

56. Steen *v.* Ross, 22 Fla. 480, holding that the complaint should state in what the "impropriety" consisted, that is to say, that no cause of action of the class in which the attachment might be sued out existed, or that the ground alleged in the affidavit was untrue, or not one of the grounds enumerated, which must exist before a writ can be obtained.

A complaint which negatived the performance of the conditions of the bond in the words of the contract, and otherwise good, was deemed to be sufficient on demurrer. Sannes *v.* Ross, 105 Ind. 558, 5 N. E. 699.

57. Hayden *v.* Sample, 10 Mo. 215; Bennett *v.* Southern Bank, 61 Mo. App. 297.

58. Bennett *v.* Southern Bank, 61 Mo. App. 297, where the reason assigned is that this question has already been determined in the main suit and cannot be retried in the suit on the bond.

Allegations of this character should be stricken out on motion; but the overruling of such motion is not such error as will prejudice defendant. Bennett *v.* Southern Bank, 61 Mo. App. 297.

59. See *supra*, XVIII, B, 1, b.

60. Bunt *v.* Rheum, 52 Iowa 619, 3 N. W. 667; Burton *v.* Knapp, 14 Iowa 196, 81 Am. Dec. 465; Mahnke *v.* Damon, 3 Iowa 107;

whatever may be the character of the proceeding in which a recovery is sought.[61] On the other hand, if the party asks exemplary or punitive damages, want of probable cause must be alleged, whether the proceeding be based on the bond or independently of it.[62] Merely alleging that the attachment was sued out maliciously is insufficient.[63]

(6) MALICE. In an action on an attachment bond, if only actual damages are sought an averment of malice on the part of plaintiff in attachment in suing out the writ is unnecessary.[64] In respect to exemplary or punitive damages, where an action lies independently of the bond to recover either actual or punitive damages, it has been held that malice must be alleged in order to warrant a recovery of exemplary or punitive damages.[65] Again it has been determined that where the bond is held to cover exemplary or punitive damages, there can be no recovery of such damages in an action thereon in the absence of an allegation of malice.[66] In Alabama, an examination of the decisions will show that in actions on bonds it is usual to allege in express terms that the writ was "maliciously" or "vexatiously" sued out when a recovery of exemplary damages is asked.[67]

(7) DISSOLUTION OF ATTACHMENT OR TERMINATION OF MAIN ACTION.[68] In jurisdictions where it is not necessary to the accrual of the right of action that a final judgment should have been rendered in favor of attachment defendant,[69]

Winchester *v.* Cox, 4 Greene (Iowa) 121; Sprague *v.* Parsons, 12 Daly (N. Y.) 392, 6 N. Y. Civ. Proc. 26, 14 Abb. N. Cas. (N. Y.) 320. *Compare* Porter *v.* Wilson, 4 Greene (Iowa) 314.

61. Painter *v.* Munn, 117 Ala. 322, 23 So. 83, 67 Am. St. Rep. 170; Crofford *v.* Vassar, 95 Ala. 548, 10 So. 350; Mitchell *v.* Mattingly, 1 Metc. (Ky.) 237; Sprague *v.* Parsons, 12 Daly (N. Y.) 392, 6 N. Y. Civ. Proc. 26, 14 Abb. N. Cas. (N. Y.) 320; Bruce *v.* Coleman, 1 Handy (Ohio) 515, 12 Ohio Dec. (Reprint) 265.

Surplusage.— If it is alleged, it will be regarded merely as surplusage, and will not render the pleading demurrable. Mitchell *v.* Mattingly, 1 Metc. (Ky.) 237.

62. Hamilton *v.* Maxwell, 119 Ala. 23, 24 So. 769; Schloss *v.* Rovelsky, 107 Ala. 596, 18 So. 71; Crofford *v.* Vassar, 95 Ala. 548, 10 So. 350; McLane *v.* McTighe, 89 Ala. 411, 8 So. 70; City Nat. Bank *v.* Jeffries, 73 Ala. 183; Elser *v.* Pierce, 2 Tex. App. Civ. Cas. § 737. *Compare* Dothard *v.* Sheid, 69 Ala. 135; Gable *v.* Hammerwell, 44 Ala. 336, where complaints were approved which contained no direct averment of want of probable cause. In both cases the question as to the sufficiency of the complaint arose on demurrer, and it is not easy to see whether the court intended to hold that the complaint was sufficient to authorize the recovery of actual damages or of exemplary damages as well. In the first-mentioned case, the averment was that the attachment was wrongfully, vexatiously, and maliciously sued out, and in the second that it was vexatiously and wrongfully sued out. If the court intended to hold that exemplary damages could be recovered under such complaints, these decisions are squarely in conflict with the other Alabama decisions above cited.

63. If it were malicious and unfounded, but there was probable cause for suing out the attachment, nothing more than actual damages can be recovered. Elser *v.* Pierce, 2 Tex. App. Civ. Cas. § 737.

64. Sprague *v.* Parsons, 12 Daly (N. Y.) 392, 6 N. Y. Civ. Proc. 26, 14 Abb. N. Cas. (N. Y.) 320; Bruce *v.* Coleman, 1 Handy (Ohio) 515, 12 Ohio Dec. (Reprint) 265.

65. Elser *v.* Pierce, 2 Tex. App. Civ. Cas. § 737.

66. Doll *v.* Cooper, 9 Lea (Tenn.) 576.

67. Hamilton *v.* Maxwell, 119 Ala. 23, 24 So. 769; Schloss *v.* Rovelsky, 107 Ala. 596, 18 So. 71; Crofford *v.* Vassar, 95 Ala. 548, 10 So. 350.

There seems to be some doubt as to whether an express averment to this effect is necessary in this state. In one decision, in which the question seems to have received casual consideration, it is said that the absence of probable cause, coupled with the unlawful act of suing out the writ, is the vexatious or malicious abuse of the process, against which the statute intends to guard, and for which the jury are authorized to give vindictive damages. Durr *v.* Jackson, 59 Ala. 203. *Compare* Schloss *v.* Rovelsky, 107 Ala. 596, 599, 18 So. 71, where it was said: "We are not prepared to hold . . . 'that if no statutory ground existed for the attachment, and that defendant did not reasonably believe that one did exist,' that plaintiff was entitled to recover punitive damages. These facts are evidence to be considered by the jury, and it is for the jury to say from these facts and all the evidence whether the attachment was maliciously sued out."

68. Replication unnecessary, when.—Where in a suit on an attachment bond a petition alleges the rendition of judgment for the attachment defendant on plea in abatement, and the answer sets up that a motion for new trial was still pending and undisposed of, this does not constitute new matter requiring a replication. State *v.* Williams, 48 Mo. 210.

69. See *supra*, XVIII, B, 3, b.

it is of course unnecessary to allege such final determination of the action, but it will be sufficient to show that the attachment had been dissolved.[70] It is equally obvious that if no cause of action accrues until the dissolution of the attachment[71] the fact of dissolution should be alleged in a direct action to recover for wrongful attachment.[72] By parity of reasoning, if a final determination of the suit in which the attachment was sued out in favor of attachment defendant is essential to a cause of action for wrongful attachment, whether based on the bond or brought independently thereof,[73] it would be necessary to show this fact by some appropriate form of averment.[74]

(8) Damages — (a) Necessity of Alleging. In proceedings to recover for injuries resulting from an attachment, it is necessary to allege that damages have actually been sustained whatever may be the character of such proceedings;[75] and if a recovery of special damages is sought such damages must be specially pleaded.[76] The following items of damages have been held not recoverable unless specially pleaded: A depreciation in the value of the property seized under the attachment;[77] attorney's fees expended in relation to the attachment;[78] injuries caused by loss of reputation;[79] special injuries resulting from loss of credit;[80]

70. McLaughlin *v.* Davis, 14 Kan. 168.

71. See *supra*, XVIII, B, 3, a.

72. Watts *v.* Hurst, 22 Ky. L. Rep. 1703, 61 S. W. 261.

Alleging dismissal of appeal from judgment of dissolution.—An attachment having been set aside by the district court, and an appeal taken from the judgment, suit was brought on the bond for damages while the appeal was pending. Defendant in the suit for damages pleaded prematurity of action. Plaintiff was then allowed by a rule of court to amend, and allege that since the institution of the suit the supreme court had decided the attachment case on appeal. It was held proper to permit the amendment. McDaniel *v.* Gardner, 34 La. Ann. 341.

Sufficiency of allegation.— In an action for wrongful attachment, an allegation in the petition that the attachment was quashed, with a reference to the record in the attachment suit, is sufficient. Warner *v.* Bailey, 7 Tex. 517.

73. See *supra*, XVIII, B, 3, b.

74. Crandall *v.* Rickley, 25 Minn. 119.

75. Flanagan *v.* Gilchrist, 8 Ala. 620; Love *v.* Kidwell, 4 Blackf. (Ind.) 553; Dickinson *v.* McCraw, 4 Rand. (Va.) 158.

Demand for interest.—Under a statute providing that in a suit on a penal bond the judgment shall be rendered for the sum really due with interest and costs, it is not necessary to authorize the allowance of interest in an action on an attachment bond, although it should be demanded in the petition. State *v.* Gold Spring Distilling Co., 72 Mo. App. 573.

Whether an allegation of demand for damages provided for in an attachment bond must be made depends on whether or not a demand is necessary to give a cause of action on the bond. In jurisdictions where it is necessary such an allegation in the complaint must be made. Morgan *v.* Menzies, 60 Cal. 341; Pinney *v.* Hershfield, 1 Mont. 367.

76. *Alabama.*— Boggan *v.* Bennett, 102 Ala. 400, 14 So. 742; Pollock *v.* Gantt, 69 Ala. 373, 44 Am. Rep. 519; Dothard *v.* Sheid, 69 Ala. 135; Lewis *v.* Paull, 42 Ala. 136; Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59.

Iowa.—Vorse *v.* Phillips, 37 Iowa 428.

Kansas.— Bradley *v.* Borin, 53 Kan. 628, 36 Pac. 977.

Missouri.— State *v.* Blackman, 51 Mo. 319.

Oregon.— Brown *v.* Moore, 3 Oreg. 435.

Texas.— Wallace *v.* Finberg, 46 Tex. 35; Hamilton *v.* Kilpatrick, (Tex. Civ. App. 1895) 29 S. W. 819.

See also Cox *v.* Robinson, 2 Rob. (La.) 313.

Variance.— In an action on an attachment bond, where it is alleged that plaintiff had actually contracted for the sale of grain after it had been attached, and the evidence rejected was that he had a conditional promise that upon a certain contingency the buyers would take the grain, and that contingency afterward happened, it was held, without deciding whether the rejected evidence made out a ground for special damage or not, that it was a variance which might be disregarded. Brown *v.* Moore, 3 Oreg. 435.

77. Wallace *v.* Finberg, 46 Tex. 35; Hamilton *v.* Kilpatrick, (Tex. Civ. App. 1895) 29 S. W. 819, where it is said that such damages are not necessary results from an attachment, and should be pleaded, in order that the opposite party may be prepared, if he can, to meet the evidence offered to establish such contingent injury.

78. Boggan *v.* Bennett, 102 Ala. 400, 14 So. 742; Dothard *v.* Sheid, 69 Ala. 135; Elder *v.* Kutner, 97 Cal. 490, 32 Pac. 563; Vorse *v.* Phillips, 37 Iowa 428; State *v.* Blackman, 51 Mo. 319.

Alleging payment of counsel fees.— In California counsel fees are not recoverable until they have been actually paid, and a complaint in an action on an attachment bond, asking counsel fees in a designated sum, but not alleging that they have been paid, will not authorize the recovery of such fees. Elder *v.* Kutner, 97 Cal. 490, 32 Pac. 563.

79. Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59.

80. Lewis *v.* Paull, 42 Ala. 136; Donnell *v.* Jones. 13 Ala. 490, 48 Am. Dec. 59.

expenses incurred in traveling to the place of trial;[81] and special injuries to business.[82]

(b) Sufficiency of Allegations. The allegations should be made with such certainty and definiteness[83] as to admit all competent and material evidence tending to prove the damages sustained and sought to be recovered.[84] Under a general allegation of "injury to credit," evidence of a general loss of credit is permissible, but not evidence of special injury by loss of credit with particular persons.[85] Although it is better to itemize the damages, yet a gross sum may be claimed embracing each item.[86] If special damages are claimed on more than one ground, and if any of the damages are recoverable, a demurrer to the entire complaint is properly overruled.[87]

(9) Non-Payment of Damages. In proceedings based on an attachment bond for injuries caused by the wrongful suing out of an attachment, it is necessary to allege that the damages have not been paid;[88] otherwise the pleading will be fatally defective.[89] If a recovery of costs in the attachment suit is sought in an

81. State *v.* Blackman, 51 Mo. 319.

82. Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59.

83. **Motion to make more definite.**— If defendant claims that allegations of special damage are not sufficiently explicit to advise him of the elements of damage, he should move to have the petition made more definite and certain. State *v.* McHale, 16 Mo. App. 478.

84. **Recovery of attorney fees and extra expenditures** in the suit is authorized under an allegation that plaintiff was required to pay out large sums of money in the defense of the suit, suffered a loss of time in attending thereto, was deprived of the use of the money attached, and was injured in his business. State *v.* McHale, 16 Mo. App. 478. *Compare* Crofford *v.* Vassar, 95 Ala. 548, 10 So. 350, where it was held that a complaint claiming "special damages in the sum of one hundred dollars, in that by the said attachment he was put to the expense of employing ınsel to defend said attachment suit," is not sufficient without a statement of some amount paid or incurred.

That plaintiff was compelled to expend "large sums of money and was put to great expense and trouble in and about defending said action of attachment to-wit: five hundred dollars," is sufficient to admit evidence of special damages, such as lawyer's fees, hotel bills, etc. Kelly *v.* Beauchamp, 59 Mo. 178.

85. Durr *v.* Jackson, 59 Ala. 203.

General averment of injuries to business, reputation, and credit.— Under an allegation that in consequence of the attachment, attachment defendant's business, reputation and credit have been destroyed and lost, and his customers have withdrawn, it is not competent to show that he was maki.ıg advances to timber men and others, and that thereby he became interested in the handling of timber and crops; that his mercantile business being stopped, he lost his advantages, and lost his advances and the shipment of his timber. Pollock *v.* Gantt, 69 Ala. 373, 44 Am. Rep. 519.

Where it is alleged that plaintiff was prevented from doing a certain amount of designated work, special damages will not be allowed in the absence of a further allegation that he could not have earned an equal amount otherwise. Brown *v.* Moore, 3 Oreg. 435.

86. Bickham *v.* Hutchinson, 50 La. Ann. 765, 23 So. 902.

87. Flournoy *v.* Lyon, 70 Ala. 308.

88. *California.*— Morgan *v.* Menzies, 60 Cal. 341.

Indiana.— Cunningham *v.* Jacobs, 120 Ind. 306, 22 N. E. 335; Uhrig *v.* Sinex, 32 Ind. 493; Michael *v.* Thomas, 27 Ind. 501; Love *v.* Kidwell, 4 Blackf. (Ind.) 553.

Iowa.— Hencke *v.* Johnson, 62 Iowa 555, 17 N. W. 766; Lorner *v.* Harrison, 37 Iowa 378; Ryder *v.* Thomas, 32 Iowa 56.

Montana.— Pinney *v.* Hershfield, 1 Mont. 367.

Washington.— Church *v.* Campbell, 7 Wash. 547, 35 Pac. 381.

89. Morgan *v.* Menzies, 60 Cal. 341; Church *v.* Campbell, 7 Wash. 547, 548, 35 Pac. 381, where it is said: "It is the breach of a covenant that is the basis of an action on a covenant, and the breach of this covenant was the non-payment of the damages incurred by the plaintiff. That was the condition of the obligation, viz., that they should pay all costs and all damages which he might sustain by reason of the attachment."

Failure to allege non-payment of damages may be urged for the first time upon a motion for a new trial, although it should ordinarily be taken advantage of by demurrer. Hencke *v.* Johnson, 62 Iowa 555, 17 N. W. 766. But *compare* Knapp *v.* Barnard, 78 Iowa 347, 43 N. W. 197, where defendant in attachment failed to allege that the damages had not been paid, and there was no evidence on that point, nor was the question of payment raised in any manner, but damages were nevertheless allowed by the jury. It was held that under these circumstances the defect in failing to allege non-payment was waived. This case assumes to distinguish Hencke *v.* Johnson, 62 Iowa 555, 17 N. W. 766, *supra*.

action on the bond it is not sufficient to allege generally that such costs have not been paid. The amount thereof should be stated.[90]

(B) *Joinder of Causes of Action.* A plaintiff may proceed in one action for damages for breaches of two or more attachment bonds executed by the obligor in his favor;[91] and it has been held that the owner of goods wrongfully attached is not compelled to elect to sue plaintiff in attachment independently for the wrongful act of the bond, or to sue him and his surety on the bond, but may sue plaintiff independently of the bond and join the surety, counting on the bond.[92] Where it is permissible to sue independently of the bond for a merely wrongful attachment, it has been held that it is not necessary to sue on one count for the wrongful and on another for the malicious attachment of property, the reason being that if an action on the case will lie for wrongful attachment malice merely goes in aggravation of damages.[93]

(II) *Of Plaintiff in Attachment*[94]—(A) *General Issue or General Denial.* Under a plea of general issue or general denial it is proper to show a judgment on the merits in favor of attachment defendant;[95] or that the proceeds of the sale of the attached property were credited to the attachment debtor in the original proceeding, in order to reduce the amount of recovery to that extent.[96] Under the general denial attachment plaintiff may show that he had stated the facts within his knowledge to his attorney before suing out the writ, and had been advised by him that the writ was authorized.[97]

(B) *Non Est Factum.* The plea of *non est factum* in an action on an attachment bond, in the absence of a plea traversing the breach, puts in issue only the making of the bond described in the declaration.[98]

90. Sterling City Gold, etc., Min., etc., Co. *v.* Cock, 2 Colo. 24.

That defendant "did not pay all such costs," etc., as accrued, has been held to be insufficient. The declaration should expressly allege that the costs and damages have actually been sustained. Dickinson *v.* McCraw, 4 Rand. (Va.) 158.

91. Gabel *v.* Hammerwell, 44 Ala. 336.

92. Leonard *v.* Harkleroad, (Tex. Civ. App. 1902) 67 S. W. 127.

In Kentucky a cause of action on an attachment bond and a cause of action for malicious attachment cannot be joined at all. Duck *v.* Hollrook, 6 Ky. L. Rep. 511.

In Missouri it seems to be the practice to allow the joinder of a count upon an attachment bond and a count for malicious attachment. Fry *v.* Estes, 52 Mo. App. 1.

In Texas it is said to be the better practice to present the claim on the bond and the claim for malicious attachment as separate and distinct causes of action or cross-action. Wallace *v.* Finberg, 46 Tex. 35.

93. Fry *v.* Estes, 52 Mo. App. 1. *Compare* Fechheimer *v.* Ball, 1 Tex. App. Civ. Cas. § 766, where it was held that in a plea of reconvention there is a distinction between damages resulting from the wrongful resorting to the writ and the malicious resorting to the same; that the grounds for actual damages and the grounds for vindictive damages constitute distinct causes of action, and should be presented by the pleading as such.

94. If an answer admits the seizure of the goods, defendant cannot on the trial allege that the property had been previously seized by another creditor. Kuhn *v.* Weil, 73 Mo. 213.

Want of information sufficient to form a belief.—An answer in an action upon an undertaking given to procure an attachment which admits the making thereof, and, as to the other allegations, denies the same upon defendant's own knowledge, or his not having any knowledge or information sufficient to form a belief in respect to the same, is insufficient, because of the impossibility of distinguishing the allegations denied upon knowledge from those denied for a want of knowledge or information sufficient to form a belief. Sheldon *v.* Sabin, 12 Daly (N. Y.) 84.

95. Renkert *v.* Elliott, 11 Lea (Tenn.) 235, where the surety offered such proof.

96. Van Dewater *v.* Gear, 21 N. Y. App. Div. 201, 47 N. Y. Suppl. 503 (where a fraudulent transfer of the property was not allowed to be shown under a general denial); Mayer *v.* Duke, 72 Tex. 445, 10 S. W. 565.

97. Bowman *v.* Western Fur Mfg. Co., 96 Iowa 188, 64 N. W. 775.

Plea in reconvention.— So it has been held that where an attachment defendant claims the value of the use of the attached property under his plea in reconvention for damages for wrongfully and maliciously suing out the writ, and that he was thereby deprived of its use, but the testimony tends to show that he was not so deprived thereof, plaintiff is entitled to the benefit of such proof without a special plea. Dwyer *v.* Testard, 65 Tex. 432.

98. All other material averments are admitted and this result is not affected by leave given to defendant to introduce special matter under that plea. Oberne *v.* Gaylord, 13 Ill. App. 30.

(c) *Non-Damnificatus.* *Non-damnificatus* is a good plea to a suit on an attachment bond, where the condition is that plaintiff in the attachment "shall pay all costs and damages which may be awarded against him, or sustained by any person by reason of his suing out said attachment." A plea of *de injuria* may also be filed.[99]

g. Defenses — (1) *In General.* It is a sufficient defense to an action on an attachment bond that the bond is void;[1] that action thereon is premature;[2] or that there has been a material alteration of the writ of attachment after its issue.[3] So it is a good defense against a claim for damages caused by wrongful attachment that the affidavit was founded on statements made by defendant in attachment to plaintiff,[4] or to third persons and communicated to plaintiff,[5] if such statements are sufficient to authorize an attachment; that title to the property attached passed from attachment defendant before the levy;[6] that the attachment was dissolved under statute by filing a bond for the restitution of the property;[7] that defendant in attachment after claiming that the property was exempt made no defense in the proceedings, and allowed judgment to be entered and the property sold without further protest.[8] The recovery of final judgment by plaintiff in attachment is also a defense.[9] On the other hand, it is not a defense to a claim for damages for wrongful attachment against the sureties on the attachment bond that the declaration in the main action was amended as to a merely formal defect;[10] that other persons than plaintiff, and without his privity, procured the undertaking to be executed;[11]

Proof of execution of an attachment bond by parties sued thereon interposing a plea of *non est factum* verified by affidavit, which is the only issue in the case, is sufficient to entitle plaintiffs to recover. Fitzsimmons *v.* Hall, 84 Ill. 538.

Verification.— Under the Missouri practice, if in an action on an attachment bond the answer is not verified by affidavit, the execution thereof will be adjudged confessed. State *v.* Chamberlin, 54 Mo. 338.

99. Hoadley *v.* Roush, 3 W. Va. 280.

For form of plea of non-damnificatus see Hoadley *v.* Roush, 3 W. Va. 280.

Non-damnificatus and tender.— In an action on an attachment bond, where unliquidated damages are asked, the plea of *non-damnificatus* as to part and tender of a sum certain as to the residue in har of the action is improper. Dunning *v.* Humphrey, 24 Wend. (N. Y.) 31.

1. Benedict *v.* Bray, 2 Cal. 251. 56 Am. Dec. 332.

2. Guthrie *v.* Fisher, 2 Ida. 101, 6 Pac. 111.

3. Starr *v.* Lyon, 5 Conn. 538.

4. Cocke *v.* Kuykendall, 41 Miss. 65; Tiblier *v.* Alford, 12 Fed. 262. *Compare* Carse *v.* Baxter, 21 Ky. L. Rep. 1593, 55 S. W. 898, holding that while the admissions by defendant of the truth of the grounds for an attachment, made both in his answer and upon the trial of the attachment, would have been admissible to estop him from contesting an attachment subsequently issued in favor of another creditor on the same grounds, yet after the second attachment has been discharged such admission will not of itself defeat an action on the bond executed for that attachment.

5. Tiblier *v.* Alford, 12 Fed. 262.

6. Viele *v.* Edwards, 4 Ky. L. Rep. 903.

7. Bick *v.* Long, 15 Ind. App. 503, 44 N. E. 555, this being the only jurisdiction, it seems, in which the mere giving of a bond of the character mentioned has such effect. See *supra*, XVIII, B, 2, b.

8. Williamson *v.* Kansas, etc., Coal Co., 6 Kan. App. 443, 50 Pac. 106. *Compare* Schenck *v.* Griffin, 38 N. J. L. 462, where it was held that defendant in attachment is not estopped from his action to recover moneys received by plaintiff and applying creditors under the attachment which are not due and owing, by the fact that he knew of the pendency of the attachment suit, and did not enter his appearance to it.

In case of successive levies.—Where a judgment for wrongful attachment is recovered against and satisfied by one of two creditors, who levied successively on the same property, such judgment operates as a bar to an action for the same wrong against the other creditor. Grimes *v.* Williams, 113 Mich. 450, 71 N. W. 835.

Where writs of attachment and sequestration were simultaneously issued and executed upon the same property, which was released on seizure under both writs at the same time, there can be no recovery based on the wrongfulness of the attachment, if the writ of sequestration was valid. Watkins Banking Co. *v.* Louisiana Lumber Co., 47 La. Ann. 581, 17 So. 143.

9. Waring *v.* Fletcher, 152 Ind. 620, 52 N. E. 203; Trentman *v.* Wiley, 85 Ind. 33; Nolle *v.* Thompson, 3 Metc. (Ky.) 121; Mitchell *v.* Mattingly, 1 Metc. (Ky.) 237; Crandall *v.* Rickley, 25 Minn. 119; Eckman *v.* Hammond, 27 Nebr. 611, 43 N. W. 397.

10. Kellogg *v.* Kimball, 142 Mass. 124, 7 N. E. 728.

11. Coleman *v.* Bean, 14 Abb. Pr. (N. Y.) 38.

or that the undertaking was not signed by attachment plaintiff as principal.[12] So it is no defense to a claim for damages for wrongful attachment that defendant in attachment replevied the goods from the officer and obtained judgment therefor;[13] failed to object to the sale of the goods under the attachment and assisted in making a better sale;[14] fraudulently assigned his property shortly after the attachment, unless the fraudulent intent on the part of defendant existed at the time the attachment issued;[15] neglected to bond the property;[16] made a settlement of an attachment wrongfully brought by giving notes for the alleged debt and payment of costs in order to obtain a release of his property;[17] made statements to third persons which if true would warrant an attachment where such statements were not communicated to plaintiff in attachment and could not have influenced his action in the matter;[18] released a claim for damages for a subsequent attachment in consideration of its relinquishment;[19] was insolvent or suffering pecuniary embarrassment;[20] or that he, being present at the sale under attachment, consented that the balance of the proceeds after satisfaction of the judgment and costs should be applied on a mortgage held by the attaching creditor.[21] Nor is it a defense that plaintiff in attachment recovered judgment in the attachment proceedings, where such judgment was recovered without service or appearance;[22] that attached property which had been taken from defendant and had not been replevied or returned to him brought its fair value when sold under an order of the court, and that the proceeds of its sale had been applied to the payment of defendant's debt;[23] that order vacating attachment was duly appealed from, and that the appeal still remains in full force and undetermined, it not being further alleged that a stay of proceedings had been ordered, or such other facts and circumstances in connection with it as legally accomplished that result;[24] that there was a chattel mortgage on the property;[25] that upon service of the attachment the goods attached were claimed to be the property of a third person and admitted so to be by defendant in attach-

12. McIntosh *v.* Hurst, 6 Mont. 287, 12 Pac. 647, it not being necessary in this state for plaintiff in attachment to sign as principal.

13. Vincent *v.* McNamara, 70 Conn. 332, 39 Atl. 444. See also Murray *v.* Lovejoy, 2 Cliff. (U. S.) 191, 17 Fed. Cas. No. 9,963, 26 Law Rep. 423 [*affirmed* in 3 Wall. (U. S.) 1, 18 L. ed. 129].

14. Decatur First Nat. Bank *v.* Houts, 85 Tex. 69, 19 S. W. 1080.

15. Donnell *v.* Jones, 17 Ala. 689, 52 Am. Dec. 194.

In an action by a partnership on an attachment bond for injuries done by the wrongful attachment of the partnership property, it has been held no defense that one of the partners fraudulently disposed of his individual property. Painter *v.* Munn, 117 Ala. 322, 23 So. 83, 67 Am. St. Rep. 170.

16. Watson *v.* Kennedy, 8 La. Ann. 280, where it was held that the right to set aside an attachment by delivering to the sheriff an obligation to satisfy the judgment that may be rendered against him is a privilege which the law affords to defendant, and not a duty enjoined.

17. Hunter *v.* Penland, (Tex. Civ. App. 1895) 32 S. W. 421.

18. Tiblier *v.* Alford, 12 Fed. 262.

19. Weston *v.* Dorr, 25 Me. 176, 43 Am. Dec. 259.

20. Lockhart *v.* Woods, 38 Ala. 631; Kaufman *v.* Armstrong, 74 Tex. 65, 11 S. W. 1048.

That attachment defendant was insolvent at the time of assigning the claim for damages on the bond sued on, and that the assignment was in fraud of creditors and without consideration has been held to constitute no defense. Ferber *v.* Smith, 3 Silv. Supreme (N. Y.) 59, 6 N. Y. Suppl. 446, 25 N. Y. St. 555.

21. Walker *v.* Fetzer, 62 Ark. 135, 34 S. W. 536.

Settlement with one of two attaching creditors.—Where separate firms bring separate attachment suits and levy on a stock of goods, a settlement by defendant with one of the firms will not extinguish any cause of action he may have against the other. Carson *v.* Smith, 133 Mo. 606, 34 S. W. 855.

22. Bliss *v.* Heasty, 61 Ill. 338.

23. Hundley *v.* Chadick, 109 Ala. 575, 19 So. 845.

24. Ferber *v.* Smith, 3 Silv. Supreme (N. Y.) 59, 6 N. Y. Suppl. 446, 26 N. Y. St. 555.

25. Hartmann *v.* Hoffman, 65 N. Y. App. Div. 443, 72 N. Y. Suppl. 982, where it was said that until default under the mortgage, attachment defendant was entitled to possession of the property, and such possession and title was sufficient to support the action. And see Union Mercantile Co. *v.* Chandler, 90 Iowa 650, 57 N. W. 595, where it was held to be no defense that the attachment was void because levied on mortgaged property.

ment;[26] or that a motion to dissolve an attachment was overruled, where the motion was made under a statute authorizing a motion to discharge for insufficiency of statement of cause "or any other cause making it apparent of record that the attachment should not have been issued, or should not have been levied on a part or all of the property seized;"[27] or, where the claim is based on the bond, that the original plaintiff has ceased to be such and a third party substituted as a party in his stead.[28] Attachment defendant may bring an action for the wrongful attachment at any time within the statutory period of limitation, and cannot lose his right by failing to notify the surety of his intentions in that regard.[29]

(II) *Advice of Counsel.* The fact that the writ was sued out on the advice of counsel is under no circumstances a defense to a claim for actual or compensatory damages;[30] and in order that advice of counsel may constitute a defense to a claim for exemplary or punitive damages it is essential that a full and fair statement of the facts should have been made to counsel,[31] and that the advice was followed in good faith.[32]

(III) *Consent to Attachment.* While a debtor's consent to attachment may not create a ground therefor, it is a complete defense to an action by him for wrongful attachment;[33] and it has been held that if the debtor is a firm, the consent of one partner to an attachment against the partnership property bars his right to recover for injuries sustained thereby.[34]

(IV) *Existence of Ground Other Than Stated in Affidavit.* While

26. Ferber *v.* Smith, 3 Silv. Supreme (N. Y.) 59, 6 N. Y. Suppl. 446, 25 N. Y. St. 555.

27. Beach *v.* Williams, (Iowa 1899) 79 N. W. 393.

Where the motion is overruled judgment is merely to the effect that it is not apparent of record that the attachment should not have been issued or should not have been levied on the property sought to be released by the motion, and the debtor may in another proceeding insist that the property should not have been taken under the attachment, and recover if he shows by preponderance of evidence that his claim is well founded. Cox *v.* Allen, 91 Iowa 462, 59 N. W. 335.

28. Brown *v.* Tidrick, 14 S. D. 249, 85 N. W. 185, where it was said that the undertaking goes along with the action as continuing security, although the cause of action is assigned and the assignee substituted as plaintiff.

Where an attachment suit against two defendants is dismissed as to one of them, a judgment against the other cannot prevent the one from claiming damages caused by the attachment. Dean *v.* Stephenson, 61 Miss. 175.

29. Kerr *v.* Reece, 27 Kan. 469.

30. Raver *v.* Webster, 3 Iowa 502, 66 Am. Dec. 96; Gregory Grocery Co. *v.* Beaton, (Kan. App. 1900) 62 Pac. 732; Kennedy *v.* Meacham, 18 Fed. 312. See also Baldwin *v.* Walker, 94 Ala. 514, 10 So. 391.

31. Baldwin *v.* Walker, 94 Ala. 514, 10 So. 391; Union Mill Co. *v.* Prenzler, 100 Iowa 540, 69 N. W. 876; Hurlbut *v.* Hardenbrook, 85 Iowa 606, 52 N. W. 510; Porter *v.* Knight, 63 Iowa 365, 19 N. W. 282.

32. Baldwin *v.* Walker, 94 Ala. 514, 10 So. 391; Union Mill Co. *v.* Prenzler, 100 Iowa 540, 69 N. W. 876; Raver *v.* Webster, 3 Iowa 502, 66 Am. Dec. 96.

The advice of one who was a lawyer by profession, but not then engaged in practice, may be shown to rebut the presumption of malice which might arise from the fact that no probable cause for the action existed. Charles City Plow, etc., Co. *v.* Jones, 71 Iowa 234, 32 N. W. 280.

33. Baines *v.* Ullmann, 71 Tex. 529, 9 S. W. 543.

Necessity of acting on consent.— Consent to an attachment is no defense where the writ was not sued out because of the consent, but because the party, acting on advice of counsel, thought he had grounds for an attachment. Dunlap *v.* Fox, (Miss. 1887) 2 So. 169.

Suing out of second writ because of irregularity in first.— The rule that consent to attachment operates as a defense to an action for wrongful attachment applies in the case of the suing out of a second writ because of irregularity in the first. Baines *v.* Ullmann, 71 Tex. 529, 9 S. W. 543.

34. Barker *v.* Abbott, 2 Tex. Civ. App. 147, 21 S. W. 72. *Contra*, Thames *v.* Schloss, 120 Ala. 470, 24 So. 835, which holds that the consent of one partner to an attachment against the partnership property estops him alone from maintaining an action for injuries sustained by himself by reason of the attachment. This decision proceeds by analogy to the rule that one partner has no general authority to bind the partnership of the non-assenting partners by confessing judgment without the consent of the partnership.

If such consent is not collusive it will bind the firm. If, however, the consent is not collusive, only the consenting partner will be estopped to sue for wrongful attachment.

there are decisions which lay down the rule that if a valid claim and a ground or grounds of attachment existed at the time the attachment was sued out, this may be shown as a complete defense to an action for wrongful attachment, notwithstanding the non-existence of the grounds stated in the affidavit;[35] the weight of authority seems to be against this rule, the better doctrine being to the effect that the investigation should be limited to the ground or grounds stated in the application for the writ of attachment.[36]

(v) *Good Faith of Attachment Plaintiff.* As already shown, it is the rule in most jurisdictions that actual damages caused by an attachment which was merely wrongful are recoverable.[37] In these jurisdictions the good faith of attachment plaintiff in suing out the writ is no defense to a claim for actual damages.[38] If, however, exemplary or punitive damages are also claimed the good faith of attachment plaintiff would be a sufficient defense, as regards the recovery of that kind of damages.[39]

(vi) *Illegality of Claim Sued On.* The illegality of the claim in aid of which the attachment was sued out and a bond given is no defense to an action on the bond.[40] Nor is it any defense to such action that the issue and execution

Barker *v.* Abbott, 2 Tex. Civ. App. 147, 21 S. W. 72.

35. This is the rule in Alabama, and the view taken is that under these circumstances the attachment was not wrongful, and defendant could not have been injured thereby. Painter *v.* Munn, 117 Ala. 322, 23 So. 83, 67 Am. St. Rep. 170; Baxley *v.* Segrest, 85 Ala. 183, 4 So. 865; Gabel *v.* Hammerwell, 44 Ala. 336; Lockhart *v.* Woods, 38 Ala. 631; Kirksey *v.* Jones, 7 Ala. 622, 629 (where it was said: "The question is, not whether the precise ground stated in the affidavit is true, for it is obvious that the plaintiff has sustained no legal damage by the writ, if it was proper to be issued by changing the terms of the affidavit").

36. In Iowa, under a statute providing that in an action on the bond plaintiff may recover if he shows that the attachment was wrongfully sued out, and that there was no reasonable cause to believe the ground upon which the same was issued to be true, investigation is limited to the very ground stated in the petition. Ringen Stove Co. *v.* Bowers, 109 Iowa 175, 80 N. W. 318.

In Pennsylvania it has been held that where the condition of the bond is to prosecute the action with effect and recover judgment against defendant or pay damages sustained by reason of attachment, it is no defense to an action thereon that a cause for attachment existed. Hibbs *v.* Blair, 14 Pa. St. 413.

In Texas it is not a defense to a claim for actual damages caused by wrongful attachment that valid grounds existed for an attachment, if the grounds stated in the affidavit did not in fact exist (Blum *v.* Strong, 71 Tex. 321, 6 S. W. 167), or were found insufficient (Woods *v.* Huffman, 64 Tex. 98). The reasoning on this question in Blum *v.* Strong, 71 Tex. 321, 326, 6 S. W. 167, is as follows: "That a debtor has done a certain act that would authorize an attachment, is no sufficient reason for a creditor to make affidavit of other acts not in fact true, and thereby cause a loss to the debtor; and if he does so, he ought not be heard to say: 'It is true I made a false affidavit to procure the attachment, but you were guilty of other acts which, if known in time, would have justified me in procuring an attachment on those grounds, and therefore you are not wronged.'"

37. See *supra*, XVIII, B, 1, b.

38. Birmingham Dry Goods Co. *v.* Finley, 122 Ala. 534, 26 So. 138; Troy *v.* Rogers, 113 Ala. 131, 20 So. 999; Jackson *v.* Smith, 75 Ala. 97; City Nat. Bank *v.* Jeffries, 73 Ala. 183; Pollock *v.* Gantt, 69 Ala. 373, 44 Am. Rep. 519; Alexander *v.* Hutchison, 9 Ala. 825; Churchill *v.* Abraham, 22 Ill. 456; Christian *v.* Seeligson, 63 Tex. 405; Cahn *v.* Bonnett, 62 Tex. 674; Culbertson *v.* Cabeen, 29 Tex. 247; Yarborough *v.* Weaver, 6 Tex. Civ. App. 215, 25 S. W. 468; Neeper *v.* Irons, 3 Tex. App. Civ. Cas. § 180; Dwyer *v.* Testard, 1 Tex. App. Civ. Cas. § 1228; Handel *v.* Kramer, 1 Tex. App. Civ. Cas. § 826; Dreiss *v.* Faust, 1 Tex. App. Civ. Cas. § 33.

The remedy is an extraordinary and harsh one, and one who adopts it must take the risk of liability for actual damages flowing therefrom, in the event the grounds upon which it is called into action should prove to be untrue. Yarborough *v.* Weaver, 6 Tex. Civ. App. 215, 25 S. W. 468.

39. Yarborough *v.* Weaver, 6 Tex. Civ. App. 215, 25 S. W. 468. To same effect see Powers *v.* Florance, 7 La. Ann. 524.

40. Claim based on unconstitutional statute.— Thus, the obligors on an attachment bond, given in a suit brought under a special statute to recover damages allowed thereby, cannot plead the unconstitutionality of the act in avoidance of their liability on the bond. State *v.* Stark, 75 Mo. 566.

So where a party brings action for a reward offered by a lottery company to pay a certain sum to any person who would present a prize ticket which had not been promptly paid, the bond having been properly executed and its breach established, de-

of a void writ of attachment was in strict compliance with a statute, where such statute was unconstitutional.[41]

(VII) *Irregularities in Proceedings*—(A) *In General.* Irregularities in attachment proceedings are not available as a defense in an action on the attachment bond.[42] It has accordingly been held that it cannot be pleaded or proved as a defense that no writ of attachment had ever been sued out;[43] that there was a misnomer of attachment defendant if process was served on him;[44] that the levy was invalid for want of notice thereof to defendant, as required by law;[45] that attachment plaintiff failed to file a new affidavit and undertaking upon adding a new cause of action to the complaint;[46] or that no affidavit had been filed in the attachment proceeding.[47]

(B) *Irregularities in Bond.* It is not a defense to an action on a bond that it was not executed until after the issue of the writ, for which reason the writ was quashed;[48] that the penalty of the bond was for a slightly larger amount than required by statute;[49] or that the person executing the bond does not appear to have been the agent of attachment plaintiff.[50] It has been held, however, that the sureties on the attachment bond are not liable thereon when the bond is unsealed.[51]

(VIII) *Probable Cause.* Except where probable cause is under the statutes essential to a right of action for injuries resulting from the suing out of an attachment,[52] the fact that there was such is no defense to a claim for actual damages caused by the attachment if wrongful.[53] It may nevertheless be shown in mitigation of vindictive damages.[54]

(IX) *Return of Property.* The return of property taken under a wrongful attachment does not furnish a complete defense.[55]

(X) *Subsequent Seizure.* It has been held that while attachment plaintiff cannot make a complete defense by showing that he caused a subsequent valid writ to be levied on the property for the owner's debt, this fact may nevertheless be shown in mitigation of damages;[56] but in a suit to recover damages for wrong-

fendant cannot escape its obligations by going behind the bond and saying that it grew out of an illegal transaction. State *v.* Fargo, 151 Mo. 280, 52 S. W. 199.

41. Merritt *v.* St. Paul, 11 Minn. 223.

42. State *v.* Goodhue, 74 Mo. App. 162; Brown *v.* Tidrick, 14 S. D. 249, 85 N. W. 185; Zechman *v.* Haak, 85 Wis. 656, 56 N. W. 158. *Contra,* Jacoby *v.* Drew, 11 Minn. 408.

Because of the doctrine of estoppel no such question can be raised in a collateral proceeding of this character. Brown *v.* Tidrick, 14 S. D. 249, 85 N. W. 185.

43. Love *v.* Kidwell, 4 Blackf. (Ind.) 553.

44. Hedrick *v.* Osborne, 99 Ind. 143.

45. Hamilton *v.* Hartinger, 96 Iowa 7, 64 N. W. 592; Drummond *v.* Stewart, 8 Iowa 341. See also Hamilton *v.* Maxwell, 119 Ala. 23, 24 So. 769, where it was held that the invalidity of a levy under a writ of attachment cannot be availed of as a defense to an action on the attachment bond, where the parties to the writ pleaded the writ as valid, and the property was subsequently sold under a venditioni exponas made and executed as under a valid levy.

Return of levy.—In an action on the attachment bond the obligors cannot question the sufficiency of the sheriff's return of levy of the writ. State *v.* Goodhue, 74 Mo. App. 162.

46. Waring *v.* Fletcher, 152 Ind. 620, 52 N. E. 203.

47. Trentman *v.* Wiley, 85 Ind. 33.

48. Sumpter *v.* Wilson, 1 Ind. 144.

49. Hibbs *v.* Blair, 14 Pa. St. 413.

50. State *v.* Hesselmeyer, 34 Mo. 76.

51. State *v.* Thompson, 49 Mo. 188, where it was said that there can be neither a statutory nor common-law bond without a seal.

Objections on appeal.—In an action to enforce the conditions of a bond given to procure an attachment, objections to the execution of the bond, or to any omissions therein, cannot be raised for the first time on appeal. Northrup *v.* Garrett, 17 Hun (N. Y.) 497.

52. Carey *v.* Gunnison, 51 Iowa 202, 1 N. W. 510; Vorse *v.* Phillips, 37 Iowa 428; Seattle Crockery Co. *v.* Haley, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156.

53. Metcalf *v.* Young, 43 Ala. 643; Pettit *v.* Mercer, 8 B. Mon. (Ky.) 51; Schofield *v.* Territory, 9 N. M. 526, 56 Pac. 306; Bear *v.* Marx, 63 Tex. 298; Carothers *v.* McIlhenny, 63 Tex. 138; Osborn *v.* Schiffer, 37 Tex. 434; Yarborough *v.* Weaver, 6 Tex. Civ. App. 215, 25 S. W. 468.

54. Metcalf *v.* Young, 43 Ala. 643.

55. See McFadden *v.* Whitney, 51 N. J. L. 391, 18 Atl. 62; Kerr *v.* Mount, 28 N. Y. 659.

56. Earl *v.* Spooner, 3 Den. (N. Y.) 246 (this case being in conflict with other New York decisions, in which the writ originally sued out was absolutely void. See *supra,* XVIII, A, 3, d, (I)); Morrison *v.* Crawford, 7 Oreg. 472.

In Illinois, however, it has been held that where property has been wrongfully attached,

ful attachment it cannot be shown that other attachments than defendant's were subsequently levied on the property.[57]

(xi) *Truth of Facts Stated in Affidavit.* Where in the main action the issue as to the rightfulness of an attachment has been decided adversely to plaintiff in attachment, he cannot, when made a defendant in an action on the attachment bond, set up as a defense that the facts stated in the affidavit were not true, or that the proceedings in attachment were wrongful.[58] Where, however, suit is brought on the attachment bond before a termination of that issue, as may be done in some jurisdictions, the converse of this doctrine is true.[59]

h. Set-Off. In an action on an attachment bond defendant therein may set off a judgment recovered in the action in which the attachment issued against the damages sustained by the wrongful attachment;[60] and this is true, although such judgment is against attachment defendant and another, who was not a party to the attachment proceedings.[61] So it has been held that where attached property has been sold, and the proceeds applied on a judgment, the amount so applied should be deducted from the damages recoverable by defendant on a dissolution of the attachment on appeal.[62]

i. Evidence — (i) *Burden of Proof.* The burden of proving the wrongfulness of the attachment is with the party seeking to recover damages for injuries caused thereby,[63] by showing such facts and circumstances as tend to

and plaintiff in attachment subsequently seizes it under valid process and applies the property so seized to the payment of the owner's debt without his consent, such application of the property cannot be shown either in defense or in mitigation of damages for the wrongful attachment. Churchill *v.* Abraham, 22 Ill. 456.

57. Blum *v.* Stein, 68 Tex. 608, 613, 5 S. W. 454, where it was said: "The appellee's cause of action accrued when the appellants sued out and caused to be levied a writ of attachment, if this was done wrongfully; and what other persons might subsequently do, could not take away that cause of action; nor tend to show that the appellants' act in suing out the writ of attachment was not wrongful."

58. Waring *v.* Fletcher, 152 Ind. 620, 52 N. E. 203; Hayden *v.* Sample, 10 Mo. 215; Kennedy *v.* Meacham, 18 Fed. 312. *Contra*, Sloan *v.* Langert, 6 Wash. 26, 32 Pac. 1015. In Hayden *v.* Sample, 10 Mo. 215, 223, it was said that if this could be done, defendants in the action on the bond could show that the court had committed an error, either in law or fact, in the former suit, and that plaintiffs should have recovered a judgment.

59. Defendant must be prepared to show in his defense that one of the causes for attachment required by statute existed at the time the attachment issued. Stewart *v.* Cole, 46 Ala. 646.

60. Weir *v.* Dustin, 32 Ill. App. 388; Gerson *v.* Hanson, 34 Kan. 590, 9 Pac. 230.

Claim due from obligees in favor of principals may be set off, notwithstanding the fact that the damages are unliquidated. Field *v.* Maxwell, 44 Nebr. 900, 63 N. W. 62; Raymond *v.* Green, 12 Nebr. 215, 10 N. W. 709, 41 Am. Rep. 763. *Contra*, State *v.* Eldridge, 65 Mo. 584.

Counter-claim on attachment bond.— Where the jury found specially that defendant was entitled to damages for the wrongful suing out of an attachment, and that plaintiff's claim was not yet due, a judgment for the amount of damages found, not diminished by the amount of plaintiff's claim, was correctly rendered. Wetherell *v.* Sprigley, 43 Iowa 41.

If the attached property was exempt, in an action to recover damages for the wrongful attachment the attaching creditor cannot set off his debt against the damages recovered. Wilson *v.* Manning, (Tex. Civ. App. 1896) 35 S. W. 1079.

Where defendant in attachment reconvenes for damages, plaintiff cannot set up as an offset against such claim that when the property was sold under the levy he had bought it in and settled mortgages on it which were in existence before the attachment, and asking to be subrogated to the mortgagees' rights. The mortgages, although assigned, could not be set off against a claim for tort. Smith *v.* Morgan, (Tex. Civ. App. 1900) 56 S. W. 950.

Where, in an attachment proceeding against partners, the bond was made payable to them, and the writ directed a levy on their property, but the sheriff improperly levied on the individual property of one of them, he being a party to the action may set up the illegal levy as a counter-claim. Mason *v.* Rice, (Iowa 1884) 19 N. W. 897.

61. State *v.* Hudson, 86 Mo. App. 501.

62. Scanlan *v.* Guiling, 63 Ark. 540, 39 S. W. 713.

63. Calhoun *v.* Hannan, 87 Ala. 277, 6 So. 291; City Nat. Bank *v.* Jeffries, 73 Ala. 183; O'Grady *v.* Julian, 34 Ala. 88; Dent *v.* Smith, 53 Iowa 262, 5 N. W. 143; Veiths *v.* Hagge, 8 Iowa 163; Burrows *v.* Lehndorff, 8 Iowa 96; Jandt *v.* Derauleau, (Nebr. 1899) 78 N. W. 22; Storz *v.* Finklestein, 48 Nebr. 27, 66 N. W. 1020, 30 L. R. A. 644; Michigan Stove Co. *v.* Waco Hardware Co., 22 Tex.

establish the truth of what he asserts.[64] The burden of proof is on him also to show want of probable cause,[65] that his property has been levied upon,[66] and that he has been injured thereby,[67] where such matters are prerequisites to his recovery; and if exemplary or punitive damages are sought he also has the burden of proving want of probable cause and malice.[68]

(II) *Admissibility* — (A) *In General.* In a suit on an attachment bond the record in the original suit is admissible in behalf of plaintiff,[69] and its exclusion is not warranted by the fact that it had not been filed with the complaint.[70] To show injury by the seizure of property, because of inability to fulfil a contract of sale thereof, the contract may be proved by parol evidence on showing that it has been destroyed.[71] If the general reputation of attachment defendant is put in issue by the evidence he may offer evidence to sustain it.[72]

(B) *In Relation to Grounds of Attachment* — (1) In General. Where an attachment is sued out on the ground of intent to defraud creditors, testimony as to the financial condition of attachment defendant, although not known to plaintiff in attachment, is admissible as tending to show the truth or falsity of the charge.[73]

(2) That Debtor Is About to Remove From State or County. As tending to show that attachment defendant was about to remove from the state or county, evidence is admissible of his declarations, if made before the suing out of the attachment writ,[74] as well as efforts on the part of attachment defendant to sell

Civ. App. 293, 54 S. W. 357; Rabb *v.* White, (Tex. Civ. App. 1898) 45 S. W. 850; Armstrong *v.* Ames, etc., Co., 17 Tex. Civ. App. 46, 43 S. W. 302; Dwyer *v.* Testard, 1 Tex. App. Civ. Cas. § 1228.

64. Burrows *v.* Lehndorff, 8 Iowa 96.

The mere fact of the abandonment of attachments does not raise the presumption that they were wrongful and cast on attachment plaintiffs the burden of showing that they were not so in an action against them for wrongful attachment. Frank *v.* Tatum, (Tex. Civ. App. 1894) 26 S. W. 900.

65. Dent *v.* Smith, 53 Iowa 262, 5 N. W. 143; Raver *v.* Webster, 3 Iowa 502, 66 Am. Dec. 96.

66. Barnett *v.* Lucas, (Ind. 1901) 61 N. E. 683. See also Graham *v.* Reno, 5 Colo. App. 330, 38 Pac. 835.

67. Ranning *v.* Reeves, 2 Tenn. Ch. 263.

68. Dwyer *v.* Testard, 1 Tex. App. Civ. Cas. § 1228.

In seeking to recover for counsel fees plaintiff must show that the fees have been paid, or that they have been contracted for, and that the amount is reasonable. Shultz *v.* Morrison, 3 Metc. (Ky.) 98.

69. Hundley *v.* Chadick, 109 Ala. 575, 19 So. 845; Dothard *v.* Sheid, 69 Ala. 135; Donnell *v.* Jones, 17 Ala. 689, 52 Am. Dec. 194; Draper *v.* Vanhorn, 12 Ind. 352; Drummond *v.* Stewart, 8 Iowa 341; Raver *v.* Webster, 3 Iowa 502, 66 Am. Dec. 96; Blanchard *v.* Brown, 42 Mich. 46, 3 N. W. 246.

Parol proof of attachment.—An attachment of property by virtue of a writ of attachment cannot be proved by parol. Braunsdorf *v.* Fellner, 76 Wis. 1, 45 N. W. 97.

The bond should be received in evidence as also testimony showing the manner of its execution, where suit is brought on a bond purporting to be executed by the attorney of attachment plaintiff in his behalf, the latter denies its execution under oath, and the testimony tends to prove the agency of the attorney and the ratification of his act in bringing the suit by the principal. Hutchinson *v.* Smith, 86 Mich. 145, 48 N. W. 1090.

Where date of the affidavit for attachment is illegible, two figures having been apparently written and blended together, the testimony of the clerk who issued the writ is admissible in connection with it to show that the wrong date had been first written by the attorney and that he had corrected it. Goldsmith *v.* Picard, 27 Ala. 142.

70. Plaintiff is not required to file the evidence by which he expects to prove the allegations in his pleadings. Draper *v.* Vanhorn, 12 Ind. 352.

71. Draper *v.* Vanhorn, 12 Ind. 352.

72. Goldsmith *v.* Picard, 27 Ala. 142.

73. Ruthven *v.* Beckwith, 84 Iowa 715, 45 N. W. 1073, 51 N. W. 153.

Evidence that defendants had refused to pay or secure debts to others than plaintiff, that judgment had been obtained against them, and that they had not acted as honest men ordinarily would have done, is not objectionable, on the ground of it being immaterial how defendants were indebted to others, or because it related to a part only of the defendants. Dent *v.* Smith, 53 Iowa 262, 5 N. W. 143.

74. Declarations of attachment defendant, tending to show preparations for removal from the state, if made after the suing out of the writ are not admissible against him; but if the evidence leaves it doubtful whether such declarations were made before or after that time, the jury should be left to decide that question, and the declarations should be allowed to go to them under proper instructions on that point. Baldwin *v.* Walker, 94 Ala. 514, 10 So. 391.

In behalf of attachment defendant declarations made anterior to the suing out of the attachment, explaining his intention to leave

his property.[75] It is not competent for attachment defendant to testify as to an uncommunicated intention to remain within the state.[76] Nor can he show that it was generally reputed in the neighborhood in which he lived that he was merely leaving the state on a temporary visit;[77] although where it is admitted that defendant left the state in the summer in which the attachment was sued out, he may show that it was his habit to leave the state on a visit every summer.[78] Any evidence tending to show that plaintiff was removing his property from the county, and that at the time he was clouding the title as to a part of the property so to be removed is admissible to show fraudulent intent on his part.[79]

(3) That Defendant Is About to Fraudulently Dispose of Property. In proceedings to recover for wrongful attachment, sued out on the ground that defendant therein was about to dispose of or convey his property in fraud of creditors, it is competent to prove in support of the proceedings all acts of defendant which tend to show such intent, whether before or after the attachment.[80] In behalf of himself attachment defendant may show his own acts prior to the application for attachment, which tend to establish his intention to pay his debts.[81] He cannot, however, testify that a certain act, done by him after the attachment, was caused thereby, when nothing appears to show that this was other than a secret and uncommunicated motive;[82] nor can he testify as to whether he was about to convey his property to defraud creditors.[83] He may show that all

the state only temporarily, are not a part of the *res gestæ* and are not admissible. Baldwin *v.* Walker, 91 Ala. 428, 8 So. 364; Jackson *v.* Smith, 75 Ala. 97; Havis *v.* Taylor, 13 Ala. 324. But see Offutt *v.* Edwards, 9 Rob. (La.) 90, where it was held that if such declarations were made a short time before the attachment and before leaving the state they should be admitted in evidence. To render such declarations competent it is necessary that they be made at the time of leaving and in explanation of the act. Baldwin *v.* Walker, 91 Ala. 428, 8 So. 364.

75. Troy *v.* Rogers, 113 Ala. 131, 20 So. 999, where it is held that in an action for wrongful attachment, sued out on the ground that attachment defendant was about to remove from the state, he may be properly required to testify that he made efforts to sell his personal property, and state that he expected to go to another state and engage in business there.

Testimony as to what defendants were doing in their business is only competent so far as it expresses their intentions as known to attachment plaintiff. Ruthven *v.* Beckwith, 84 Iowa 715, 45 N. W. 1073, 51 N. W. 153.

76. This is a matter of inference to be drawn by the jury from the facts and circumstances in the case. Baldwin *v.* Walker, 91 Ala. 428, 8 So. 364.

77. Havis *v.* Taylor, 13 Ala. 324.

One who is boarding with attachment defendant cannot testify that he knew that the latter was not about to remove from the state at the time of the suing out of the attachment, as this is a mere matter of opinion. Baldwin *v.* Walker, 94 Ala. 514, 10 So. 391.

78. Baldwin *v.* Walker, 94 Ala. 514, 10 So. 391, where it was said that proof of such habit would tend to establish a fact which might otherwise be treated by the jury as evidence of a permanent removal.

79. O'Neil *v.* Wills Point Bank, 67 Tex. 36, 2 S. W. 754.

80. Citizens' Nat. Bank *v.* Converse, 105 Iowa 669, 75 N. W. 506; Mayne *v.* Council Bluffs Sav. Bank, 80 Iowa 710, 45 N. W. 1057.

Statements of attachment defendant.— If it is shown that attachment defendant was negotiating at the time the attachment was sued out for a sale of his property at a low price, evidence is admissible of a statement by him that he "was involved and broke." Lockhart *v.* Woods, 38 Ala. 631.

That attachment defendant was embarrassed in his pecuniary affairs and pressed for money when writ issued cannot be shown unless the relevance of the evidence is shown by its connection with some question of fraud. Floyd *v.* Hamilton, 33 Ala. 235.

The record of a conveyance of land is not admissible in support of an allegation that plaintiff was about to convey his property out of the state with intent to hinder and defraud his creditors. Dynes *v.* Robinson, 11 Iowa 137.

81. Kaufman *v.* Armstrong, 74 Tex. 65, 11 S. W. 1048.

82. Adams *v.* Thornton, 82 Ala. 260, 3 So. 20.

Testimony held not within rule.— On an issue as to the rightfulness of an attachment, testimony by attachment defendant that he had made no arrangement to dispose of the property except in the usual course of business, and to utilize the proceeds to pay his debts, is admissible, and is not objectionable as stating the unexpressed intention of defendant in disposing of the property. Ruthven *v.* Beckwith, 84 Iowa 715, 45 N. W. 1073, 51 N. W. 153.

83. Charles City Plow, etc., Co. *v.* Jones,

the money received by him in his business, other than that necessary for his family, was used to pay his debts.[84]

(4) That Defendant Has Conveyed Property to Defraud Creditors. In proceedings to recover for injuries caused by wrongful attachment, issued on the ground that defendant therein had conveyed property to defraud creditors, attachment plaintiff may question the party to whom the goods were conveyed as to the price paid, to determine the question of attachment defendant's good faith, and the memory of the witness may be refreshed by showing him an invoice of the goods.[85] In his own behalf attachment defendant's testimony respecting his intent in disposing of his property is inadmissible;[86] as are also secret instructions given only to his employees in regard to the conduct of the business.[87]

(5) That Defendant Is Fraudulently Withholding Means From Creditors. In an action for wrongful attachment, based on the ground that the debtor was fraudulently withholding means from his creditors, he may show in his own behalf that he had paid out large sums to creditors during the year preceding the levy,[88] or that at the time the attachment was sued out, he was a man of large means, and had a large amount of property about him and under his control, claiming it openly and notoriously as his own.[89]

(c) *In Relation to Malice of Attachment Plaintiff*—(1) To Show Malice. In actions to recover for wrongful attachment declarations of attachment plaintiff may be admissible as tending to show malice on his part,[90] and evidence of his declarations to his attorney as to his reasons for suing out the writ, made at the time of suing it out, is also admissible as a part of the *res gestæ*.[91] On the other hand, acts and declarations of the attorney of plaintiff in attachment, of which he is not informed, cannot be shown for the purpose of proving malice on his part;[92] and the same is the case in regard to statements of his counsel made subsequently to the attachment.[93] So, it has been held competent for the purpose of proving malice to show that plaintiff in attachment procured two attachments in one week,[94] or to adduce evidence of attachment defendant's reputation for solvency and ability to pay his debts;[95] and where the debtors sued in attachment were a partnership it is competent to prove a wrongful levy of the attachment on

71 Iowa 234, 32 N. W. 280, where it was said: "The question is whether or not they had so conducted themselves as to give their creditors reasonable ground to believe that the fraudulent intent existed."

84. Kaufman *v.* Armstrong, 74 Tex. 65, 11 S. W. 1048.

85. Marx *v.* Leinkauff, 93 Ala. 453, 9 So. 818.

86. Selz *v.* Belden, 48 Iowa 451.

That before attachment was sued out attachment defendant offered to convey property to the attaching creditor in settlement of his debt, and that the offer was declined is not competent evidence. Jefferson County Sav. Bank *v.* Eborn, 84 Ala. 529, 4 So. 386.

87. Deere *v.* Bagley, 80 Iowa 197, 45 N. W. 557.

Nor can a witness testify for him that he had heard no suspicions expressed by others that attachment defendant was trying to defraud his creditors. White *v.* Beck, 64 Iowa 122, 19 N. W. 872.

Where the business of attachment defendant is the baling and shipping of hay, his testimony as to delays in getting cars for shipment is admissible as showing the general course of business and as bearing on the question of intent to defraud. Ruthven *v.* Beckwith, 84 Iowa 715, 45 N. W. 1073, 51 N. W. 153.

88. Birmingham Dry Goods Co. *v.* Finley, 122 Ala. 534, 26 So. 138.

89. Burton *v.* Smith, 49 Ala. 293.

90. It is competent therefore to show that attachment plaintiff said he had more money than the defendant in attachment had to spend in a lawsuit (Dothard *v.* Sheid, 69 Ala. 135); or that attaching creditor went to the field of attachment defendant and threatened to prosecute him if he did not stop shucking certain corn, which he claimed under the attachment, and a part of which he took (Byford *v.* Girton, 90 Iowa 661, 57 N. W. 588); or that some months before the attachment, attachment plaintiff had declared that he intended to get everything that defendant made for nothing (Crofford *v.* Vassar, 95 Ala. 448, 10 So. 350).

91. Wood *v.* Barker, 37 Ala. 60, 76 Am. Dec. 346.

92. Baldwin *v.* Walker, 91 Ala. 428, 8 So. 364. See also Louisville Jeans Clothing Co. *v.* Lischkoff, 109 Ala. 136, 19 So. 436.

93. Empire Mill Co. *v.* Lovell, 77 Iowa 100, 41 N. W. 583, 14 Am. St. Rep. 272.

94. Ryall *v.* Marx, 50 Ala. 31.

95. Mayfield *v.* Cotton, 21 Tex. 1.

the individual property of one of the partners, and attendant circumstances of aggravation, wantonness, or gross negligence, for the purpose of proving malice.[96]

(2) To Show Absence of Malice. To show absence of malice, attachment plaintiff may introduce evidence of attachments against attachment defendant levied prior to his own, provided he knew of them, but not otherwise;[97] that the debt upon which the attachment issued was actually due;[98] that prior to the suing out of the writ attachment defendant had admitted the facts on which the affidavit for attachment was based;[99] that at the time of the suing out of writ defendant in attachment was greatly involved in debt;[1] that attachment plaintiff acted on the advice of counsel given on a full statement of the facts.[2] Plaintiff in attachment cannot, however, testify that he acted without malice in suing out the attachment.[3]

(D) *In Relation to Probable Cause.* In proceedings to recover for injuries caused by wrongful attachment, facts and circumstances within the knowledge of attachment plaintiff, such as gave him reason to believe the truth of the facts stated in the affidavit, are competent evidence to show probable cause for suing out the writ.[4] On this question, it is also competent to show the amount of

96. Watts *v.* Rice, 75 Ala. 289.

The following evidence has been held inadmissible to prove malice on the part of attachment plaintiff: Slanderous words or declarations made by him after the commencement of the suit, unless they relate directly to the act of suing out the attachment (Burton *v.* Knapp, 14 Iowa 196, 81 Am. Dec. 465); evidence that plaintiff in attachment was angry with the defendant therein after the time of the levy (Yarborough *v.* Weaver, 6 Tex. Civ. App. 215, 25 S. W. 468); the sending of notices of the attachment to the commercial papers, if plaintiff is not first connected with the sending of such notices (Jamison *v.* Weaver, 81 Iowa 212, 46 N. W. 996); evidence of the value of the property seized, where it is not proposed to show that the levy was made on more property than the writ authorized, or that plaintiff in attachment gave directions as to the property on which it should be levied (Deere *v.* Bagley, 80 Iowa 197, 45 N. W. 557).

Nor is it permissible to introduce affidavits for continuance made by the sheriff, attachment plaintiffs' attorneys, and others in the case in support of the theory that the attaching creditors and the sheriff knew that the debtor's transfer of his goods was an honest one, and that the attachments were levied for vexatious purposes, and to compel the grantee to pay the grantor's debts. Buckingham *v.* Tyler, 74 Mich. 101, 41 N. W. 868.

97. Lockhart *v.* Woods, 38 Ala. 631; Yarbrough *v.* Hudson, 19 Ala. 653.

98. Marshall *v.* Betner, 17 Ala. 832.

99. Raver *v.* Webster, 3 Iowa 502, 66 Am. Dec. 96.

1. Mitchell *v.* Harcourt, 62 Iowa 349, 17 N. W. 581. See also Myers *v.* Wright, 44 Iowa 38.

2. Sloan *v.* Langert, 6 Wash. 26, 32 Pac. 1015, holding that attachment plaintiff as well as counsel may testify as to the giving of such advice.

Where plaintiff in attachment seeks to recover but the presumption of malice arising from want of probable cause, on the ground that attachment was sued out on the advice of counsel, it may be shown what was said in the conversation with counsel. Charles City Plow, etc., Co. *v.* Jones, 71 Iowa 234, 32 N. W. 280.

3. **This fact must be determined by** the jury from all the circumstances bearing on that issue. Hamilton *v.* Maxwell, 119 Ala. 23, 24 So. 769.

Evidence of his remarks at the time he procured the writ is likewise inadmissible in his behalf to show his motives. Shuck *v.* Vanderventer, 4 Greene (Iowa) 264. So where evidence was introduced of a statement by plaintiff in attachment, tending to show the motive which actuated him in suing out the writ, his explanation of what he meant by that statement was held to be admissible. White *v.* Beck, 64 Iowa 122, 19 N. W. 872.

4. Deere *v.* Bagley, 80 Iowa 197, 45 N. W. 557. See also Schneider *v.* Ferguson, 77 Tex. 572, 14 S. W. 154.

It may therefore be shown when and how the debt for which the attachment issued originated, what occurred from time to time as to its payment, and what defendant did and said in relation thereto (Dent *v.* Smith, 53 Iowa 262, 5 N. W. 143); that another creditor telegraphed plaintiff in attachment that the debtor was sure to fail, and to attach (Citizens Nat. Bank *v.* Converse, 105 Iowa 669, 75 N. W. 506); what were the circumstances and outcome of an attachment issued five weeks previous to the one sued out by plaintiff in attachment (Willis *v.* McNeill, 57 Tex. 465); that defendant in attachment intended to "fix his property," so that plaintiff in attachment could not collect his debt (Dent *v.* Smith, 53 Iowa 262, 5 N. W. 143); that one of the attachment **defendants had conveyed** realty to another, and that it had been reconveyed to him, although this was done some time previous to the attachment (Dent *v.* Smith 53 Iowa 262, 5 N. W. 143).

attachment defendant's indebtedness when the writ was sued out, that for some time he had been selling his property, and within two months prior to the attachment had been acting fraudulently.[5] As tending to show probable cause for suing out an attachment facts not known to the creditor at the time of suing it out cannot be shown.[6] Evidence as to the conduct of his affairs and the good faith of his transactions is competent to prove want of reasonable cause.[7]

(E) *To Identify Plaintiff in Suit at Bar With Attachment Defendant.* In an action on an attachment bond to recover damages for a wrongful attachment, it is competent to identify plaintiff as the real defendant in the attachment proceedings, doing business under the name of the obligee named in such bond.[8]

(F) *To Identify Property Sold.* In support of a counter-claim for damages caused by a wrongful attachment of a stock of goods, attachment defendant's inventory of the stock is admissible in connection with other evidence on the question of the identity of the property sold.[9]

(G) *To Show Quantity of Property Seized.* It has been held that in an action for wrongful attachment the return of an officer making a levy is conclusive as to the quantity of goods sold.[10]

(H) *To Show Value of Property Attached.* In determining the value of the property attached at the time of the attachment it is competent to show what it cost,[11] or what it brought at sheriff's sale, shortly after the seizure.[12] A sworn

5. Gaddis *v.* Lord, 10 Iowa 141.

6. **As, for instance, declarations made by attachment defendant,** which were not shown to have been brought to attachment plaintiff's knowledge when he made the affidavit. Raver *v.* Webster, 3 Iowa 502, 66 Am. Dec. 96.

Nor can it be shown that certain persons had told attachment plaintiff that defendant therein was running away, where there is no offer to prove that it was true, or that plaintiff had reason to believe it to be. Schrimpf *v.* McArdle, 13 Tex. 368.

7. Seattle Crockery Co. *v.* Haley, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156.

So where attachment plaintiff has offered evidence to show the pecuniary embarrassment of defendant at the time of the attachment, the latter may rebut the evidence as to pecuniary embarrassment by proof of outstanding accounts due to him; but a foundation must be laid for this testimony by first showing the justice of the accounts. Lockhart *v.* Woods, 38 Ala. 631.

8. Ermeling *v.* Bargh, 121 Mich. 167, 79 N. W. 1094. And for this purpose the affidavit, bond, and writ of attachment are admissible. Hundley *v.* Chadick, 109 Ala. 575, 19 So. 845, where it was held that in an action by C on an attachment bond, payable to "C. & C.," a complaint alleging that the bond was made payable to plaintiff under the name of "C. & Co.," plaintiff might show the evidence mentioned in connection with proof that he alone composed "C. & Co."

9. Michigan Stove Co. *v.* Waco Hardware Co., 24 Tex. Civ. App. 301, 58 S. W. 734.

10. Schneider *v.* Ferguson, 77 Tex. 572, 14 S. W. 154 (where it was said that as between the parties to the action in which the return is made it cannot be attacked in a collateral suit, the remedy of the party aggrieved being by a direct proceeding to have the return amended, or by an action against the officer for a false return); Matthews *v.* Boydstun, (Tex. Civ. App. 1895) 31 S. W. 814.

In Alabama it is held that plaintiff may show that other goods than those designated in the sheriff's return were seized, whether the omission to inventory them be the result of fraud or mistake. Jefferson County Sav. Bank *v.* Eborn, 84 Ala. 529, 4 So. 386. It is further held that, although to determine the quantity of goods seized it is not competent to show the percentage of profits on goods sold, it is permissible to prove for this purpose the amount of goods on hand at any particular time, the quantity sold by way of diminution, and the stock with all additions made to it by accretions in the meantime. Jefferson County Sav. Bank *v.* Eborn, 84 Ala. 529, 4 So. 386.

11. Angell *v.* Hopkins, 79 Cal. 181, 21 Pac. 729.

12. Hildreth *v.* Fitts, 53 Vt. 684. *Compare* Williams *v.* Kane, (Tex. Civ. App. 1900) 55 S. W. 974, where it was held proper to refuse evidence of the value of the goods a considerable time after attachment, the issue being their value at the time of levy.

Evidence to show unsalability of goods attached.— In an action for wrongful attachment, evidence on cross-examination of plaintiff's witness, who had been interested as purchaser of the goods subsequently to attachment, tending to show that they were unsalable, is admissible on the question of damages. The testimony tends to show that the goods were of less value than claimed by attachment defendant. Armstrong *v.* Ames, etc., Co., 17 Tex. Civ. App. 46, 43 S. W. 302.

The auctioneer making the sale, who had been engaged in that business for a long time, may testify that in his opinion they brought a fair price under the circumstances. Marx *v.* Leinkauff, 93 Ala. 453, 9 So. 818.

Written bids for the property made after

appraisal made under a sheriff's levy on attachment,[13] or an inventory of the stock of goods seized made by defendant in attachment,[14] is also admissible for this purpose; but it is not competent to show the amount of insurance that attachment defendant had on the property seized.[15] A deputy sheriff who did not levy the attachment may testify as to the value of the goods, where a few days prior to the levy thereof he seized the same goods under a writ of detinue.[16]

(I) *To Show Damages Sustained.* Where exemplary or punitive damages are asked, attachment plaintiff should be permitted to show that he acted without malice;[17] otherwise if only actual damages are sought.[18] As a basis for the recovery of exemplary damages for injuries to business, it is competent to show that after the suing out of the attachment a number of plaintiff's customers had withdrawn from trading with him;[19] but the amount of business done since the attachment is not competent evidence.[20] To prove injuries to credit, it is competent to introduce evidence that an account of the attachment proceedings was published in a daily paper and to show the extent of its circulation.[21] Attachment defendant cannot, however, be permitted to testify that his credit was damaged in a designated amount.[22] For attachment plaintiff, evidence that attachment defendant was reputed insolvent at the time of the attachment is competent on the question whether the latter has sustained any, and what, injury to his credit;[23] but evidence that attachment defendant was a man of limited means is not admissible in his own behalf.[24] Where realty and personalty are both attached, and attachment defendant is not deprived of the use of the realty, the value thereof is immaterial on the question of damages for the seizure of the personalty.[25] The improper rejection of evidence in respect of damages may under some circumstances constitute harmless error.[26] So in some instances

advertisement by the receiver appointed therein are admissible in evidence, as tending to show whether the goods sold for a fair price, even though not of themselves sufficient to prove the value. Citizens Nat. Bank *v.* Converse, 105 Iowa 669, 75 N. W. 506.

13. Hunt *v.* Strew, 33 Mich. 85; Walrath *v.* Campbell, 28 Mich. 111; Worthington *v.* Hanna, 23 Mich. 530.

14. Michigan Stove Co. *v.* Waco Hardware Co., 24 Tex. Civ. App. 301, 58 S. W. 734.

Basing value on retail price.— The fact that plaintiff's testimony as to the value of articles seized under wrongful attachment was based on a retail price-list was immaterial, in view of an inventory made by defendant's attorney, and when plaintiff was corroborated by another witness as to value. Caldwell *v.* Porcher, (Tex. 1891) 17 S. W. 87.

Invoice taken by defendant in attachment twenty days before levy, showing the values of separate articles and what articles the stock contained, the sheriff having sold the stock in bulk without unboxing it, is admissible. Carothers *v.* McIlhenny Co., 63 Tex. 138.

In the case of an attachment on live stock it is competent to show the value thereof at times other than the day of their release, as injuries may have been sustained by reason of the attachment which are not immediately apparent. Schofield *v.* Territory, 9 N. M. 526, 56 Pac. 306.

15. Blum *v.* Stein, 68 Tex. 608, 5 S. W. 454.

16. Jefferson County Sav. Bank *v.* Eborn, 84 Ala. 529, 4 So. 386.

17. Sloan *v.* Langert, 6 Wash. 26, 32 Pac. 1015.

18. Williams *v.* Kane, (Tex. Civ. App. 1900) 55 S. W. 974.

19. Birmingham Dry Goods Co. *v.* Finley, 122 Ala. 534, 26 So. 138.

Seasons at which property is salable.—An expert may testify what the damage would be by reason of the fact that some of the goods were salable only at certain seasons, and that in consequence of the proper season for that year having passed, some of the goods would have to be carried in stock until the next year. Knapp, etc., Co. *v.* Barnard, 78 Iowa 347, 43 N. W. 197.

20. Adams *v.* Thornton, 82 Ala. 260, 3 So. 20.

Where property seized is a hay-press, evidence is competent to show the number of tons per day pressed in it after its release from the attachment. Ruthven *v.* Beckwith, 84 Iowa 715, 45 N. W. 1073, 51 N. W. 153.

21. Brand *v.* Hinchman, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 363.

22. The extent of damage to credit is an inferential fact which can be arrived at only by the examination and weighing of all the facts and circumstances, and cannot be the subject of direct proof. Trammell *v.* Ramage, 97 Ala. 666, 11 So. 916.

23. Mayfield *v.* Cotton, 21 Tex. 1.

24. Jackson *v.* Smith, 75 Ala. 97.

25. Imperial Roller Milling Co. *v.* Cleburne First Nat. Bank, 5 Tex. Civ. App. 686, 27 S. W. 49.

26. If only nominal damages are allowed by the jury the exclusion of evidence offered in mitigation of damages is harmless error.

it has been held that error in admitting such evidence may be one which is subsequently cured.[27]

(J) *To Show Amount of Attorney's Fees.* Notes given for counsel fees in the attachment suit are admissible in evidence in an action on the attachment bond to show the amount of fees attachment defendant is legally bound to pay.[28]

(III) *Weight and Sufficiency of Evidence and Presumptions* — (A) *In General.* Where, in an action for wrongful attachment, the answer admits the attachment proceedings, the issue of the attachment, and an adverse decision on appeal, these facts will be deemed sufficiently proved without the introduction of the record of the attachment suit.[29] So where the record shows that a final judgment *in personam* alone has been taken, this sufficiently shows a dissolution or abandonment of the attachment.[30] Execution of the attachment bond is sufficiently shown by introducing the record of the attachment suit.[31]

(B) *In Relation to Cause of Action.* Payment into court and tender of a sum of money by defendants in attachment are a conclusive admission that such money was due when attachment issued.[32]

(C) *In Relation to Malice and Want of Probable Cause.* Want of probable cause cannot be inferred from the fact that an attachment was maliciously sued out,[33] but malice may be inferred from want of probable cause, such inference supplying the place of direct proof.[34] The jury, however, are at liberty to draw the inference or not, according to the facts and circumstances of the case.[35] Malice is not necessarily established by showing want of probable cause.[36] The presumption may be rebutted by other circumstances shown.[37] The mere fact that an attachment was discharged,[38] or that judgment was rendered for defendant in the suit in which the attachment was issued[39] does not prove that the attachment was issued maliciously and without probable cause. Nor does an unsuccessful attempt to show probable cause afford a fair inference of malice.[40] So malice cannot be presumed, as against sureties on a bond to procure an attachment, who are strangers to the controversy and not interested in the result, from the mere fact that they signed without previously examining into the merits of

Whitney *v.* Brownewell, 71 Iowa 251, 32 N. W. 285.

27. Thus if evidence is admitted to show an item of damages not properly allowable the error is cured by the action of the trial court in requiring attachment defendant to remit the value of such item, and rendering judgment for the amount of the verdict less the sum remitted. Hurlbut *v.* Hardenbrook, 85 Iowa 606, 52 N. W. 510.

28. State *v.* Gage, 52 Mo. App. 464.

29. Byford *v.* Girton, 90 Iowa 661, 57 N. W. 588.

30. Sannes *v.* Ross, 105 Ind. 558, 5 N. E. 699.

31. Adams *v.* Olive, 48 Ala. 551.

Affidavit for attachment.— Where it is alleged in an action on an undertaking that application was made for a warrant of attachment, and that the warrant issued, it will be presumed that proper affidavit was filed with the clerk. Brown *v.* Tidrick, 14 S. D. 249, 85 N. W. 185. But where a party reconvenes for damages in the main action, the affidavit for the attachment is not evidence of the alleged causes on which the attachment was sued out. Dupree *v.* Gunter, 33 Tex. 679.

32. Mitchell *v.* Harcourt, 62 Iowa 349, 17 N. W. 581.

33. Biering *v.* Galveston First Nat. Bank, 69 Tex. 599, 7 S. W. 90.

34. Senecal *v.* Smith, 9 Rob. (La.) 418; Biering *v.* Galveston First Nat. Bank, 69 Tex. 599, 7 S. W. 90; Willis *v.* McNeill, 57 Tex. 465; Tillman *v.* Adams, 2 Tex. App. Civ. Cas. § 308; Schwartz *v.* Burton, 1 Tex. App. Civ. Cas. § 1216.

35. Willis *v.* McNeill, 57 Tex. 465; Lister *v.* Campbell, (Tex. Civ. App. 1898) 46 S. W. 876; Thompson *v.* Bell, 11 Tex. Civ. App. 1, 32 S. W. 142.

36. Talbott *v.* Great Western Plaster Co., 86 Mo. App. 558.

37. Kaufman *v.* Wicks, 62 Tex. 234; Dwyer *v.* Testard, 1 Tex. App. Civ. Cas. § 1228.

For instance, by showing a fair and honest effort to collect a debt believed by plaintiff to be due. Dwyer *v.* Testard, 1 Tex. App. Civ. Cas. § 1228.

38. Mitchell *v.* Mattingly, 1 Metc. (Ky.) 237.

39. Hilfrich *v.* Meyer, 11 Wash. 186, 39 Pac. 455.

Malice of agent.— Participation by the principal in the malice of his agent in suing out an attachment cannot be inferred merely from the relation of principal and agent. Jackson *v.* Smith, 75 Ala. 97.

40. Flournoy *v.* Lyon, 70 Ala. 308.

the cause.[41] On the other hand, absence of malice is conclusively proved by evidence that plaintiff acted under the advice of counsel, and that during the litigation two judgments were rendered in his favor, although subsequently reversed.[42]

(D) *In Relation to Value of Property.* On the question of the value of property seized, neither a sworn appraisal made under a sheriff's levy,[43] nor the price which the goods brought at forced sale is conclusive.[44]

(E) *In Relation to Wrongfulness of Attachment.* A dissolution of an attachment on the merits is conclusive that the writ was wrongfully sued out,[45] but such is not the case where the dissolution is based on mere irregularities in the attachment proceedings.[46]

j. Damages — (I) *Character of Damages Recoverable as Affected by Method of Enforcing Liability* — (A) *By Proceedings on Bond* — (1) Rule That Only Actual Damages Recoverable. In a large majority of the statutes requiring attachment plaintiff to give a bond before issue of the attachment, the damages covered by the bond are designated as "all damages" caused by the wrongful attachment.[47] These statutes are very generally held to include only actual damages. Indirect, consequential, or punitive damages are not included, and nothing beyond actual damages can be recovered on the bond, whether the proceeding be by an independent action on the bond,[48] or by assessment of damages in the main action on determination of the issue as to the validity of the attachment in favor of defendant, and rendition of judgment on the bond for the amount so assessed.[49] Under the latter procedure the jury trying the issue, have as large a scope to consider and estimate the damages as in a suit on the bond.[50]

(2) Rule That Exemplary or Punitive Damages Recoverable — (a) Under Statutes Making Express Provision Therefor. In Alabama the statute provides that if the attachment is sued out maliciously as well as wrongfully, the jury may, in addition to the allowance of damages actually sustained, give "vindictive" damages;[51] and the Iowa and Washington statutes[52] provide that if the

41. Dawson *v.* Baum, 3 Wash. Terr. 464, 19 Pac. 46.

42. Frank *v.* Chaffe, 34 La. Ann. 1203.

43. Worthington *v.* Hanna, 23 Mich. 530; Blum *v.* Stein, 68 Tex. 608, 5 S. W. 454.

Where the property is claimed by the assignee of defendants, whose allegation as to the value of the property is not controverted, the return showing the value is sufficient. Hayden Saddlery Hardware Co. *v.* Ramsay, 14 Tex. Civ. App. 185, 36 S. W. 595.

44. Carey *v.* Dyer, 97 Wis. 554, 73 N. W. 29.

45. Boatwright *v.* Stewart, 37 Ark. 614; Hoge *v.* Norton, 22 Kan. 374; Mitchell *v.* Mattingly, 1 Metc. (Ky.) 237; Barrimore *v.* McFeely, 32 La. Ann. 1179. See also Jerman *v.* Stewart, 12 Fed. 266, 267, where it was said that "the judgment of the court in favor of the defendant is conclusive evidence of his right to actual damages."

46. Boatwright *v.* Stewart, 37 Ark. 614; Jandt *v.* Derauleau, (Nebr. 1899) 78 N. W. 22. See also Sacket *v.* McCord, 23 Ala. 851; and *supra*, XVIII, B, 2, b.

47. See the statutes of the several states.

48. *Arkansas.*— Adkins *v.* Lacy, 68 Ark. 170, 56 S. W. 876; Boatwright *v.* Stewart, 37 Ark. 614; Holliday *v.* Cohen, 34 Ark. 707.

California.— Elder *v.* Kutner, 97 Cal. 490, 32 Pac. 563.

Dakota.— Thompson *v.* Webber, 4 Dak. 240, 29 N. W. 671.

Kentucky.— Reidhar *v.* Berger, 8 B. Mon. (Ky.) 160; Pettit *v.* Mercer, 8 B. Mon. (Ky.) 51; Mocerf *v.* Stirman, 16 Ky. L. Rep. 587, 29 S. W. 324; Duck *v.* Holbrook, 6 Ky. L. Rep. 511.

Missouri.— State *v.* Thomas, 19 Mo. 613, 61 Am. Dec. 580; State *v.* Goodhue, 74 Mo. App. 162; State *v.* Hill, 60 Mo. App. 130; State *v.* Watts, 3 Mo. App. 568.

New York.— Epstein *v.* U. S. Fidelity, etc., Co., 29 Misc. (N. Y.) 295, 60 N. Y. Suppl. 527.

Ohio.— Bruce *v.* Coleman, 1 Handy (Ohio) 515, 12 Ohio Dec. (Reprint) 265.

Pennsylvania.— Berwald *v.* Ray, 165 Pa. St. 192, 30 Atl. 727; Com. *v.* Magnolia Villa Land, etc., Co., 163 Pa. St. 99, 29 Atl. 793. See also Dyer *v.* Sharp, 2 Pa. Co. Ct. 216.

South Carolina.— McClendon *v.* Wells, 20 S. C. 514.

49. Goodbar *v.* Lindsley, 51 Ark. 380, 11 S. W. 577, 14 Am. St. Rep. 54; Patton *v.* Garrett, 37 Ark. 605; Holliday *v.* Cohen, 34 Ark. 707; Marqueze *v.* Sontheimer, 59 Miss. 430; Roach *v.* Brannon, 57 Miss. 490.

50. Fleming *v.* Bailey, 44 Miss. 132.

51. Ala. Civ. Code (1896), § 565.

52. Iowa Code (1897), § 3887; Wash. Anno. Codes & Stats. § 5257.

In Alabama and Iowa it is settled, in accordance with the express provisions of the statutes cited, that in an action on the bond only actual damages are recoverable when

attachment is sued out maliciously, "exemplary" damages may be recovered, in addition to actual damages.

(b) Under Statutes Making No Provision For Other Than Actual Damages. In Louisiana, Tennessee, and Texas the statutes contain no express provisions for the allowance of exemplary or punitive damages in an action on the bond. Nevertheless the rule is settled that in an action on the bond such damages are recoverable if the attachment is malicious as well as wrongful;[53] while only actual damages are recoverable if attachment plaintiff has acted in good faith and without malice.[54]

(3) Limitation of Damages Recoverable by Amount of Penalty Named in Bond. As a general rule, where suit is brought on an attachment bond, the amount of the recovery cannot exceed the penalty on the face of it.[55]

(B) *By Actions or Proceedings Independent of Bond.* In jurisdictions where the common-law doctrine in regard to the necessity of malice and want of probable cause as a basis for the recovery of damages caused by a wrongful attachment has never obtained[56] defendant in attachment may, independently of any statutory authority, bring an action independently of the bond,[57] set up

the attachment is merely wrongful (Dothard *v.* Sheid, 69 Ala. 135; Floyd *v.* Hamilton, 33 Ala. 235; Plumb *v.* Woodmansee, 34 Iowa 116; Raver *v.* Webster, 3 Iowa 502, 66 Am. Dec. 96); but that if the attachment is also sued out maliciously, exemplary or punitive damages may be recovered (Dothard *v.* Sheid, 69 Ala. 135; Floyd *v.* Hamilton, 33 Ala. 235; Campbell *v.* Chamberlain, 10 Iowa 337. See also Baldwin *v.* Walker, 94 Ala. 514, 10 So. 391).

In Washington it is held that if the attachment is sued out maliciously, defendant may recover "exemplary damages;" but this term is construed to mean only indeterminable actual damages, such as damages to reputation, pride, or feelings, and not damages by way of punishment. Levy *v.* Fleischner, 12 Wash. 15, 40 Pac. 384.

53. Nicaragua Accessory Transit Co. *v.* McCerren, 13 La. Ann. 214; Moore *v.* Withenburg, 13 La. Ann. 22; Stringfield *v.* Hirsch, 94 Tenn. 425, 29 S. W. 609, 45 Am. St. Rep. 733; Renkert *v.* Elliott, 11 Lea (Tenn.) 235; Doll *v.* Cooper, 9 Lea (Tenn.) 576; Reeves *v.* John, (Tenn. Ch. 1897) 43 S. W. 134; Mayer *v.* Duke, 72 Tex. 445, 10 S. W. 565; Tynburg *v.* Cohen, 67 Tex. 220, 2 S. W. 734; Emerson *v.* Skidmore, 7 Tex. Civ. App. 641, 25 S. W. 671; Jerman *v.* Stewart, 12 Fed. 266 (construing Tennessee statute).

The term "wrongfully suing out said attachment," as used in the statutes prescribing the form of attachment bonds, is as properly applicable to a case where the process has been resorted to in the absence of sufficient legal cause, without reference to the intent, as to a case where it has been sued out and set on foot from motives of malice and oppression. The damages, however, would be confined in the one case to the actual injury sustained, while in the other, vindictive damages might be allowed. Smith *v.* Eakin, 2 Sneed (Tenn.) 456.

Liability of sureties.— In Tennessee the sureties will be liable for exemplary damages where the principal is liable for such damages. Renkert *v.* Elliott, 11 Lea (Tenn.) 235; Smith *v.* Eakin, 2 Sneed (Tenn.) 456; Reeves *v.* John, (Tenn. Ch. 1897) 43 S. W. 134. In Texas actual damages only can be awarded against the sureties, although exemplary damages may be given against the principal. Emerson *v.* Skidmore, 7 Tex. Civ. App. 641, 25 S. W. 671.

54. Teal *v.* Lyons, 30 La. Ann. 1140; Nicaragua Accessory Transit Co. *v.* McCerren, 13 La. Ann. 214; Moore *v.* Withenburg, 13 La. Ann. 22; Lobenstein *v.* Hymson, 90 Tenn. 606, 18 S. W. 250; Renkert *v.* Elliott, 11 Lea (Tenn.) 235; Smith *v.* Eakin, 2 Sneed (Tenn.) 455; Reeves *v.* John, (Tenn. Ch. 1897) 43 S. W. 134. See also Davis *v.* Rawlins, 1 Tex. App. Civ. Cas. § 17; Jerman *v.* Stewart, 12 Fed. 266 (construing Tennessee statute).

55. City Nat. Bank *v.* Jeffries, 73 Ala. 183; Renkert *v.* Elliott, 11 Lea (Tenn.) 235; Doll *v.* Cooper, 9 Lea (Tenn.) 576. *Compare* Marchand *v.* York, 10 Ky. L. Rep. 777, where it was held that liability on the bond is not limited to the amount therein designated as security; that the clerk is merely directed to require security to such extent as is presumably sufficient.

On a counter-claim on an attachment bond for wrongful attachment the recovery cannot exceed the amount claimed, although the evidence shows or tends to show that a larger amount of damage was sustained. Charles City Plow, etc., Co. *v.* Jones, 71 Iowa 234, 32 N. W. 280. So where defendant in attachment pleads in reconvention for damages caused by the wrongful attachment, he cannot recover a greater amount than is claimed in his plea. Handel *v.* Kramer, 1 Tex. App. Civ. Cas. § 826.

56. See *supra*, XVIII, B, 6, c.

57. Half *v.* Curtis, 68 Tex. 640, 5 S. W. 451; Kauffman *v.* Babcock, 67 Tex. 241, 2 S. W. 878. See also Dickinson *v.* Maynard, 20 La. Ann. 66, 96 Am. Dec. 379; Phelps *v.* Coggeshall, 13 La. Ann. 440; Horn *v.* Bayard, 11 Rob. (La.) 259; Craddock *v.* Goodwin, 54 Tex. 578.

damages by way of reconvention,[58] or counter-claim in the main attachment action for the recovery of damages if the attachment be wrongful.[59] If the facts are such as to warrant it exemplary or punitive damages may also be recovered if appropriate averments are made,[60] but if the attachment be sued out in good faith, of course only actual damages are recoverable.[61]

(II) *Actual Damages*—(A) *Defined.* Generally speaking actual damages are the natural, proximate result or consequence of the wrongful act of suing out the attachment.[62]

(B) *Right to Recover Where Attachment Merely Wrongful*—(1) Statement of Rule. At common law no damages are recoverable for an attachment which is merely wrongful and not instituted with malice and without probable cause.[63] This doctrine, however, has been so disturbed that at the present time it is rather the exception than the rule. In the great majority of states there are statutes which either expressly or by implication authorize the recovery by some form of procedure of at least actual damages, although the attachment be merely wrongful.[64]

(2) Extent and Limitations of Rule. In actions of this character, however, the recovery is limited strictly to the actual damages which have been sustained,[65] and the injuries must be the proximate and natural result of the attachment.[66] It has been held, however, that where either malice[67] or want of probable cause is

58. Half *v.* Curtis, 68 Tex. 640, 5 S. W. 451.

59. Half *v.* Curtis, 68 Tex. 640, 5 S. W. 451.

60. Offutt *v.* Edwards, 9 Rob. (La.) 90; Kaufman *v.* Armstrong, 74 Tex. 65, 11 S. W. 1048; Craddock *v.* Goodwin, 54 Tex. 578; Culbertson *v.* Cabeen, 29 Tex. 247; Reed *v.* Samuels, 22 Tex. 114, 73 Am. Dec. 253; Walcott *v.* Hendrick, 6 Tex. 406; Schwartz *v.* Burton, 1 Tex. App. Civ. Cas. § 1216.

61. Steinhart *v.* Leman, 41 La. Ann. 835, 6 So. 665; Biggs *v.* D'Aquin, 13 La. Ann. 21; Offutt *v.* Edwards, 9 Rob. (La.) 90; Kaufman *v.* Armstrong, 74 Tex. 65, 11 S. W. 1048; Bear *v.* Marx, 63 Tex. 298; Reed *v.* Samuels, 22 Tex. 114, 73 Am. Dec. 253; Melvin *v.* Chancy, 8 Tex. Civ. App. 252, 28 S. W. 241; Bateman *v.* McCreight, 2 Tex. Unrep. Cas. 309.

62. Marqueze *v.* Sontheimer, 59 Miss. 430; Tynberg *v.* Cohen, (Tex. Civ. App. 1893) 24 S. W. 314; Elser *v.* Pierce, 2 Tex. App. Civ. Cas. § 737; Schwartz *v.* Burton, 1 Tex. App. Civ. Cas. § 1216.

63. See *supra*, XVIII, B, 1, a.

64. *Alabama.*—Dothard *v.* Sheid, 69 Ala. 135; Durr *v.* Jackson, 59 Ala. 203; McCullough *v.* Walton, 11 Ala. 492.

Kansas.—Hoge *v.* Norton, 22 Kan. 374.

Kentucky.—Reidhar *v.* Berger, 8 B. Mon. (Ky.) 160; Pettit *v.* Mercer, 8 B. Mon. (Ky.) 51.

Louisiana.—Hollingsworth *v.* Atkins, 46 La. Ann. 515, 15 So. 77; Frank *v.* Chaffe, 34 La. Ann. 1203; McDaniel *v.* Gardner, 34 La. Ann. 341; Dickinson *v.* Maynard, 20 La. Ann. 66, 96 Am. Dec. 379; Phelps *v.* Coggeshall, 13 La. Ann. 440; Horn *v.* Bayard, 11 Rob. (La.) 259; Offutt *v.* Edwards, 9 Rob. (La.) 90.

Missouri.—Callaway Min., etc., Co. *v.* Clark, 32 Mo. 305.

Tennessee.—Reeves *v.* John, (Tenn. Ch. 1897) 43 S. W. 134.

Texas.—Dreiss *v.* Faust, 1 Tex. App. Civ. Cas. § 33; Davis *v.* Rawlins, 1 Tex. App. Civ. Cas. § 17.

United States.—Kennedy *v.* Meacham, 18 Fed. 312; Jerman *v.* Stewart, 12 Fed. 266; Tiblier *v.* Alford, 12 Fed. 262.

The elements of malice and want of probable cause are eliminated so far as the right to recover actual damages is concerned; no matter what may be the good faith of the party suing out the attachment, or however honest his belief that ground for an attachment existed, defendant is entitled to recover the actual damages which he has sustained. Durr *v.* Jackson, 59 Ala. 203; Jerman *v.* Stewart, 12 Fed. 266.

65. *Alabama.*—Floyd *v.* Hamilton, 33 Ala. 235.

Indiana.—Barnett *v.* Lucas, (Ind. 1901) 61 N. E. 683.

Iowa.—Turner *v.* Hardin, 80 Iowa 691, 45 N. W. 758; Plumb *v.* Woodmansee, 34 Iowa 116.

Louisiana.—Barrimore *v.* McFeely, 32 La. Ann. 1179; Biggs *v.* D'Aquin, 13 La. Ann. 21.

Missouri.—State *v.* Thomas, 19 Mo. 613, 61 Am. Dec. 580; Talbott *v.* Great Western Plaster Co., 86 Mo. App. 558.

Texas.—McClelland *v.* Fallon, 74 Tex. 236, 12 S. W. 60; Craddock *v.* Goodwin, 54 Tex. 578; Reed *v.* Samuels, 22 Tex. 114, 73 Am. Dec. 253.

United States.—L. Bucki, etc., Lumber Co. *v.* Maryland Fidelity, etc., Co., 109 Fed. 393.

When verdict should be set aside.—Where on a trial before a jury a verdict for actual damages is for an amount in excess of any amount authorized by the evidence, and after remitting a portion of the damages given the evidence will not sustain a judgment for the remainder, the verdict should be set aside. Kaufman *v.* Armstrong, 74 Tex. 65, 11 S. W. 1048.

66. Jefferson County Sav. Bank *v.* Eborn, 84 Ala. 529, 4 So. 386; Jackson *v.* Smith, 75 Ala. 97; State *v.* Watts, 3 Mo. App. 568.

67. *Alabama.*—City Nat. Bank *v.* Jeffries, 73 Ala. 183; McCullough *v.* Walton, 11 Ala. 492.

absent, nothing beyond actual damages can be allowed in an action for wrongful attachment.[68]

(III) *Exemplary or Punitive Damages*—(A) *Under What Circumstances Allowable*—(1) In General. Where an attachment has been sued out maliciously and without probable cause, exemplary or punitive damages may be allowed in a proper proceeding therefor;[69] but both of these elements must concur to authorize their recovery.[70] It is also essential that attachment creditor should have been actuated by malice against the debtor himself and not against some third person not a party to the process.[71] So it has been held that exemplary damages are not recoverable for the interruption of an illegal business by the levying of an attachment on the debtor's goods.[72]

(2) Allowance of Actual Damages as Basis For Exemplary Damages.

Kentucky.— Wolf *v.* Hunter, 15 Ky. L. Rep. 846.

Louisiana.—New Iberia State Bank *v.* Martin, 52 La. Ann. 1628, 28 So. 130; Bloch *v.* His Creditors, 46 La. Ann. 1334, 16 So. 267; Chaffe *v.* Mackenzie, 43 La. Ann. 1062, 10 So. 369; Steinhardt *v.* Leman, 41 La. Ann. 835, 6 So. 665; Cretin *v.* Levy, 37 La. Ann. 182; Byrne *v.* Gardner, 33 La. Ann. 6; Barrimore *v.* McFeely, 32 La. Ann. 1179; Teal *v.* Lyons, 30 La. Ann. 1140.

Tennessee.— Renkert *v.* Elliott, 11 Lea (Tenn.) 235; Littleton *v.* Frank, 2 Lea (Tenn.) 300; Smith *v.* Eakin, 2 Sneed (Tenn.) 456.

Texas.— Ellis *v.* Bonner, 80 Tex. 198, 15 S. W. 1045, 26 Am. St. Rep. 731; Walcott *v.* Hendrick, 6 Tex. 406.

If an attachment is malicious and unfounded, only actual damages are recoverable, notwithstanding probable cause existed for suing out the writ. Dreiss *v.* Faust, 1 Tex. App. Civ. Cas. § 33.

68. Jackson *v.* Smith, 75 Ala. 97; Bear *v.* Marx, 63 Tex. 298; Culbertson *v.* Cabeen, 29 Tex. 247; Michigan Stove Co. *v.* Waco Hardware Co., 22 Tex. Civ. App. 293, 54 S. W. 357.

69. *Alabama.*— Dothard *v.* Sheid, 69 Ala. 135; Melton *v.* Troutman, 15 Ala. 535; Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59; McCullough *v.* Walton, 11 Ala. 492.

Colorado.— Nachtrieb *v.* Stoner, 1 Colo. 423.

Iowa.— Union Mill Co. *v.* Prenzler, 100 Iowa 540, 69 N. W. 876; Wright *v.* Waddell, 89 Iowa 350, 56 N. W. 650; Campbell *v.* Chamberlain, 10 Iowa 337; Raver *v.* Webster, 3 Iowa 502, 66 Am. Dec. 96.

Kansas.— Western News Co. *v.* Wilmarth, 33 Kan. 510, 6 Pac. 786; Morris *v.* Shew, 29 Kan. 661.

Minnesota.— Cronfeldt *v.* Arrol, 50 Minn. 327, 52 N. W. 857, 36 Am. St. Rep. 648.

Tennessee.— Renkert *v.* Elliott, 11 Lea (Tenn.) 235; Doll *v.* Cooper, 9 Lea (Tenn.) 576; Smith *v.* Eakin, 2 Sneed (Tenn.) 456; Reeves *v.* John, (Tenn. Ch. 1897) 43 S. W. 134.

Texas.—Craddock *v.* Goodwin, 54 Tex. 578; Culbertson *v.* Cabeen, 29 Tex. 247; Reed *v.* Samuels, 22 Tex. 114, 73 Am. Dec. 253; Walcott *v.* Hendrick, 6 Tex. 406; Smith *v.* Mather, (Tex. Civ. App. 1899) 49 S. W. 257; Schwartz *v.* Burton, 1 Tex. App. Civ. Cas. § 1216.

United States.— Tiblier *v.* Alford, 12 Fed. 262.

Exemplary damages are allowed where a wrongful act is done with a bad motive or so recklessly as to imply a disregard of social obligations, or where there is negligence so gross as to amount to misconduct and recklessness. Jacobs *v.* Crum, 62 Tex. 401. If there be no reasonable foundation for believing a statutory ground for attachment exists, and if the process be sued out wantonly or recklessly, or without probable cause, or if it be resorted to in a mere race of diligence to obtain a first lien, where no statutory ground exists in fact, or is reasonably believed to exist, then it is vexatious as well as wrongful, and exemplary or vindictive damages may be recovered. City Nat. Bank *v.* Jeffries, 73 Ala. 183.

70. *Colorado.*— Crymble *v.* Mulvaney, 21 Colo. 203, 40 Pac. 499.

Iowa.— Turner *v.* Hardin, 80 Iowa 691, 45 N. W. 758; Gaddis *v.* Lord, 10 Iowa 141.

Kansas.—Adams *v.* Gillam, 53 Kan. 131, 36 Pac. 51.

Louisiana.— Nicaragua Accessory Transit Co. *v.* McCerren, 13 La. Ann. 214; Offutt *v.* Edwards, 9 Rob. (La.) 90.

Maryland.—Wanamaker *v.* Bowes, 36 Md. 42.

Tennessee.— Doll *v.* Cooper, 9 Lea (Tenn.) 576.

Texas.— Biering *v.* Galveston First Nat. Bank, 69 Tex. 599, 7 S. W. 90; Kauffman *v.* Babcock, 67 Tex. 241, 2 S. W. 878; Lister *v.* Campbell, (Tex. Civ. App. 1898) 46 S. W. 876; Melvin *v.* Chancy, 8 Tex. Civ. App. 252, 28 S. W. 241; Bateman *v.* McCreight, 2 Tex. Unrep. Cas. 309.

United States.— Kennedy *v.* Meacham, 18 Fed. 312.

"To justify a recovery of exemplary damages, the act causing the injury must be done with an evil intent and with the purpose of injuring the plaintiff, or with such a wanton and reckless disregard of his right as evidences a wrongful motive." Crymble *v.* Mulvaney, 21 Colo. 203, 40 Pac. 499.

71. Malice against a third person affords no grounds for recovery of exemplary damages if the attachment was not malicious as against defendant himself. Wood *v.* Barker, 37 Ala. 60, 76 Am. Dec. 346.

72. Kauffman *v.* Babcock, 67 Tex. 241, 2 S. W. 878.

Where there is no right of action for actual damages there can be no recovery of exemplary damages,[73] although the writ was maliciously sued out;[74] and where plaintiff remits the actual damages the court has no power to render a judgment for exemplary damages.[75]

(B) *Method of Estimating.* In estimating exemplary damages it has been said that they should bear proportion to the actual damage sustained.[76] By this is not meant that one should be either in exact or approximate ratio to the other, but that the imposition of heavy exemplary damages when the actual damage is small is a circumstance that aids in determining whether passion instead of reason influenced the verdict.[77]

(IV) *Nominal Damages.* According to the weight of authority, where an attachment is wrongfully sued out but no actual damages have resulted, attachment defendant is nevertheless entitled to recover nominal damages.[78] Under these circumstances, however, he can recover nothing more.[79]

(V) *Damages For Acts of Agent or Attorney* — (A) *Acts of Agent.* Where an agent sues out a writ of attachment wrongfully and maliciously, the principal will be liable both for actual and exemplary damages, if he ratifies the act of the agent with full knowledge that such act was wrongful and malicious,[80] or if he caused or participated in such evil motive or conduct.[81] In the

73. Myers *v.* Wright, 44 Iowa 38; Girard *v.* Moore, 86 Tex. 675, 26 S. W. 945; Trawick *v.* Martin Brown Co., 79 Tex. 460, 14 S. W. 564; Lacy *v.* Gentry, (Tex. Civ. App. 1900) 56 S. W. 949; Smith *v.* Dye, (Tex. Civ. App. 1899) 51 S. W. 858; Hilfrich *v.* Meyer, 11 Wash. 186, 39 Pac. 455.

74. Hilfrich *v.* Meyer, 11 Wash. 186, 39 Pac. 455.

75. Smith *v.* Dye, (Tex. Civ. App. 1899) 51 S. W. 858.

76. Willis *v.* McNeill, 57 Tex. 465.

Damages held not excessive.—An allowance of five hundred dollars exemplary damages, where the actual damages allowed were ninety dollars, is not so disproportionate as to authorize the setting aside of the verdict. Leonard *v.* Harkleroad, (Tex. Civ. App. 1902) 67 S. W. 127. So where the attachment proceeding was unwarranted and resorted to more as a means of oppression or extortion than to preserve legal rights, a verdict of two hundred dollars as exemplary damages is not excessive, although the actual damages are assessed at sixty dollars only. Byford *v.* Girton, 90 Iowa 661, 57 N. W. 588.

Damages held excessive.— In an action for wrongful attachment, where it appeared that defendant had levied on and sold a horse of plaintiff valued at one hundred dollars, it was held that an allowance of five hundred dollars for loss of reputation and humiliation from the levy of the attachment is excessive. Jensen *v.* Hallam, 51 Nebr. 492, 70 N. W. 1121.

77. Tynberg *v.* Cohen, 76 Tex. 409, 13 S. W. 315.

78. Lockhart *v.* Woods, 38 Ala. 631; Blynn *v.* Smith, 4 N. Y. Suppl. 306, 22 N. Y. St. 69; Reeves *v.* John, (Tenn. Ch. 1897) 43 S. W. 134; Farrar *v.* Talley, 68 Tex. 349, 4 S. W. 558. *Contra*, Waldo *v.* Pelly, 1 Hawaii 53; Winsor *v.* Orcutt, 11 Paige (N. Y.) 578. And see Britson *v.* Tjernagel, 90 Iowa 356, 57 N. W. 872, which seems to hold that nominal damages are not recoverable where there are no actual damages.

79. *Iowa.*— Schwartz *v.* Davis, 90 Iowa 324, 57 N. W. 849.

Louisiana.— Scott *v.* Moll, 45 La. Ann. 1401, 14 So. 301; Hunter *v.* Bennett, 15 La. Ann. 715. See also Billington *v.* Poitevent, etc., Lumber Co., 52 La. Ann. 1397, 27 So. 725.

New York.—Blynn *v.* Smith, 4 N. Y. Suppl. 306, 22 N. Y. St. 69; Groat *v.* Gillespie, 25 Wend. (N. Y.) 383.

Pennsylvania.— Central Nat. Bank *v.* Gallagher, 163 Pa. St. 456, 30 Atl. 212.

Texas.— Pinkard *v.* Willis, (Tex. Civ. App. 1902) 67 S. W. 135.

Illustrations.—Where attached goods are returned to defendant without cost, he not having suffered any injury from the attachment, and such return is accepted by an authorized agent, defendant can only recover nominal damages in an action for wrongful attachment. Pinkard *v.* Willis, (Tex. Civ. App. 1902) 67 S. W. 135. So where a sheriff levied an attachment on perishable goods without disturbing them, and subsequently sold them under order of court, it was held in an action of trespass against him for such selling that he was liable for nominal damages only. Central Nat. Bank *v.* Gallagher, 163 Pa. St. 456, 30 Atl. 212.

80. Baldwin *v.* Walker, 94 Ala. 514, 10 So. 391; Baldwin *v.* Walker, 91 Ala. 428, 8 So. 364; Tynburg *v.* Cohen, 67 Tex. 220, 2 S. W. 734. *Compare* Levey *v.* Fargo, 1 Nev. 415, 420, where it is said: "If an agent maliciously, and without probable cause, sues out an attachment without instructions from his principal, the agent, and not the principal, is responsible in damages. If the principal, after he finds out that his agent acted maliciously and without probable cause, continues the prosecution of the attachment, he will be responsible for the damages which arise after the facts of the case come to his knowledge. But there is no ground of action against the principal for the original suing out of the attachment."

81. Pollock *v.* Gantt, 69 Ala. 373, 44 Am. Rep. 519.

absence, however, of such ratification of or participation in the malicious conduct of the agent, there can be no recovery at least of exemplary or punitive damages.[82] So a principal who directs or authorizes an agent to sue out an attachment will be liable for actual damages caused thereby if it be wrongful;[83] and irrespective of such authorization he will be liable for actual damages if he ratifies the act of the agent.[84]

(B) *Acts of Attorney.* A creditor is not liable for exemplary or punitive damages for the wrongful and malicious suing out of an attachment by his attorney, unless he participated in the evil motive of the attorney, or subsequently to the attachment ratified his act with a full knowledge of the facts.[85] If, however, the attachment is sued out wrongfully and maliciously, and the principal with full knowledge of all the facts ratifies the act of the attorney, exemplary as well as actual damages may be recovered.[86] As regards actual damages the creditor is liable where the attachment has been either wrongfully or maliciously sued out by the attorney.[87]

(VI) *Particular Expenses, Injuries, or Losses*—(A) *In General.* No recovery can be had for injuries resulting from the demoralization of attachment defendant's tenants;[88] from inability to raise[89] or gather a crop,[90] because of the seizure of attachment defendant's working stock; from an enforced sale under an assignment;[91] or from seizure under a writ in detinue by attachment plaintiff, which suit was dismissed before suing out the attachment.[92] So where a fund already in *custodia legis* is impounded by a wrongful attachment, the receiver's compensation for loaning the fund pending litigation, which was retained out of the growing interest, does not constitute an element of damage recoverable upon a breach of the attachment bond.[93] Interest on damages allowed for wrongful

82. Jackson *v.* Smith, 75 Ala. 97; Pollock *v.* Gantt, 69 Ala. 373, 44 Am. Rep. 519; Oberne *v.* O'Donnell, 35 Ill. App. 180; Tynburg *v.* Cohen, 67 Tex. 220, 2 S. W. 734.

83. Peiser *v.* Cushman, 13 Tex. 390; Tillman *v.* Adams, 2 Tex. App. Civ. Cas. § 308.

84. Tillman *v.* Adams, 2 Tex. App. Civ. Cas. § 308. See also Seattle Crockery Co. *v.* Haley, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156, holding that liability attaches unless the act of the agent is repudiated as soon as knowledge of it is received.

85. City Nat. Bank *v.* Jeffries, 73 Ala. 183; Floyd *v.* Hamilton, 33 Ala. 235; Kirksey *v.* Jones, 7 Ala. 622; Foster *v.* Pitts, 63 Ark. 387, 38 S. W. 1114; Strauss *v.* Dundon, (Tex. Civ. App. 1894) 27 S. W. 503.

Application of rule.—Where a creditor living in another state intrusts a claim against his debtor to a reputable resident attorney for collection, and the latter informs him there exists a ground for suing out an attachment, and thereupon he orders the attachment issued, and at the attorney's request furnishes resident sureties to make the bond, in the absence of other knowledge or information, vexatiousness or malice cannot be imputed to the creditor, and he and his sureties are not liable for exemplary or vindictive damages. City Nat. Bank *v.* Jeffries, 73 Ala. 183.

86. City Nat. Bank *v.* Jeffries, 73 Ala. 183; Foster *v.* Pitts, 63 Ark. 387, 38 S. W. 1114; Tillman *v.* Adams, 2 Tex. App. Civ. Cas. § 308.

87. *Alabama.*— Kirksey *v.* Jones, 7 Ala. 622.

Arkansas.— Foster *v.* Pitts, 63 Ark. 387, 38 S. W. 1114.

Maine.— Fairbanks *v.* Stanley, 18 Me. 296.

Texas.— Lee *v.* Wilkins, 1 Tex. Unrep. Cas. 287.

United States.—Murray *v.* Lovejoy, 2 Cliff. (U. S.) 191, 17 Fed. Cas. No. 9,963, 26 Law Rep. 423 [*affirmed* in 3 Wall. (U. S.) 1, 18 L. ed. 129].

Knowledge of attorney as to want of probable cause.—Where an attorney sues out a writ of attachment, although he knows that there is no probable cause therefor, his client will be liable for actual damages, whether the attorney communicated all the facts to the client or not. The knowledge of the attorney binds the client. Hurlbut *v.* Hardenbrook, 85 Iowa 606, 52 N. W. 510.

88. Carter *v.* Wilson, 61 Ala. 434.

89. State *v.* Allen, 12 Mo. App. 566.

90. Lang *v.* Fritz, (Tex. Civ. App. 1896) 38 S. W. 233.

91. Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59.

Sale in large quantities depreciating price.—Where attachment plaintiff after the levy wrongfully induces the sheriff to sell the goods in unreasonably large quantities, thereby depreciating the price and causing a sacrifice, this would be a tort for which an action might lie, but is not an element of damage in an action for wrongful attachment on the bond. Jefferson County Sav. Bank *v.* Eborn, 84 Ala. 529, 4 So. 386.

92. Jefferson County Sav. Bank *v.* Eborn, 84 Ala. 529, 4 So. 386.

93. Stringfield *v.* Hirsch, 94 Tenn. 425, 29 S. W. 609, 45 Am. St. Rep. 733, holding further that taxes accruing thereon pending the litigation and paid out of the fund are not an element of damage.

attachment cannot be recovered,[94] nor can money expended in telegrams to prevent injury to attachment defendant's credit.[95]

(B) *Expenses Incurred in Defending Attachment.* There is some conflict as to whether expenses incurred in defending against an attachment wrongfully sued out may be recovered. In a number of states the rule seems to be fairly well settled that such expenses are recoverable.[96] On the other hand, there are decisions in which it has been held that expenses incurred by way of defending an attachment are not actual damages and not recoverable as such.[97]

(C) *Expenses Incurred in Defending Principal Action.* Expenses incurred in relation to the main action in which the attachment was sued out are not, as a rule, recoverable.[98]

94. Preston *v.* Slocomb, 1 La. Ann. 382; Addison *v.* Sujette, (S. C. 1901) 38 S. E. 229. *Contra*, Kauffman *v.* Babcock, 67 Tex. 241, 2 S. W. 878, where it was held that the owner of goods seized under an attachment wrongfully sued out is entitled to eight per cent interest on the value of the goods during the time they are in the hands of the sheriff as actual damages. See also Marchand *v.* York, 10 Ky. L. Rep. 777.

95. Johnson *v.* King, 64 Tex. 226.

96. *Alabama.*—Higgins *v.* Mansfield, 62 Ala. 267. *Compare* Flournoy *v.* Lyon, 70 Ala. 308.

Colorado.— See Sterling City Gold, etc., Min., etc., Co. *v.* Cock, 2 Colo. 24.

Illinois.— Damron *v.* Sweetser, 16 Ill. App. 339.

Iowa.— Ringen Stove Co. *v.* Bowers, 109 Iowa 175, 80 N. W. 318.

Kansas.— Tyler *v.* Safford, 31 Kan. 608, 3 Pac. 333.

Kentucky.— Johnson *v.* Farmers' Bank, 4 Bush (Ky.) 283; Trapnall *v.* McAfee, 3 Metc. (Ky.) 34, 77 Am. Dec. 152.

Louisiana.— Byrne *v.* Gardner, 33 La. Ann. 6; Brandon *v.* Allen, 28 La. Ann. 60.

Minnesota.— Greaves *v.* Newport, 41 Minn. 240, 42 N. W. 1059.

Mississippi.—Where the property attached did not belong to defendant, he cannot on recovery of a judgment on the issue of indebtedness recover on the attachment bond the expenses incurred in defending the action. Tebo *v.* Betancourt, 73 Miss. 868, 19 So. 833, 55 Am. St. Rep. 573.

Missouri.— Hayden *v.* Sample, 10 Mo. 215; State *v.* Larabie, 25 Mo. App. 208; State *v.* Shobe, 23 Mo. App. 474. But *compare* Haeussler *v.* Laclede Bank, 23 Mo. App. 282, where it is held that the expenses of an attachment suit are not recoverable unless the case presents elements of fraud, malice, or oppression. See also State *v.* O'Neill, 4 Mo. App. 221.

New York.—Lee *v.* Homer, 37 Hun (N. Y.) 634 [*affirmed* in 109 N. Y. 630, 15 N. E. 896, 14 N. Y. St. 921].

Oregon.— Drake *v.* Sworts, 24 Oreg. 198, 33 Pac. 563.

Tennessee.— Littleton *v.* Frank, 2 Lea (Tenn.) 300.

Washington.— Hilfrich *v.* Meyer, 11 Wash. 186, 39 Pac. 455.

United States.— Kennedy *v.* Meacham, 18 Fed. 312.

Costs of appeal.—Where a bond given to procure an attachment is conditioned that if the obligee fails to recover judgment the obligors will pay damages and costs which the obligee may sustain by reason of the attachment, and the obligee obtains judgment, which is reversed on appeal, the obligee is entitled to recover as a part of his damage the costs incurred by him in the appellate court. Bennett *v.* Brown, 31 Barb. (N. Y.) 158. So the costs of appeal are covered by an attachment bond, providing that if defendant should recover judgment in the action, or if the attachment should be vacated, the obligors were to pay all costs that might be awarded defendant and all damages which he might sustain by reason of the attachment. Palmer *v.* Starbuck, 19 N. Y. Suppl. 465, 46 N. Y. St. 276.

Expenses allowed.—A reasonable amount may be recovered for traveling expenses (Higgins *v.* Mansfield, 62 Ala. 267; Damron *v.* Sweetser, 16 Ill. App. 339; Hayden *v.* Sample, 10 Mo. 215; State *v.* Shobe, 23 Mo. App. 474; Kennedy *v.* Meacham, 18 Fed. 312. See also Tyler *v.* Safford, 31 Kan. 608, 3 Pac. 333), for hotel bills (Damron *v.* Sweetser, 16 Ill. App. 339), for counsel fees (Damron *v.* Sweetser, 16 Ill. App. 339. See also *infra*, XVIII, B, 6, l). But loss of time resulting from the defense against an attachment is not an element of actual damages and is not recoverable, at least where the basis of the claim for damages is merely that the attachment was wrongfully sued out. Craddock *v.* Goodwin, 54 Tex. 578; Lang *v.* Fritz, (Tex. Civ. App. 1896) 38 S. W. 233.

97. Craddock *v.* Goodwin, 54 Tex. 578; Jacobus *v.* Monongahela Nat. Bank, 35 Fed. 395.

98. *Alabama.*—White *v.* Wyley, 17 Ala. 167.

Illinois.— Damron *v.* Sweetser, 16 Ill. App. 339.

Kentucky.— Johnson *v.* Farmers' Bank, 4 Bush (Ky.) 283; Trapnall *v.* McAfee, 3 Metc. (Ky.) 34, 77 Am. Dec. 152.

Missouri.— State *v.* Larabie, 25 Mo. App. 208.

Washington.— Hilfrich *v.* Meyer, 11 Wash. 186, 39 Pac. 455; Seattle Crockery Co. *v.* Haley, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156.

Contra, Greaves *v.* Newport, 41 Minn. 240, 42 N. W. 1059; Drake *v.* Sworts, 24 Oreg. 198, 33 Pac. 563; Brown *v.* Tidrick, 14 S. D. 249, 85 N. W. 185. See also Ammon *v.*

(D) *Expenses Incurred in Proceeding to Recover Damages.* Expenses incurred by the trial of a counter-claim on an attachment bond for damages for the wrongful suing out of an attachment are not recoverable.[99]

(E) *Injury Resulting From Subsequent Levies.* Attachment defendant cannot recover, as an item of actual damage for wrongful attachment, injuries resulting from the levy of executions by other creditors in consequence of the attachment.[1]

(F) *Injury to Credit.* There is some diversity of opinion as to the right of a defendant in attachment to recover for injury to his credit caused by the levy of the attachment. In some jurisdictions the right is denied without qualification, on the ground that such damages are too remote and speculative.[2] On the other hand, it seems to be well settled in a number of jurisdictions that damages for injury to credit are recoverable, and that it is immaterial whether the attachment was malicious or not.[3] There are also jurisdictions in which the right to recover is conceded in case the attachment was sued out maliciously.[4]

Thompson, 34 Tex. 237, where it was held that where an attachment was levied on exempt property, which was released on a delivery bond, and defendant reconvened and secured a verdict for nominal damages, he was entitled to judgment for the entire amount of costs.

In New York, where the trial of an action is rendered necessary to vacate an attachment, the expenses of the trial are recoverable of the sureties on the undertaking. Tyng *v.* American Surety Co., 67 N. Y. App. Div. 137, 74 N. Y. Suppl. 502. See also Lee *v.* Homer, 37 Hun (N. Y.) 634 [*affirmed* in 109 N. Y. 630, 15 N. E. 896, 14 N. Y. St. 921].

99. Goodbar *v.* Lindsley, 51 Ark. 380, 11 S. W. 577, 14 Am. St. Rep. 54. See also Cottrell *v.* Russell, 21 Mo. App. 1, holding in an action of trespass to personal property, that in the absence of aggravation, for which punitive damages are allowable, no allowance can be made beyond the taxable costs for the expenses of a litigation to procure redress for the injury by trespass.

1. Marqueze *v.* Sontheimer, 59 Miss. 430. See also Blum *v.* Davis, 56 Tex. 423, holding that where in attachment defendant reconvenes for damages for the wrongful suing out of the writ, there can be no allowance of damages by reason of subsequent attachments by other parties.

2. Crymble *v.* Mulvaney, 21 Colo. 203, 40 Pac. 499; Mitchell *v.* Harcourt, 62 Iowa 349, 17 N. W. 581; Lowenstein *v.* Monroe, 55 Iowa 82, 7 N. W. 406; Campbell *v.* Chamberlain, 10 Iowa 337; Seattle Crockery Co. *v.* Haley, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156. *Compare* Thomas *v.* Isett, 1 Greene (Iowa) 470, where it was held that in an action of trespass by the seizing and obtaining of plaintiff's goods under an attachment, loss of credit cannot be proved, unless it appears to be intimately connected with the act complained of, and unless the act appears to have been done with an aggravating and malicious intention to injure the party complaining.

There can be no recovery after defendant, a merchant, went out of business (R. F. Scott Grocer Co. *v.* Kelly, 14 Tex. Civ. App. 136, 36 S. W. 140); where attachment defendant was insolvent at the time the attachment was issued (Chaffe *v.* Mackenzie, 43 La. Ann. 1062, 10 So. 369; Roach *v.* Brannon, 57 Miss. 490); or where the financial embarrassment of attachment defendant was such as to necessitate the stopping of his business, unless he could obtain relief from some source, it not being shown that there was any source from which such relief could be obtained (MacFarland *v.* Lehman, 38 La. Ann. 351). So injuries to credit incidental to the suit and not to the seizure cannot be allowed (Cretin *v.* Levy, 37 La. Ann. 182), and where the credit of the debtor has been lessened rather through his own conduct than by the act of the creditor in wrongfully attaching the property, no grounds for damage on that account exist (New Iberia State Bank *v.* Martin, 52 La. Ann. 1628, 28 So. 130).

3. These decisions proceed upon the theory that such damages are the natural and proximate consequences of the levy, and that the damages so caused are consequently actual damages. Marx *v.* Leinkauff, 93 Ala. 453, 9 So. 818; Flournoy *v.* Lyon, 70 Ala. 308; Durr *v.* Jackson, 59 Ala. 203; Goldsmith *v.* Picard, 27 Ala. 142; Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59; Meyer *v.* Fagan, 34 Nebr. 184, 51 N. W. 753; Doll *v.* Cooper, 9 Lea (Tenn.) 576; Brewer *v.* Jacobs, 22 Fed. 217; Kennedy *v.* Meacham, 18 Fed. 312.

4. Pettit *v.* Mercer, 8 B. Mon. (Ky.) 51; Offutt *v.* Edwards, 9 Rob. (La.) 90; Grimes *v.* Bowerman, 92 Mich. 258, 52 N. W. 751; Lewis *v.* Taylor, (Tex. Civ. App. 1893) 24 S. W. 92; Schwartz *v.* Burton, 1 Tex. App. Civ. Cas. § 1216.

The view is taken that such damages are not the natural and proximate consequence of the suing out of the attachment, are consequently not actual damages, and that in the absence of malice and want of probable cause there can be no recovery therefor.

Arkansas.—Holliday *v.* Cohen, 34 Ark. 707.

California.— See Elder *v.* Kutner, 97 Cal. 490, 32 Pac. 563.

Illinois.— Oberne *v.* Gaylord, 13 Ill. App. 30.

Kentucky.— Reidhar *v.* Berger, 8 B. Mon. (Ky.) 160; Pettit *v.* Mercer, 8 B. Mon. (Ky.) 51.

(G) *Injury to or Depreciation in Value of Property Attached*—(1) PERSONAL PROPERTY. Injury to or depreciation in value of personal property attached is an element of actual damage, and may be recovered in an appropriate action or proceeding therefor.[5] The fact that the injury or depreciation was the result of the negligence of the officer making the levy does not affect the rule.[6]

(2) REAL PROPERTY. Ordinarily depreciation in the value of real property, which occurs while the levy remains in force, there being no change of possession or loss of the use thereof, is not the immediate result of the attachment, and no recovery beyond nominal damages can be had therefor.[7] Nevertheless, the cases do not go so far as to hold that under no circumstances can actual damages be recovered. Thus when a pending sale is broken up by the levy itself, unaided by the act or delinquency of attachment defendant, and depreciation and loss follow, a different case is presented, and there is ample foundation for the recovery of actual damages.[8] In order to recover, however, it must be shown

Louisiana.— Offutt *v.* Edwards, 9 Rob. (La.) 90.

Missouri.— State *v.* Thomas, 19 Mo. 613, 61 Am. Dec. 580.

Texas.— Kaufman *v.* Armstrong, 74 Tex. 65, 11 S. W. 1048; Melvin *v.* Chancy, 8 Tex. Civ. App. 252, 28 S. W. 241; Landes *v.* Eichelberger, 2 Tex. App. Civ. Cas. § 133; Schwartz *v.* Burton, 1 Tex. App. Civ. Cas. § 1216.

Wisconsin.— Chicago Union Nat. Bank *v.* Cross, 100 Wis. 174, 75 N. W. 992.

United States.—L. Bucki, etc., Lumber Co. *v.* Maryland Fidelity, etc., Co., 109 Fed. 393.

5. *Alabama.*— Crofford *v.* Vassar, 95 Ala. 548, 10 S. W. 350.

Arkansas.— Estes *v.* Chesney, 54 Ark. 463, 16 S. W. 267; Boatwright *v.* Stewart, 37 Ark. 614.

California.— Frankel *v* Stern, 44 Cal. 168.

Iowa.— Chesmore *v.* Barker, 101 Iowa 576, 70 N. W. 701; Jamison *v.* Weaver, 81 Iowa 212, 46 N. W. 996; Lowenstein *v.* Monroe, 55 Iowa 82, 7 N. W. 406; Campbell *v.* Chamberlain, 10 Iowa 337. See also Knapp, etc., Co. *v.* Barnard, 78 Iowa 347, 43 N. W. 197.

Kansas.— Sanford *v.* Willetts, 29 Kan. 647; Hoge *v.* Norton, 22 Kan. 374.

Mississippi.— Fleming *v.* Bailey, 44 Miss. 132.

Ohio.—Bruce *v.* Coleman, 1 Handy (Ohio) 515, 12 Ohio Dec. (Reprint) 265.

Tennessee.— Doll *v.* Cooper, 9 Lea (Tenn.) 576.

Wisconsin.— Anderson *v.* Sloane, 72 Wis. 566, 40 N. W. 214, 7 Am. St. Rep. 885; Meshke *v.* Van Doren, 16 Wis. 319.

Deterioration arising from attachment defendant's act.— In an action for injury to lumber by being left piled in bulk during the period of an unlawful levy, it appeared that on the day the levy was made plaintiff had agreed to sell the lumber and that the purchaser was to examine it several days after before paying the price, but that learning of the levy he had refused to complete the purchase. It was held that plaintiff could not recover for deterioration of the lumber in value during the time it would have taken to complete the sale from natural causes operating on it in the condition in which he himself had placed it. Memphis First Nat. Bank *v.* Hancock, (Miss. 1895) 17 So. 736.

Where attachment does not prevent disposition.—Where stocks are pledged for a loan, and are subsequently tied up by attachment against the pledgor, and the attachment interposes no obstacle in the way of their disposition by the pledgee and they depreciate after the attachment is issued and before the pledgor can pay the loan, and not afterward, the pledgor is not entitled to damages for such depreciation. Chattanooga Fourth Nat. Bank *v.* Crescent Min. Co., (Tenn. Ch. 1897) 52 S. W. 1021.

6. Boatwright *v.* Stewart, 37 Ark. 614; Ruthven *v.* Beckwith, 84 Iowa 715, 45 N. W. 1073, 51 N. W. 153; Blaul *v.* Tharp, 83 Iowa 665, 49 N. W. 1044; Chicago Union Nat. Bank *v.* Cross, 100 Wis. 174, 75 N. W. 992. *Contra*, Barrimore *v.* McFeely, 32 La. Ann. 1179.

7. Heath *v.* Lent, 1 Cal. 410; Tisdale *v.* Major, 106 Iowa 1, 75 N. W. 663, 68 Am. St. Rep. 263; Tank *v.* Rohweder, 98 Iowa 154, 67 N. W. 106; Brandon *v.* Allen, 28 La. Ann. 60; Trawick *v.* Martin Brown Co., 79 Tex. 469, 14 S. W. 564; Drew *v.* Ellis, 6 Tex. Civ. App. 507, 26 S. W. 95; Girard *v.* Moore, (Tex. Civ. App. 1894) 24 S. W. 652. See also Barker *v.* Abbott, 2 Tex. Civ. App. 147, 21 S. W. 72.

Levy after creation of lis pendens.—An action to set aside a conveyance alleged to have been executed in fraud of creditors creates a *lis pendens* lien on the property sought to be thus subjected, and, as the levy of an attachment in such suit on the property causes no additional damage, defendant, on defeating the attachment, cannot recover damages for the wrongful levy thereof; the only damage suffered being caused by the bringing of the action. Caldwell *v.* Eminence Deposit Bank, 22 Ky. L. Rep. 684, 58 S. W. 589.

A non-resident cannot claim damages for the levy of an attachment on his land without showing special injury. Woessner *v.* Wells, (Tex. Civ. App. 1894) 28 S. W. 247.

8. Tillman *v.* Wetsel, (Tex. Civ. App. 1895) 31 S. W. 433. See also Chicago Union Nat. Bank *v.* Cross, 100 Wis. 174, 75 N. W. 992.

Loss occasioned by act of owner.— The fact that plaintiff himself notified the owner,

that the contemplated sale would have been consummated in the absence of the attachment.[9]

(H) *Injury to Feelings.* An allowance may be made for an injury to feelings if the attachment was sued out maliciously and without probable cause,[10] but in the absence of these elements there can be no recovery.[11]

(I) *Injury to or Loss of Business.* Where the elements of a malicious attachment are present damages may be recovered for injury to or loss of business on the part of attachment defendant.[12] Furthermore, the view is taken in some jurisdictions that damages for injuries of this nature are recoverable as actual damages.[13] The weight of authority is against this view, however, and is to the effect that injury to or loss of business is not the proximate or natural result of an attachment of property, and that there can be a recovery therefor only when exemplary damages are proper.[14]

(J) *Injury to Reputation or Character.* Damages for injuries to reputation or character are not considered actual damages, and hence not recoverable unless the attachment be malicious as well as wrongful.[15]

with whom he was negotiating for the sale of certain realty, that he would be unable to carry out the agreement entered into between them because of a wrongful levy under an attachment issued against it deprives him of his right of action to recover as damages for the wrongful levy the loss occasioned by the failure of the sale. Graham *v.* Remo, 5 Colo. App. 330, 38 Pac. 335.

9. Drew *v.* Ellis, 6 Tex. Civ. App. 507, 26 S. W. 95.

10. City Nat. Bank *v.* Jeffries, 73 Ala. 183; Floyd *v.* Hamilton, 33 Ala. 235; Pettit *v.* Mercer, 8 B. Mon. (Ky.) 51; Friel *v.* Plumer, 69 N. H. 498, 43 Atl. 618, 76 Am. St. Rep. 190; Trawick *v.* Martin Brown Co., 79 Tex. 460, 14 S. W. 564. But see Tisdale *v.* Major, 106 Iowa 1, 75 N. W. 663, 68 Am. St. Rep. 263, where it was held that injury to feelings resulting from the suing out of an attachment does not constitute an element of recovery, notwithstanding the attachment may have been malicious.

11. Reidhar *v.* Berger, 8 B. Mon. (Ky.) 160; Pettit *v.* Mercer, 8 B. Mon. (Ky.) 51.

Injury to private feelings of one partner.— The damages which a mercantile firm composed of three individuals can recover in an action for wrongfully and maliciously suing out an attachment must be for the injury done to their joint business, and must not only be the natural and proximate legal result and consequence of the wrongful act, but must affect the joint business or trade of the partnership. Injury to the private feelings of the individual partners is not a proper subject of inquiry. Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59.

12. *Alabama.*— Goldsmith *v.* Picard, 27 Ala. 142; Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59.

Arkansas.—Holliday *v.* Cohen, 34 Ark. 707.

Kansas.— Western News Co. *v.* Wilmarth, 33 Kan. 510, 6 Pac. 786.

Kentucky.— Reidhar *v.* Berger, 8 B. Mon. (Ky.) 160; Pettit *v.* Mercer, 8 B. Mon. (Ky.) 51.

Missouri.— State *v.* Thomas, 19 Mo. 613, 61 Am. Dec. 580.

Wisconsin.— Chicago Union Nat. Bank *v.* Cross, 100 Wis. 174, 75 N. W. 992.

13. Marx *v.* Leinkauff, 93 Ala. 453, 9 So. 818; Meyer *v.* Fagan, 34 Nebr. 184, 51 N. W. 753; Powers-Taylor Drug Co. *v.* Wafford, (Tenn. Ch. 1899) 53 S. W. 243. See also Birmingham Dry Goods Co. *v.* Finley, 122 Ala. 534, 26 So. 138; Marqueze *v.* Sontheimer, 59 Miss. 430; Alexander *v.* Jacoby, 23 Ohio St. 358.

14. *Dakota.*—Thompson *v.* Webber, 4 Dak. 240, 29 N. W. 671.

Kentucky.— Reidhar *v.* Berger, 8 B. Mon. (Ky.) 160; Pettit *v.* Mercer, 8 B. Mon. (Ky.) 51.

Missouri.— State *v.* Thomas, 19 Mo. 613, 61 Am. Dec. 580.

Texas.— Kirbs *v.* Provine, 78 Tex. 353, 14 S. W. 849; Melvin *v.* Chancy, 8 Tex. Civ. App. 252, 28 S. W. 241; Tynberg *v.* Cohen, (Tex. Civ. App. 1895) 32 S. W. 157.

Vermont.— Weeks *v.* Prescott, 53 Vt. 57.

Wisconsin.— Chicago Union Nat. Bank *v.* Cross, 100 Wis. 174, 75 N. W. 992.

Even where a statute expressly makes loss of or injury to business recoverable, and the issue as to the rightfulness of the attachment is decided in favor of attachment defendant, he is nevertheless not entitled to recover on such determination where at the time of the attachment he was merely winding up his business by selling out his stock on hand. Roach *v.* Brannon, 57 Miss. 490.

15. Oberne *v.* Gaylord, 13 Ill. App. 30; Campbell *v.* Chamberlain, 10 Iowa 337; Mitchell *v.* Mattingly, 1 Metc. (Ky.) 237; Chicago Union Nat. Bank *v.* Cross, 100 Wis. 174, 75 N. W. 992. But see Doll *v.* Cooper, 9 Lea (Tenn.) 576; Powers-Taylor Drug Co. *v.* Wafford, (Tenn. Ch. 1899) 53 S. W. 243, which seem to hold that injuries to reputation or character may be recovered for in the absence of malice or want of probable cause, provided the attachment be wrongful.

Damages to the reputation of goods caused by the levy of an attachment thereon are too vague to be capable of legitimate proof.

(K) *Loss, Destruction, or Conversion of Property.* In case of loss, destruction, or conversion of the attached property,[16] or if for any other reason it cannot be returned or recovered its reasonable value is an element of damage in an action on the bond, and in some jurisdictions interest on the value thereof is allowable.[17]

(L) *Loss of Probable or Prospective Profits.* While there are some decisions which hold that a recovery may be had for damages caused by the loss of probable or prospective profits, although the attachment was merely wrongful,[18] the weight of authority is to the effect that such profits are not an element of damage unless the attachment was malicious and without probable cause.[19]

(M) *Loss of Use of Property.* Damages for loss of property during the time of its detention by virtue of a wrongful attachment is an injury for which recovery may be had.[20]

Oberne *v.* Gaylord, 13 Ill. App. 30; Alexander *v.* Jacoby, 23 Ohio St. 358.

16. Bruce *v.* Coleman, 1 Handy (Ohio) 515, 12 Ohio Dec. (Reprint) 265; Doll *v.* Cooper, 9 Lea (Tenn.) 576; Willis *v.* McNatt, 75 Tex. 69, 12 S. W. 478.

17. Porter *v.* Knight, 63 Iowa 365, 19 N. W. 282; Willis *v.* McNatt, 75 Tex. 69, 12 S. W. 478.

Value is to be determined by what the property wrongfully attached would bring if sold at the time and place of attachment. The market value is not properly tested by what the party paid for the property nor by what he is holding or selling it at in his current business at retail. The ultimate test is what the property will bring when properly sold, after giving the public an opportunity to know what the property is, and when and where, and the terms of the sale. Reeves *v.* John, (Tenn. Ch. 1897) 43 S. W. 134.

18. British, etc., Steamship Nav. Co. *v.* Sibley, 27 La. Ann. 191; Wilson *v.* Manning, (Tex. Civ. App. 1896) 35 S. W. 1079 [*distinguishing* Kaufman *v.* Armstrong, 74 Tex. 65, 11 S. W. 1048]; State *v.* Andrews, 39 W. Va. 35, 19 S. E. 385, 45 Am. St. Rep. 884.

19. *Alabama.*— Donnell *v.* Jones, 17 Ala. 689, 52 Am. Dec. 194. *Compare* Pollock *v.* Gantt, 69 Ala. 373, 44 Am. Rep. 519.

Arkansas.— Blass *v.* Lee, 55 Ark. 329, 18 S. W. 186.

Colorado.—Crymble *v.* Mulvaney, 21 Colo. 203, 40 Pac. 499.

Kentucky.— See Carpenter *v.* Stevenson, 6 Bush (Ky.) 259.

Missouri.— Callaway Min., etc., Co. *v.* Clarke, 32 Mo. 305.

Texas.— Kaufman *v.* Armstrong, 74 Tex. 65, 11 S. W. 1048; Miller *v.* Jannett, 63 Tex. 82.

Wisconsin.—Braunsdorf *v.* Fellner, 76 Wis. 1, 45 N. W. 97. See also Meshke *v.* Van Doren, 16 Wis. 319.

United States.— L. Bucki, etc., Lumber Co. *v.* Maryland Fidelity, etc., Co., 109 Fed. 393; Kennedy *v.* Meacham, 18 Fed. 312.

Compare De Goey *v.* Van Wyk, 97 Iowa 491, 66 N. W. 787.

Loss of good-will.—Where customers who resort to a particular locality are driven therefrom by reason of a wrongful attachment, damages may be recovered therefor. Carey *v.* Gunnison, (Iowa 1883) 17 N. W. 881, 885, where it is said: "The distinction between the two is obvious. Profits are the gains realized from trade; good-will is that which brings trade. A favorable location of a mercantile establishment, or the habit of customers to resort to a particular locality, will bring trade. This advantage may be designated by the term 'good-will.'"

20. *Arkansas.*— Walker *v.* Fetzer, 62 Ark. 135, 34 S. W. 536; Boatwright *v.* Stewart, 37 Ark. 614.

California.—See Hurd *v.* Barnhart, 53 Cal. 97.

Georgia.— Jones *v.* Lamon, 92 Ga. 529, 18 S. E. 423.

Iowa.—Selz *v.* Belden, 48 Iowa 451; Campbell *v.* Chamberlain, 10 Iowa 337. *Compare* Charles City Plow, etc., Co. *v.* Jones, 71 Iowa 234, 32 N. W. 280.

Kentucky.— Gaar *v.* Lyons, 99 Ky. 672, 37 S. W. 73, 148.

Missouri.— State *v.* Dodd, 4 Mo. App. 597.

Nevada.— Elder *v.* Trevert, 18 Nev. 446, 5 Pac. 69.

Ohio.— Bruce *v.* Coleman, 1 Handy (Ohio) 515, 12 Ohio Dec. (Reprint) 265.

Oregon.— White *v.* Thompson, 3 Oreg. 115.

Tennessee.— Doll *v.* Cooper, 9 Lea (Tenn.) 576.

Texas.— Munnerlyn *v.* Alexander, 38 Tex. 125. See also R. F. Scott Grocer Co. *v.* Kelly, 14 Tex. Civ. App. 136, 36 S. W. 140.

Wisconsin.—Meshke *v.* Van Doren, 16 Wis. 319.

United States.—See Coulson *v.* Panhandle Nat. Bank, 54 Fed. 855, 13 U. S. App. 39, 4 C. C. A. 616.

Interest on moneys.—Where money is attached by way of garnishment interest thereon may be recovered as damages during the time it was held by the garnisher. W. P. Green Fruit Co. *v.* Pate, 99 Ga. 60, 24 S. E. 455; Cincinnati Fourth Nat. Bank *v.* Mayer, 96 Ga. 728, 24 So. 453; State *v.* McHale, 16 Mo. App. 478; Jacobus *v.* Monongahela Nat. Bank, 35 Fed. 395. See also Northampton Nat. Bank *v.* Wylie, 52 Hun (N. Y.) 146, 4 N. Y. Suppl. 907, 26 N. Y. St. 286, 16 N. Y. Civ. Proc. 326 [*affirmed* in 123 N. Y. 663, 26 N. E. 750, 34 N. Y. St. 1009], where it was held that where defendant in attachment is a banking corporation and the property attached consists of funds on deposit with another bank, and there is evidence showing

(VII) *Measure of Damages* — (A) *Where Property Is Returned or Recovered.* It has been variously held that the measure of damages where the property has been restored to or recovered back by attachment defendant is the value of the use of the property wrongfully taken during the period of its detention;[21] the value of the use of such property, necessary expenses incurred in regaining possession, and the loss of time in giving necessary personal attention to the business;[22] and the value of the use of property during the time of detention, depreciation in value, and expenses incurred in defending the attachment proceedings.[23] In two cases — the property being kept for sale — it has been held that the measure of damages is the depreciation in value during the time of detention;[24] in another, the measure stated is injury to the property attached caused by the attachment, and the expense, and value and time of labor expended in obtaining a dissolution thereof.[25]

(B) *Where Property Is Not Recoverable.* Where property attached has been destroyed, sold, or lost, or for any other reason cannot be returned or recovered, the measure of damages has been held in some cases to be the value of the property at the time and place of the taking, in the absence of the elements going to make up a malicious attachment.[26] In other decisions the measure of damages given is the value of the property at the time of seizure and interest thereon from the date of the seizure to the date of trial;[27] in others, the value of the property at the time of seizure, with interest thereon from the date of seizure

that if defendant had not been restrained by the attachment it might have secured a higher rate of interest by using the funds in its own business, it may recover as damages in an action on the bond the interest which is thereby lost.

Preventing collection of accounts.—A levy of attachment on books of account is not a levy on the debts represented by the books, but only on the materials composing the books, and does not prevent the person to whom such debts are due from collecting them, so as to make such prevention an element of damage for wrongful attachment. Goodbar *v.* Lindsley, 51 Ark. 380, 11 S. W. 577, 14 Am. St. Rep. 54.

21. Hurd *v.* Barnhart, 53 Cal. 97; Chicago Union Nat. Bank *v.* Cross, 100 Wis. 174, 75 N. W. 992. See also Rogers *v.* Beard, 20 How. Pr. (N. Y.) 98.

Attachment of mortgaged property.— In an action by the mortgagor for the wrongful attachment by the mortgagee of mortgaged personal property, the measure of damages will be the loss for the detention of the property up to a judgment of foreclosure as the mortgagor's right of possession ceased then; he cannot recover for detention up to the time of trial. Gaar *v.* Lyons, 99 Ky. 672, 37 S. W. 73, 148.

22. Jones *v.* Lamon, 92 Ga. 529, 18 S. E. 423.

23. Boatwright *v.* Stewart, 37 Ark. 614; Campbell *v.* Chamberlain, 10 Iowa 337; Stanley *v.* Carey, 89 Wis. 410, 62 N. W. 188; Meshke *v.* Van Doren, 16 Wis. 919.

24. Harris *v.* Davis, 13 Ky. L. Rep. 736; Fleming *v.* Bailey, 44 Miss. 132. See also Morey *v.* Hoyt, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611, where it was held that where property of no value for mere use but only for consumption is taken and afterward returned, and the owner seeks to recover in a suit only the damages suffered by reason of the taking or detention, mere interest on the value of the property at the time it was taken would generally be a complete indemnity. If the property depreciated, the amount of depreciation should be added to the interest. *Compare* Fullerton Lumber Co. *v.* Spencer, 81 Iowa 549, 46 N. W. 1058, where it was held that in an action for the wrongful suing out of an attachment against property used only for the purpose of sale, the owner is not entitled to recover as damages interest on the value of such property from the time of seizure without a showing of any loss merely from the failure to have the property on hand.

25. Sanford *v.* Willetts, 29 Kan. 647.

Where property is released to a third person, who executes a bond under a statute which provides that the sheriff may release attached property if defendant causes to be executed a bond to the effect that he will perform the judgment, such property is constructively in the sheriff's custody; and, where the attachment is wrongful, defendant's damage is to be measured by the length of time it was in such custody, and not merely by the length of time up to the period when the release bond was given. Selz *v.* Belden, 48 Iowa 451.

26. Teal *v.* Lyons, 30 La. Ann. 1140; State *v.* Allen, 12 Mo. App. 566; Reeves *v.* John, (Tenn. Ch. 1897) 43 S. W. 134.

Estimating value where owner has sold attached property.— In an action for the wrongful attachment of property which the owner had sold the value of the property, in estimating the measure of damages, is the price contracted for, although it is in excess of its market value. Curry *v.* Catlin, 12 Wash. 322, 41 Pac. 55.

27. Norman *v.* Fife, 61 Ark. 33, 31 S. W. 740; State *v.* Gage, 52 Mo. App. 464.

to the date of rendition of judgment;[28] and in others, the value of the property with interest thereon from the time it was taken, and such expenses as were necessarily incurred in the defense of such proceedings with interest thereon from the time such expenses were incurred.[29] If the property is taken from the attaching officer and sold under the prior lien of a mortgage, the measure of damages is the amount paid over to the attaching officer after the satisfaction of the mortgage and interest thereon.[30]

k. Matters in Mitigation. It is matter in mitigation of damages that there has been a return and acceptance of the property seized under the attachment,[31] or that attachment plaintiffs had offered to return it;[32] that attachment defendant had recovered back the property for less than its value;[33] that after seizure the attaching creditor bought the property at a sale under foreclosure of a lien placed thereon by attachment defendant in favor of another creditor;[34] that part of the property attached belonged to third persons;[35] that defendant in attachment had replevied the property, sold it, and with the proceeds paid the debt, to enforce which the attachment was sued out;[36] or that the party suing out the attachment was security on a bond of attachment defendant, and that the latter at the time the writ was sued out was about to remove his property from the state.[37] So any sum paid by plaintiff in an attachment suit for costs and damages awarded against him operates to reduce the liability specified in the undertaking given by the sureties.[38] On the other hand the fact that the attached property which had not been replevied by or returned to attachment defendant brought its fair value when sold under an order of court, and that the proceeds of its sale had been applied to the payment of the debt of defendant is not in mitigation of damages.[39] So the damages cannot be reduced by showing that at the time of the seizure the debtor contemplated selling his goods in bulk at a sacrifice;[40] that attachment defendant was insolvent;[41] or that plaintiff in attachment had a cause of action, the petition in the action in which the attach-

28. Willis *v.* Lowry, 66 Tex. 540, 2 S. W. 449; Schoolher *v.* Hutchins, 66 Tex. 324, 1 S. W. 266; Wallace *v.* Finberg, 46 Tex. 35.

29. Trentman *v.* Wiley, 85 Ind. 33.

Where the attached property is sold, and the proceeds applied on the indebtedness sued for, the measure of damages has been held in some cases to be the difference between the value of the property at the time of the seizure and the amount realized at the sale and applied on the indebtedness. Ruthven *v.* Beckwith, 84 Iowa 715, 45 N. W. 1073, 51 N. W. 153; Empire Mill Co. *v.* Lovell, 77 Iowa 100, 41 N. W. 583, 14 Am. St. Rep. 272. In another case, interest on such balance was also allowed. Mayer *v.* Duke, 72 Tex. 445, 10 S. W. 565. In another the measure of damages was held to be the value of the goods at the time of seizure, with interest to the date of trial less the sum for which they were sold. Blass *v.* Lee, 55 Ark. 329, 18 S. W. 186.

30. Porter *v.* Knight, 63 Iowa 365, 19 N. W. 282.

31. McFadden *v.* Whitney, 51 N. J. L. 391, 18 Atl. 62; Kerr *v.* Mount, 28 N. Y. 659; Lyon *v.* Yates, 52 Barb. (N. Y.) 237; Hanmer *v.* Wilsey, 17 Wend. (N. Y.) 91.

32. Billingsley *v.* Hewett, (Tex. Civ. App. 1897) 39 S. W. 953.

33. Scott *v.* Childers, (Tex. Civ. App. 1900) 60 S. W. 775.

34. Koyer *v.* White, 6 Tex. Civ. App. 381, 25 S. W. 46.

35. Wieland *v.* Oberne, 20 Ill. App. 118.

36. Painter *v.* Munn, 117 Ala. 322, 336, 23 So. 83, 67 Am. St. Rep. 170, where the court said: "The replevy and sale of the property in such case is not the necessary result of the suing out of the attachment, but is the voluntary act of the defendant, done for his own convenience and benefit to prevent the injury which would result from a failure to replevy."

37. Forrest *v.* Collier, 20 Ala. 175, 56 Am. Dec. 190.

38. Baere *v.* Armstrong, 26 Hun (N. Y.) 19, 62 How. Pr. (N. Y.) 515.

39. Hundley *v.* Chadick, 109 Ala. 575, 19 So. 845 [*overruling* City Nat. Bank *v.* Jeffries, 73 Ala. 183]. In Hundley *v.* Chadick, 109 Ala. 575, 585, the court said, in support of this view: "To hold, in a case of a suit on the attachment bond, counting upon the wrongful suing out of an attachment, that the measure of damages is the value of the property taken, but only that, less the amount of the attaching creditor's demand, would be to offer inducement for the unlawful substitution, and to make it answer the ends of a most unwarranted trespass, to secure a preference of payment over other creditors, and to deprive the debtor of his property otherwise than by due process of law."

40. Estes *v.* Chesney, 54 Ark. 463, 16 S. W. 267.

41. Kaufman *v.* Armstrong, 74 Tex. 65, 11 S. W. 1048.

ment was issued having been dismissed on the ground that there was no cause of action;[42] and it has been held that where an attachment is dismissed because the affidavit therefor is defective, the fact that grounds for an attachment exist will not go in mitigation of damages if the damages sought are merely compensatory.[43] It cannot be shown in mitigation of actual damages that there was probable cause for suing out the attachment.[44]

l. Counsel Fees — (I) *In Actions on Bonds* — (A) *View That No Fees Recoverable.* There is considerable diversity of holdings in regard to the allowance of attorney's fees in actions on bonds given to indemnify defendant in attachment for injuries caused by a wrongful attachment. In a number of jurisdictions it is well settled that such fees will not be allowed.[45]

(B) *View That Fees Expended in Defense of Attachment Recoverable.* On the other hand, in probably the greater number of jurisdictions, in an action on an attachment bond a party may recover, as damages sustained by reason of the attachment, reasonable attorney fees expended in defense of the attachment.[46]

42. Adam Roth Grocery Co. *v.* Hopkins, 16 Ky. L. Rep. 678, 29 S. W. 293.

43. Lobenstein *v.* Hymson, 90 Tenn. 606, 18 S. W. 250.

44. Schofield *v.* Territory, 9 N. M. 526, 56 Pac. 306.

45. *Arkansas.*— Patton *v.* Garrett, 37 Ark. 605.

California.— Heath *v.* Lent, 1 Cal. 410.

Pennsylvania.— Com. *v.* Meyer, 170 Pa. St. 380, 37 Wkly. Notes Cas. (Pa.) 263, 32 Atl. 1044.

Tennessee.—Stringfield *v.* Hirsch, 94 Tenn. 425, 29 S. W. 609, 45 Am. St. Rep. 733; Littleton *v.* Frank, 2 Lea (Tenn.) 300.

United States.— Jacobus *v.* Monongahela Nat. Bank, 35 Fed. 395.

Reason for rule.— In Stringfield *v.* Hirsch, 94 Tenn. 425, 438, 29 S. W. 609, 45 Am. St. Rep. 733, it is said: "It is not sound public policy to place a penalty on the right to litigate; that the defeated party must pay the fees of counsel for his successful opponent in any case, and, especially, since it throws wide the doors of temptation for the opposing party, and his counsel, to swell the fees to undue proportions, and, in cases of attachment and injunction, to apportion them arbitrarily between the fees pertaining properly to the attachment and injunction and that relating to the merits of the case."

46. *Alabama.*— Dothard *v.* Sheid, 69 Ala. 135; Higgins *v.* Mansfield, 62 Ala. 267.

Georgia.— W. P. Green Fruit Co. *v.* Pate, 99 Ga. 60, 24 S. E. 455; Cincinnati Fourth Nat. Bank *v.* Mayer, 96 Ga. 728, 24 S. E. 453.

Illinois.— Damron *v.* Sweetser, 16 Ill. App. 339.

Indiana.— Wilson *v.* Root, 43 Ind. 486.

Iowa.— Attorney's fees are recoverable in an action on the attachment bond, provided the attachment was sued out without probable cause, as well as wrongfully, but not otherwise. The statute expressly so provides. Iowa Code (1897), § 3885. And while there are a number of decisions in which attorney's fees were allowed, it not appearing, or nothing being said as to whether or not the attachment was sued out without probable cause (Union Mill Co. *v.* Frenzler, 100 Iowa 540, 69 N. W. 876; Lyman *v.* Lauderbaugh, 75 Iowa 481, 39 N. W. 812; Whitney *v.* Brownewell, 71 Iowa 251, 32 N. W. 285; Weller *v.* Hawes, 49 Iowa 45), there are a number of decisions in which it has been directly held that the attachment must be both wrongful and without probable cause to authorize a recovery (Dickinson *v.* Athey, 96 Iowa 363, 65 S. W. 326; Nockles *v.* Eggspieler, 53 Iowa 730, 6 N. W. 67; Plumb *v.* Woodmansee, 34 Iowa 116). It has also been held that where an attachment bond stipulates for a reasonable attorney fee as part of the costs, such fee may be allowed, in addition to the judgment for the full penalty of the bond. Union Mercantile Co. *v.* Chandler, 90 Iowa 650, 57 N. W. 595.

Kentucky.— Trapnall *v.* McAfee, 3 Metc. (Ky.) 34, 77 Am. Dec. 152; McClure *v.* Renaker, 21 Ky. L. Rep. 360, 51 S. W. 317; Wilson *v.* Smith, 18 Ky. L. Rep. 927, 38 S. W. 870; Marchand *v.* York, 10 Ky. L. Rep. 777. *Compare* Worthington *v.* Morris, 98 Ky. 54, 17 Ky. L. Rep. 624, 32 S. W. 269.

Louisiana.— McDaniel *v.* Gardner, 34 La. Ann. 341; Byrne *v.* Gardner, 33 La. Ann. 6; Brandon *v.* Allen, 28 La. Ann. 60; Dickinson *v.* Maynard, 20 La. Ann. 66, 96 Am. Dec. 379; Phelps *v.* Coggeshall, 13 La. Ann. 440; Littlejohn *v.* Wilcox, 2 La. Ann. 620; Offutt *v.* Edwards, 9 Rob. (La.) 90.

Michigan.—Swift *v.* Plessner, 39 Mich. 178.

Minnesota.— Frost *v.* Jordan, 37 Minn. 544, 36 N. W. 713.

Mississippi.— Buckley *v.* Van Diver, 70 Miss. 622, 12 So. 905; Marqueze *v.* Sontheimer, 59 Miss. 430.

Missouri.— State *v.* Beldsmeier, 56 Mo. 226; State *v.* Thomas, 19 Mo. 613, 61 Am. Dec. 580; State *v.* Gage, 52 Mo. App. 464; State *v.* McKeon, 25 Mo. App. 667; State *v.* Shobe, 23 Mo. App. 474.

Nebraska.— Raymond *v.* Green, 12 Nebr. 215, 10 N. W. 709, 41 Am. Rep. 763.

New Mexico.— Territory *v.* Rindscoff, 4 N. M. 363, 20 Pac. 180.

New York.— Northrup *v.* Garrett, 17 Hun (N. Y.) 497; Epstein *v.* U. S. Fidelity, etc., Co., 29 Misc. (N. Y.) 295, 60 N. Y. Suppl.

In applying this doctrine it has been held immaterial whether the fees had been paid or were merely promised;[47] but it has no application where no counsel was employed,[48] where the services of the attorney were not rendered until after judgment was rendered in the attachment suit,[49] or where no defense was made,[50] although services were rendered by filing cross-interrogatories to plaintiff's witnesses, requiring proof of the debt.[51] So attorney's fees are not allowable where the attachment is not controverted, but fails because the principal suit fails.[52]

(c) *View That Only Fees Expended in Defense of Attachment Recoverable.* In most jurisdictions where any allowance of counsel fees at all is made, the recovery is limited to fees incurred in the defense of the attachment proceedings alone, nothing being allowed for the defense of the main suit,[53] unless there is an express stipulation in the bond providing therefor. This rule has been held to apply, although jurisdiction was obtained solely by attaching the property of a non-resident, who subsequently appeared and defended the action.[54] Some decisions, however, recognize an exception to this rule. Thus it has been held that fees for the defense of the whole suit may be allowed, where both the action and the attachment proceeding have been defeated;[55] and there are decisions to the effect that attorney's fees for the whole case may be allowed, where the entire defense to the attachment action merely tended to show the wrongful issue of the attachment.[56]

(d) *Fees For Bringing Suit on Bond.* It is very generally agreed that counsel fees incurred in bringing suit on an attachment bond are not recoverable in such action.[57]

527 [*reversing* 28 Misc. (N. Y.) 440, 58 N. Y. Suppl. 1135]. *Compare* Northampton Nat. Bank *v.* Wylie, 52 Hun (N. Y.) 146, 4 N. Y. Suppl. 907, 26 N. Y. St. 286, 16 N. Y. Civ. Proc. 326 [*affirmed* in 123 N. Y. 663, 26 N. E. 750, 34 N. Y. St. 1009].

Ohio.— Alexander *v.* Jacoby, 23 Ohio 358.

United States.— L. Bucki, etc., Lumber Co. *v.* Maryland Fidelity, etc., Co., 109 Fed. 393, construing Florida statute.

Where two attachments are levied successively it is not proper in an action on the second attachment bond to allow as damages the entire amount paid two attorneys to defend both attachment suits. Carse *v.* Baxter, 21 Ky. L. Rep. 1593, 55 S. W. 898.

47. Higgins *v.* Mansfield, 62 Ala. 267; Raymond *v.* Green, 12 Nebr. 215, 10 N. W. 709, 41 Am. Rep. 763; Epstein *v.* U. S. Fidelity, etc., Co., 29 Misc. (N. Y.) 295, 60 N. Y. Suppl. 527 [*reversing* 28 Misc. (N. Y.) 440, 58 N. Y. Suppl. 1135].

48. Dothard *v.* Sheid, 69 Ala. 135.

49. Trammell *v.* Ramage, 97 Ala. 666, 11 So. 916.

50. Trammell *v.* Ramage, 97 Ala. 666, 11 So. 916; Northampton Nat. Bank *v.* Wylie, 52 Hun (N. Y.) 146, 4 N. Y. Suppl. 907, 26 N. Y. St. 286, 16 N. Y. Civ. Proc. 326 [*affirmed* in 123 N. Y. 663, 26 N. E. 750, 34 N. Y. St. 1009].

51. Baldwin *v.* Walker, 94 Ala. 514, 10 So. 391.

52. Vannatta *v.* Vannatta, 21 Ky. L. Rep. 1464, 55 S. W. 685.

53. *Florida.*— Gonzales *v.* De Funiak Havana Tobacco Co., 41 Fla. 471, 26 So. 1012.

Illinois.— Damron *v.* Sweetser, 16 Ill. App. 339.

Iowa.— Porter *v.* Knight, 63 Iowa 365, 19 N. W. 282; Sadler *v.* Bean, 38 Iowa 684.

Kentucky.— Trapnall *v.* McAfee, 3 Metc. (Ky.) 34, 77 Am. Dec. 152; McClure *v.* Renaker, 21 Ky. L. Rep. 360, 51 S. W. 317; Wilson *v.* Smith, 18 Ky. L. Rep. 927, 38 S. W. 870.

Louisiana.— Adam *v.* Gomila, 37 La. Ann. 479; Cretin *v.* Levy, 37 La. Ann. 182; McDaniel *v.* Gardner, 34 La. Ann. 341; Nicaragua Accessory Transit Co. *v.* McCerren, 13 La. Ann. 214.

Minnesota.— Frost *v.* Jordan, 37 Minn. 544, 36 N. W. 713.

Missouri.— State *v.* Fargo, 151 Mo. 280, 52 S. W. 199 [*overruling* State *v.* Coombs, 67 Mo. App. 199; State *v.* O'Neill, 4 Mo. App. 221]; State *v.* Heckart, 62 Mo. App. 427; State *v.* McHale, 16 Mo. App. 478.

New York.— Northampton Nat. Bank *v.* Wylie, 52 Hun (N. Y.) 146, 4 N. Y. Suppl. 907, 26 N. Y. St. 286, 16 N. Y. Civ. Proc. 326 [*affirmed* in 123 N. Y. 663, 26 N. E. 750, 34 N. Y. St. 1009]; Tyng *v.* American Surety Co., 42 N. Y. App. Div. 240, 62 N. Y. Suppl. 843.

Ohio.— Alexander *v.* Jacoby, 23 Ohio St. 358.

United States.— L. Bucki, etc., Lumber Co. *v.* Maryland Fidelity, etc., Co., 109 Fed. 393, construing Florida statute.

54. Gonzales *v.* De Funiak Havana Tobacco Co., 41 Fla. 471, 26 So. 1012; Frost *v.* Jordan, 37 Minn. 544, 36 N. W. 713.

55. Wilson *v.* Root, 43 Ind. 486; Morris *v.* Price, 2 Blackf. (Ind.) 457; Bing Gee *v.* Ar Jim, 7 Sawy. (U. S.) 117, 7 Fed. 811.

56. Union Mill Co. *v.* Prenzler, 100 Iowa 540, 69 N. W. 876; Whitney *v.* Brownewell, 71 Iowa 251, 32 N. W. 285.

57. Copeland *v.* Cunningham, 63 Ala. 394 [*overruling* Burton *v.* Smith, 49 Ala. 293]; Vorse *v.* Phillips, 37 Iowa 428; Offutt *v.* Edwards, 9 Rob. (La.) 90; Roach *v.* Brannon, 57 Miss. 490.

(II) *On Trial of Plea in Abatement to Attachment.* Where by statute damages may be allowed to defendant in attachment, when he is successful on the trial of a plea in abatement to the attachment, defendant is entitled to an allowance for reasonable counsel fees, as he would be in an action on the bond.[58]

(III) *In Actions Independent of Bond.* In one state, where an action for an attachment merely wrongful can be brought independently of the bond given to indemnify against injury caused by the wrongful attachment, there are two decisions which are in direct conflict on the question whether counsel fees incurred in defending the attachment are allowable.[59] In another state, where the same practice obtains, attorney's fees cannot be recovered, the view being taken that malice is the basis of the right to an allowance thereof.[60]

ATTACK. To fall upon with force; to assault, as with force of arms; to assault.[1]

ATTAINDER. At common law, the stain or corruption of the blood of a criminal capitally condemned;[2] that extinction of civil rights and capacities which takes place wherever a person, who has committed treason or felony, receives sentence of death for his crime.[3] (See also Bills of Attainder.)

ATTAINT. A writ which lay to inquire whether a jury of twelve men gave a false verdict;[4] convicted of a crime.[5]

ATTEMPT. To make an effort to effect some object; to make a trial or experiment; to endeavor; to use exertion for some purpose;[6] to make an effort, or endeavor, or an attack;[7] a trial or physical effort to do a particular thing;[8] an effort or endeavor to effect the accomplishment of an act;[9] an intent to do a thing combined with an act which falls short of the thing intended.[10] (Attempt:

58. Selz *v.* Belden, 48 Iowa 451; Dunlap *v.* Fox, (Miss. 1887) 2 So. 169; Marqueze *v.* Sontheimer, 59 Miss. 430. See also Fleming *v.* Bailey, 44 Miss. 132.

If the plea in abatement is decided in favor of plaintiff, thereby rendering a trial on the merits necessary to obtain a dissolution of the attachment, attorney's fees are recoverable by defendant on a final judgment in his favor. State *v.* McHale, 16 Mo. App. 478.

In allowing damages for wrongful attachment, attorneys' fees can be allowed for one firm of attorneys only, unless the necessities of the case require more than one. Roach *v.* Brannon, 57 Miss. 490.

59. That counsel fees are recoverable.—Fry *v.* Estes, 52 Mo. App. 1.

That counsel fees are not recoverable.—Haeussler *v.* Laclede Bank, 23 Mo. App. 282.

60. Strauss *v.* Dundon, (Tex. Civ. App. 1894) 27 S. W. 503; Yarborough *v.* Weaver, 6 Tex. Civ. App. 215, 25 S. W. 468.

1. Phipps *v.* State, 34 Tex. Crim. 560, 31 S. W. 397, 400 [*quoting* Webster Dict.].

2. Cozens *v.* Long, 3 N. J. L. 331, 340; Jacob L. Dict. [*quoted* in dissenting opinion of Mason, J., in Green *v.* Shumway, 39 N. Y. 418, 431]; Tomlins L. Dict. [*quoted* in *Ex p.* Garland, 4 Wall. (U. S.) 333, 387, 18 L. ed. 366].

3. Burrill L. Dict. [*quoted* in dissenting opinion of Mason, J., in Green *v.* Shumway, 39 N. Y. 418, 430].

4. 3 Bl. Comm. 402.

The writ was abolished by 4 Geo. IV, c. 50, §§ 60, 61. Wharton L. Lex.

5. Browne *v.* Blick, 7 N. C. 511, 518.

A person was said to be "attaint" when he was under Attainder, *q. v.* Cozens *v.* Long, 3 N. J. L. 331, 340; Mason, J., in Green *v.* Shumway, 39 N. Y. 418, 430; 4 Bl. Comm. 380. See also State *v.* Hastings, 37 Nebr. 96, 119, 55 N. W. 774.

6. Com. *v.* McDonald, 5 Cush. (Mass.) 365, 367.

7. Gray *v.* State, 63 Ala. 66, 73.

8. Lewis *v.* State, 35 Ala. 380, 387.

9. Stow *v.* Converse, 4 Conn. 17, 37.

10. Graham *v.* People, 181 Ill. 477, 489, 55 N. E. 179, 47 L. R. A. 731 [*quoting* Scott *v.* People, 141 Ill. 195, 201, 30 N. E. 329 (*citing* 1 Bishop Crim. L. (3d ed.), 659)].

"An attempt may be immediate — an assault, for instance; but it very commonly means a remote effort, or indirect measure, taken with intent to effect an object." People *v.* Lawton, 56 Barb. (N. Y.) 126, 135.

"There is a marked distinction between the words 'attempt,' and 'intent.' The former conveys the idea of a physical effort to do, or accomplish an act — the latter, the quality of the mind with which an act was done. It is not descriptive of the physical act, but describes the will that induced, or governed the act." State *v.* Marshall, 14 Ala. 411, 414. To same effect see Prince *v.* State, 35 Ala. 367, 369; Johnson *v.* State, 14 Ga. 55, 59 (but holding that an indictment for assault with "attempt" to commit rape was good as an indictment for assault with "intent" to commit rape); State *v.* Martin, 14 N. C. 290, 291; Stabler *v.* Com., 95 Pa. St. 318, 321, 40 Am. Rep. 653. But see Griffin *v.* State, 26 Ga. 493, 497 (wherein it is said that "the word 'attempt' ordinarily implies an act, an effort, but the General Assembly, in this statute, uses it as synonymous with 'intend'"); Hart *v.* State, 38 Tex. 382, 383

To Commit Crime — In General, see CRIMINAL LAW; Specific Crimes, see ABORTION; ADULTERY; ARSON; ASSAULT AND BATTERY; BRIBERY; BURGLARY; HOMICIDE; LARCENY; MAYHEM; RAPE; ROBBERY; SUICIDE; TREASON. To Escape, see ESCAPE. To Pass Counterfeit Money, see COUNTERFEITING. To Procure Money by False Pretenses, see FALSE PRETENSES. To Provoke Assault, see ASSAULT AND BATTERY; BREACH OF THE PEACE. To Seduce, see ABDUCTION. To Suborn Perjury, see PERJURY.)

ATTENTAT. Literally, "he attempts." A term used to designate any step improperly taken or attempted by a judge pending an appeal in a cause from his decision to a superior court.[11]

ATTENTION. The act or state of attending or heeding; notice; exclusive or special consideration; observant care.[12]

ATTEST. To bear witness to;[13] to certify; to affirm to be true or genuine; to make a solemn declaration in words or writing to support a fact;[14] to certify to the verity of a copy of a public document;[15] the technical word by which, in the practice of many states, a certifying officer gives assurance to the verity of a copy.[16]

ATTESTATION. The act of witnessing the signature of an instrument and subscribing the name of the witness in testimony of such fact;[17] the certification by the keeper of a record of the verity of a copy.[18] (Attestation: Addition or Erasure of, After Execution, see ALTERATIONS OF INSTRUMENTS. In General, see ACKNOWLEDGMENTS. Of Assignment, see ASSIGNMENTS; ASSIGNMENTS FOR BENEFIT OF CREDITORS. Of Award of Arbitrators, see ARBITRATION AND AWARD. Of Bills and Notes, see BILLS AND NOTES. Of Bills of Sale, see SALES. Of Bonds, see BONDS; COSTS. Of Deeds, see DEEDS. Of Mortgages, see CHATTEL MORTGAGES; MORTGAGES. Of Records and Documentary Evidence,[19] see EVIDENCE. Of Wills, see WILLS.)

ATTESTATION CLAUSE. That clause in which the witnesses certify that the instrument has been executed before them, and the manner of its execution.[20]

ATTESTING WITNESS. One who signs his name to an instrument, at the request of the party or parties, for the purpose of proving or identifying it.[21]

ATTORN. To transfer or turn over to another;[22] to consent to a transfer.[23]

(wherein the jury found defendant guilty of an assault with "attempt to murder," and it was held that the word "attempt," in this connection, conveys the same idea as "intent").

11. Abbott L. Dict.

12. Manier *v.* Appling, 112 Ala. 663, 669, 20 So. 978 [*citing* Century Dict.; Webster Dict.].

13. McGuire *v.* Church, 49 Conn. 248, 249 [*quoting* Webster Dict.]; Wright *v.* Wakeford, 4 Taunt. 213, 223.

14. McGuire *v.* Church, 49 Conn. 248, 249 [*quoting* Webster Dict.].

Distinguished from "subscribe."—"To 'attest' the publication of a paper as a last will, and to 'subscribe' to that paper the names of the witnesses, are very different things, and are required for obviously distinct and different ends. Attestation is the act of the senses, subscription is the act of the hand; the one is mental, the other mechanical, and to 'attest' a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication; but to 'subscribe' a paper published as a will, is only to write on the same paper the names of the witnesses, for the sole purpose of identification." Swift *v.* Wiley, 1 B. Mon. (Ky.) 114, 117 [*quoted* in Matter of Downie, 42 Wis. 66, 76].

15. Anderson L. Dict. [*quoted* in Wickersham *v.* Johnston, 104 Cal. 407, 413, 38 Pac. 89, 43 Am. St. Rep. 118]. See also Goss, etc., Mfg. Co. *v.* People, 4 Ill. App. 510, 515, where it is said "the word 'attested,' when used with reference to judicial writings, or copies thereof, as copies of records or judicial process, seems to have a legal meaning, which is an authentication by the clerk of the court so as to make them receivable in evidence."

16. Abbott L. Dict. [*quoted* in Wickersham *v.* Johnston, 104 Cal. 407, 413, 38 Pac. 89, 43 Am. St. Rep. 118].

17. Burrill L. Dict.

"'Attestation' and 'acknowledgment' are different acts. 'Attestation' is the act of witnessing the actual execution of a paper and subscribing one's name as a witness to that fact. 'Acknowledgment' is the act of a grantor in going before some competent officer and declaring the paper to be his deed." White *v.* Magarahan, 87 Ga. 217, 219, 13 S. E. 509.

18. Wickersham *v.* Johnston, 104 Cal. 407, 413, 38 Pac. 89, 43 Am. St. Rep. 118.

19. Attestation of certificate of naturalization see ALIENS, 2 Cyc. 115, note 37.

20. Black L. Dict.

21. Black L. Dict.

22. Eichelberger *v.* Sifford, 27 Md. 320, 330.

23. Burrill L. Dict.

ATTORNEY AND CLIENT

By George F. Tucker*

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I. TERMINOLOGY.

A. Attorney. In its broadest sense, one put in place of another;[1] an agent;[2] but, when not coupled with any qualifying expression, the word is usually construed as meaning attorney at law,[3] in which sense it will be used in this article.

B. Attorney at Law. An officer in a court of justice who is employed by a party in a cause to manage the same for him.[4]

C. Barrister. In England and her colonies, a person entitled to practise as an advocate or counsel in the superior courts.[5]

D. Client. One who applies to a lawyer or counselor for advice and direction in a question of law, or commits his cause to his management in prosecuting a claim or defending against a suit, in a court of justice.[6]

1. Eichelberger *v.* Sifford, 27 Md. 320, 330. See also Ward *v.* Ward, 20 Ohio Cir. Ct. 136, 141 [*quoting* Webster Dict.], where the word is defined as meaning "one who takes the turn or place of another; one who is legally appointed by another to transact any business for him."

2. Abbott L. Dict. See also Hall *v.* Sawyer, 47 Barb. (N. Y.) 116; Hughes *v.* Mulvey, 1 Sandf. (N. Y.) 92.

Non-professional agents are properly styled attorneys in fact. Bouvier L. Dict. See, generally, PRINCIPAL AND AGENT.

3. Trowbridge *v.* Weir, 6 La. Ann. 706; Ingram *v.* Richardson, 2 La. Ann. 839; Clark *v.* Morse, 16 La. 575; People *v.* May, 3 Mich. 598; Kelly *v.* Herb, 147 Pa. St. 563, 23 Atl. 889.

4. Bouvier L. Dict.; 3 Bl. Comm. 25.

Distinction between attorneys and counselors.— At an early date a distinction seems to have been made by the supreme court of the United States between attorneys and counselors (*Ex p.* Hallowell, 3 Dall. (U. S.) 410, 1 L. ed. 658); but now no such distinction is made either by the federal (Texas *v.* White, 10 Wall. (U. S.) 483, 19 L. ed. 992; Law *v.* Ewell, 2 Cranch C. C. (U. S.) 144, 15 Fed. Cas. No. 8,127) or state (Ingraham *v.* Leland, 19 Vt. 304, wherein it was held that a plea in abatement, alleging that the magistrate signing the writ was an attorney of record in the case, was sufficient under a statute prohibiting a justice from acting in any cause where he shall have been of counsel) courts.

5. Sweet L. Dict.

Distinction between barristers and solicitors.— In the English courts, there is a distinction between barristers and solicitors. See "The Legal Profession in England," 19 Am. L. Rev. 677.

6. McCreary *v.* Hoopes, 25 Miss. 428, 429.

E. Proctor. An attorney in the admiralty and ecclesiastical courts.[7]

F. Solicitor. A person whose business is to be employed in the care and management of suits depending in courts of chancery.[8]

II. THE OFFICE OF ATTORNEY.

A. Nature of. An attorney does not hold an office or public trust, in the constitutional or statutory sense of that term,[9] but is an officer of the court, exercising a privilege or franchise.[10]

B. Exercise of — 1. Right to Practise — a. In General. The right to practise law is not an absolute right,[11] but, as stated above, is a privilege or franchise,[12] which may be taxed by the government like other franchises or occupations.[13]

7. Anderson L. Dict.

8. Bouvier L. Dict.

9. *California.*— *Ex p.* Yale, 24 Cal. 241, 85 Am. Dec. 62; Cohen *v.* Wright, 22 Cal. 293.

Colorado.— *In re* Thomas, 16 Colo. 441, 27 Pac. 707, 13 L. R. A. 538.

Massachusetts.— Robinson's Case, 131 Mass. 376, 379, 41 Am. Rep. 239, wherein Gray, C. J., said: "An attorney at law is not indeed, in the strictest sense, a public officer. But he comes very near it. As was said by Lord Holt, 'the office of an attorney concerns the public, for it is for the administration of justice.' White's Case, 6 Mod. 18."

New York.— Matter of Cooper, 22 N. Y. 67, 20 How. Pr. (N. Y.) 1, S. C. *sub nom.* Matter of Graduates, 11 Abb. Pr. (N. Y.) 301 [*reversing* 31 Barb. (N. Y.) 353, 10 Abb. Pr. (N. Y.) 348, 19 How. Pr. (N. Y.) 97]; Matter of Burchard, 27 Hun (N. Y.) 429; Matter of Baum, 8 N. Y. Suppl. 771, 30 N. Y. St. 174. *Contra*, Waters *v.* Whittemore, 22 Barb. (N. Y.) 593; Wallis *v.* Loubat, 2 Den. (N. Y.) 607; Wood's Case, 2 Cow. (N. Y.) 29, note *b*, Hopk. (N. Y.) 7; Seymour *v.* Ellison, 2 Cow. (N. Y.) 13.

South Carolina.— Byrne *v.* Stewart, 3 Desauss. (S. C.) 466.

Virginia.— Bland, etc., County Judge Case, 33 Gratt. (Va.) 443; Leigh's Case, 1 Munf. (Va.) 468.

West Virginia.— *Ex p.* Faulkner, 1 W. Va. 269.

Wisconsin.— Matter of Mosness, 39 Wis. 509, 510, 20 Am. Rep. 55, where Ryan, C. J., says: "Attorneys . . . though not properly public officers, are *quasi* officers of the state whose justice is administered by the court."

See 5 Cent. Dig. tit. "Attorney and Client," § 21.

10. *Alabama.*— Matter of Dorsey, 7 Port. (Ala.) 293.

California.— Cohen *v.* Wright, 22 Cal. 293.

Indiana.— Heffren *v.* Jayne, 39 Ind. 463, 13 Am. Rep. 281.

New York.— Matter of Burchard, 27 Hun (N. Y.) 429; Matter of Baum, 8 N. Y. Suppl. 771, 30 N. Y. St. 174; Baur *v.* Betz, 7 N. Y. Civ. Proc. 233, 1 How. Pr. N. S. (N. Y.) 344 [*affirmed* in 99 N. Y. 672.]

Tennessee.— Ingersoll *v.* Howard, 1 Heisk. (Tenn.) 247.

Virginia.— Leigh's Case, 1 Munf. (Va.) 468.

United States.— *Ex p.* Garland, 4 Wall. (U. S.) 333, 378, 18 L. ed. 366, 370; *In re* Wall. 13 Fed. 814, 27 Alb. L. J. 91 (wherein Field, J., said: "The profession of an attorney and counselor is not like an office created by an Act of Congress, which depends for its continuance, its powers and its emoluments, upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. . . . They are officers of the court; admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character"); *Ex p.* Law, 15 Fed. Cas. No. 8,126, 35 Ga. 285, 6 Am. L. Reg. N. S. 410 note.

See 5 Cent. Dig. tit. "Attorney and Client," § 21.

11. *Ex p.* Yale, 24 Cal. 241, 85 Am. Dec. 62; Cohen *v.* Wright, 22 Cal. 293.

"It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence." Bradley, J., in Bradwell *v.* Illinois, 16 Wall. (U. S.) 130, 142, 21 L. ed. 442.

12. See *supra*, II, A.

13. *Alabama.*— McCaskell *v.* State, 53 Ala. 510; Goldthwaite *v.* Montgomery, 50 Ala. 486, 487 (wherein the court, in upholding the authority of a city to pass and enforce an ordinance requiring all attorneys practising in the city limits to obtain licenses, said: "There is nothing in the constitution or laws of this State, known to me, which places the pursuit of the practice of the law above legislative control, or exempts that particular occupation from the burdens of the government imposed by taxation in any of its forms. If such exemption existed by a constitutional or legislative command, it could be very easily pointed out and shown. But this has not been done, or attempted in any other way, than by mere implication. This is hardly sufficient to establish the relinquishment by the State of the power to tax and regulate the occupations of its citizens by State laws"); Cousins *v.* State, 50 Ala. 113, 20 Am. Rep. 290; Jones *v.* Page, 44 Ala. 657.

Florida.— Young *v.* Thomas, 17 Fla. 169, 35 Am. Rep. 93.

Louisiana.— State *v.* King, 21 La. Ann. 201; State *v.* Fellowes, 12 La. Ann. 344; State *v.* Waples, 12 La. Ann. 343.

Neither is the right to practise law in the state courts a privilege or an immunity of a citizen of the United States within the meaning of the fourteenth amendment to the constitution of the United States, which forbids a state to abridge the privileges and immunities of citizens of the United States.[14]

b. Without Admission. In the absence of statutory authority,[15] a person who

Mississippi.— Stewart *v.* Potts, 49 Miss. 749.

Missouri.— St. Louis *v.* Sternberg, 69 Mo. 289; St. Louis *v.* Laughlin, 49 Mo. 559; Simmons *v.* State, 12 Mo. 268, 49 Am. Dec. 131.

Ohio.— State *v.* Gazlay, 5 Ohio 14, 22, wherein, in answer to a contention that a license to practise is a contract, and that a tax upon such as are licensed is a violation thereof, the court said: "We cannot consider the license in this light, although the effect of the license gives to the members of these professions [law and medicine] something of an exclusive character, and incidentally confers valuable privileges, yet the design of the license is to protect the community from the consequences of a want of professional qualifications, and to benefit the public by enabling the profession to acquire professional merits:—consequently the license cannot be holden to confer any vested privileges; but is liable to be modified in any manner which the public welfare may demand."

Texas.— Languille *v.* State, 4 Tex. App. 312, holding that the license to practise law is not a contract, investing the person to whom it is granted with rights which cannot be interfered with by the state, but a naked grant of a privilege, which the state may revoke, or upon which it may impose such conditions as may be demanded by the public interest.

Virginia.— Ould *v.* Richmond, 23 Gratt. (Va.) 464, 14 Am. Rep. 139.

Canada.— See Latham *v.* Law Soc., 9 U. C. Q. B. 269.

Compare Lawyers' Tax Cases, 8 Heisk. (Tenn.) 565, which involved the constitutional power of the legislature to impose a tax upon lawyers for the privilege of practising law in the several courts in which they had been enrolled as attorneys, the act in question [Tenn. Acts (1867–68), c. 4, § 19] declaring that the practice of law was a privilege, and prohibiting the exercise of the privilege without first obtaining a license and paying the privilege tax. A majority of the court held the act unconstitutional, two judges holding that the right to practise law is not subject to taxation; two judges holding that, even conceding that the legislature may tax the privilege of a lawyer, the act in question was unconstitutional because it required a new license to be taken out. Two judges dissented, holding the act constitutional.

See 5 Cent. Dig. tit. "Attorney and Client," § 41.

A county attorney practising only as such need not take out a certificate. *Re* Coleman, 33 U. C. Q. B. 51.

Each member of a firm must pay the tax, under a statute providing that all lawyers practising their profession must pay a license-tax. Jones *v.* Page, 44 Ala. 657; Blanchard *v.* State, 30 Fla. 223, 11 So. 785, 18 L. R. A. 409; Jones *v.* Milliken, 22 N. Brunsw. 315.

Power of cities to tax.— Having the right to tax attorneys, the legislature may delegate that right to cities, which may, under city ordinances, tax attorneys.

Alabama.— Goldthwaite *v.* Montgomery, 50 Ala. 486.

Georgia.— Savannah *v.* Hines, 53 Ga. 616.

Kentucky.— Baker *v.* Lexington, 21 Ky. L. Rep. 809, 53 S. W. 16.

Louisiana.— State *v.* Fernandez, 49 La. Ann. 764, 21 So. 591.

Missouri.— St. Louis *v.* Sternberg, 69 Mo. 289 [*reversing*, on other grounds, 4 Mo. App. 453].

North Carolina.—Wilmington *v.* Macks, 86 N. C. 88, 41 Am. Rep. 443.

Virginia.— Ould *v.* Richmond, 23 Gratt. (Va.) 464, 14 Am. Rep. 139.

But, under Utah Rev. Stat. (1898), § 206, subs. 87, it has been held that a city has no power to exact such a license-fee. Ogden *v.* Boreman, 20 Utah 98, 57 Pac. 843.

Non-resident attorneys are not taxable by a city, where an act gives to cities the power to levy license-taxes upon attorneys residing in the city, even though such attorneys have offices in the city and do business therein. Garden City *v.* Abbott, 34 Kan. 283, 8 Pac. 473. See, however, Petersburg *v.* Cocke, 94 Va. 244, 26 S. E. 576, 36 L. R. A. 432, wherein a city ordinance was held broad enough to include non-resident attorneys who had their offices in the city and practised there.

Validity of uncertificated attorney's acts.— Proceedings in a suit by an attorney who has not taken out his certificate are a nullity (Des Brisay *v.* Mackey, 12 N. Brunsw. 138; Ryan *v.* McIntyre, (Hil. T. 1870) Stevens' Dig. N. Brunsw. 91. *Compare* Wallace *v.* Harrington, 34 Nova Scotia 1), and the objection is not waived by defendant's attorney attending the trial of the cause after knowledge of the omission (Ryan *v.* McIntyre, (Hil. T. 1870) Stevens' Dig. N. Brunsw. 91).

14. Matter of Taylor, 48 Md. 28, 30 Am. Rep. 451; Bradwell *v.* Illinois, 16 Wall. (U. S.) 130, 21 L. ed. 442, the latter case holding that the right to control and regulate the granting of licenses to practise law in the courts of a state is one of those powers that was not transferred for its protection to the federal government, and that its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.

15. Statute authorizing held unconstitutional.— It has been held, however, that an act providing that "any person of good moral character, although not admitted as an attorney, may manage, prosecute, or defend a suit

has not been admitted as an attorney cannot practise as such, in a court of record,[16] by attempting to act as his client's agent;[17] but the parties may manage, prosecute, or defend their own suits personally.[18]

2. Admission to Practice — a. In General — (i) *Jurisdiction.* As attorneys are officers of the court,[19] their admission is the exercise of a judicial power, resting with the courts.[20] Legislatures, however, may prescribe regulations and qualifications for the office,[21] and have uniformly done so.

for any other person, provided he is specially authorized for that purpose by the person for whom he appears, in writing, or by personal nomination in open court," was unconstitutional, being contrary to the provisions of the constitution respecting the admission of attorneys to practice. McKoan *v.* Devries, 3 Barb. (N. Y.) 196; Bullard *v.* Van Tassell, 3 How. Pr. (N. Y.) 402.

16. In a court not of record (McWhorter *v.* Bloom, 3 N. J. L. 134; Hall *v.* Sawyer, 47 Barb. (N. Y.) 116), or not strictly of record (Porter *v.* Bronson, 19 Abb. Pr. (N. Y.) 236, 29 How. Pr. (N. Y.) 292), an unlicensed attorney may practise. See also Voto *v.* Quinsler, 15 N. Brunsw. 432.

On application to the legislature for a pardon one not an attorney may appear. Bird *v.* Breedlove, 24 Ga. 623.

17. Robb *v.* Smith, 4 Ill. 46; Cobb *v.* Judge Grand Rapids Super. Ct., 43 Mich. 289, 5 N. W. 309; Yorks *v.* Peck, 31 Barb. (N. Y.) 350; Newburger *v.* Campbell, 9 Daly (N. Y.) 102, 58 How. Pr. (N. Y.) 313; Weir *v.* Slocum, 3 How. Pr. (N. Y.) 397, 1 Code Rep. (N. Y.) 105; Spicer's Will, Tuck. Surr. (N. Y.) 80. See also Bronson *v.* Brown, 8 Pa. Dist. 365.

Instituting appeal.— Where an appeal from a superior court must be initiated in that court by a notice from appellant's attorney of record in that court, the fact that such attorney is not qualified to practise in the appellate court will not affect the validity of the appeal. Beardsley *v.* Frame, 73 Cal. 634, 15 Pac. 310.

It has been held ground for reversal of judgment that one not admitted to practice as an attorney was permitted, against objection and contrary to the code, to conduct a trial. Newburger *v.* Campbell, 9 Daly (N. Y.) 102, 58 How. Pr. (N. Y.) 313. *Compare,* however, Rader *v.* Snyder, 3 W. Va. 413, holding that, if a suit is brought by a person not admitted to practice, the suit should not be dismissed for that reason.

Waiver of objection.— Recognition of a person as attorney in a cause, after his actual admission, waives the objection that he was not admitted at the time of his first appearance in the cause. Parow *v.* Cary, 1 How. Pr. (N. Y.) 66.

Collateral attack.— The admission of an attorney to practice cannot be attacked collaterally. Holshue *v.* Morgan, 170 Pa. St. 217, 32 Atl. 623; Hooven Mercantile Co. *v.* Morgan, 4 Pa. Dist. 48, 15 Pa. Co. Ct. 567.

18. May *v.* Williams, 17 Ala. 23; Philbrook *v.* San Francisco Super. Ct., 111 Cal. 31, 43 Pac. 402 (holding, where the cause was assigned in good faith before trial to a disbarred attorney, that the latter had, none the less, the right to appear in person); San Jose Funded Debt Com'rs *v.* Younger, 29 Cal. 147, 87 Am. Dec. 164; Bolan *v.* Egan, 2 Brev. (S. C.) 426; Hightower *v.* Hawthorn, Hempst. (U. S.) 42, 12 Fed. Cas. No. 6,478*b*. See also Appearances, 3 Cyc. 512.

19. See *supra,* II, A.

20. Matter of Cooper, 22 N. Y. 67, 20 How. Pr. (N. Y.) 1, S. C. *sub nom.* Matter of Graduates, 11 Abb. Pr. (N. Y.) 301 [*reversing* 31 Barb. (N. Y.) 653, 10 Abb. Pr. (N. Y.) 348, 19 How. Pr. (N. Y.) 97]; Splane's Petition, 123 Pa. St. 527, 23 Wkly. Notes Cas. (Pa.) 154, 16 Atl. 481; Com. *v.* Judges Cumberland County Ct. C. Pl., 1 Serg. & R. (Pa.) 187 (the last two cases holding that mandamus will not lie from the supreme court to compel a common pleas court to admit an attorney); *Ex p.* Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; *Ex p.* Secombe, 19 How. (U. S.) 9, 15 L. ed. 565 (wherein the court said: "It has been well settled, by the rules and practice of common law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counselor, and for what cause he ought to be removed"). See also Manning *v.* French, 149 Mass. 391, 21 N. E. 945, 4 L. R. A. 339, holding that, by virtue of an act of congress, the court of commissioners of Alabama claims had the power to make rules for the admission of attorneys to practise before it.

When motion for admission may be made. — Under an order providing that sessions should be held for "calling, arguing, and disposing of the causes remaining on the docket," the only motion that can be entertained, except motions relating to causes on the docket, is a motion for admission to the bar. *Re* Admission to Bar, 14 Nova Scotia 366, 2 Can. L. T. 96.

21. Matter of Guerrero, 69 Cal. 88, 10 Pac. 261; *Ex p.* Yale, 24 Cal. 241, 85 Am. Dec. 62; Cohen *v.* Wright, 22 Cal. 293; Matter of Cooper, 22 N. Y. 67, 20 How. Pr. (N. Y.) 1, S. C. *sub nom.* Matter of Graduates, 11 Abb. Pr. (N. Y.) 301 [*reversing* 31 Barb. (N. Y.) 353, 10 Abb. Pr. (N. Y.) 348, 19 How. Pr. (N. Y.) 97]; *Ex p.* Garland, 4 Wall. (U. S.) 333, 379, 18 L. ed. 366 (where the court said: "The Legislature may undoubtedly prescribe qualifications for the office, to which he [the attorney] must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the

(II) *Requirements* — (A) *In England.* In England barristers are not admitted to practice by the courts, but are called to the bar by the Inns of Court, which fix the requirements for admission.[22] Solicitors are admitted after such examination as the judges think proper.[23]

(B) *In United States* — (1) Federal Courts. To practise in the United States supreme court, attorneys must have been such for three years in the supreme courts of the states to which they belong, their private and professional character must appear to be fair, and they must swear or affirm that they will act uprightly and according to law, and will support the constitution of the United States.[24] The rules as to admission to the bar of the district and circuit courts vary with the different courts. In general, those courts recognize a member of the bar of the supreme court of the United States as a member of their courts, without requiring any formal order or motion for his admission.[25]

(2) State Courts.[26] In general, the statutes and rules of court of the different states require that an applicant for admission to practice must be a citizen[27] of the state, twenty-one years of age or upward,[28] and of good moral character.[29] He must have studied law for a certain period either in a law school

infliction of punishment, against the prohibition of the Constitution"); *Re* Jackson, 2 N. W. Terr. (Can.) 292. See, however, Matter of Goodell, 39 Wis. 232, 240, 20 Am. Rep. 42, where the court suggests a doubt as to the power or right of the legislature to prescribe rules for the admission of attorneys to practice, saying: "The legislature has, indeed, from time to time, assumed power to prescribe rules for the admission of attorneys to practice. Where these have seemed reasonable and just, it has generally, we think, been the pleasure of the courts to act upon such statutes, in deference to the wishes of a coördinate branch of the government, without considering the question of power. . . If, unfortunately, such an attack [referring to an old act which had been repealed] upon the dignity of the courts should again be made, it will be time for them to inquire whether the rule of admission be within the legislative or judicial power."

22. Matter of Cooper, 22 N. Y. 67, 90, 20 How. Pr. 1, S. C. *sub nom.* Matter of Graduates, 11 Abb. Pr. (N. Y.) 301; Rex *v.* Lincoln's Inn, 4 B. & C. 855, 7 D. & R. 351, 28 Rev. Rep. 482, 10 E. C. L. 830, in which latter case the court of queen's bench refused a mandamus to compel the admission of a student to Lincoln's Inn, on the ground that no person has a right to be admitted a member of one of these societies unless he be approved of by the society.

23. 6 & 7 Vict. c. 73; 23 & 24 Vict. c. 127; 36 & 37 Vict. c. 66, § 87.

24. U. S. Supreme Ct. Rules, No. 2, 21 How. (U. S.) v. See also *Ex p.* Garland, 4 Wall. (U. S.) 333, 378, 18 L. ed. 366.

25. 1 Foster Fed. Prac. (3d ed.) 269.

26. For form of certificate of study see Ohio Supreme Ct. Rules, 47 N. E. xii; of certificate by board of examiners that applicant is entitled to admission see Ga. Supreme Ct. Rules, 33 S. E. vi; of order for clerk to issue license to applicant for admission see Ga. Supreme Ct. Rules, 33 S. E. vi.

27. An alien cannot be admitted to practise as an attorney (*In re* Hong Yen Chang, 84 Cal. 163, 24 Pac. 156; *In re* Ashford, 4 Hawaii 614; *In re* Admission to Bar, (Nebr. 1900) 84 N. W. 611; *In re* O'Neill, 27 Hun (N. Y.) 599 [*affirmed* in 90 N. Y. 584]; Caines' Case, 3 Johns. Cas. (N. Y.) 499; *Ex p.* Thompson, 10 N. C. 355, 363 [wherein the court said: "There is no profession relative to which the public good more imperiously requires that its members should duly appreciate, and honestly maintain, the freedom, the purity, and the genuine spirit of our political institutions. It is difficult to conceive how a professional advocate, owing foreign allegiance and cherishing alien prejudices, can usefully vindicate principles in the abhorrence of which he may have been nurtured"]), though, in New York, prior to the supreme court rule of Aug. 16, 1806 (1 Johns. (N. Y.) 528) expressly so providing, alienage was no bar to admission in that state (Emmet's Case, 2 Cai. (N. Y.) 386), and, in some states, one who has declared his intention to become a citizen of the United States and who possesses the other necessary qualifications may be admitted by virtue of statutory provisions (*In re* Hong Yen Chang, 84 Cal. 163, 24 Pac. 156; *Ex p.* Porter, 3 Ohio Dec. (Reprint) 333).

White male citizens.—A statute limiting the right of admission to white male citizens is not in conflict with the federal constitution. Matter of Taylor, 48 Md. 28, 30 Am. Rep. 451.

28. Age.— *Ex p.* Coleman, 54 Ark. 235, 15 S. W. 470 (holding that a male citizen under twenty-one cannot be admitted to practise law in Arkansas, although his disability to transact business in general had been removed pursuant to statute); State *v.* Baker, 25 Fla. 598, 6 So. 445 (holding that a male person over eighteen years of age, whose disabilities have been removed pursuant to statute, is entitled to be examined); *In re* Admission to Bar, (Nebr. 1900) 84 N. W. 611.

29. Character.—Attorney's License Application, 21 N. J. L. 345 (holding that the courts are not limited, in their inquiry as to the moral character of an applicant for an attorney's license, to the certificate, but will, and are bound, in cases attended with sus-

or while serving a clerkship in the office of a practising attorney,[30] and must possess the requisite ability and legal learning,[31] to test which he must submit himself to an examination,[32] either by the court itself or by a duly appointed board of examiners. He must also take the prescribed oath[33] to support the state and

picious circumstances, to look behind it); State *v.* Byrkett, 4 Ohio Dec. 89, 3 Ohio N. P. 28; Splane's Petition, 123 Pa. St. 527, 23 Wkly. Notes Cas. (Pa.) 154, 16 Atl. 481.

30. *In re* Admission to Bar, (Nebr. 1900) 84 N. W. 611, holding that, under the Nebraska statute, attentive study of the law in the office of a practising attorney for the full period of two years, or regular graduation from the college of law of the University of Nebraska, is absolutely required, and that study in any other law school or otherwise than in such office will not be considered. See also Wilson's Application, 9 Pa. Dist. 102.

Clerkship.— The applicant, during his period of clerkship, must have been actually engaged in assisting the attorney whom he serves, in his business and under his control (Matter of Dunn, 43 N. J. L. 359, 39 Am. Rep. 600), and must have studied under the personal direction of the attorney (A. B.'s Application, 4 Johns. (N. Y.) 191). See also Anonymous, 3 Wend. (N. Y.) 456; *Ex p.* Sayre, 7 Cow. (N. Y.) 368.

Clerkship with a judge of the supreme court or with a president of the common pleas is sufficient under a rule authorizing the admission of a person who has "served a regular clerkship, within the state 'to some practising attorney or gentleman of the law, of known abilities.'" Com. *v.* Judges Cumberland County Ct. C. Pl., 1 Serg. & R. (Pa.) 187.

31. Learning.— Court Notice, 9 Mart. (La.) 642 (must understand English language); Matter of Cooper, 22 N. Y. 67, 20 How. Pr. (N. Y.) 1, S. C. *sub nom.* Matter of Graduates, 11 Abb. Pr. (N. Y.) 301; Matter of Maggio, 27 N. Y. App. Div. 129, 51 N. Y. Suppl. 1055; Devries *v.* McKoan, 1 Code Rep. (N. Y.) 6; *In re* Brown, 9 Pa. Dist. 103.

Three years' practice in the higher courts of Italy affords no presumption that an Italian attorney is sufficiently familiar with the laws of New York to properly advise clients in respect thereto. Matter of Maggio, 27 N. Y. App. Div. 129, 51 N. Y. Suppl. 1055.

32. Examination.—*California.*—*Ex p.* Snelling, 44 Cal. 553.

Colorado.— People *v.* Carr, 21 Colo. 525, 43 Pac. 128; People *v.* Betts, 7 Colo. 453, 4 Pac. 42, the latter case holding that the examination can be had only in applicant's judicial district.

Florida.— State *v.* Hocker, 39 Fla. 477, 22 So. 721, 63 Am. St. Rep. 174.

New York.— Matter of Pratt, 13 How. Pr. (N. Y.) 1; Matter of Brewer, 3 How. Pr. (N. Y.) 169; Matter of A. B., 5 N. Y. Leg. Obs. 136.

South Dakota.— *In re* Helwig, 5 S. D. 272, 58 N. W. 674.

The application for examination must fully comply with the rules of court governing such admission. Wilson's Application, 9 Pa. Dist. 102. See also People *v.* Carr, 21 Colo. 525, 43 Pac. 128.

An examining committee is not justified in refusing an examination to a student of the state university if, in all other respects, he is qualified, merely because he failed to pass an examination by the faculty of that institution; nor can the committee substitute for its own judgment that of the faculty as to the qualifications of one who is examined for admission to the bar. People *v.* Carr, 21 Colo. 525, 43 Pac. 128.

Passing the prescribed regents' examination within three months after the commencement of his clerkship is a prerequisite to examination for admission which cannot be dispensed with. Matter of Mason, 140 N. Y. 658, 35 N. E. 654, 57 N. Y. St. 617; Matter of Moore, 108 N. Y. 280, 15 N. E. 369.

An examination is not necessary, though prescribed by the South Dakota act of March 8, 1901, where the attorney has been previously engaged in practice by virtue of a certificate of the circuit court, such person having a vested right of which he could not be deprived by the legislature. *In re* Applications For Admission to Practice, 14 S. D. 429, 85 N. W. 992.

An applicant is not entitled to examination where, though admitted to the highest court of original jurisdiction in New Jersey and having practised therein for one year, he has resided during the whole time in New York and was not possessed of the educational qualifications required by the rules of the latter state for admission to the bar. Matter of Simpson, 167 N. Y. 403, 60 N. E. 747.

33. Wood's Case, 2 Cow. (N. Y.) 29, note *b*, Hopk. (N. Y.) 7; Champion *v.* State, 3 Coldw. (Tenn.) 111. *Compare* Emmet's Case, 2 Cai. (N. Y.) 386.

Test oath.—An attorney, duly admitted to practice in the United States courts, and practising therein prior to the civil war, and who has received and accepted a full pardon from the president and taken oath of amnesty, may resume his practice without taking the oath prescribed by the act of congress of Jan. 24, 1865, which requires him to swear that he never was engaged in, or aided hostilities against, the United States. *Ex p.* Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; *Ex p.* Law, 15 Fed. Cas. No. 8,126, 35 Ga. 285, 6 Am. L. Reg. N. S. 410 note. *Contra, Ex p.* Quarrier, 4 W. Va. 210. See also Cohen *v.* Wright, 22 Cal. 293 [*followed* in *Ex p.* Yale, 24 Cal. 241, 85 Am. Dec. 62], which held that the legislature of California had a right to impose the oath of attorneys required by the act "to exclude traitors and alien enemies from the courts in civil cases," and that a payment of

federal constitutions, and to faithfully discharge the duties of an attorney and must be licensed.[34]

(c) *In Canada.* Under the Canadian statutes, no person can be admitted to practice as an attorney unless upon an actual service under articles[35] for five years with some practising attorney in the province,[36] except graduates of universities in the United Kingdom, who may be admitted after they have faithfully served for three years.[37] An applicant has been admitted upon his own affidavit of service, the attorney being absent from the province,[38] and, where he had lost his articles, on an affidavit of the loss, and producing the usual certificate of service.[39]

(III) *Review of Decision.* An appeal does not lie from an order admitting[40] an attorney to practice or from an order denying admission,[41] where the court properly exercised its discretionary power in passing upon the qualifications of the applicant.[42]

a United States revenue tax did not give an attorney a right to practise without taking such oath; and State *v.* Garesche, 36 Mo. 256, which held that a similar requirement was constitutional. So, too, it has been held that an attorney need not take the oath prescribed by acts to prevent duelling (Leigh's Case, 1 Munf. (Va.) 468. *Contra*, Matter of Oaths, 20 Johns. (N. Y.) 492), or that he is not guilty of any offense contained in the Ku-Klux Act (Ingersoll *v.* Howard, 1 Heisk. (Tenn.) 247), and that an act requiring the oath against duelling is unconstitutional (Matter of Dorsey, 7 Port. (Ala.) 293. *Compare Ex p.* Tenney, 2 Duv. (Ky.) 351; *Ex p.* Quarrier, 2 W. Va. 569; *Ex p.* Hunter, 2 W. Va. 122).

34. People *v.* Betts, 7 Colo. 453, 4 Pac. 42; Robb *v.* Smith, 4 Ill. 46; Matter of Fellows, 3 Ill. 369; Matter of Villeré, 33 La. Ann. 998; State *v.* Marks, 30 La. Ann. 97.

Presumption as to license.—Where a person has been, in fact, practising as an attorney, he will be presumed, the contrary not appearing, to have been licensed to practise. *Ex p.* Trippe, 66 Ind. 531.

35. Filing articles nunc pro tunc.— The court refused to allow a law student's articles of clerkship to be filed *nunc pro tunc* where they had not been filed at the time of their execution. *In re* Weeks, 11 Nova Scotia 383.

36. Matter of Hume, 19 U. C. Q. B. 373; *In re* Holland, 6 U. C. Q. B. O. S. 441; Gwillim *v.* British Columbia Law Soc., 6 Brit. Col. 147. But see *In re* Hagarty, 6 U. C. Q. B. O. S. 188, wherein a clerk, having served four years, obtained his master's consent to go to Ireland for the benefit of his health, intending to return in six months, but his health still continuing bad, he, with his master's permission, remained six months longer, and the court on his return admitted him as an attorney.

Service with attorney's agent.—An articled clerk can serve only one year with the agent of the attorney in this province. *In re* Gilkison, (Hil. T. 7 Wm. IV) Robinson & J. Dig. Can. 293.

Time spent under articles will not be computed where the clerk carried on business in a place where the master did not reside (McIntosh *v.* McKenzie, (Mich. T. 1 Vict.) Robinson & J. Dig. Can. 293), or where, during the period, he was a salaried clerk attending a public office (*In re* Ridout, (Trin. T. 2 & 3 Vict.) Robinson & J. Dig. Can. 293); and where an applicant, in 1847, articled himself to M, an attorney then in partnership with J, and M, in November, 1850, went to England and did not return, his partnership with J being dissolved in February, 1852, whereupon, in March, 1852, the clerk articled himself, of his own accord, to G for the residue of his five years, M not consenting to this arrangement, the court would not allow the time served with the last master (*Ex p.* McIntyre, 10 U. C. Q. B. 294).

When term of clerkship must expire.— The time of a clerk articled after July 1, 1858, must expire fourteen days before the term of his admission, for the affidavit of service cannot be accepted at a later period. Matter of MacGachen, 20 U. C. Q. B. 321.

37. *In re* Holland, 6 U. C. Q. B. O. S. 441.

A solicitor in the sheriff's court in Scotland is not entitled to be admitted on proof of service for three years. *In re* Macara, 2 U. C. Q. B. 114.

38. *Ex p.* Radenhurst, Taylor (U. C.) 138.

Insufficient showing.—A certificate from the master, and an affidavit of the clerk "that he had during his clerkship done every thing required of him," was held not sufficient. *Ex p.* Lyons, Taylor (U. C.) 171.

39. *In re* Loring, (Mich. T. 2 Vict.) Robinson & J. Dig. Can. 294.

40. State *v.* Johnston, 2 Harr. & M. (Md.) 160.

41. *In re* Cohan, 21 Can. Supreme Ct. 100.

42. Matter of Beggs, 67 N. Y. 120, intimating that if the lower court should deny, in a particular case, that it had the legal power to admit, though satisfied that the applicant was possessed of sufficient legal acquirements, and had a good character, and was a male citizen of the age of twenty-one years, the court of appeals would review its order so far as to discover whether it had the power of admission in that case, or that, if a clear case of abuse of discretion appeared, it might correct. This case distinguished Matter of Graduates, 11 Abb. Pr. (N. Y.) 301, S. C. *sub nom.* Matter of Cooper, 22 N. Y. 67, 20 How Pr. (N. Y.) I, wherein the general term, having

b. Of Women. It has been held in some cases that, in the absence of express legislation, women are not entitled to practise law in either the federal[43] or state[44] courts, though in numerous others it has been held that they may be entitled to practise in the absence of constitutional or legislative inhibition.[45] By specific statutory provisions women are now entitled to practise in the supreme court of the United States,[46] and in the highest courts of many of the states.

c. Comity. While a citizen of one state, although possessed of all the requisite qualifications, has no absolute right to be admitted to practice in the courts of another state,[47] he is universally allowed to practise, either by courtesy of the courts or by statute.[48]

denied the admission to practice on the ground of the unconstitutionality of an act making the diploma of the law school of Columbia College conclusive evidence of the learning and ability of its possessor, the court of appeals held that the constitution of 1846 conferred a substantial right; that the proceedings upon an application for admission, being proceedings to enforce that right, were of a judicial nature; and that, therefore, an appeal would lie from the order of the lower court denying admission.

43. *In re* Lockwood, 9 Ct. Cl. 346.

44. *Illinois.*— Matter of Bradwell, 55 Ill. 535 [*affirmed* in 16 Wall. (U. S.) 130, 21 L. ed. 442].

Maryland.— Matter of Taylor, 48 Md. 28, 30 Am. Rep. 451.

Massachusetts.—Robinson's Case, 131 Mass. 376, 41 Am. Rep. 239.

New York.— *In re* Stoneman, 53 Am. Rep. 325 note.

Oregon.— *In re* Leonard, 12 Oreg. 93, 6 Pac. 426, 53 Am. Rep. 323.

Wisconsin.—Matter of Goodell, 39 Wis. 232, 20 Am. Rep. 42.

It is for the state courts to construe their own statutes and to determine whether the word "person" as therein used is confined to males. *Ex p.* Lockwood, 154 U. S. 116, 14 S. Ct. 1082, 38 L. ed. 929. See also Bradwell *v.* Illinois, 16 Wall. (U. S.) 130, 21 L. ed. 442.

45. *Colorado.*—*In re* Thomas, 16 Colo. 441, 27 Pac. 707, 13 L. R. A. 538.

Connecticut.—Matter of Hall, 50 Conn. 131, 47 Am. Rep. 625.

Indiana.— *In re* Leach, 134 Ind. 665, 34 N. E. 641, 21 L. R. A. 701.

New Hampshire.— Ricker's Petition, 66 N. H. 207, 29 Atl. 559, 24 L. R. A. 740.

Pennsylvania.— *In re* Kilgore, 17 Wkly. Notes Cas. (Pa.) 475 (wherein Carrie Burnham Kilgore, a married woman, was admitted to practice in the supreme court, having been previously admitted to the orphans' court of Philadelphia county, to the court of common pleas No. 4 of said county (*In re* Kilgore, 14 Wkly. Notes Cas. (Pa.) 466), and to the court of common pleas of Delaware county (*In re* Kilgore, 2 Del. Co. (Pa.) 105), and having been denied admission to the court of common pleas Nos. 1, 2 (Kilgore's Application, 14 Wkly. Notes Cas. (Pa.) 30), and 3 (*In re* Kilgore, 14 Wkly. Notes Cas. (Pa.) 255) of Philadelphia county. After her admission to the supreme court she was admitted to the court of common pleas Nos. 1 (*In re* Kilgore, 17 Wkly. Notes Cas. (Pa.) 562) and 2 (*In re* Kilgore, 17 Wkly. Notes Cas. (Pa.) 563) of Philadelphia county); Richardson's Case, 3 Pa. Dist. 299. See also Kast's Case, 3 Pa. Dist. 302, 14 Pa. Co. Ct. 432, holding that women may register as students at law.

46. U. S. Rev. Stat. (Suppl. 1891), p. 217, c. 81.

47. Matter of Henry, 40 N. Y. 560; Richardson *v.* Brooklyn City, etc., R. Co., 22 How. Pr. (N. Y.) 368; *In re* Rodgers, 194 Pa. St. 161, 46 Atl. 668; Matter of Mosness, 39 Wis. 509, 20 Am. Rep. 55.

48. *In re* Admission to Bar, (Nebr. 1900) 84 N. W. 611; McWhorter *v.* Bloom, 3 N. J. L. 134. See also *Ex p.* Quarrier, 2 W. Va. 569; *Ex p.* Faulkner, 1 W. Va. 269, which hold that an attorney licensed to practise in Virginia before the formation of the state of West Virginia, and resident in the latter at its organization, was not required to obtain a new license.

Applicable only to citizens of other states. — The rules of comity and reciprocity which are recognized in admitting attorneys under certificates from other states are applicable only to citizens of such states, and not to citizens of the state of Pennsylvania. *In re* Brown, 9 Pa. Dist. 103, 2 Pittsb. (Pa.) 152.

Standing in courts of sister state.— The applicant must be in good standing in the courts of the sister state (*In re* Crum, 72 Minn. 401, 75 N. W. 385, 79 N. W. 967), and must be prepared to produce evidence of such standing (*In re* Application For Admission to Bar, 14 Wkly. Notes Cas. (Pa.) 88, 31 Pittsb. Leg. J. (Pa.) 273) by certificate from the proper court (Splane's Petition, 123 Pa. St. 527, 23 Wkly. Notes Cas. (Pa.) 154, 16 Atl. 481).

An order admitting lawyers to appear as counsel, in a cause where they are neither attorneys nor counsel of the particular court, only authorizes them to represent their client at the argument or hearing and does not empower them to agree to a continuance. Nightingale *v.* Oregon Cent. R. Co., 2 Sawy. (U. S.) 338, Fed. Cas. No. 10,264, 17 Int. Rev. Rec. 61, 93, 5 Chic. Leg. N. 243, 4 Leg. Op. (Pa.) 622, 5 Leg. Gaz. (Pa.) 61. But see Garrison *v.* McGowan, 48 Cal. 592, holding that, if a person has been admitted to practice in another state, and has been accustomed to practise in California and been recognized by the courts and bar there as a member of the bar, he is, *de*

3. Suspension or Disbarment — a. In General. Attorneys being officers of the court,[49] it is well settled that the court[50] which grants a license[51] to an attorney may, when proper grounds exist,[52] suspend or disbar him.[53] This power, however, is one which should be exercised with great caution,[54] and only for the most weighty reasons.[55]

b. Grounds — (1) *In General.* While the statutes of many of the states authorize the suspension or removal of attorneys upon specified grounds,[56] it has

facto, an officer of the court of that state, and the validity of his acts as an attorney cannot be called in question collaterally.

49. See *supra*, II, A.

50. "Attorneys have never been tried by the bar for misconduct. The bar, as such, is neither a court nor a jury." Matter of Westcott, 66 Conn. 585, 587, 34 Atl. 505. But see Montreal Bar *v.* Honan, 8 Quebec Q. B. 26 [*affirmed* in 30 Can. Supreme Ct. 1], holding that the council of the bar of Montreal were competent to hear and decide upon a charge against a practising attorney, the facts being of a nature to constitute, *prima facie*, a proceeding derogatory to professional honor.

51. Power of removal commensurate with power of appointment.— In the absence of specific provisions to the contrary, the power of removal is, from its nature, commensurate with the power of appointment. Matter of Westcott, 66 Conn. 585, 34 Atl. 505; Fairfield County Bar *v.* Taylor, 60 Conn. 11, 22 Atl. 441, 13 L. R. A. 767. But see Matter of Dellenbaugh, 17 Ohio Cir. Ct. 106, holding that, although the Ohio statute places the authority to admit persons to the bar exclusively in the supreme court, it does not deprive the circuit and common pleas courts of the jurisdiction in disbarment proceedings conferred by Ohio Rev. Stat. § 563.

Power vested in particular courts.— In some states, however, the power is conferred only upon particular courts. Winkelman *v.* People, 50 Ill. 449; Mattler *v.* Schaffner, 53 Ind. 245; State *v.* Laughlin, 73 Mo. 443.

The pecuniary amount involved does not affect the power to disbar attorneys given to the district courts by La. Acts (1896), No. 129. State *v.* Rightor, 49 La. Ann. 1015, 22 So. 195.

52. Grounds for suspension or disbarment see *infra*, II, B, 3, b.

Acts done in an attorney's capacity as attorney-general were held not to be of such a nature as would justify disbarment proceedings against him as a member of the bar. Matter of Cooper, 12 Hawaii 124.

53. *Arkansas.*— Beene *v.* State, 22 Ark. 149.

California.— Cohen *v.* Wright, 22 Cal. 293.

Colorado.— People *v.* Green, 7 Colo. 237, 3 Pac. 65, 49 Am. Rep. 351.

Connecticut.— Matter of Westcott, 66 Conn. 585, 34 Atl. 505; Fairfield County Bar *v.* Taylor, 60 Conn. 11, 22 Atl. 441, 13 L. R. A. 767.

Florida.— State *v.* Kirke, 12 Fla. 278, 95 Am. Dec. 314.

Illinois.— People *v.* Goodrich, 79 Ill. 148.

Indiana.— *Ex p.* Trippe, 66 Ind. 531.

Kentucky.— Rice *v.* Com., 18 B. Mon. (Ky.) 472.

Maine.— Sanborn *v.* Kimball, 64 Me. 140 [*followed* in Strout *v.* Proctor, 71 Me. 288].

Mississippi.—*Ex p.* Brown, 1 How. (Miss.) 303.

Missouri.— State *v.* Harber, 129 Mo. 271, 31 S. W. 889; *In re* Bowman, 7 Mo. App. 569.

New Hampshire.— Delano's Case, 58 N. H. 5, 42 Am. Rep. 555; Bryant's Case, 24 N. H. 149.

New York.— Percy's Case, 36 N. Y. 651; Matter of Baum, 8 N. Y. Suppl. 771, 30 N. Y. St. 174.

North Carolina.— Matter of Moore, 64 N. C. 398; *Ex p.* Biggs, 64 N. C. 202.

Ohio.— *In re* Swadener, 5 Ohio Dec. 598, 7 Ohio N. P. 446; Matter of Dellenbaugh, 17 Ohio Cir. Ct. 106.

Oregon.— State *v.* Winton, 11 Oreg. 456, 5 Pac. 337, 50 Am. Rep. 486.

Pennsylvania.— *Ex p.* Steinman, 8 Wkly. Notes Cas. (Pa.) 296; *In re* Smith, 2 Lack. Leg. N. (Pa.) 152.

South Carolina.— State *v.* Holding, 1 McCord (S. C.) 379.

Tennessee.— Davis *v.* State, 92 Tenn. 634, 23 S. W. 59.

Texas.— Scott *v.* State, 86 Tex. 321, 24 S. W. 789; Jackson *v.* State, 21 Tex. 668.

West Virginia.— State *v.* McClaugherty, 33 W. Va. 250, 10 S. E. 407.

Wisconsin.— *In re* O——, 73 Wis. 602, 42 N. W. 221.

United States.— *Ex p.* Wall, 107 U. S. 265, 2 S. Ct. 569, 27 L. ed. 552; Bradley *v.* Fisher, 13 Wall. (U. S.) 335, 20 L. ed. 646; *Ex p.* Garland, 4 Wall. (U. S.) 333, 18 L. ed. 366; *In re* Boone, 83 Fed. 944; Bradley *v.* Tochman, 1 Hayw. & H. (U. S.) 263, 3 Fed. Cas. No. 1,788; *Ex p.* Burr, 2 Cranch C. C. (U. S.) 379, 4 Fed. Cas. No. 2,186, 1 Wheel. Crim. (N. Y.) 503.

See 5 Cent. Dig. tit. "Attorney and Client," § 49.

54. Bradley *v.* Tochman, 1 Hayw. & H. (U. S.) 263, 3 Fed. Cas. No. 1,788.

55. Bradley *v.* Fisher, 13 Wall. (U. S.) 335, 20 L. ed. 646.

The power is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility, but in using it the courts should exercise a sound and just judicial discretion. State *v.* Stiles, 48 W. Va. 425, 37 S. E. 620; *Ex p.* Secombe, 19 How. (U. S.) 9, 15 L. ed. 565. See also State *v.* Shumate, 48 W. Va. 359, 37 S. E. 618.

56. Misconduct of partner.—An innocent attorney is not liable to disbarment for the misconduct of his partner. Klingensmith *v.* Kepler, 41 Ind. 341; Porter *v.* Vance, 14 Lea (Tenn.) 629. See also Kepler *v.* Klingensmith, 50 Ind. 434.

generally been held that such statutes do not restrict the general powers of the court over attorneys, who are its officers, and that they may be removed for other than statutory grounds.[57]

(II) *Bad Character.* As good character is an essential qualification for the admission of an attorney to practice, he may be removed whenever he ceases to possess such a character. To warrant the removal, however, the attorney's character must be bad in such respects as to show that he is unsafe and unfit to be trusted with the powers of an attorney.[58]

(III) *Conviction of Crime.* Conviction of crime is good ground for the disbarment of an attorney, such conviction proving him to be an unfit person to practise as an attorney.[59]

(IV) *Fraud in Procuring Admission.* Fraudulent procurement of admission to practice is good ground for disbarment, such conduct making the attorney

57. *Arkansas.*— Beene *v.* State, 22 Ark. 149.

California.— Cohen *v.* Wright, 22 Cal. 293.

Maine.— Sanborn *v.* Kimball, 64 Me. 140.

Massachusetts.— Boston Bar Assoc. *v.* Greenhood, 168 Mass. 169, 46 N. E. 568.

Michigan.— Matter of Mills, 1 Mich. 392.

Missouri.— State *v.* Laughlin, 10 Mo. App. 1; *In re* Bowman, 7 Mo. App. 569.

New Hampshire.— Delano's Case, 58 N. H. 5, 42 Am. Rep. 555.

Ohio.— State *v.* Chapman, 11 Ohio 430.

Pennsylvania.— Serfass' Case, 116 Pa. St. 455, 2 Pa. Co. Ct. 649, 19 Wkly. Notes Cas. (Pa.) 476, 9 Atl. 674.

West Virginia.— State *v.* McClaugherty, 33 W. Va. 250, 10 S. E. 407.

Wisconsin.— *In re* O——, 73 Wis. 602, 42 N. W. 221.

United States.— *Ex p.* Wall, 107 U. S. 265, 2 S. Ct. 569, 27 L. ed. 552; *In re* Boone, 83 Fed. 944.

Contra, Ex p. Trippe, 66 Ind. 531; *Ex p.* Smith, 28 Ind. 47; Kane *v.* Haywood, 66 N. C. 1; *In re* Eaton, 4 N. D. 514, 62 N. W. 597. See also *Re* J. B., 6 Manitoba 19.

58. *California.*— Matter of Haymond, 121 Cal. 385, 53 Pac. 899.

Hawaii.— *In re* Campbell, 2 Hawaii 27.

Kentucky.— *In re* Woolley, 11 Bush (Ky.) 95; Baker *v.* Com., 10 Bush (Ky.) 592.

Massachusetts.— O'Connell, Petitioner, 174 Mass. 253, 53 N. E. 1001, 54 N. E. 558; Boston Bar Assoc. *v.* Greenhood, 168 Mass. 169, 46 N. E. 568.

Michigan.— Matter of Mills, 1 Mich. 392.

New York.— Percy's Case, 36 N. Y. 651; Matter of Goldberg, 49 N. Y. App. Div. 357, 63 N. Y. Suppl. 392.

Ohio.— *In re* Swadener, 5 Ohio Dec. 598, 7 Ohio N. P. 446; State *v.* Eager, 4 Ohio Dec. (Reprint) 351, 2 Clev. L. Rep. 1.

Canada.— *In re* O'Reilly, 1 U. C. Q. B. 392, 2 Ont. Pr. 198.

59. *California.*— Matter of Coffey, 123 Cal. 522, 56 Pac. 448, attempt to commit extortion.

Colorado.—People *v.* Varnum, (Colo. 1901) 64 Pac. 202, blackmail.

Illinois.— People *v.* Schintz, 181 Ill. 574, 54 N. E. 1011, larceny.

Michigan.— Matter of McCarthy, 42 Mich. 71, 51 N. W. 963, felony.

Montana.— *In re* Wellcome, 23 Mont. 140, 58 Pac. 45, felony or misdemeanor involving moral turpitude.

New York.— Matter of ——, 86 N. Y. 563 (forgery); Matter of E., 65 How. Pr. (N. Y.) 171 (perjury).

North Dakota.— *In re* Simpson, 9 N. D. 379, 83 N. W. 541, embezzlement.

Oregon.— *Ex p.* Thompson, 32 Oreg. 499, 52 Pac. 570, 40 L. R. A. 194, larceny.

Pennsylvania.— H.'s Case, 5 Pa. Dist. 539 (forgery); *In re* Hirst, 1 Wkly. Notes Cas. (Pa.) 18, 9 Phila. (Pa.) 216, 31 Leg. Int. (Pa.) 340.

South Carolina.— State *v.* Holding, 1 McCord (S. C.) 379, subornation of perjury.

South Dakota.— *In re* Kirby, 10 S. D. 322, 73 N. W. 92, 39 L. R. A. 856, knowingly receiving stolen property with intent to convert.

Texas.— Scott *v.* State, 6 Tex. Civ. App. 343, 25 S. W. 337, felony.

England.— *Ex p.* Brounsall, Cowp. 829, felony.

See 5 Cent. Dig. tit. "Attorney and Client," § 52.

Effect of appeal.—When an attorney has been convicted of crime in a United States district court it is a sufficient cause for his disbarment by a state court, notwithstanding an appeal has been taken and is pending from the conviction in the United States court. *In re* Kirby, 10 S. D. 414, 73 N. W. 907, 39 L. R. A. 859.

Effect of pardon.— In Matter of ——, 86 N. Y. 563, it was held that the court might disbar an attorney even though he had been pardoned after conviction of a felony. But see Scott *v.* State, 6 Tex. Civ. App. 343, 25 S. W. 337 (holding that a statute authorizing the disbarment of an attorney on proof of a conviction of a felony does not allow disbarment where there has been an unconditional pardon); *In re* Hirst, 1 Wkly. Notes Cas. (Pa.) 18, 9 Phila. (Pa.) 216, 31 Leg. Int. (Pa.) 340 (holding that an attorney convicted of crime will not be disbarred therefor where a number of years elapse before the matter is brought to the attention of the court). It has also been held that a pardon for a felony will not entitle an attorney to restoration. Matter of E., 65 How. Pr. (N. Y.) 171.

unfit to be a member of the legal profession, and being an imposition on the court.[60]

(v) *Fraudulent Conduct Toward Client.* As the relation between attorney and client is a fiduciary one, requiring the utmost good faith on the part of the attorney, a failure of the latter to account to his client for money collected, and the misappropriation of the same,[61] or any other unfaithful or fraudulent conduct toward his client, showing the unfitness of the attorney to handle the affairs of others,[62] is good ground for suspension or disbarment.

60. *California.*— Lowenthal's Case, 61 Cal. 122.

Colorado.— People *v.* Campbell, 26 Colo. 481, 58 Pac. 591, concealment of previous disbarment.

Oklahoma.— Dean *v.* Stone, 2 Okla. 13, 35 Pac. 578.

Pennsylvania.— *In re* Brown, 9 Pa. Dist. 103, 2 Pittsb. (Pa.) 152; *In re* O'Grady, 4 Wkly. Notes Cas. (Pa.) 199.

Canada.— *In re* Ridout, (Trin. T. 2 & 3 Vict.) Robinson & J. Dig. Can. 293. But when the attorney had been admitted for two years the court refused to strike him from the roll because he had not served his full period as an articled clerk. *In re* Holland, 6 U. C. Q. B. O. S. 441.

Fraud in procuring admission will not be presumed in proceedings to disbar. *In re* Baum, 10 Mont. 223, 25 Pac. 99.

Failure to take out annual certificate is ground for suspension where an attorney practised even in an isolated case. *Re* Clarke, 32 Ont. 237. See also Macdougall *v.* Upper Canada Law Soc., 18 Can. Supreme Ct. 203.

An information for disbarment is insufficient which alleges that an attorney made a false affidavit to the board of law examiners concerning his term of study, but fails to state that the affidavit was fraudulently made with knowledge of its falsity or with intent to fraudulently secure a certificate of qualification. People *v.* Comstock, 176 Ill. 192, 52 N. E. 67.

61. *California.*—Matter of Burris, 101 Cal. 624, 36 Pac. 101; *In re* Treadwell, 67 Cal. 353, 7 Pac. 724.

Colorado.—People *v.* Webster, (Colo. 1901) 64 Pac. 207; People *v.* Waldron, (Colo. 1901) 64 Pac. 186; People *v.* Hays, (Colo. 1900) 62 Pac. 832; People *v.* Betts, 26 Colo. 521, 58 Pac. 1091; People *v.* Walkey, 26 Colo. 483, 58 Pac. 591; People *v.* Selig, 25 Colo. 505, 55 Pac. 722; People *v.* Ryalls, 8 Colo. 332, 7 Pac. 290.

Georgia.— Baker *v.* State, 90 Ga. 153, 15 S. E. 788.

Hawaii.— Matter of Nahoe, 3 Hawaii 255.

Illinois.— People *v.* Salomon, 184 Ill. 490, 56 N. E. 815; People *v.* Cole, 84 Ill. 327; People *v.* Palmer, 61 Ill. 255.

Iowa.— Slemmer *v.* Wright, 54 Iowa 164, 6 N. W. 181.

Kentucky.— Wilson *v.* Popham, 91 Ky. 327, 12 Ky. L. Rep. 904, 15 S. W. 859.

Minnesota.— *In re* Temple, 33 Minn. 343, 23 N. W. 463.

Montana.— State *v.* Baum, 14 Mont. 12, 35 Pac. 108.

New Hampshire.— Delano's Case, 58 N. H. 5, 42 Am. Rep. 555, misappropriating money received as tax-collector.

New York.— Matter of Bleakley, 5 Paige (N. Y.) 311. *Compare* People *v.* Brotherson, 36 Barb. (N. Y.) 662.

Ohio.— State *v.* Hand, 9 Ohio 42; *In re* Swadener, 2 Ohio Leg. N. 478.

Pennsylvania.— *In re* Maires' Case, 7 Pa. Dist. 297, 4 Lack. Leg. N. (Pa.) 139.

Tennessee.— State *v.* Davis, 92 Tenn. 634, 23 S. W. 59.

Wisconsin.— *In re* O——, 73 Wis. 602, 42 N. W. 221.

United States.— Jeffries *v.* Laurie, 23 Fed. 786 [*affirmed* in 27 Fed. 195].

Canada.— Honan *v.* Montreal Bar, 30 Can. Supreme Ct. 1 [*affirming* 8 Quebec Q. B. 26]; Harris *v.* Burne, 2 N. W. Terr. (Can.) 230. See also *Re* Knowles, 16 Ont. Pr. 408.

See 5 Cent. Dig. tit. "Attorney and Client," § 56.

Liability for acts of partner.— To justify an order to strike a solicitor off the rolls there must be personal misconduct. It is not enough to show that his partner has been guilty of fraudulent conduct, from which a constructive liability to pay money may perhaps arise. *Re* McCaughey, 3 Ont. 425. See also Harris *v.* Burne, 2 N. W. Terr. (Can.) 230.

Where, before the rule for disbarment, the funds were turned over to the client and the subsequent circumstances do not warrant the conclusion that the attorney is unworthy of the confidence of his clients, disbarment or suspension is not proper. *In re* Lentz, 65 N. J. L. 134, 46 Atl. 761, 50 L. R. A. 415.

62. *California.*—Matter of Whittemore, 69 Cal. 67, 10 Pac. 68.

Connecticut.— Fairfield County Bar *v.* Taylor, 60 Conn. 11, 22 Atl. 441, 13 L. R. A. 767.

Colorado.— People *v.* Sindlinger, (Colo. 1901) 64 Pac. 191; People *v.* Betts, 26 Colo. 521, 58 Pac. 1091; People *v.* Selig, 25 Colo. 505, 55 Pac. 722.

Hawaii.— Matter of Keliikoa, 5 Hawaii 279. See also *In re* Keawehunahala, 6 Hawaii 112; *In re* Keliipio, 6 Hawaii 111.

Illinois.— People *v.* George, 186 Ill. 122, 57 N. E. 804; People *v.* Ford, 54 Ill. 520; People *v.* Lamborn, 2 Ill. 123.

Iowa.— State *v.* Howard, 112 Iowa 256, 83 N. W. 975.

Maine.— Strout *v.* Proctor, 71 Me. 288.

Montana.— State *v.* Cadwell, 16 Mont. 119, 40 Pac. 176.

New Jersey.— Tate *v.* Field, (N. J. 1900) 46 Atl. 952; *In re* McDermit, 63 N. J. L. 476, 43 Atl. 685.

(VI) *Improper Treatment of Court*—(A) *Offensive Conduct Toward Judges.* It is the duty of an attorney not merely to observe the rules of courteous demeanor in open court, but also to abstain out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts. For a breach of this duty the attorney may be suspended or disbarred.[63]

New York.— Matter of B—— V——, 10 N. Y. App. Div. 491, 42 N. Y. Suppl. 268.

North Dakota.— *In re* Simpson, 9 N. D. 379, 83 N. W. 541.

Pennsylvania.— Maires' Disbarment, 189 Pa. St. 99, 43 Wkly. Notes Cas. (Pa.) 311, 41 Atl. 988; Serfass' Case, 116 Pa. St. 455, 2 Pa. Co. Ct. 649, 19 Wkly. Notes Cas. (Pa.) 476, 9 Atl. 674.

Wisconsin.— *In re* O——, 73 Wis. 602, 42 N. W. 221.

United States.— *In re* Boone, 83 Fed. 944; U. S. *v.* Costen, 38 Fed. 24; *In re* Snyder, 24 Fed. 910.

Canada.— *Re* J. B., 6 Manitoba 19.

See 5 Cent. Dig. tit. "Attorney and Client," § 55.

An agreement to waive his client's constitutional right to meet the witnesses against him, while invalid, is not, of itself, ground for dismissal from the bar. Matter of Jones, 3 Hawaii 240.

Failure to disclose to a client all his connection with adverse claims, on being retained, is not sufficient ground for disbarment where the attorney mentioned such claims to the client and believed that the latter was familiar with all former litigation concerning the transactions, and proceeds no further in the prosecution of the same. Davis *v.* Chattanooga Union R. Co., 65 Fed. 359. See also Matter of Luce, 83 Cal. 303, 23 Pac. 350, holding that, since there must be a union of act and intent, the acceptance of a retainer from one about to make an assignment for the benefit of his creditors while having in his possession a forgotten claim against such insolvent, was not such unprofessional conduct as justified disbarment.

63. *Arkansas.*— Beene *v.* State, 22 Ark. 149.

California.— Matter of Philbrook, 105 Cal. 471, 38 Pac. 511, 884, 45 Am. St. Rep. 59, characterizing a judge as a corrupt person in a brief.

Colorado.— People *v.* Brown, 17 Colo. 431, 30 Pac. 338 (charging judge, in the pleadings, with falsifying court records); People *v.* Green, 9 Colo. 506, 13 Pac. 514 (charging judge, in the pleadings, with accepting bribe); People *v.* Green, 7 Colo. 237, 3 Pac. 65, 49 Am. Rep. 351, 7 Colo. 244, 3 Pac. 374 (assailing judge on the street with low epithets, charges of corruption, etc.).

Florida.— State *v.* Maxwell, 19 Fla. 31.

Louisiana.— De Armas' Case, 10 Mart. (La.) 123, using indecorous language in an application for rehearing.

Michigan.— *In re* Mains, 121 Mich. 603, 80 N. W. 714.

New York.— Matter of Murray, 11 N. Y. Suppl. 336, 33 N. Y. St. 831, charging a surrogate with corrupt practices, in an affidavit made in the latter's court, and reiterating the charges in the supreme court.

North Dakota.— State *v.* Root, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568, threatening, out of court, to assault a judge for his official acts.

Pennsylvania.— *In re* Scouten, 186 Pa. St. 270, 42 Wkly. Notes Cas. (Pa.) 227, 40 Atl. 481 (using foul and abusive language to a judge, involving charges against the integrity of the latter, during a session of the court but outside the court-room); *In re* Smith, 2 Lack. Leg. N. (Pa.) 152.

West Virginia.— State *v.* McClaugherty, 33 W. Va. 250, 10 S. E. 407, publication in a newspaper of an article, over the signature of the attorney, falsely charging that a judge had, for partisan purposes, corruptly combined and conspired with the executive committee of the democratic party and other persons, unjustly and improperly to induce the grand jury of his court to indict many persons for alleged illegal voting, was held good ground for disbarment.

Wyoming.— *In re* Brown, 3 Wyo. 121, 4 Pac. 1085, applying to the court, in conversation, vile, opprobrious, and indecent epithets.

United States.—Bradley *v.* Fisher, 13 Wall. (U. S.) 335, 20 L. ed. 646 (threats of personal chastisement); U. S. *v.* Green, 85 Fed. 857; *In re* Hastings, 11 Fed. Cas. No. 6,199, 4 Am. L. Rev. 173.

Canada.— *In re* Hervey, (Mich. T. 5 Vict.) Robinson & J. Dig. Can. 309.

See 5 Cent. Dig. tit. "Attorney and Client," § 60.

Contempt in neglecting to appear before an examiner is not sufficient ground for suspending an attorney from the exercise of his profession. Com. *v.* Newton, 1 Grant (Pa.) 453.

Posting a paper at the office door of a judge, accusing him of being a base and corrupt man, is not sufficient ground for temporarily revoking an attorney's license, where it does not appear that the charge had reference to any official act of the judge or that it was committed in term-time. Neel *v.* State, 9 Ark. 259, 50 Am. Dec. 209.

Scurrilous epithets applied to a judge in vacation do not constitute a contempt within the meaning of Tex. Acts (1854), p. 118, § 2, authorizing disbarment for contempts involving fraudulent or dishonorable conduct or malpractice. Jackson *v.* State, 21 Tex. 668.

Suggesting, in a letter, the retirement of a judge as a means of restoring public confidence in the court over which he presides, in response to a letter from the judge, where such advice is couched in respectful language, is not such conduct as will authorize the court to strike the attorney's name from the roll, nor is the character of such letter changed by its publication in a newspaper,

(B) *Perverting, or Attempting to Pervert, Justice.* An attorney may be suspended or disbarred for perverting, or attempting to pervert, a decision of a cause upon the merits, by deceiving or misleading the court,[64] by tampering with witnesses,[65] or by false testimony.[66]

(VII) *Misuse of Records and Papers.* An attorney may be suspended or disbarred for improperly falsifying, altering, or abstracting court records or papers.[67]

not for the purpose of assailing the judge, but of defending the lawyer's own reputation. Austin's Case, 5 Rawle (Pa.) 191, 28 Am. Dec. 657.

The publication in a newspaper of a criticism of a particular case, which has been determined, by two attorneys who were also editors of the paper, is not ground for disbarment even though the article may have been libelous, for, to amount to a breach of professional duty, it must have been designed to acquire an influence over the judge in the exercise of his judicial functions by the instrumentality of popular prejudice. *Ex p.* Steinman, 95 Pa. St. 220, 40 Am. Rep. 637 [*reversing* 8 Wkly. Notes Cas. (Pa.) 296].

64. *Georgia.*— Baker *v.* State, 90 Ga. 153, 15 S. E. 788, wherein an attorney was disbarred for making a false showing to obtain a continuance, thereby deceiving the court.

Illinois.— People *v.* Pickler, 186 Ill. 64, 57 N. E. 893.

Ohio.— Matter of Lundy, 14 Ohio Cir. Ct. 561, 8 Ohio Cir. Dec. 111, wherein an attorney was suspended for a year for erasing from the papers in a cause a memorandum of dismissal made thereon by a judge, such erasure being made with the intention of deceiving another judge.

Oregon.— *Ex p.* Finn, 32 Oreg. 519, 52 Pac. 756, 67 Am. St. Rep. 550.

Pennsylvania.— Bristor *v.* Tasker, 135 Pa. St. 110, 26 Wkly. Notes Cas. (Pa.) 40, 19 Atl. 851, 20 Am. St. Rep. 853; *In re* Shoemaker, 38 Wkly. Notes Cas. (Pa.) 414 [*affirming* 5 Pa. Dist. 161, 38 Wkly. Notes Cas. (Pa.) 54]; Matter of Deringer, 4 Wkly. Notes Cas. (Pa.) 200, 12 Phila. (Pa.) 217, 34 Leg. Int. (Pa.) 248.

Tennessee.— *In re* Henderson, 88 Tenn. 531, 13 S. W. 413.

United States.—*Ex p.* Cole, 1 McCrary (U. S.) 405, 6 Fed. Cas. No. 2,973.

See 5 Cent. Dig. tit. "Attorney and Client," § 54.

Intention of attorney material.—Where it is not clear that the attorney intended to state a falsehood, and so to deceive the court, there is not ground for disbarment. Matter of Houghton, 67 Cal. 511, 8 Pac. 52.

65. Matter of Eldridge, 82 N. Y. 161, 2 Ky. L. Rep. 75, 37 Am. Rep. 558; *Ex p.* Miller, 37 Oreg. 304, 60 Pac. 999; *In re* Hirst, 1 Wkly. Notes Cas. (Pa.) 18, 9 Phila. (Pa.) 216, 31 Leg. Int. (Pa.) 340; *Ex p.* Burr, 2 Cranch C. C. (U. S.) 379, 4 Fed. Cas. No. 2,186, 1 Wheel. Crim. (N. Y.) 503, in which last case an attorney was disbarred for advising a witness for the prosecution in a murder case to conceal himself so that his testimony could not be procured.

Offering an expert money to testify.— Where an attorney, supposing that an expert whom he had hired to examine a certain paper believed the paper to be a forgery, offered the expert a large sum of money to testify regarding the forgery, such conduct of the attorney, though subject to criticism, was not ground for disbarment. *In re* Barnes, (Cal. 1888) 16 Pac. 896.

Unauthorized acts of agent.— On motion to disbar attorneys it was shown that they were notified that the deposition of a witness for whom they had sought would be taken by the adverse party. Desiring to know what he would testify, they sent an agent to see him, with instructions to try to incline him as favorably toward their client as possible. Their agent induced the witness to keep out of the way, making him drunk for the purpose, and got him to come to the city where one of the attorneys was, and have a consultation with the latter at his office. There being no evidence that the attorneys directed that the witness should be made drunk, kept out of the way, bribed, or intimidated, it was held not sufficient misconduct for disbarment. *In re* Thomas, 36 Fed. 242.

66. *Idaho.*— *In re* Badger, (Ida. 1894) 35 Pac. 839.

Illinois.— People *v.* Beattie, 137 Ill. 553, 27 N. E. 1096, 31 Am. St. Rep. 384.

Indiana.— *Ex p.* Walls, 64 Ind. 461, holding that obtaining a change of venue of a case by means of an affidavit forged by the attorney was good ground for disbarment.

Iowa.— Perry *v.* State, 3 Greene (Iowa) 550.

New York.— *In re* Ryan, 143 N. Y. 528, 38 N. E. 963, 62 N. Y. St. 822.

Oregon.— *Ex p.* Kindt, 32 Oreg. 474, 52 Pac. 187.

United States.— *In re* Keegan, 31 Fed. 129, holding that subscribing to an affidavit containing false statements was good ground for disbarment.

Compare Matter of Knott, 71 Cal. 584, 12 Pac. 780, wherein proceedings for disbarment were dismissed where a young and inexperienced attorney made a false affidavit, relying on the assurance of an older lawyer that he could properly make such affidavit.

67. *Illinois.*— People *v.* Pickler, 186 Ill. 64, 57 N. E. 893; People *v.* Moutray, 166 Ill. 630, 47 N. E. 79 (altering bill of exceptions); People *v.* Murphy, 119 Ill. 159, 6 N. E. 488; People *v.* Leary, 84 Ill. 190 (substituting his name for client's in affidavit for alimony).

Kentucky.— Baker *v.* Com., 10 Bush (Ky.) 592; Rice *v.* Com., 18 B. Mon. (Ky.) 472.

Minnesota.— *In re* Nunn, 73 Minn. 292, 76 N. W. 38, changing and altering public

(VIII) *NON-PROFESSIONAL MISCONDUCT.* An attorney may be suspended or disbarred for such misconduct unconnected with his professional duties as shows him to be an unfit and unsafe person to manage the legal business of others.[68] It appears by the weight of authority that, if such misconduct constitutes an indictable offense, the courts will proceed to disbar the attorney even though there has been no previous indictment and conviction.[69]

records in the office of the clerk of the district court.

Mississippi.— *Ex p.* Brown, 1 How. (Miss.) 303, antedating a writ to avoid the effect of the statute of limitations.

Missouri.— State *v.* Harber, 129 Mo. 271, 31 S. W. 889, falsifying the transcript of evidence.

Montana.— State *v.* Cadwell, 16 Mont. 119, 40 Pac. 176, altering a decree of court, with a corrupt purpose.

New York.— Matter of Goldberg, 79 Hun (N. Y.) 616, 29 N. Y. Suppl. 972, 61 N. Y. St. 277; Matter of Loew, 5 Hun (N. Y.) 462, 50 How. Pr. (N. Y.) 373; Matter of Peterson, 3 Paige (N. Y.) 510.

Pennsylvania.— Serfass' Case, 116 Pa. St. 455, 2 Pa. Co. Ct. 649, 19 Wkly. Notes Cas. (Pa.) 476, 9 Atl. 674; *In re* Gates, 17 Wkly. Notes Cas. (Pa.) 142, 2 Atl. 214.

See 5 Cent. Dig. tit. "Attorney and Client," § 54.

Changing the name of an appraiser in an order appointing three appraisers, in the presence of the three finally chosen, the clerk, and attorneys of proponents of a will, in accordance with the custom of the bar, was not such conduct as to warrant disbarment. *Ex p.* Tongue, 29 Oreg. 48, 43 Pac. 717.

Cutting leaves from a book, not a book of record, which leaves were not destroyed, but promptly produced when called for, was held not to be a violation of an attorney's duty. Matter of Luce, 83 Cal. 303, 23 Pac. 350.

Interlining, in a decree, immaterial words omitted through clerical oversight, after the decree has received the judicial signature, while reprehensible, does not, in the absence of fraudulent motive, justify disbarment. State *v.* Finley, 30 Fla. 325, 11 So. 674, 18 L. R. A. 401.

Where an indictment was secretly returned to the files by an attorney who had it, upon discovery thereof, although he had denied having it, the court refused to suspend him. State *v.* Chapman, 11 Ohio 430.

68. *Louisiana.*—Dormenon's Case, 1 Mart. (La.) 129, aiding and heading an insurrection of slaves in San Domingo.

Montana.— *In re* Wellcome, 23 Mont. 450, 59 Pac. 445.

Pennsylvania.— Jones' Case, 2 Pa. Dist. 538, 12 Pa. Co. Ct. 229, making a false statement regarding the law, with the intent of stirring up a riot.

Wisconsin.— *In re* O——, 73 Wis. 602, 42 N. W. 221.

United States.— *Ex p.* Wall, 107 U. S. 265, 2 S. Ct. 569, 27 L. ed. 552; *Ex p.* Burr, 2 Cranch C. C. (U. S.) 379, 4 Fed. Cas. No. 2,186, 1 Wheel. Crim. (N. Y.) 503 (participating in a lynching as leader of a mob).

England.— Matter of Blake, 3 E. & E. 34, 6 Jur. N. S. 242, 30 L. J. Q. B. 32, 2 L. T. Rep. N. S. 429, 107 E. C. L. 34.

Compare New York Bank *v.* Stryker, 1 Wheel. Crim. (N. Y.) 330 (holding that an attorney cannot be disbarred for a non-indictable offense not affecting his office); *Ex p.* Steinman, 95 Pa. St. 220, 40 Am. Rep. 637 [*reversing* 8 Wkly. Notes Cas. (Pa.) 296]; Dickens' Case, 67 Pa. St. 169, 5 Am. Rep. 420 (which hold that discreditable acts, if not infamous and not connected with the attorney's duty, will not give the court jurisdiction to strike him from the roll).

Appropriating money arising from a wrongful mortgage and sale of property conveyed to an attorney by a deed of trust, not as a result of his professional advice, but simply as a friendly office, will not justify a summary disbarment. People *v.* Appleton, 105 Ill. 474, 44 Am. Rep. 812.

Misconduct toward other attorneys.—An attorney has been disbarred for attempting to make the opposing attorney drunk in order to obtain the advantage of him in the trial of a case (Dickens' Case, 67 Pa. St. 169, 5 Am. Rep. 420), for intermeddling between a brother attorney and his client (Baker *v.* State, 90 Ga. 153, 15 S. E. 788), and for instituting disbarment proceedings against a brother attorney for improper motives and without just grounds (Matter of Kelly, 62 N. Y. 198). See, however, People *v.* Berry, 17 Colo. 322, 29 Pac. 904, holding that, where the attorney's misconduct consisted in alleging in a petition unnecessary scandalous matter as to the moral character of another attorney, there is an adequate remedy by contempt proceedings in the court in which the petition was filed, and that the supreme court will not disbar an attorney therefor.

Misrepresentation in a newspaper of facts connected with the trial of a cause, by the editor, who was also an attorney of the court, will not justify disbarment. *In re* Greevy, 4 Wkly. Notes Cas. (Pa.) 308.

69. *Florida.*— State *v.* Finley, 30 Fla. 302, 11 So. 500.

Indiana.— *Ex p.* Walls, 64 Ind. 461.

Iowa.— Perry *v.* State, 3 Greene (Iowa) 550.

Maine.— Sanborn *v.* Kimball, 64 Me. 140.

Montana.— State *v.* Cadwell, 16 Mont. 119, 40 Pac. 176.

New Hampshire.— Delano's Case, 58 N. H. 5, 42 Am. Rep. 555.

New York.— Percy's Case, 36 N. Y. 651.

Oregon.— State *v.* Winton, 11 Oreg. 456, 5 Pac. 337, 50 Am. Rep. 486.

Pennsylvania.— Gates' Case, 1 Pa. Co. Ct. 236. *Contra, Ex p.* Steinman, 95 Pa. St. 220, 40 Am. Rep. 637; H.'s Case, 5 Pa. Dist. 539.

(IX) *PROFESSIONAL MISCONDUCT.* Professional misconduct or neglect of duty as an attorney is a good ground for suspension or disbarment.[70]

Tennessee.— Smith *v.* State, 1 Yerg. (Tenn.) 228.

United States.— *Ex p.* Wall, 107 U. S. 265, 2 S. Ct. 569, 27 L. ed. 552; *In re* Wall, 13 Fed. 814.

Contra, holding that there must be an indictment and conviction.

Arkansas.— Beene *v.* State, 22 Ark. 149.

California.— *In re* Lowenthal, (Cal. 1894) 37 Pac. 526; Matter of Stephens, 102 Cal. 264, 36 Pac. 586; *In re* Tilden, (Cal. 1891) 25 Pac. 687; People *v.* Treadwell, 66 Cal. 400, 5 Pac. 686, in which last case it was held that proceedings for disbarment, instituted during the pendency of an appeal from a judgment of conviction, were premature.

Idaho.— *In re* Tipton, (Ida. 1895) 42 Pac. 504.

Illinois.— People *v.* Comstock, 176 Ill. 192, 52 N. E. 67.

New Jersey.—Anonymous, 7 N. J. L. 162.

North Carolina.— Kane *v.* Haywood, 66 N. C. 1.

The English rule is accurately stated by Bradley, J., in *Ex p.* Wall, 107 U. S. 265, 280, 2 S. Ct. 569, 27 L. ed. 552, 559, as follows: "An attorney will be struck off the roll if convicted of felony or if convicted of a misdemeanor involving want of integrity, even though the judgment be arrested or reversed for error; and also, without a previous conviction, if he is guilty of gross misconduct in his profession or of acts which, though not done in his professional capacity, gravely affect his character as an attorney; but in the latter case, if the acts charged are indictable and are fairly denied, the court will not proceed against him until he has been convicted by a jury; and will in no case compel him to answer under oath to a charge for which he may be indicted."

70. *California.*— *In re* Stephens, 84 Cal. 77, 24 Pac. 46; Matter of Tyler, 71 Cal. 353, 12 Pac. 289, 13 Pac. 169; Matter of Cowdery, 69 Cal. 32, 10 Pac. 47, 58 Am. Rep. 545 (accepting retainer, after expiration of term as city attorney, not to appear for city in certain pending suits); People *v.* Spencer, 61 Cal. 128 (appearing for defendant against whom, as district attorney, he had drawn the indictment).

Colorado.— People *v.* Varnum, (Colo. 1901) 64 Pac. 202 (blackmailing); People *v.* Manus, (Colo. 1900) 62 Pac. 840 (larceny of law books); People *v.* Keegan, 18 Colo. 237, 32 Pac. 424, 36 Am. St. Rep. 274 (obtaining a judgment in aiding another to carry out a fraud); People *v.* McCabe, 18 Colo. 186, 187, 32 Pac. 280, 36 Am. St. Rep. 270, 19 L. R. A. 231 (repeated publication in a newspaper of the following advertisement: "Divorces legally obtained very quietly; good everywhere. Box 2344, Denver").

Hawaii.— Matter of Achi, 10 Hawaii 7; Matter of Paakiki, 8 Hawaii 518.

Illinois.— People *v.* Murphy, 119 Ill. 159, 6 N. E. 488; People *v.* Goodrich, 79 Ill. 148 (advertising to procure divorces without compliance with the requisites of the law).

Missouri.— *Ex p.* Krieger, 7 Mo. App. 367, filing a sham petition in order to obtain the taking of a deposition, that the testimony might be published in a newspaper.

New York.— Matter of Gale, 75 N. Y. 526 (collusion in obtaining divorce); Matter of B—— V——, 10 N. Y. App. Div. 491, 42 N. Y. Suppl. 268; Matter of Titus, 21 N. Y. Suppl. 724, 50 N. Y. St. 636; Matter of Bleakley, 5 Paige (N. Y.) 311 (purchasing demands for purpose of instituting suit thereon and agreeing to accept as compensation a percentage of amount recovered); New York Bank *v.* Stryker, 1 Wheel. Crim. (N. Y.) 330.

North Dakota.— *In re* Crum, 7 N. D. 316, 75 N. W. 257; State *v.* Root, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568.

Ohio.— *In re* Cunningham, 9 Ohio Dec. (Reprint) 717, 16 Cinc. L. Bul. 447, 19 Cinc. L. Bul. 315; *In re* Dellenbaugh, 17 Ohio Cir. Ct. 336; Matter of Burke, 17 Ohio Cir. Ct. 315, 9 Ohio Cir. Dec. 350.

Oregon.— *Ex p.* Ditchburn, 32 Oreg. 538, 52 Pac. 694.

Pennsylvania.— Maires' Case, 7 Pa. Dist. 297, 4 Lack. Leg. N. (Pa.) 139 (employing runners and paying them for hunting up cases); Gates' Case, 1 Pa. Co. Ct. 236; *In re* Kensington, etc., Turnpike Road Co., 12 Phila. (Pa.) 611, 35 Leg. Int. (Pa.) 152; *Ex p.* Orwig, 31 Leg. Int. (Pa.) 20; Matter of Carter, 1 Phila. (Pa.) 507, 11 Leg. Int. (Pa.) 210 (conversing with jurors concerning client's case).

Tennessee.— Smith *v.* State, 1 Yerg. (Tenn.) 228, accepting a challenge to fight a duel, or fighting a duel in another state and killing his adversary.

Texas.— Dillon *v.* State, 6 Tex. 55, commencing suit for divorce without authority.

Vermont.— *In re* Jones, 70 Vt. 71, 39 Atl. 1087 (misconduct as prosecuting attorney for the state); *Re* Enright, 67 Vt. 351, 31 Atl. 786 (offering to sell evidence to adverse attorney).

United States.—*In re* Kirby, 84 Fed. 606; *In re* Wall, 13 Fed. 814; U. S. *v.* Porter, 2 Cranch C. C. (U. S.) 60, 27 Fed. Cas. No. 16,072.

Canada.— *Re* Titus, 5 Ont. 87. See also Rex *v.* Whitehead, Taylor (U. C.) 476.

Making motions, the grounds of which are not supported by the facts of the case, does not empower any court whatsoever to strike an attorney from the rolls. Fletcher *v.* Daingerfield, 20 Cal. 427.

"Misdemeanor in his professional capacity," in the statute relating to attorneys, does not mean offenses punishable by fine and imprisonment in the county jail, but merely professional misdemeanor. *In re* Bowman, 7 Mo. App. 569. See also State *v.* Robinson, 26 Tex. 367, holding that section 8 of the Texas act of 1846, declaring that any attorney guilty of any malpractice shall be liable to be sus-

c. Proceedings — (i) *Nature of.* While proceedings to suspend or disbar attorneys are special and of a summary character, resulting from the inherent power of the courts over their officers,[71] attorneys cannot be deprived of their right to practise without notice and an opportunity to be heard, whether the court proceed under statute or in the exercise of its inherent power.[72] As such proceedings are intended, not for punishment, but for the protection of the courts and the profession, they are generally held not to be of a criminal nature.[73] Where properly instituted, they are due process of law, and not an invasion of the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law.[74]

pended, does not relate to conduct or malpractice constituting any of the offenses named in section 5 of said act, which provides that no person convicted of perjury, bribery, etc., shall have a license as an attorney.

Offering to sell to a newspaper the confession of a defendant accused of murder, while such defendant's trial was going on, is not ground for disbarment, where the negotiations were closed without any confession having been received, or sold, or caused to be published. Matter of Haymond, 121 Cal. 385, 53 Pac. 899.

Receiving money for campaign purposes while a candidate for office, which money was afterward returned, does not warrant the disbarment of the candidate after his election. People *v.* Goddard, 11 Colo. 259, 18 Pac. 338.

Seduction of a stenographer and confidential secretary is not unprofessional conduct involving moral turpitude within the meaning of a statute providing for the disbarment of attorneys. State *v.* Byrkett, 4 Ohio Dec. 89, 3 Ohio N. P. 28.

Uniting the functions of attorney and constable at the same time is not an offense derogatory to the discipline and honor of the bar. O'Farrell *v.* Quebec Dist. Bar Council, 1 Quebec 154.

Where an attorney was tried and acquitted of a crime, it is no ground for his disbarment that, pending the criminal proceedings, he asked the district attorney for time in which to fix up the case with the prosecutor. *Ex p.* Trumbore, 39 Leg. Int. (Pa.) 356.

71. *Florida.*— State *v.* Maxwell, 19 Fla. 31.
Iowa.— State *v.* Clarke, 46 Iowa 155.
Kentucky.—Rice *v.* Com., 18 B. Mon. (Ky.) 472.
Montana.— *In re* Wellcome, 23 Mont. 259, 58 Pac. 711.
New York.— Matter of Attorney, 83 N. Y. 164.
United States.— Bradley *v.* Fisher, 13 Wall. (U. S.) 335, 20 L. ed. 646 [*affirming* 7 D. C. 32]; *Ex p.* Burr, 2 Cranch C. C. (U. S.) 379, 4 Fed. Cas. No. 2,186, 1 Wheel. Crim. (N. Y.) 503.

72. *Arkansas.*— Beene *v.* State, 22 Ark. 149.
California.— People *v.* Turner, 1 Cal. 143, 52 Am. Dec. 295.
Colorado.— *In re* Walkey, 26 Colo. 161, 56 Pac. 576, holding that, where the statute regulating disbarment proceedings did not direct how the notice should be served, the mailing of copies of the charges was good service.
Indiana.— Heffren *v.* Jayne, 39 Ind. 463, 13 Am. Rep. 281.
Iowa.— State *v.* Start, 7 Iowa 499.
Kansas.— *In re* Peyton, 12 Kan. 398.
Maine.— Sanborn *v.* Kimball, 64 Me. 140 [*followed* in Strout *v.* Proctor, 71 Me. 288].
Mississippi.— *Ex p.* Heyfron, 7 How. (Miss.) 127.
New York.— Matter of ———, 86 N. Y. 563; Saxton *v.* Stowell, 11 Paige (N. Y.) 526.
Oklahoma.— Matter of Brown, 2 Okla. 590, 39 Pac. 469.
Pennsylvania.— *Ex p.* Steinman, 95 Pa. St. 220, 40 Am. Rep. 637.
Virginia.— *Ex p.* Fisher, 6 Leigh (Va.) 619.
United States.— *Ex p.* Robinson, 19 Wall. (U. S.) 505, 22 L. ed. 205.
See 5 Cent. Dig. tit. "Attorney and Client," § 68.

73. *District of Columbia.*— Bradley *v.* Fisher, 7 D. C. 32 [*affirmed* in 13 Wall. (U. S.) 335, 20 L. ed. 646].
Massachusetts.— Randall, Petitioner, 11 Allen (Mass.) 473.
Montana.— *In re* Wellcome, 23 Mont. 450, 59 Pac. 445.
North Dakota.— *In re* Crum, 7 N. D. 316, 75 N. W. 257.
Ohio.— *In re* Palmer, 15 Ohio Cir. Ct. 94. *Compare* State *v.* Byrkett, 4 Ohio Dec. 89, 3 Ohio N. P. 28.
Oregon.— *Ex p.* Finn, 32 Oreg. 519, 52 Pac. 756, 67 Am. St. Rep. 550; State *v.* Winton, 11 Oreg. 456, 5 Pac. 337, 50 Am. Rep. 486.
Texas.— Scott *v.* State, 86 Tex. 321, 24 S. W. 789. *Compare* State *v.* Tunstall, 51 Tex. 81.
United States.— *Ex p.* Wall, 107 U. S. 265, 2 S. Ct. 569, 27 L. ed. 552; Philbrook *v.* Newman, 85 Fed. 139; *Ex p.* Burr, 2 Cranch C. C. (U. S.) 379, 4 Fed. Cas. No. 2,186, 1 Wheel. Crim. (N. Y.) 503.
England.— *Ex p.* Brounsall, Cowp. 829.
Contra.—*Alabama.*— Thomas *v.* State, 58 Ala. 365.
Indiana.— Klingensmith *v.* Kepler, 41 Ind. 341.
Kansas.— *In re* Peyton, 12 Kan. 398.
Michigan.— Matter of Baluss, 28 Mich. 507.
New York.— Matter of ———, 1 Hun (N. Y.) 321.
See 5 Cent. Dig. tit. "Attorney and Client," § 48.

74. *Ex p.* Wall, 107 U. S. 265, 2 S. Ct. 569, 27 L. ed. 552.

(II) *Conduct of*—(A) *In General.*[75] In proceedings for suspension or disbarment the practice is for the court to issue a rule or order upon the attorney, reciting the substance of the information or charges against him, and requiring him to show cause why he should not be suspended or disbarred.[76] It is not necessary that the proceedings should be founded upon formal allegations.[77] They are often instituted upon information developed in the progress of a cause, or from what the court learns of the conduct of the attorney from its own observation,[78] being sometimes moved by third parties upon affidavit,[79] and sometimes taken by the court upon its own motion.[80] The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation.[81]

(B) *Charges.* While the charges against an attorney, on proceedings for suspension or disbarment, need not be formal or technical,[82] they should be suf-

75. Necessity of notice see *supra*, II, B, 3, c, (I).

76. Beene *v.* State, 22 Ark. 149; State *v.* Watkins, 3 Mo. 480; Percy's Case, 36 N. Y. 651. See also Walker *v.* Com., 8 Bush (Ky.) 86; State *v.* Stiles, 48 W. Va. 425, 37 S. E. 620.

For forms of orders to show cause see *In re* Woolley, 11 Bush (Ky.) 95; *Ex p.* Wall, 107 U. S. 265, 2 S. Ct. 569, 27 L. ed. 552.

Want of service of a rule to show cause is waived by the attorney appearing to defend himself. State *v.* Kirke, 12 Fla. 278, 95 Am. Dec. 314.

The pleadings are not controlled by common-law rules in proceeding to disbar. State *v.* Maxwell, 19 Fla. 31.

77. Sanborn *v.* Kimball, 64 Me. 140; Boston Bar Assoc. *v.* Greenhood, 168 Mass. 169, 46 N. E. 568; Randall, Petitioner, 11 Allen (Mass.) 473; *In re* Bowman, 7 Mo. App. 569; Randall *v.* Brigham, 7 Wall. (U. S.) 523, 19 L. ed. 285; Philbrook *v.* Newman, 85 Fed. 139; *In re* Wall, 13 Fed. 814, 27 Alb. L. J. 91.

When entitled to charges.—Where the facts upon which alleged misconduct is based are not at issue in a case passed upon by the court and do not occur in the presence of the court, the attorney is entitled to have specific charges preferred against him, and an opportunity for meeting them. Matter of Achi, 8 Hawaii 216.

78. Matter of Wool, 36 Mich. 299, where the misconduct of the attorney had come out in an equity hearing, where the court had itself heard the cause and passed upon the facts, and, accordingly, the order to show cause was based on the decree in equity.

79. Proceedings may be instituted by a bar association (Fairfield County Bar *v.* Taylor, 60 Conn. 11, 22 Atl. 441, 13 L. R. A. 767; Boston Bar Assoc. *v.* Greenhood, 168 Mass. 169, 46 N. E. 568), by the prosecuting attorney (*In re* Shepard, 109 Mich. 631, 67 N. W. 971), or by the attorney-general (see Attorney-General). But in People *v.* Allison, 68 Ill. 151, it was intimated that an attorney would not be disbarred at the relation of a stranger for failure to pay over money to a client who had made no complaint.

The court may require a member of the bar to prosecute charges against an attorney looking to his disbarment. State *v.* Harber, 129 Mo. 271, 31 S. W. 889. But the appointment of an attorney to draw up the accusation is not necessary where the proceedings are commenced by an individual, and not by the direction of the court. Byington *v.* Moore, 70 Iowa 206, 30 N. W. 485.

Conducted in whose name.—The proceedings may be conducted in the name of the state (Turner *v.* Com., 2 Metc. (Ky.) 619), but need not be so conducted (*In re* Bowman, 7 Mo. App. 569; *In re* Crum, 7 N. D. 316, 75 N. W. 257); or in the name of a client (Wilson *v.* Popham, 91 Ky. 327, 12 Ky. L. Rep. 904, 15 S. W. 859).

Waiver of objection to manner of commencement.—Although, by statute, a prosecution against one attorney for misconduct may be instituted by information or motion of two or more practising attorneys, a defendant, by appearing and answering to a motion of one attorney, waives objection to the form of proceeding that it was commenced by only one. Jackson *v.* State, 21 Tex. 668.

80. Walker *v.* Com., 8 Bush (Ky.) 86; Matter of ———, 86 N. Y. 563; Percy's Case, 36 N. Y. 651; *In re* Orton, 54 Wis. 379, 385, 11 N. W. 584, in which last case the court said: "The fact that the circuit court, on its own motion, granted an order to show cause, requires no comment. It was the duty of the circuit judge, on his attention being called to the pleadings in the case of Wheeler *v.* Orton, pending before him, to issue such an order if he thought there was anything in the answers of Mr. Orton which the interest of the public or the integrity of the profession required should be investigated. Courts institute these proceedings on their own motion where papers are presented showing that there are probable grounds for believing that attorneys have been guilty of acts of misconduct in their practice which render them unfit longer to be members of the bar."

81. Field, J., in Randall *v.* Brigham, 7 Wall. (U. S.) 523, 19 L. ed. 285 [*cited* with approval in *In re* Shepard, 109 Mich. 631, 67 N. W. 971; U. S. *v.* Parks, 93 Fed. 414; Philbrook *v.* Newman, 85 Fed. 139].

82. Randall *v.* Brigham, 7 Wall. (U. S.) 523, 19 L. ed. 285.

For form of petition for disbarment see Serfass' Case, 116 Pa. St. 455, 2 Pa. Co. Ct. 649, 19 Wkly. Notes Cas. (Pa.) 476, 9 Atl. 674.

ficiently specific and particular to apprise the attorney of the precise nature of the accusation against him,[83] and should be on oath.[84]

(c) *Defenses.* In proceedings for suspension or disbarment the accused attorney may demur, and, if the demurrer is overruled, he will be allowed time to prepare and file his answer to the charges.[85] In such proceedings the statute of

83. *Florida.*— State *v.* Finley, 30 Fla. 302, 11 So. 500, 30 Fla. 325, 11 So. 674, 18 L. R. A. 401; State *v.* Kirke, 12 Fla. 278, 95 Am. Dec. 314.

Illinois.— People *v.* Allison, 68 Ill. 151.

Iowa.— Perry *v.* State, 3 Greene (Iowa) 550.

Michigan.— Dickinson *v.* Dustin, 21 Mich. 561; Matter of Mills, 1 Mich. 392.

New Mexico.— *In re* Veeder, (N. M. 1901) 65 Pac. 180.

Wisconsin.— *In re* Orton, 54 Wis. 379, 382, 11 N. W. 584, wherein the court said: "If charges of professional misconduct are made, common justice requires that he should know just what they are, and have a full opportunity to meet them. Therefore, specific, distinct, special charges should be clearly made, in some form and in some manner, before he is called upon to make his defense."

United States.—*Ex p.* Burr, 2 Cranch C. C. (U. S.) 379, 4 Fed. Cas. No. 2,186, 1 Wheel. Crim. (N. Y.) 503.

Canada.— *In re* Tremayne, 14 U. C. C. P. 257, holding that a certificate of the clerk of the court, on which an application under the rule of court is made to have the attorney struck off the rolls in another court, should show the ground on which he was struck off. The application should also be for a rule to show cause, and should not be made on the last day of term.

Compare Thomas *v.* State, 58 Ala. 365, holding that, the statutory proceedings for disbarment being in the nature of a criminal proceeding, the information must disclose with certainty the facts of misconduct, and that defendant is amenable to the proceeding.

It is no objection that the facts were stated in narrative form, without allegations connecting them with the general charges of misconduct, where facts are stated showing such misconduct on the part of the attorney as is sufficient to put him upon his trial. *In re* Lowenthal, 78 Cal. 427, 21 Pac. 7.

Variance between general charge and specifications.—Where a complaint alleges that an attorney is guilty of professional misconduct "in the following particulars," but the charges set out do not relate to professional conduct, a demurrer will be sustained. State *v.* Cadwell, (Mont. 1894) 36 Pac. 85.

When based upon a criminal conviction, the information should set out the offense of which the attorney was convicted (U. S. *v.* Clark, 76 Fed. 560), and, where the ground of disbarment is conviction of a misdemeanor involving moral turpitude, it must be alleged that moral turpitude was involved in the acts constituting the crime (State *v.* Bannon, (Oreg. 1895) 42 Pac. 869).

84. State *v.* Kirke, 12 Fla. 278, 95 Am. Dec. 314; *Ex p.* Burr, 9 Wheat. (U. S.) 529, 6 L. ed. 152. *Compare Ex p.* Wall, 107 U. S. 265, 2 S. Ct. 569, 27 L. ed. 552, holding that, where an attorney assisted a mob in taking a prisoner from the jail and hanging him in the court-yard, and, in consequence of the excitement, no one was willing to make an affidavit against the attorney, the proceedings were valid, even though the charges were not made on affidavit.

Verification on information and belief by a prosecuting attorney is sufficient. *In re* Shepard, 109 Mich. 631, 67 N. W. 971. See also *In re* Wellcome, 23 Mont. 213, 58 Pac. 47, holding that, under Mont. Code Civ. Proc. § 420, which provides that an accusation must be verified by an oath that the charges therein are true, an accusation in disbarment proceedings wherein some of the charges are verified only on information and belief, and others are positively sworn to, is partially valid, and will stand against an objection aimed at the entire accusation.

Insufficient verification.—Where the accusation was signed by two informants, and all the allegations of acts on the part of the attorney were upon information of such informants, a verification upon information and belief of a third person, without explanation why it was not made by one of the informants, was insufficient. Matter of Hotchkiss, 58 Cal. 39. See also Matter of Hudson, 102 Cal. 467, 36 Pac. 812.

85. *In re* Lowenthal, 78 Cal. 427, 21 Pac. 7.

Disavowal of an intent to commit contempt is sufficient to excuse, if not acquit, even though in a subsequent paragraph of his answer the attorney, an editor, insists that the article complained of was not libelous and did not transcend the limits to criticism upon public men allowed to the freedom of the press. *Ex p.* Biggs, 64 N. C. 202.

Misconduct of an attorney is not cured by his consent, under legal compulsion, to an order rectifying the effects thereof (Matter of B—— V——, 10 N. Y. App. Div. 491, 42 N. Y. Suppl. 268), nor by the fact that such conduct was customary in the community where the attorney resided (*Ex p.* Finn, 32 Oreg. 519, 52 Pac. 756, 67 Am. St. Rep. 550). Neither is it a defense, to a motion to suspend an attorney for failure to pay over money collected by him, that he is holding the same to indemnify himself for sums of money owing him by the collecting agency through whom he received the claim for collection. McMath *v.* Maus, 12 Ky. L. Rep. 952, 15 S. W. 879.

Res judicata.—An order final in its character, discharging a rule to show cause why defendant should not be suspended, not made without prejudice, is a bar to a renewal of such rule after a decision in the pending suit adverse to the attorney. Com. *v.* Mc-

limitations is no defense,[86] nor, when the offense is criminal, is the fact that a prosecution therefor is barred by limitation a defense.[87] Neither is the settlement of the matter which was the ground for the proceedings a good defense for the attorney, so as to bar proceedings.[88]

(D) *Evidence.* The common-law rules of evidence govern the proceedings,[89] and the charges must be proved by a clear preponderance of the evidence.[90]

Kay, 14 Ky. L. Rep. 407, 20 S. W. 276. So, too, where, on appeal from county commissioners to the circuit court in proceedings for contempt against an attorney, the proceedings are dismissed as to the contempt, a subsequent trial and judgment of suspension from practice before the board is unauthorized. Garrigus *v.* State, 93 Ind. 239. But, where an attorney, in his appeal brief, cast reflections on the trial judge, who, after the appellate court had attached him for contempt, disbarred him, and subsequently an information was filed against him for practising without a license, whereupon he questioned the jurisdiction of the court to render the judgment of disbarment because the supreme court had assumed jurisdiction, and because he could not, under the statute, be sued out of the county of his domicile, and objected because he had no jury trial, and could not be punished for a consequential contempt, it was held that the judgment was conclusive against such attacks in the collateral proceeding. Smith *v.* State, 5 Tex. 578.

Where the answer of respondent appeared evasive and irresponsive, he was given an opportunity to file a more specific answer. People *v.* Webster, (Colo. 1901) 64 Pac. 207.

For form of answer see Jackson *v.* State, 21 Tex. 668.

86. *In re* Lowenthal, 78 Cal. 427, 429, 21 Pac. 7, where the court said: "We do not understand that a charge of this kind can be barred by the statute of limitations, or that it should be, under any circumstances. The fullest opportunity should be given to investigate the conduct of an attorney who is charged with a violation of his duties as such; and while this court might not be willing to disbar or suspend an attorney if it appeared that there had been unreasonable delay in the presentation of the charges, so that a fair opportunity could not be had for procuring the witnesses and meeting the accusation, we are not prepared to say, as a matter of law upon this demurrer, that the accusation is barred either by the express terms of the statute of limitations or by analogy." See also *Re* R. A., 6 Manitoba 601.

87. *Ex p.* Tyler, 107 Cal. 78, 40 Pac. 33; U. S. *v.* Parks, 93 Fed. 414.

88. People *v.* Weeber, 26 Colo. 229, 57 Pac. 1079; People *v.* Ryalls, 8 Colo. 332, 7 Pac. 290; *In re* Davies, 93 Pa. St. 116, 122, 39 Am. Rep. 729; *Ex p.* Orwig, 31 Leg. Int. (Pa.) 20 (wherein, in answer to the contention that a settlement operated as a remission of the attorney's offense, the court said: "This view of the case ignores the fact that the exercise of the power is not for the purpose of enforcing civil remedies between parties, but to protect the court and the public against an attorney guilty of unworthy practices in his profession. He had acted in clear disregard of his duty as an attorney at the bar, and without 'good fidelity' to his client. The public had rights which Mrs. Curtiss could not thus settle or destroy").

89. State *v.* Finley, 30 Fla. 302, 11 So. 500; Matter of Attorney, 83 N. Y. 164; Matter of Eldridge, 82 N. Y. 161, 2 Ky. L. Rep. 75, 37 Am. Rep. 558. See also Walker *v.* Com., 8 Bush (Ky.) 86.

Effect of failure to testify.— The failure of an attorney to testify, in a proceeding for disbarment on charges of deceit and malpractice, raises the legal presumption of the truth of such uncontradicted facts given in evidence against him as must have been known by him. Matter of Randel, 158 N. Y. 216, 52 N. E. 1106.

Presumption of attorney's innocence.— The presumption that the accused is innocent until the contrary appears remains with him only until it appears to the court with reasonable certainty that he is guilty. *In re* Wellcome, 23 Mont. 450, 59 Pac. 445.

Previous good character and standing as a lawyer and as a man of integrity in the community is properly considered; but, if the court is satisfied from the evidence that the attorney is guilty of having fraudulently misappropriated his client's funds and of falsely informing the latter that he had not collected the money so misappropriated, the attorney should be disbarred notwithstanding such previous good character. People *v.* Betts, 26 Colo. 521, 58 Pac. 1091.

Record of case to which attorney not a party.— The record of a case in which the attorney in disbarment proceedings was not a party is not admissible in evidence against him. Dillon *v.* State, 6 Tex. 55.

Testimony of accomplice.—One who entered into a corrupt scheme with an attorney may, in proceedings to disbar the attorney, testify to the details of the scheme. State *v.* Cadwell, 16 Mont. 119, 40 Pac. 176.

90. *California.*— Matter of Houghton, 67 Cal. 511, 8 Pac. 52.

Colorado.— People *v.* Pendleton, 17 Colo. 544, 30 Pac. 1041.

Hawaii.— Matter of Wahaku, 4 Hawaii 56.

Illinois.— People *v.* Barker, 56 Ill. 299; People *v.* Harvey, 41 Ill. 277.

Michigan.— *In re* Clink, 117 Mich. 619, 76 N. W. 1; Matter of Baluss, 28 Mich. 507.

Missouri.— *In re* Bowman, 7 Mo. App. 569.

Montana.— State *v.* Wines, 21 Mont. 464, 54 Pac. 562.

New York.— Matter of ———, 1 Hun (N. Y.) 321. *Compare* Matter of Mashbir, 44 N. Y. App. Div. 632, 60 N. Y. Suppl. 451, 7 N. Y. Annot. Cas. 1, holding that evidence of grave malpractice, for which an attorney may

Where the charges are denied, the affidavits and papers upon which the proceedings were instituted are not evidence upon the issues, but are simply pleadings or statements of the charges relied on.[91]

(E) *Judgment.*[92] In proceedings for suspension or disbarment, the judgment or order should specify the particular charge or accusation upon which the attorney was disbarred or suspended,[93] and should be no broader than the rule to show cause.[94] Removal may be absolute or for a stated time,[95] the extent of punishment, which is governed by the facts of each case, resting in the discretion of the court.[96]

be disbarred for life, should establish guilt beyond a reasonable doubt.

Utah.— *In re* Evans, 22 Utah 366, 62 Pac. 913, 53 L. R. A. 952.

West Virginia.— State *v.* Shumate, 48 W. Va. 359, 37 S. E. 618.

Wisconsin.— *In re* O——, 73 Wis. 602, 42 N. W. 221.

Evidence held sufficient.— In the following cases the evidence was held sufficient to sustain the charges against the attorney:

Illinois.— People *v.* Moutray, 166 Ill. 630, 47 N. E. 79.

Iowa.— State *v.* Howard, 112 Iowa 256, 83 N. W. 975.

Massachusetts.— Boston Bar Assoc. *v.* Greenhood, 168 Mass. 169, 46 N. E. 568.

New York.— Matter of Randel, 158 N. Y. 216, 52 N. E. 1106; Matter of ———, 86 N. Y. 563.

Oregon.— *Ex p.* Miller, 37 Oreg. 304, 60 Pac. 999.

Pennsylvania.— *In re* Smith, 179 Pa. St. 14, 36 Atl. 134.

Wisconsin.— Flanders *v.* Keefe, 108 Wis. 441, 84 N. W. 878.

United States.— *Ex p.* Cole, 1 McCrary (U. S.) 405, 6 Fed. Cas. No. 2,973.

Evidence held insufficient.— In the following cases the evidence was held insufficient to sustain the charges:

California.— *In re* Cobb, 84 Cal. 550, 24 Pac. 293; Matter of Luce, 83 Cal. 303, 23 Pac. 350; Matter of Houghton, 67 Cal. 511, 8 Pac. 52.

Colorado.— People *v.* Benson, 24 Colo. 358, 51 Pac. 481.

Florida.— State *v.* Young, 30 Fla. 85, 11 So. 514.

Michigan.— *In re* Clink, 117 Mich. 619, 76 N. W. 1; Matter of Baluss, 28 Mich. 507.

New Hampshire.— Barker's Case, 49 N. H. 195.

New Mexico.— *In re* Catron, 8 N. M. 253, 43 Pac. 724.

Oregon.— *Ex p.* Cowing, 26 Oreg. 572, 38 Pac. 1090.

West Virginia.— Walker *v.* State, 4 W. Va. 749.

91. Matter of Eldridge, 82 N. Y. 161, 2 Ky. L. Rep. 75, 37 Am. Rep. 558; *In re* Simpson, 9 N. D. 379, 83 N. W. 541.

92. For forms of orders of disbarment see Beene *v.* State, 22 Ark. 149; *In re* Shepard, 109 Mich. 631, 67 N. W. 971.

93. Perry *v.* State, 3 Greene (Iowa) 550 (holding that, where there was no evidence to support some of the charges, a judgment that the attorney was "guilty of the charges in said accusation" was too broad); State *v.* Watkins, 3 Mo. 480. See also *Ex p.* McCulley, 3 N. Brunsw. 521.

Modifying judgment.— Even where a judgment of disbarment has been affirmed by the supreme court, an application to modify it should be made to the superior court, where the original proceedings for the disbarment were had and determined. Matter of Wharton, 130 Cal. 486, 62 Pac. 741.

Vacating judgment.—Where, to prevent the trial of other charges against an attorney, charged by information with violation of duty, a judgment of conviction is rendered by consent, such judgment will not be vacated, in the absence of fraud, on the ground that the attorney acted on the erroneous advice of counsel. People *v.* Hill, 182 Ill. 425, 55 N. E. 542.

94. Moutray *v.* People, 162 Ill. 194, 44 N. E. 496; Winkelman *v.* People, 50 Ill. 449, holding that, under a rule requiring an attorney to show cause why he should not be suspended from practice in the circuit court of a certain named county, an order cannot be entered suspending him from practice in a judicial circuit comprising other counties and courts.

95. Matter of Tyler, 78 Cal. 307, 20 Pac. 674, 12 Am. St. Rep. 55 (wherein it was moved to modify a judgment suspending an attorney from practice for the period of two years from the date of the judgment and until a judgment obtained by a third person for money collected by said attorney should be paid, by striking out the latter part of the judgment, the two years having expired, on the ground that the court had no power or jurisdiction to make an order suspending an attorney for what is claimed to be an indefinite time. The court denied the motion, on the ground that, the court having the power to dishar an attorney permanently, the punishment inflicted was within its jurisdiction); Boston Bar Assoc. *v.* Greenhood, 168 Mass. 169, 46 N. E. 568 (holding that the removal of an attorney from office under a statute, as well as at common law, may be absolute, leaving the party to apply to the court for readmission if his offense was of such a kind that, after a lapse of time, he can satisfy the court that he has become trustworthy, or for a stated time if the court is of opinion that the interests of the public will thereby be sufficiently protected). See also Slemmer *v.* Wright, 54 Iowa 164, 6 N. W. 181.

96. *California.*— Matter of Moore, 72 Cal. 359, 13 Pac. 885.

(III) *REVIEW.* In some jurisdictions, an appeal lies from an order suspending or disbarring an attorney;[97] but a writ of certiorari is not a proper remedy to correct or revise disbarment proceedings,[98] except where certiorari has taken the place of writ of error.[99]

(IV) *COSTS.* In the absence of express legislation,[1] no costs or disbursements can be recovered by either party,[2] except where the court finds that such proceedings have been instituted in bad faith, when it may order costs against the party who instituted them.[3]

4. REINSTATEMENT. An order or judgment of disbarment is not necessarily final, or conclusive for all time, but an attorney who has been disbarred may be reinstated, on motion or application, for reasons satisfactory to the court.[4] Man-

Colorado.— People *v.* Green, 9 Colo. 506, 13 Pac. 514.

Missouri.— Strother *v.* State, 1 Mo. 605.

Oregon.— State *v.* Mason, 29 Oreg. 18, 43 Pac. 651, 54 Am. St. Rep. 772.

Pennsylvania.—*In re* Gates, 17 Wkly. Notes Cas. (Pa.) 142, 2 Atl. 214.

United States.— *Ex p.* Burr, 2 Cranch C. C. (U. S.) 379, 4 Fed. Cas. No. 2,186, 1 Wheel. Crim. (N. Y.) 503.

Where mitigating circumstances are shown, such as previous good character or inexperience, the court will often suspend rather than disbar the attorney, or will reduce the term of suspension.

California.— *In re* Stephens, 84 Cal. 77, 24 Pac. 46.

Colorado.— People *v.* McCabe, 18 Colo. 186, 32 Pac. 280, 36 Am. St. Rep. 270, 19 L. R. A. 231; People *v.* Brown, 17 Colo. 431, 30 Pac. 338.

Missouri.— *In re* Buchanan, 28 Mo. App. 230.

New York.— Matter of Goldberg, 29 N. Y. Suppl. 972, 61 N. Y. St. 277.

Pennsylvania.— *In re* Smith, 179 Pa. St. 14, 36 Atl. 134; Shoemaker's Case, 5 Pa. Dist. 161, 38 Wkly. Notes Cas. (Pa.) 54.

Washington.—Matter of Lambuth, 18 Wash. 478, 51 Pac. 1071.

97. Turner *v.* Com., 2 Metc. (Ky.) 619; Boston Bar Assoc. *v.* Greenhood, 168 Mass. 169, 46 N. E. 568; *In re* Crum, 7 N. D. 316, 75 N. W. 257; *In re* H—— T——, 2 Pennyp. (Pa.) 84, 14 Lanc. Bar (Pa.) 127. See also APPEAL AND ERROR, 2 Cyc. 595, note 19. *Contra, Ex p.* Robinson, 19 Wall. (U. S.) 513, 22 L. ed. 205; *Ex p.* Bradley, 7 Wall. (U. S.) 364, 19 L. ed. 214, both cases holding that the proper remedy, if any, was by mandamus. See also Matter of Westcott, 66 Conn. 585, 34 Atl. 505; Fairfield County Bar *v.* Taylor, 60 Conn. 11, 22 Atl. 441, 13 L. R. A. 767, in which cases it was doubted whether an appeal was permissible.

An appeal by the accuser is not contemplated by the law and will, therefore, be dismissed. *In re* Thompson, (Cal. 1896) 45 Pac. 1034; State *v.* Tunstall, 51 Tex. 81.

Effect of appeal.— Since a judgment suspending an attorney from practice executes itself, except as to the collection of costs, it is not affected by an appeal (Walls *v.* Palmer, 64 Ind. 493; McMath *v.* Maus Bros. Boot, etc., Store, 12 Ky. L. Rep. 952, 15 S. W. 879. *Contra,* Heffren *v.* Jayne, 39 Ind. 463, 13 Am. Rep. 281; Bird *v.* Gilbert, 40 Kan. 469, 19 Pac. 924) or writ of error (Tyler *v.* Presley, 72 Cal. 290, 13 Pac. 856), except as to costs (Walls *v.* Palmer, 64 Ind. 493).

Motion for new trial.—Where the supreme court has disbarred an attorney a motion for a new trial will not be heard by it. Matter of Tyler, 71 Cal. 353, 12 Pac. 289, 13 Pac. 169. *Compare Ex p.* Walls, 64 Ind. 461, holding that where, on the trial of a proceeding to disbar, the person whose name appeared as affiant testifies denying that he made or signed the affidavit, defendant cannot obtain a new trial on the ground that he was surprised by such testimony.

98. Randall, Petitioner, 11 Allen (Mass.) 472.

99. *Ex p.* Biggs, 64 N. C. 202, holding that mandamus in such a case would be improper.

1. Under S. D. Comp. Laws, § 5189, certain items are allowable. *In re* Kirby, 10 S. D. 416, 73 N. W. 908. See also Matter of Wakefield, 11 Hawaii 188, wherein certain costs were taxed against respondent.

2. Turner *v.* Com., 2 Metc. (Ky.) 619; Morton *v.* Watson, 60 Nebr. 672, 84 N. W. 91; *In re* Eaton, 7 N. D. 269, 74 N. W. 870.

3. Matter of Kelly, 59 N. Y. 595, 62 N. Y. 198.

4. *California.*— *In re* Treadwell, 114 Cal. 24, 45 Pac. 993.

Colorado.— Matter of Browne, 2 Colo. 553.

Hawaii.— *In re* Campbell, 2 Hawaii 27.

Ohio.— Matter of King, 54 Ohio St. 415, 43 N. E. 686; Matter of Burke, 21 Ohio Cir. Ct. 34, 11 Ohio Cir. Dec. 397; Matter of Palmer, 9 Ohio Cir. Ct. 55, 15 Ohio Cir. Ct. 94.

Vermont.— *In re* Enright, 69 Vt. 317, 37 Atl. 1046, holding, however, that an attorney will not be reinstated on petition of attorney merely stating belief that he has been sufficiently punished for the offense.

United States.— *In re* Boone, 90 Fed. 793.

England.— *Ex p.* Pyke, 6 B. & S. 703, 11 Jur. N. S. 504, 34 L. J. Q. B. 121, 118 E. C. L. 703; Rex *v.* Greenwood, 1 W. Bl. 221.

Canada.— *Re* Forbes, 2 N. W. Terr. (Can.) 184; *Re* Macnamara, 9 Ont. Pr. 497.

The test for reinstatement is laid down in Matter of Palmer, 9 Ohio Cir. Ct. 55, 70, as follows: "Looking at the life and conduct of the attorney prior to the disbarment, and the reasons for the disbarment, have his life and conduct since that time been such as to satisfy the court that if restored to the bar he will be upright, honorable and honest in

damus is the proper remedy to restore an attorney, where the court below has exceeded its jurisdiction in disbarring him.[5]

C. Incidents of the Office — 1. Privileges — a. As Party to a Suit. At common law, an attorney had the right to bring suits in which he was plaintiff in the court of which he was an attorney,[6] and to be proceeded against as defendant by bill in the court in which he practised.[7] The bill against him and all notices had to be served personally on the attorney or his agent.[8] The attorney, however, could not plead his privilege when he was sued jointly,[9] and it ceased when he had not practised for a year.[10] Under modern practice, attorneys sue and are sued the same as other parties.

b. From Arrest. At common law, attorneys, as officers of the court whose duty it is to attend the court in their official capacity,[11] are privileged from arrest

all his dealings? Will his restoration to the bar be compatible with a proper respect of the court for itself and with the dignity of the profession?"

Such restoration may be provisional where the attorney's conduct after his dismissal has not been wholly free from blame. *In re* Davies, 16 Phila. (Pa.) 65, 40 Leg. Int. (Pa.) 46.

Acquittal on the ground of insanity and subsequent discharge from an asylum as cured are not sufficient grounds for revoking a judgment of disbarment for embezzlement. Kennedy's Disbarment, 178 Pa. St. 232, 35 Atl. 995.

Procedure for reinstatement.—After an attorney has been disbarred, the judgment remaining unreversed, he cannot apply, as in the first instance, for admission, but must apply to the court in which he was disbarred to be reinstated (Matter of King, 54 Ohio St. 415, 43 N. E. 686), and the mere petition of attorneys and others for such reinstatement will not be considered, such attorney not being before the court in person or by petition asking for reinstatement, and giving his reasons therefor (*In re* Pemberton, (Mont. 1901) 63 Pac. 1043).

Effect of pardon.— The power of the governor to grant pardons for offenses does not extend to disbarment proceedings. Matter of Browne, 2 Colo. 553.

5. *Alabama.*— Withers *v.* State, 36 Ala. 252.

California.— People *v.* Turner, 1 Cal. 143, 52 Am. Dec. 295.

Florida.— State *v.* Maxwell, 19 Fla. 31; State *v.* Kirke, 12 Fla. 278, 95 Am. Dec. 314.

Indiana.— Walls *v.* Palmer, 64 Ind. 493.

New York.— People *v.* Justices Delaware C. Pl., 1 Johns. Cas. (N. Y.) 181; Matter of Gephard, 1 Johns. Cas. (N. Y.) 134.

Tennessee.— Ingersoll *v.* Howard, 1 Heisk. (Tenn.) 247.

United States.— *Ex p.* Robinson, 19 Wall. (U. S.) 505, 22 L. ed. 205; *Ex p.* Bradley, 7 Wall. (U. S.) 364, 19 L. ed. 214.

Compare Randall, Petitioner, 11 Allen (Mass.) 473 (where a mandamus was refused, on the ground that the disbarment proceedings were within the jurisdiction and discretion of the lower court); *Ex p.* Secombe, 19 How. (U. S.) 9, 15 L. ed. 565 (where it was held that mandamus would not lie to restore an attorney, the order of dismissal being a judicial, not a ministerial, act, but in which case the question did not turn on the jurisdiction of the lower court).

6. Pitcher *v.* Sheriff, 2 Marsh. 152, 4 E. C. L. 480. See also Allaire *v.* Ouland, 2 Johns. Cas. (N. Y.) 52; Simonds *v.* Hallett, 34 N. Brunsw. 216; Des Brisay *v.* Baldwin, 5 N. Brunsw. 379.

7. Scott *v.* Van Alstyne, 9 Johns. (N. Y.) 216; Emmet's Case, 2 Cai. (N. Y.) 386. See also Van Alstyne *v.* Dearborn, 2 Wend. (N. Y.) 586; Wood *v.* Gibson, 1 Cow. (N. Y.) 597; Walsh *v.* Sackrider, 7 Johns. (N. Y.) 537; Moulton *v.* Hubbard, 6 Johns. (N. Y.) 332.

The object of the privilege was that attorneys might not be drawn into other courts or to other business, to the injury of the suitors. The privilege was not intended as an accommodation to the attorney, but was for the sake of the court and public justice. Attendance in court was the ground and foundation of the privilege. Brooks *v.* Patterson, 2 Johns. Cas. (N. Y.) 102.

The bill of privilege need not allege that defendant is personally present in court, since all practising attorneys are presumed to be present in court. Bennington Iron Co. *v.* Rutherford, 18 N. J. L. 105, 35 Am. Dec. 528.

8. Lawrence *v.* Warner, 1 Cow. (N. Y.) 198; Sheldon *v.* Cumming, 1 Cow. (N. Y.) 168; Brown *v.* Childs, 17 Johns. (N. Y.) 1; Bridgeport Bank *v.* Sherwood, 16 Johns. (N. Y.) 43. See also Backus *v.* Rogers, 8 Johns. (N. Y.) 346; Wells *v.* Cruger, 5 Paige (N. Y.) 164.

9. Chenango Bank *v.* Root, 4 Cow. (N. Y.) 126; Gay *v.* Rogers, 3 Cow. (N. Y.) 368; Tiffany *v.* Driggs, 13 Johns. (N. Y.) 252.

10. Brooks *v.* Patterson, 2 Johns. Cas. (N. Y.) 102. See also Colt *v.* Gregory, 3 Cow. (N. Y.) 22.

11. "The ancient rule in England extended to practicing attorneys generally . . . on the theory that they were 'always supposed to be there attending,' and that the 'business of the court or their client's causes would suffer by their being drawn into any other than that in which their personal attendance is required.' 3 Bl. Comm. 289. . . . This doctrine obtained no acceptance, as an entirety, in the jurisprudence of this country; and a privilege of such nature and extent could not well exist, in the light of American institutions, nor under the conditions of the present day. But, out of the common-law

on mesne process[12] and from service of process in civil suits while attending court.[13]

2. Disabilities — a. Acting as Bail or Surety. As an attorney enjoys certain privileges because of his profession and of his being an officer of the court,[14] so, for the same reasons, he is subject to certain restrictions or disabilities, one of which is that he cannot act as bail or surety in any proceeding in court. This has been a rule of the English courts since 1654,[15] and has been quite generally[16] adopted in this country, either by rule of court[17] or by statute.[18] This disqualification extends not only to suits in which he might be retained as attorney or as counsel, but to all cases pending in the courts.[19] A bond signed by an attorney

rule, it has become firmly established in the courts of the Union that 'all persons who have any relation to a cause which calls for their attendance in court, and who attend in the course of that cause, though not compelled by process, are, for the sake of public justice, protected from arrest in coming to, attending upon, or returning from the court. . . . Necessarily, if not primarily, the immunity extends to the attorney representing the cause of his client before the court." Central Trust Co. *v.* Milwaukee St. R. Co., 74 Fed. 442, 443.

12. Arrest on execution.—An attorney, coming to court in term on professional business which has been disposed of, is not privileged from arrest on execution. Stroubridge *v.* Davis, (Mich. T. 2 Vict.) Robinson & J. Dig. Can. 295.

13. *Michigan.*— Hoffman *v.* Bay Cir. Judge, 113 Mich. 109, 71 N. W. 480, 67 Am. St. Rep. 458, 38 L. R. A. 663.

New Jersey.— Ogden *v.* Hughes, 5 N. J. L. 840.

New York.— Humphrey *v.* Cumming, 5 Wend. (N. Y.) 90; Van Alstyne *v.* Dearborn, 2 Wend. (N. Y.) 586; Sperry *v.* Willard, 1 Wend. (N. Y.) 32; Webb *v.* Cleveland, 9 Johns. (N. Y.) 266.

Ohio.— Whitman *v.* Sheets, 20 Ohio Cir. Ct. 1, 11 Ohio Cir. Dec. 179.

Virginia.— Com. *v.* Ronald, 4 Call (Va.) 97.

United States.— Central Trust Co. *v.* Milwaukee St. R. Co., 74 Fed. 442.

England.— Wheeler's Case, Wils. C. P. 298; 1 Tidd Pr. 80, 81, 193.

Compare Elam *v.* Lewis, 19 Ga. 608, where the court held that the essential difference in the relation which the profession sustains, both to the courts and the public, in England and in this country, makes it unreasonable to apply the English doctrine to American lawyers.

Attorneys are not privileged from arrest while they remain at home (Corey *v.* Russell, 4 Wend. (N. Y.) 204); or while attending a master, examiner, or judge out of court (Cole *v.* McClellan, 4 Hill (N. Y.) 59). See also Gay *v.* Rogers, 3 Cow. (N. Y.) 368; Gibbs *v.* Loomis, 10 Johns. (N. Y.) 463.

Waiver of the privilege.—In Cole *v.* McClellan, 4 Hill (N. Y.) 59, there was a *dictum* to the effect that the privilege of an attorney from arrest can be waived. In that case, there was a motion to be discharged from arrest on the ground of privilege, and the court thought honesty and fair dealing forbade the attorney to set up the privilege. The court distinguished Scott *v.* Van Alstyne, 9 Johns. (N. Y.) 216, in which it was said an attorney could not waive his privilege as to being sued.

14. See *supra*, II, C, 1.

15. 1 Tidd Pr. 246.

In Canada the same rule obtains. Beckitt *v.* Wragg, 1 Ch. Chamb. (U. C.) 5; Lemelin *v.* Larue, 10 L. C. Rep. 190; Routier *v.* Gingras, 3 L. C. Rep. 57, 3 R. J. R. Q. 423; *Re* Gibson, 13 Ont. Pr. 359. But a practising attorney may be a surety in an election petition. *Re* Hamilton Election, 10 L. J. N. S. 170.

16. In Indiana it has been held that an attorney may bind himself as surety. Abbott *v.* Zeigler, 9 Ind. 511, in which case, however, the court stated that it thought the moral influence upon the bar of a contrary rule would be salutary.

17. *Florida.*— Love *v.* Sheffelin, 7 Fla. 40.

Minnesota.— Schuek *v.* Hagar, 24 Minn. 339.

New York.— Miles *v.* Clarke, 4 Bosw. (N. Y.) 632 [*affirming* 2 Bosw. (N. Y.) 709]; Coster *v.* Watson, 15 Johns. (N. Y.) 535; Blankman *v.* Hilliker, 1 N. Y. Leg. Obs. 188.

Ohio.— State *v.* Van Martels, 10 Ohio Dec. (Reprint) 819, 11 Cinc. L. Bul. 154, wherein the court refused a mandamus to compel a judge of the lower court to accept as bail an attorney who was an officer of such court, where, by the rules of such court, its attorneys are not receivable as bail bond.

Texas.— "No attorney or other officer of the court shall be surety in any cause pending in the court, except under special leave of court." Tex. Dist. Ct. Rules, No. 50, 47 Tex. 626.

18. Cuppy *v.* Coffman, 82 Iowa 214, 47 N. W. 1005; Massie *v.* Mann, 17 Iowa 131; Johnson *v.* Com., 2 Duv. (Ky.) 410; Towle *v.* Bradley, 2 S. D. 472, 50 N. W. 1057; Gilbank *v.* Stephenson, 30 Wis. 155; Branger *v.* Buttrick, 30 Wis. 153; Cothren *v.* Connaughton, 24 Wis. 134.

That surety is an attorney must be proved, for courts do not take judicial notice of who are practising attorneys. Cothren *v.* Connaughton, 24 Wis. 134.

An attorney who has not practised for a year, and is engaged in another vocation, is not precluded from acting as a surety. Evans *v.* Harris, 47 N. Y. Super. Ct. 366.

19. Towle *v.* Bradley, 2 S. D. 472, 50 N. W. 1057; Gilbank *v.* Stephenson, 30 Wis. 155.

is not, however, a nullity, and, in a suit thereon, the attorney cannot escape liability by pleading that, at the time of its execution, he was a practising attorney.[20]

b. Acting For Adverse Party. As it is the duty of an attorney, growing out of the relation between himself and his client, to devote all his skill and diligence to the interests of his client, he cannot act for the adverse party in the same suit, even though his motives are honest;[21] and even after the relation has ended he cannot assume a position antagonistic to his former client's interest.[22] When,

20. *Arkansas.*— State *v.* Jones, 29 Ark. 127.

Illinois.— Jack *v.* People, 19 Ill. 57.

Indiana.— Ohio, etc., R. Co. *v.* Hardy, 64 Ind. 454.

Iowa.—Wright *v.* Schmidt, 47 Iowa 233.

Kansas.— Sherman *v.* State, 4 Kan. 570.

Kentucky.—Holandsworth *v.* Com., 11 Bush (Ky.) 617.

Missouri.— Hicks *v.* Chouteau, 12 Mo. 341.

Nebraska.— Tessier *v.* Crowley, 17 Nebr. 207, 22 N. W. 422.

Ohio.— Wallace *v.* Scoles, 6 Ohio 428, wherein the bond was held valid on the ground that otherwise the attorney would escape a legal responsibility voluntarily undertaken, and thus obtain advantage by his own wrongful act, although the court stated that the attorney's conduct was a contempt of court, for which he might be punished.

Texas.— Kohn *v.* Washer, 69 Tex. 67, 6 S. W. 551, 5 Am. St. Rep. 28 (holding that the rule of court prohibiting attorneys from becoming bail or surety was merely directory, so that the attorney's act, in becoming surety, was neither void nor voidable); Rogers *v.* Burbridge, 5 Tex. Civ. App. 67, 24 S. W. 300.

Canada.— Fournier *v.* Cannon, 6 Quebec Q. B. 228.

See 5 Cent. Dig. tit. "Attorney and Client," § 25.

21. *Alabama.*— Parker *v.* Parker, 99 Ala. 239, 13 So. 520, 42 Am. St. Rep. 48.

California.— De Celis *v.* Brunson, 53 Cal. 372.

Illinois.— Strong *v.* International Bldg., etc., Union, 82 Ill. App. 426; Heffron *v.* Flower, 35 Ill. App. 200; Askew *v.* Goddard, 17 Ill. App. 377.

Indiana.— Bowman *v.* Bowman, 153 Ind. 498, 55 N. E. 422; Wilson *v.* State, 16 Ind. 392.

Kansas.— McArthur *v.* Fry, 10 Kan. 233.

Kentucky.— Ball *v.* Poor, 81 Ky. 26.

Mississippi.—Spinks *v.* Davis, 32 Miss. 152.

Missouri.— MacDonald *v.* Wagner, 5 Mo. App. 56.

New York.— Sherwood *v.* Saratoga, etc., R. Co., 15 Barb. (N. Y.) 650; Quinn *v.* Van Pelt, 36 N. Y. Super. Ct. 279; Herrick *v.* Catley, 1 Daly (N. Y.) 512, 30 How. Pr. (N. Y.) 208.

North Carolina.— Marcom *v.* Wyatt, 117 N. C. 129, 23 S. E. 169; Wilson Cotton Mills *v.* Randleman Cotton Mills, 116 N. C. 647, 21 S. E. 431.

Washington.— Clarke County *v.* Clarke County Com'rs, 1 Wash. Terr. 250.

Canada.— Boulton *v.* Dow, etc., Road Co., 1 Ch. Chamb. (U. C.) 329; *Ex p.* Philip, 26 N. Brunsw. 178; Beatty *v.* Haldan, 10 Ont. 278; *Re* Charles Stark Co., 15 Ont. Pr. 471. See also Fraser *v.* Halifax, etc., R. Co., 18 Nova Scotia 23, 6 Can. L. T. 138.

See 5 Cent. Dig. tit. "Attorney and Client," § 27.

"The rule is a rigid one, and designed, not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests rather than to enforce, to their full extent, the rights of the interest which he should alone represent." Strong *v.* International Bldg., etc., Union, 82 Ill. App. 426.

22. Weidekind *v.* Tuolumne County Water Co., 74 Cal. 386, 19 Pac. 173, 5 Am. St. Rep. 445 [*quoting* Matter of Cowdery, 69 Cal. 32, 50, 10 Pac. 47, 58 Am. Rep. 545, to the effect that: "The law secures the client the privilege of objecting at all times and forever to an attorney, solicitor, or counsel from disclosing information in a cause confidentially given while the relation exists. The client alone can release the attorney, solicitor, or counsel from this obligation. The latter cannot discharge himself from the duty imposed on him by law"]; Valentine *v.* Stewart, 15 Cal. 387; Price *v.* Grand Rapids, etc., R. Co., 18 Ind. 137; Hatch *v.* Fogerty, 40 How. Pr. (N. Y.) 492; Nickels *v.* Griffin, 1 Wash. Terr. 374. *Compare* Lalance, etc., Mfg. Co. *v.* Haberman Mfg. Co., 93 Fed. 197, holding that attorneys who have withdrawn from a case, believing, in good faith, that the litigation is ended, will not, in case of its continuance, be enjoined from accepting a retainer from parties having an adverse interest to their former client, or from disclosing information acquired in their professional capacity from such client, for the court, in the absence of any showing to the contrary, will assume that such attorneys will observe all the obligations of honorable members of the bar.

"The test of inconsistency is not whether the attorney has ever appeared for the party against whom he now proposes to appear, but it is whether his accepting the new retainer will require him, in forwarding the interests of his new client, to do anything which will injuriously affect his former client in any matter in which he formerly represented him, and also whether he will be called upon, in his new relation, to use against his former client any knowledge or information acquired through their former connection." *In re* Boone, 83 Fed. 944, 952.

An attorney may act for a third person in obtaining property through a defect in proceedings conducted by him to gain possession thereof after the relation with his former client has ceased (Learned *v.* Haley, 34 Cal.

however, the parties are not adverse or when the client's interests are not hostile to those of the other party, the attorney may act for both parties.[23]

c. Acting in Different Capacities. The relation of attorney and client is of such an important nature that the courts will not allow an attorney to act in any capacity or assume any duty inconsistent with his office of attorney or his duty to his client. Public policy, also, demands that an attorney should not act in another capacity where his duty would be incompatible with his duty as an attorney.[24]

3. LIABILITIES — a. For Contempt. The power of the court to punish an attorney for contempt is separate and distinct from its power to suspend or disbar for misconduct in the exercise of his office, though such misconduct may, in some instances, involve a contempt of court.[25] An attorney, like any other person, is subject to summary punishment for contempt, for abusive or insulting language or conduct toward the court, or for disobedience of the orders of the court,[26] and

608), for a director in an action to recover money which a corporation has lost through a breach of the director's official trust, although he has acted as counsel for the corporation (Bent *v.* Priest, 10 Mo. App. 543), or for plaintiff in an action for breach of promise of marriage, although such plaintiff was prosecuting witness in bastardy proceedings in which the attorney had been retained for defendant and been perpetually enjoined from appearing against him in such prosecution (Musselman *v.* Barker, 26 Nebr. 737, 42 N. W. 759).

In criminal cases this rule prevents defendant's attorney from assisting in the prosecution (Wilson *v.* State, 16 Ind. 392; State *v.* Halstead, 73 Iowa 376, 35 N. W. 457), or a prosecuting officer who instituted the proceedings from appearing for defendant (Gaulden *v.* State, 11 Ga. 47). See also Com. *v.* Gibbs, 4 Gray (Mass.) 146, holding that an attorney who has acted in a civil action cannot, on appointment by the court, perform the duties of prosecuting officer, in the absence of the district attorney, in a criminal case depending upon the same state of facts.

23. *Alabama.*— Cargile *v.* Ragan, 65 Ala. 287.

Arkansas.— Wassell *v.* Reardon, 11 Ark. 705, 54 Am. Dec. 245.

California.— Perkins *v.* West Coast Lumber Co., 129 Cal. 427, 62 Pac. 57; Matter of Jones, 118 Cal. 499, 50 Pac. 766, 62 Am. St. Rep. 251.

Illinois.— J. W. Butler Paper Co. *v.* J. L. Regan Printing Co., 35 Ill. App. 152.

Indiana.— Wallace *v.* Furber, 62 Ind. 103.

Kentucky.— Graves *v.* Long, 87 Ky. 441, 10 Ky. L. Rep. 414, 9 S. W. 297.

Michigan.— Webber *v.* Barry, 66 Mich. 127, 33 N. W. 289, 11 Am. St. Rep. 466.

New Hampshire.— Kelly *v.* McMinniman, 58 N. H. 288.

Texas.— Deering *v.* Hurt, (Tex. 1886) 2 S. W. 42.

United States.— Shaw *v.* Bill, 95 U. S. 10, 24 L. ed. 333.

See 5 Cent. Dig. tit. "Attorney and Client," § 27.

24. White *v.* Haffaker, 27 Ill. 349, 351 (holding that a complainant's solicitor could not properly act as a special master to execute the decree in the case in which he had acted as solicitor, and wherein the court said: "In all legal proceedings, and at every stage of a cause, courts scrupulously guard against entrusting the execution of its mandates, to persons having any interest in the cause. The law, for wise purposes, acts alone through disinterested agents. It will not tempt those having an interest in any way to abuse its process, for the purpose of promoting selfish ends. The relation of attorney and client is so intimate, and the duty of the attorney to protect the interest of his client is so rigid, that it can hardly be supposed that he would be willing, even if he were a disinterested person, to be entrusted with the enforcement of the legal rights of his clients. . . . Such a position, it seems to us, would never be sought, and it should not be imposed by the court"); Spinks *v.* Davis, 32 Miss. 152 (holding that a contract by which an attorney agreed to collect a claim against a decedent's estate, and for that purpose agreed to administer on the estate, was void as against public policy, since his duty as attorney and as administrator were incompatible with each other); Lawrence *v.* Lawrence, 4 Edw. (N. Y.) 357; Jones *v.* Boulware, 39 Tex. 367.

Where the duties are not incompatible with his duties as an attorney, he may act in both capacities.

Alabama.— Taylor *v.* Huntsville Branch Bank, 14 Ala. 633.

Indiana.— Union Mut. L. Ins. Co. *v.* Buchanan, 100 Ind. 63.

Iowa.— Smith *v.* Chicago, etc., R. Co., 60 Iowa 515, 15 N. W. 291.

Louisiana.— Fly *v.* Noble, 37 La. Ann. 667.

New Hampshire.— Hall *v.* Brackett, 60 N. H. 215.

Canada.— Romanes *v.* Fraser, 16 Grant Ch. (U. C.) 97, 17 Grant Ch. (U. C.) 267.

25. Beene *v.* State, 22 Ark. 149; State *v.* Root, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568; *Ex p.* Robinson, 19 Wall. (U. S.) 505, 22 L. ed. 205; *Ex p.* Bradley, 7 Wall. (U. S.) 364, 19 L. ed. 214.

26. *Colorado.*— Butler *v.* People, 2 Colo. 295.

Hawaii.— *In re* Campbell, 2 Hawaii 27.

Indiana.— Holman *v.* State, 105 Ind. 513, 5 N. E. 556.

this power of punishing for contempt is inherent in the courts, and is essential to the due administration of justice.[27]

b. For Costs — (I) *In General*[28] — (A) *On Indorsement of Writ.* An attorney has sometimes, by statute, been held liable for costs on the indorsement of the writ, where plaintiff was unable to pay or was a non-resident.[29]

(B) *Where Suit Brought For Non-Resident.* By statute, in some states, an attorney, where defendant succeeds, is liable for defendant's costs in a suit instituted by the attorney for a non-resident plaintiff.[30]

(II) *As Punishment.* Where an attorney has been guilty of unauthorized or negligent acts or of general professional misconduct, he is often held liable for costs by the court[31] as a punishment for such acts or misconduct.

Kansas.— Matter of Pryor, 18 Kan. 72, 26 Am. Rep. 747.

Kentucky.— *In re* Woolley, 11 Bush (Ky.) 95.

United States.— Sharon *v.* Hill, 24 Fed. 726; *Ex p.* Cole, 1 McCrary (U. S.) 405, 6 Fed. Cas. No. 2,973.

England.— Wilson's Case, 7 Q. B. 984, 53 E. C. L. 983.

Canada.— *Re* McIntyre, 2 Ont. Pr. 74; *Ex p.* Binet, 2 Rev. de Lég. 471.

27. Neel *v.* State, 9 Ark. 259, 50 Am. Dec. 209; Holman *v.* State, 105 Ind. 513, 5 N. E. 556; Little *v.* State, 90 Ind. 338, 46 Am. Rep. 224; *In re* Woolley, 11 Bush (Ky.) 95; *Ex p.* Robinson, 19 Wall. (U. S.) 505, 22 L. ed. 205. See, generally, CONTEMPT.

28. **In Canada** an attorney will not be ordered to pay costs due by his client to the opposite party unless such attorney has positively engaged so to do. Ross *v.* Calder, 3 U. C. Q. B. 180.

In Hawaii, under Hawaii Cir. Ct. Rules, No. 24*c*, attorneys are liable for costs of court incurred by their respective clients, but this does not include fees or disbursements. Waikulani *v.* Carter, 12 Hawaii 83; Kanahele *v.* Wakefield, 11 Hawaii 258.

29. Booker *v.* Stinchfield, 47 Me. 340; Skillings *v.* Boyd, 10 Me. 43; Strout *v.* Bradbury, 5 Me. 313; How *v.* Codman, 4 Me. 79 (in a note to which case the court said that the statute had abolished the common law, as to the indorsement of writs, to the effect that an agent who makes a contract in the name of his principal is not bound); Davis *v.* McArthur, 3 Me. 27; Morrill *v.* Lamson, 138 Mass. 115; Wheeler *v.* Lynde, 1 Allen (Mass.) 402; Seagrave *v.* Erickson, 11 Cush. (Mass.) 89; State *v.* Ackley, 8 Cush. (Mass.) 98; Chapman *v.* Phillips, 8 Pick. (Mass.) 25; Chadwick *v.* Upton, 3 Pick. (Mass.) 442; Talbot *v.* Whiting, 10 Mass. 359; Middlesex Turnpike Corp. *v.* Tufts, 8 Mass. 266; Woods *v.* Blodgett, 15 N. H. 569; Pettingill *v.* McGregor, 12 N. H. 179. See, generally, COSTS.

30. Court Officers *v.* Hines, 33 Ga. 516; Ross *v.* Harvey, 32 Ga. 388; Mackey *v.* Blake, 15 Ga. 402; Carmichael *v.* Pendleton, Dudley (Ga.) 173; Renwick *v.* New Cent. Coal Co., 55 N. Y. Super. Ct. 444, 14 N. Y. St. 758, 14 N. Y. Civ. Proc. 114; Matter of Levy, 2 N. Y. Civ. Proc. 108; Willmont *v.* Meserole, 48 How. Pr. (N. Y.) 430; Boyce *v.* Bates, 8 How. Pr. (N. Y.) 495; Cobb *v.* Robinson, 1 How. Pr. (N. Y.) 235; Gillespie *v.* Stanless, 1 How. Pr. (N. Y.) 101; Jones *v.* Savage, 10 Wend. (N. Y.) 621; Wright *v.* Black, 2 Wend. (N. Y.) 258; People *v.* Marsh, 3 Cow. (N. Y.) 334; Waring *v.* Barret, 2 Cow. (N. Y.) 460 (wherein the real plaintiff was a resident but the nominal plaintiff was a non-resident); Knowles *v.* Frawley, 84 Wis. 119, 54 N. W. 107. See also Moir *v.* Brown, 9 How. Pr. (N. Y.) 270; Alexander *v.* Carpenter, 3 Den. (N. Y.) 266; Pfister *v.* Gillespie, 2 Johns. Cas. (N. Y.) 109; Jackson *v.* Powell, 2 Johns. Cas. (N. Y.) 67; Balbi *v.* Duvet, 3 Edw. (N. Y.) 418.

31. *Hawaii.*— See Palaki *v.* Paakaula, 6 Hawaii 269.

Illinois.— Anonymous, 11 Ill. 488.

Indiana.— Brown *v.* Brown, 4 Ind. 627, 58 Am. Dec. 641; Loveland *v.* Jones, 4 Ind. 184.

Kentucky.— Respass *v.* Morton, Hard. (Ky.) 226.

New York.— Post *v.* Charlesworth, 66 Hun (N. Y.) 256, 21 N. Y. Suppl. 168, 49 N. Y. St. 476; Attleboro Nat. Bank *v.* Wendell, 64 Hun (N. Y.) 208, 19 N. Y. Suppl. 45, 67 N. Y. St. 140; McVey *v.* Cantrell, 8 Hun (N. Y.) 522; Jordan *v.* National Shoe, etc., Bank, 45 N. Y. Super. Ct. 423; Baur *v.* Betz, 7 N. Y. Civ. Proc. 233, 1 How. Pr. N. S. (N. Y.) 344; Schaughnessy *v.* Reilly, 41 How. Pr. (N. Y.) 382; People *v.* Bradt, 6 Johns. (N. Y.) 318; Den *v.* Fen, Col. & C. Cas. (N. Y.) 302; Cornell *v.* Allen, Col. & C. Cas. (N. Y.) 74; American Ins. Co. *v.* Oakley, 9 Paige (N. Y.) 496, 38 Am. Dec. 561; Cushman *v.* Brown, 6 Paige (N. Y.) 539; Powell *v.* Kane, 5 Paige (N. Y.) 265; Kane *v.* Van Vranken, 5 Paige (N. Y.) 62.

North Carolina.— *Ex p.* Robbins, 63 N. C. 309.

Ohio.— Falor *v.* Beery, 8 Ohio Dec. 306, 6 Ohio N. P. 290, 7 Ohio N. P. 645.

Tennessee.— Sharp *v.* Fields, 5 Lea (Tenn.) 326.

Virginia.— Howard *v.* Rawson, 2 Leigh (Va.) 733.

England.—Fricker *v.* Van Grutten, [1896] 2 Ch. 649, 65 L. J. Ch. 823, 75 L. T. Rep. N. S. 117, 45 Wkly. Rep. 53; Harbin *v.* Masterman, [1896] 1 Ch. 351, 65 L. J. Ch. 195, 73 L. T. Rep. N. S. 591, 44 Wkly. Rep. 421; Nurse *v.* Durnford, 13 Ch. D. 764, 49 L. J. Ch. 229, 41 L. T. Rep. N. S. 611, 28 Wkly. Rep. 145; Newbiggin-by-the-Sea Gas Co. *v.* Armstrong, 13 Ch. D. 310, 49 L. J. Ch. 231. *Compare In re* Armstrong, [1896] 1 Ch. 536, holding that where a solicitor, believing his client

(III) *How Enforced.* The liability of an attorney for costs may be enforced by an application for an order requiring the attorney to pay costs.[32]

c. To Third Persons — (I) *In Contract.* As an agent can always bind himself personally where such is his intention, an attorney who places a writ in the hands of an officer for service is regarded as personally requesting the service, and, the inference being that the attorney intends to be personally liable for such service, he is held liable in contract for the officer's fees, unless he expressly informs the officer that he will not be personally liable, or there are circumstances which make it clear that such was the understanding of the parties.[33] An attorney is not liable, however, in the absence of an express promise, for the fees of a referee,[34] of witnesses,[35] of stenographers,[36] or of other officers of the court.[37]

(II) *In Tort* — (A) *Prosecuting Claims.* Where an attorney acts in good

to be of sound mind, obtained an order for her on an *ex parte* application, without disclosing the fact that a petition in lunacy was pending against her, and she was subsequently found to be of unsound mind, he had not been guilty of such professional misconduct as to make him liable for the costs upon application to discharge the order.

Canada.—See Brigham *v.* Smith, 2 Ch. Chamb. (U. C.) 462; Leonard *v.* Glendennan, Draper (U. C.) 232; Gore Dist. Mut. F. Ins. Co. *v.* Webster, 10 L. J. 190; Scribner *v.* Parcells, 20 Ont. 554; Anonymous, 4 Ont. Pr. 242.

See 5 Cent. Dig. tit. "Attorney and Client," § 35.

Reason for the rule.— The rule is based on the power of a court to punish any of its officers, including attorneys, for a contempt, in a proper case; and the power to compel an attorney to pay costs, for negligence or professional misconduct, is not a distinct power, but only a branch of the general power to punish for contempt. *Ex p.* Robbins, 63 N. C. 309.

32. Matter of Levy, 10 Daly (N. Y.) 391, 2 N. Y. Civ. Proc. 108; Sigourney *v.* Waddle, 9 Paige (N. Y.) 381; Bogart *v.* Electrical Supply Co., 23 Blatchf. (U. S.) 552, 27 Fed. 722. See also Struffman *v.* Muller, 74 N. Y. 594; Bronson *v.* Freeman, 8 How. Pr. (N. Y.) 492; Anonymous, 2 Cow. (N. Y.) 589.

33. *Connecticut.*— Heath *v.* Bates, 49 Conn. 342, 44 Am. Rep. 234.

Maine.— Tilton *v.* Wright, 74 Me. 214, 43 Am. Rep. 578.

Massachusetts.— Tarbell *v.* Dickinson, 3 Cush. (Mass.) 345.

New Hampshire.— Towle *v.* Hatch, 43 N. H. 270.

New York.— Judson *v.* Gray, 11 N. Y. 408; Campbell *v.* Cothran, 65 Barb. (N. Y.) 534, 1 Thomps. & C. (N. Y.) 70 [*affirmed* in 56 N. Y. 279]; Birkheck *v.* Stafford, 14 Abb. Pr. (N. Y.) 285, 23 How. Pr. (N. Y.) 236; Jackson *v.* Anderson, 4 Wend. (N. Y.) 474; Ousterhout *v.* Day, 9 Johns. (N. Y.) 114; Adams *v.* Hopkins, 5 Johns. (N. Y.) 252.

England.— Foster *v.* Blakelock, 5 B. & C. 328, 8 D. & R. 48, 4 L. J. K. B. O. S. 170, 29 Rev. Rep. 258, 11 E. C. L. 483; Walbank *v.* Quarterman, 3 C. B. 94, 54 E. C. L. 94.

Canada.— Jarvis *v.* Washburn, Draper (U. C.) 163; Devlin *v.* Bibeau, 30 L. C. Jur. 101; Boston *v.* Taylor, 1 L. C. Jur. 60; Fraser *v.* Fellowes, 7 L. J. 131; Palmer *v.* Harding, 19 N. Brunsw. 281; Kavanagh *v.* McPhelon, 3 N. Brunsw. 472; Panneton *v.* Guillet, 7 Quebec 250. But see Theroux *v.* Pacaud, 6 Quebec 14; Gelinas *v.* Dumont, 10 Rev. Lég. 229, to the effect that, unless there is an agreement to that effect, or the attorney has received the money from his client, he is not personally liable to the bailiff for the latter's fees for services.

Contra, Doughty *v.* Paige, 48 Iowa 483; Preston *v.* Preston, 1 Dougl. (Mich.) 292; Wires *v.* Briggs, 5 Vt. 101, 26 Am. Dec. 284.

See 5 Cent. Dig. tit. "Attorney and Client," § 37.

Such liability, as regards a partnership of advocates, is joint, and not joint and several. Decelles *v.* Bazin, 19 Quebec Super. Ct. 399, 4 Quebec Pr. 92.

Poundage.—An attorney is not liable for poundage upon an execution (Corbet *v.* McKenzie, 6 U. C. Q. B. 605) unless he receives the amount from defendant (Caldwell *v.* Badger, 7 N. Brunsw. 516), though defendant has escaped from the limits and his bail has paid the debt and costs to attorney.

Remuneration of guardian.—An attorney is not liable to a bailiff for the remuneration of the guardian appointed by the latter. Plante *v.* Cazeau, 1 Quebec 203.

Sheriffs are recommended to take precise written engagements from attorneys when they mean to hold them liable in cases they have nothing to do with except professionally, though the court, where the attorney has verbally agreed to indemnify and the agreement is admitted, will enforce it. Corbett *v.* O'Reilly, 8 U. C. Q. B. 130.

34. Geib *v.* Topping, 83 N. Y. 46; Judson *v.* Gray, 11 N. Y. 408; Howell *v.* Kinney, 1 How. Pr. (N. Y.) 105. See also Curtis *v.* Engle, 4 Edw. (N. Y.) 117.

35. Sargeant *v.* Pettibone, 1 Aik. (Vt.) 355; Fendall *v.* Nokes, 2 Arn. 101, 3 Jur. 726, 7 Scott 647; Robins *v.* Bridge, 6 Dowl. P. C. 140, 7 L. J. Exch. 49, M. & H. 357, 3 M. & W. 114. See also Pessano *v.* Eyre, 13 Pa. Super. Ct. 157.

36. Bonynge *v.* Waterbury, 12 Hun (N. Y.) 534; Sheridan *v.* Genet, 12 Hun (N. Y.) 660; Bonynge *v.* Field, 44 N. Y. Super. Ct. 581 [*affirmed* in 81 N. Y. 159].

37. Lamoreux *v.* Morris, 4 How. Pr. (N. Y.) 245; Moore *v.* Porter, 13 Serg. & R. (Pa.) 100.

faith in prosecuting a claim which his client believes to be just, and is actuated only by motives of fidelity to his trust, he is not liable to the other party, even though the attorney himself may think the claim is not just or legal.[38] If, however, the attorney knowingly aids his client in maliciously prosecuting an unjust claim, or if the attorney is actuated by malice on his own part, he is liable for any injury suffered by the other party.[39]

(B) *Service of Process.* An attorney is not liable for a wrongful or illegal seizure by a sheriff where he simply acted in the performance of his duty as an attorney;[40] but, where he goes beyond that and actually participates in the trespass, he is liable, with the officer, to the party injured.[41]

4. ASSIGNMENT AS COUNSEL BY COURT. It has been held that an attorney cannot refuse to act, without compensation, for persons accused of crime and destitute of means upon appointment thereto by the court,[42] and, by statute, the

38. *Illinois.*— Burnap *v.* Marsh, 13 Ill. 535.
Louisiana.— Heffner *v.* Wise, 51 La. Ann. 1637, 26 So. 415.
Missouri.— Peck *v.* Chouteau, 91 Mo. 138, 3 S. W. 577, 60 Am. Rep. 236.
New Jersey.— Schalk *v.* Kingsley, 42 N. J. L. 32.
Ohio.— Meyers *v.* Seinsheimer, 5 Ohio N. P. 281.
South Carolina.— Wigg *v.* Simonton, 12 Rich. (S. C.) 583.
United States.— Campbell *v.* Brown, 2 Woods (U. S.) 349, 4 Fed. Cas. No. 2,355.
England.— Stockley *v.* Hornidge, 8 C. & P. 11, 34 E. C. L. 580; Sedley *v.* Sutherland, 3 Esp. 202.

"The public interest demands this. If attorneys cannot act and advise freely and without constant fear of being harassed by suits and actions at law, parties could not obtain their legal rights. If not free to advise and defend those who seek their aid, the laws are made in vain. Injustice and oppression would rule highhanded in the land. . . . It is as necessary to the public weal that they should be privileged from molestation by actions and suits in the courageous performance of their duty as it is that the representatives of the people in the legislature or the judges of the courts should be thus privileged." Campbell *v.* Brown, 2 Woods (U. S.) 349, 4 Fed. Cas. No. 2,355.

39. *Illinois.*— Burnap *v.* Marsh, 13 Ill. 535.
Kentucky.— Wood *v.* Weir, 5 B. Mon. (Ky.) 544.
Missouri.— Peck *v.* Chouteau, 91 Mo. 138, 3 S. W. 577, 60 Am. Rep. 236.
New York.— Sleight *v.* Leavenworth, 5 Duer (N. Y.) 122.
England.— Stockley *v.* Hornidge, 8 C. & P. 11, 34 E. C. L. 580, holding that if the attorneys who commenced the suit alleged to be malicious knew that there was no cause of action, and knowing this, "dishonestly and with some sinister view, for some purpose of their own, or for some other ill purpose which the law calls malicious, caused the plaintiff to be arrested and imprisoned," they were liable.

"If there is probable cause for the prosecution then the suit for malicious prosecution must fail, though malice be clearly shown; and it must follow that knowledge on his part by the attorney, that the client is actuated by malicious motives, is not sufficient to make the attorney liable." Peck *v.* Chouteau, 91 Mo. 138, 150, 3 S. W. 577, 60 Am. Rep. 236.

Conspiracy between attorney and client.— It has been held that, in order to maintain an action against the attorney, it is necessary to show a conspiracy between the attorney and client (Bicknell *v.* Dorion, 16 Pick. (Mass.) 478); but this view is criticized in Burnap *v.* Marsh, 13 Ill. 535, 539, where the court said: "Nor is it always necessary to show a conspiracy between the attorney and client."

40. *Alabama.*— Smith *v.* Gayle, 58 Ala. 600.
Georgia.— Hunt *v.* Printup, 28 Ga. 297.
Iowa.— Dawson *v.* Buford, 70 Iowa 127, 30 N. W. 35; Rice *v.* Melendy, 41 Iowa 395.
Minnesota.— Farmer *v.* Crosby, 43 Minn. 459, 45 N. W. 866.
New York.— Ford *v.* Williams, 13 N. Y. 577, 67 Am. Dec. 830; Baker *v.* Secor, 4 N. Y. Suppl. 303, 22 N. Y. St. 97.
Canada.— See Eadus *v.* Dougall, 14 U. C. C. P. 352.

41. *Illinois.*— Hardy *v.* Keeler, 56 Ill. 152; Arnold *v.* Phillips, 59 Ill. App. 213.
Michigan.— Cook *v.* Hopper, 23 Mich. 511.
Nebraska.— Peckinbaugh *v.* Quillin, 12 Nebr. 586, 12 N. W. 104.
New York.— Ford *v.* Williams, 24 N. Y. 359.
Texas.— Cunningham *v.* Coyle, 2 Tex. App. Civ. Cas. § 422.

An attorney is liable over to a sheriff who sustains damages by proceeding under what purports to be a writ of the court, but which is not, when the same is put into the sheriff's hands by such attorney. Johnston *v.* Winslow, 2 N. Brunsw. 53.

42. Rowe *v.* Yuba County, 17 Cal. 61. See also Com. *v.* Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491.

This power is not limited to the appointment of only one attorney. The actual necessity of the case alone regulates the judicial discretion of the court in making such appointment. Gordon *v.* Dearborn County, 52 Ind. 322.

Defendant must accept court's appointee.— Defendant, if he would be defended at the expense of the county, must accept the services of any reputable attorney whom the court, in its discretion, may see fit to appoint. Baker *v.* State, 86 Wis. 474, 56 N. W. 1088.

Prosecuting appeal.— The supreme court

court[43] has a right to command the services of counsel for persons unable to pay in civil as well as criminal cases.[44]

5. Partnership of Attorneys. A partnership of attorneys[45] is lawful and, as in the case of other partnerships, one partner may bind the other by acts done within the scope of the partnership business;[46] but, as such a partnership is not

has no authority to appoint or pay an attorney to prosecute an appeal for a defendant in a criminal case, but the attorney appointed by the court below has full authority to prosecute the appeal. Stout *v.* State, 90 Ind. 1.

43. The clerk of the court of appeals has no authority to appoint an attorney for appellees constructively summoned, but this must be done by the court. Arthurs *v.* Harlan, 78 Ky. 138.

44. House *v.* Whitis, 5 Baxt. (Tenn.) 690, 692, where the court said: "Where a lawyer takes his license he takes it burthened with these honorary obligations. He is a sworn minister of justice, and when commanded by the court cannot withhold his services in cases prosecuted *in forma pauperis*."

The court cannot appoint an attorney, in a divorce case, for an adult *compos mentis* party to the suit, against the consent of such party, and tax a fee for such attorney with the costs. Chandler *v.* Chandler, 13 Ind. 492. See also Gordon *v.* Green, 113 Mass. 259 (holding that the solicitor of a trustee bringing a bill in equity to obtain instructions cannot, under the twenty-seventh rule in chancery, be appointed to represent contingent interests under the bill); Harris *v.* Mutual L. Ins. Co., 13 N. Y. Suppl. 718, 37 N. Y. St. 599 (holding that the attorney who makes an application for leave for a non-resident to sue *in forma pauperis* should not be assigned as counsel unless in exceptional cases, and then only where it clearly appears that the party seeking to sue as a poor person knows that the counsel assigned is bound to act without compensation, and where the counsel certifies that he will so act, and that no charge or claim for counsel fees will be made).

45. A partnership between an attorney and one not admitted is illegal. Dunne *v.* O'Reilly, 11 U. C. C. P. 404.

46. *Arkansas.*— Smith *v.* Hill, 13 Ark. 173.

California.— Williams *v.* More, 63 Cal. 50.

Illinois.— Smith *v.* Brittenham, 109 Ill. 540.

Kentucky.— McGill *v.* McGill, 2 Metc. (Ky.) 258.

Mississippi.— Fitch *v.* Stamps, 6 How. (Miss.) 487.

New York.— Green *v.* Milbank, 3 Abb. N. Cas. (N. Y.) 138; Warner *v.* Griswold, 8 Wend. (N. Y.) 665.

Pennsylvania.— Livingston *v.* Cox, 6 Pa. St. 360.

United States.— Gordon *v.* Coolidge, 1 Sumn. (U. S.) 537, 10 Fed. Cas. No. 5,606.

Canada.— Doe *v.* Taylor, 8 N. Brunsw. 437. But the court considers it irregular for the name of more than one attorney of a firm to appear as attorney on the record. Gilmore *v.* Bull, 3 N. Brunsw. 94.

See 5 Cent. Dig. tit. "Attorney and Client," § 43.

Earnings ultra partnership.— Commissions received by a partner as executor do not belong to the firm under an agreement by which the parties undertook to give their "time, talents and strength to the prosecution of the interest of the firm," since acting as executor does not pertain to the practice of law. Metcalfe *v.* Bradshaw, 145 Ill. 124, 33 N. E. 1116, 36 Am. St. Rep. 478 [*affirming* 43 Ill. App. 286]. See also Starr *v.* Case, 59 Iowa 491, 13 N. W. 645.

Effect of dissolution on pending litigation.—A lawyer who voluntarily abandons a partnership and becomes a judge is not entitled to any fees earned by his former partner for services rendered after the dissolution in cases commenced either before or after the dissolution of the partnership, nor is he chargeable with any of the expenses of his partner, after the dissolution, in prosecuting cases commenced before the partnership was dissolved. Money afterward collected by him or paid to him by his former partner as his share of the fees earned after the dissolution of the partnership in cases commenced before the dissolution cannot be recovered by the partner in an action for an accounting. Isenhart *v.* Hazen, (Kan. 1901) 63 Pac. 451.

Effect of death on pending litigation.— The surviving partner of a law firm should not be required to assume solely the conduct of all pending litigations in the office at the time of his partner's decease and share the results of such subsequent labor with the estate, and equity will enforce a reasonable agreement made with the estate concerning such labor. Sterne *v.* Goep, 20 Hun (N. Y.) 396. See also Babbitt *v.* Riddell, 1 Grant (Pa.) 161, holding that, where two attorneys were employed for a certain sum to prosecute with success a certain suit, and, after part of the services had been performed, one of them died and the engagement was completed by the survivor, who received the compensation, the latter must pay to the representatives of the deceased such part of the compensation as was equivalent to the latter's portion of the work done.

It is not within the scope of the implied authority of a solicitor carrying on business in partnership to constitute himself a constructive trustee, and thereby to subject his partner to liability in that character, the partner being ignorant of the dealings by which the constructive trust is established. Mara *v.* Browne, [1896] 1 Ch. 199, 65 L. J. Ch. 225, 73 L. T. Rep. N. S. 638, 44 Wkly. Rep. 330. Neither will a promise to indemnify an officer for committing a person to jail, made by one attorney, bind his partner; but the partnership may warrant the inference that he acted for both, and a subsequent ratification by the partner binds him. Marsh *v.* Gold, 2 Pick. (Mass.) 285.

one in trade or commerce, one partner has no implied authority to become a party to a negotiable instrument and bind the firm thereby.[47]

D. Attorney's Clerks. During an attorney's absence his clerk represents him, as to all ordinary business of the office, so as to bind the attorney.[48]

III. RETAINER AND AUTHORITY.

A. Retainer — 1. Definition. "Retainer" may be defined as "the act of a client by which he engages an attorney to manage his cause," and also as "the retaining fee."[49]

2. Necessity of — a. In General. Every attorney regularly licensed and duly admitted to practice possesses a general license to appear in court for any suitors who may retain him; but his license is not, of itself, an authority to appear for any particular person[50] until he is, in fact, employed by, or retained for, him.[51]

b. Effect of Unauthorized Action[52] — (i) *For Defendant.* Where an attorney appears for a defendant who has been duly served with process there is a strong presumption that such attorney had authority, and, even if this inference is overcome, it is incumbent upon defendant to disavow the attorney's act at once,[53] for, if he neglects this duty, his carelessness will have contributed to mislead plaintiff, and he will not be in a position to ask relief at a later stage in the proceedings.[54] Where, however, there has been no formal service and the court acquires jurisdiction only through the unauthorized appearance of the attorney, defendant will be relieved from any injury he may suffer.[55]

A person is not a partner of an attorney whom he procures to prepare, file, and prove certain claims before a certain court for a percentage of the amount recovered, which claims the former has been employed to collect under a contract entitling him to a percentage of the amount collected. Grapel *v.* Hodges, 112 N. Y. 419, 20 N. E. 542, 21 N. Y. St. 845 [*affirming* 49 Hun (N. Y.) 107, 1 N. Y. Suppl. 823, 17 N. Y. St. 83].

47. *Florida.*— Friend *v.* Duryee, 17 Fla. 111, 35 Am. Rep. 89.

Kentucky.— Breckinridge *v.* Shrieve, 4 Dana (Ky.) 375.

Wisconsin.— Smith *v.* Sloan, 37 Wis. 285, 19 Am. Rep. 757.

England.— Hedley *v.* Bainbridge, 3 Q. B. 316, 2 G. & D. 483, 11 L. J. Q. B. 293, 43 E. C. L. 752.

Canada.— Wilson *v.* Brown, 6 Ont. App. 411. *Compare* Workman *v.* McKinstry, 21 U. C. Q. B. 623, where there was evidence of mutual authority.

48. Mahoney *v.* Middlesex County, 144 Mass. 459, 11 N. E. 689; Birkbeck *v.* Stafford, 14 Abb. Pr. (N. Y.) 285, 23 How. Pr. (N. Y.) 236; Jackson *v.* Yale, 1 Cow. (N. Y.) 215; Power *v.* Kent, 1 Cow. (N. Y.) 211; Cooper *v.* Carr, 8 Johns. (N. Y.) 360; Tremper *v.* Wright, 2 Cai. (N. Y.) 101; Rathbone *v.* Blackford, 1 Cai. (N. Y.) 343; Anonymous, 1 Cai. (N. Y.) 73. See also Shattuck *v.* Bill, 142 Mass. 56, 62, 7 N. E. 39, holding that a client is liable for the act of his attorney's clerk in making an illegal arrest on execution, and wherein the court said: "Details of a law business, especially such as that of the collection of claims, are often not attended to by the attorney, but entrusted to subordinates, whose acts in the conduct of a business are his, so far as civil responsibility therefor, either on his own part or that of his clients, is concerned." *Compare* Page *v.* San Francisco Super. Ct., 122 Cal. 209, 54 Pac. 730 (holding that a statute authorizing the service of a written notice on an attorney's clerk does not enable the clerk to bind the attorney by a waiver of the notice); Irvine *v.* Spring, 7 Rob. (N. Y.) 293 (holding that an attorney's clerk cannot discontinue an action without the consent of the attorney).

49. Bouvier L. Dict.

50. Cartwell *v.* Menifee, 2 Ark. 356; People *v.* Mariposa Co., 39 Cal. 683; Clark *v.* Willett, 35 Cal. 534; McAlexander *v.* Wright, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93.

51. Cartwell *v.* Menifee, 2 Ark. 356.

52. This section includes cases where the attorney assuming to act has not been employed by the client he professes to represent. Questions of the exact scope of authority under a general retainer are treated *infra*, III, C, 3.

53. See Appearances, 3 Cyc. 535, note 9.

Where objection is made in time, a plea (Bell *v.* Ursury, 4 Litt. (Ky.) 334) or a demurrer (Winterstien *v.* Walker, 10 Iowa 198) filed by a volunteer counsel may be withdrawn.

54. Ruckman *v.* Allwood, 40 Ill. 128; Mason *v.* Stewart, 6 La. Ann. 736; Norton *v.* Cooper, 3 Smale & G. 375.

55. Merritt *v.* Clow, 2 Tex. 582; Robb *v.* Vos, 155 U. S. 13, 15 S. Ct. 4, 39 L. ed. 52; Norton *v.* Cooper, 3 Smale & G. 375; Weir *v.* Hervey, 1 U. C. Q. B. 430. See, generally, Appearances, 3 Cyc. 531 *et seq.*

Attorney's liability to plaintiff.— It seems that an attorney who appears for defendant without authority is not liable to plaintiff in action for so doing, though he may be liable for the costs of suit on an application to the

(II) *For Plaintiff.* Where suits are brought by an attorney without authority from the plaintiff, the rule seems established that the bringing of suit does not bind the involuntary plaintiff.[56] The usual practice is to have the suit dismissed on motion as soon as the attorney's lack of authority is established.[57]

3. Formalities of — a. In General. An attorney may be employed without formalities of any kind.[58] The contract may be made by parol,[59] and is oftentimes largely implied from the acts of the parties.[60]

b. Payment of Fees. Neither is the relation dependent upon the payment of fees. It may exist between two parties, though a third person pays for the

court in the original suit. Fisher *v.* Holden, 17 U. C. C. P. 395.

56. Atkinson *v.* Howlett, 11 Ky. L. Rep. 364; Hurste *v.* Hotaling, 20 Nebr. 178, 29 N. W. 299; Robson *v.* Eaton, 1 T. R. 62.

57. Frye *v.* Calhoun County, 14 Ill. 132; McDowell *v.* Gregory, 14 Nebr. 33, 14 N. W. 899; Lindheim *v.* Manhattan R. Co., 68 Hun (N. Y.) 122, 22 N. Y. Suppl. 685, 52 N. Y. St. 34; Hudson River West Shore R. Co. *v.* Kay, 14 Abb. Pr. N. S. (N. Y.) 191; Glass *v.* Smith, 66 Tex. 548, 2 S. W. 195. See also Meyers *v.* Lake, 1 Grant Ch. (U. C.) 305; Dewolf *v.* Albert Min. Co., 15 N. Brunsw. 260; James *v.* McLean, 8 N. Brunsw. 164; Shaw *v.* Ormiston, 2 Ont. Pr. 152; Smith *v.* Turnbull, 1 Ont. Pr. 88; Henderson *v.* McMahon, 12 U. C. Q. B. 288.

58. The only requisites are a desire on the client's part to have a particular attorney act for him, and willingness on the attorney's part to do so. Smith *v.* Black, 51 Md. 247.

In case of a corporation the appointment of a solicitor need not be under the corporate seal (Clarke *v.* Union F. Ins. Co., 10 Ont. Pr. 339. See also Faviell *v.* Eastern Counties R. Co., 6 Dowl. & L. 54, 2 Exch. 344, 17 L. J. Exch. 223, 297), and an advocate may appear as attorney without being thereto specially authorized by resolution (Nadeau *v.* Commissaires d'École de St-Frédéric, 6 Quebec Super. Ct. 66. But see Barrie Public School Board *v.* Barrie, 19 Ont. Pr. 33).

Question of fact for jury.—Where, on a trial, the question of the attorney's authority to appear becomes a material and contested question of fact, it should be submitted, under proper instructions, to the consideration and decision of the jury. Stillwell *v.* Badgett, 22 Ark. 164; Howard *v.* Smith, 33 N. Y. Super. Ct. 124, 42 How. Pr. (N. Y.) 300; Alspaugh *v.* Jones, 64 N. C. 29; Henderson *v.* Terry, 62 Tex. 281.

59. See *infra*, III, B, 6, c.

60. Hallam *v.* Bardsley, 7 Ky. L. Rep. 516; Toplitz *v.* Meyer, 34 Misc. (N. Y.) 786, 69 N. Y. Supp. 849; Swartz *v.* Morgan, 163 Pa. St. 195, 29 Atl. 974, 975, 43 Am. St. Rep. 786; Fore *v.* Chandler, 24 Tex. 146.

Circumstances sufficient to show employment were held to exist in the following cases:

Alabama.— Christian, etc., Grocery Co. *v.* Coleman, 125 Ala. 158, 27 So. 786.

Georgia.—Hood *v.* Ware, 34 Ga. 328 (adoption of papers prepared by an attorney, and his recognition as counsel by the counsel of the adverse party); Dalton City Co. *v.* Dalton Mfg. Co., 33 Ga. 243.

Illinois.— Famous Mfg. Co. *v.* Wilcox, 180 Ill. 246, 54 N. E. 211; Strean *v.* Lloyd, 128 Ill. 493, 21 N. E. 533; Neff *v.* Smyth, 111 Ill. 100; Burnham *v.* Roberts, 70 Ill. 19 (preparing a bill in chancery, and signing complainant's name and then the name of the attorney's firm); Swift *v.* Lee, 65 Ill. 336.

Indiana.— Coffin *v.* Anderson, 4 Blackf. (Ind.) 395.

Iowa.— Wheeler *v.* Cox, 56 Iowa 36, 8 N. W. 688.

Kansas.— Clark *v.* Lilliebridge, 45 Kan. 567, 26 Pac. 43.

Kentucky.— Pittsburgh, etc., R. Co. *v.* Woolley, 12 Bush (Ky.) 451; Mendel *v.* Kinnimouth, 13 Ky. L. Rep. 139.

Maryland.—African Methodist Bethel Church *v.* Carmack, 2 Md. Ch. 143.

Massachusetts.— Perry *v.* Lord, 111 Mass. 504; Field *v.* Proprietors Nantucket, etc., Land, 1 Cush. (Mass.) 11.

Minnesota.—Holden *v.* Greve, 41 Minn. 173, 42 N. W. 861; Eickman *v.* Troll, 29 Minn. 124, 12 N. W. 347 (a letter to the attorney).

Mississippi.— Grayson *v.* Wilkinson, 5 Sm. & M. (Miss.) 268.

Missouri.— Eoff *v.* Irvine, 108 Mo. 378, 18 S. W. 907, 32 Am. St. Rep. 609.

Nebraska.— White *v.* Merriam, 16 Nebr. 96, 19 N. W. 703.

Nevada.— Marye *v.* Martin, 9 Nev. 28.

New Hampshire.— Goodall *v.* Bedel, 20 N. H. 205, retention of necessary papers and entering upon the defense in the presence of the party for whom he appears.

North Carolina.— Arrington *v.* Arrington, 102 N. C. 491, 9 S. E. 200.

South Carolina.— Sullivan *v.* Susong, 40 S. C. 154, 18 S. E. 268.

United States.—*In re* Gasser, 104 Fed. 537, 44 C. C. A. 20; Orr *v.* Brown, 69 Fed. 216, 30 U. S. App. 405, 16 C. C. A. 197.

Circumstances insufficient to show employment were held to exist in Hersleb *v.* Moss, 28 Ind. 354; Cooley *v.* Cecile, 8 La. Ann. 51; Bradley *v.* Welch, 100 Mo. 258, 12 S. W. 911; Foster *v.* Bookwalter, 152 N. Y. 166, 46 N. E. 299; Stout *v.* Smith, 98 N. Y. 25, 50 Am. Rep. 632; Wilmerdings *v.* Fowler, 55 N. Y. 641, 15 Abb. Pr. N. S. (N. Y.) 86; Lindheim *v.* Manhattan R. Co., 68 Hun (N. Y.) 122, 22 N. Y. Suppl. 685, 52 N. Y. St. 34; Burghart *v.* Gardner, 3 Barb. (N. Y.) 64; Norwood *v.* Barcalow, 6 Daly (N. Y.) 117; Hotchkiss *v.* Le Roy, 9 Johns. (N. Y.) 142.

attorney's services,[61] or though such services were rendered by the attorney gratuitously.[62]

c. Subject-Matter of Employment. In order, however, that the relation shall be a professional one and not merely one of principal and agent, the attorney must be employed either to give advice upon a legal point or to prosecute or defend an action in a court of justice.[63]

B. Proof of Authority — 1. In General. Although it is necessary that an attorney be specially authorized to act for a client,[64] his position as an officer of the court makes it unnecessary for him, in the ordinary case,[65] to show his authority in any way, there being a firmly established presumption in favor of an attorney's authority to act for any client he professes to represent.[66] It follows, there-

61. Arnold *v.* Robertson, 3 Daly (N. Y.) 298.

Joint defendants and employment through third persons.—An attorney has no right to act for a person who is not his client, even though there may be a community of interest (Hobbs *v.* Duff, 43 Cal. 485; Bowen *v.* Wood, 35 Ind. 268; Jacobs *v.* Copeland, 54 Me. 503; Stout Coal Co. *v.* O'Donnell, 4 Kulp (Pa.) 495; Yoakley *v.* Hawley, 5 Lea (Tenn.) 670; Silverman *v.* Greaser, 27 W. Va. 550); but, where there are several joint defendants and an attorney appears in the case, he is, usually, supposed to act for all (Odd Fellows Sav. Bank *v.* Brander, 124 Cal. 255, 56 Pac. 1109; Oltrogge *v.* Schutte, 51 Iowa 279, 1 N. W. 544; Phelps *v.* Brewer, 9 Cush. (Mass.) 390, 57 Am. Dec. 56; Adams *v.* Mowry, 6 Mo. App. 582), except when one of the joint defendants has not been served with process (Miller *v.* Alexander, 8 Tex. 36; Whitney *v.* Silver, 22 Vt. 634). While it is true that if one as agent for another and with authority employs an attorney for him, the relation is between the attorney and the principal (Porter *v.* Peckham, 44 Cal. 204), yet it is settled that when a claim is placed in the hands of an attorney by a commercial agency, the attorney is agent of the commercial agency and not of the owner of the claim (Milligan *v.* Alabama Fertilizer Co., 89 Ala. 322, 7 So. 650; Hoover *v.* Greenbaum, 61 N. Y. 305; Bradstreet *v.* Emerson, 72 Pa. St. 124, 13 Am. Rep. 665; Hoover *v.* Wise, 91 U. S. 308, 23 L. ed. 392. See also Matter of Redmond, 54 N. Y. App. Div. 454, 66 N. Y. Suppl. 782).

62. Packard *v.* Delfel, 9 Wash. 562, 38 Pac. 208.

63. Perkins *v.* West Coast Lumber Co., 129 Cal. 427, 62 Pac. 57; Ryan *v.* Long, 35 Minn. 394, 29 N. W. 51; McCreary *v.* Hoopes, 25 Miss. 428.

To employ an attorney merely as a scrivener does not create the relation. De Wolf *v.* Strader, 26 Ill. 225, 79 Am. Dec. 371.

64. See *supra*, III, A, 2, a.

65. A member of a firm who joins after the institution of an action must show that he is authorized to act therein. If he does not do so the subsequent proceedings must be signed by the remaining members of the firm alone. Landry *v.* Pacaud, 19 Quebec Super. Ct. 171.

A power of attorney may be demanded from one of several joint and several creditors, not constituting a single ideal person, who is absent (Laframboise *v.* D'Amour, 28 L. C. Jur. 290), and where two attorneys *ad litem* have appeared in the same case and for the same defendant, the court will not hear the case until it is decided which attorney represents defendant (Giguère *v.* Beauparlant, 4 Rev. Lég. 686).

66. *Arizona.*— Clark *v.* Morrison, (Ariz. 1898) 52 Pac. 985.

Arkansas.— State *v.* Baxter, 38 Ark. 462; Wyatt *v.* Burr, 25 Ark. 476.

California.— San Francisco Sav. Union *v.* Long, 123 Cal. 107, 55 Pac. 708 [*reversing* (Cal. 1898) 53 Pac. 907]; Hunter *v.* Bryant, 98 Cal. 247, 33 Pac. 51; San Luis Obispo County *v.* Hendricks, 71 Cal. 242, 11 Pac. 682; Turner *v.* Caruthers, 17 Cal. 431.

Georgia.— Hirsch *v.* Fleming, 77 Ga. 594, 3 S. E. 9; Alexander *v.* State, 56 Ga. 478.

Hawaii.— Spencer *v.* Bailey, 1 Hawaii 205.

Illinois.— Ferris *v.* Commercial Nat. Bank, 158 Ill. 237, 41 N. E. 1118 [*affirming* 55 Ill. App. 218]; People *v.* Barnett Tp., 100 Ill. 332; School Directors *v.* School Trustees, 66 Ill. 247; Leslie *v.* Fischer, 62 Ill. 118; Williams *v.* Butler, 35 Ill. 544; Reed *v.* Curry, 35 Ill. 536; Ransom *v.* Jones, 2 Ill. 291.

Iowa.— Wheeler *v.* Cox, 56 Iowa 36, 8 N. W. 688; State *v.* Carothers, 1 Greene (Iowa) 464.

Kansas.—Kerr *v.* Reece, 27 Kan. 469; Esley *v.* People, 23 Kan. 510; Hendrix *v.* Fuller, 7 Kan. 331. See also O'Neill *v.* Douthitt, 39 Kan. 316, 18 Pac. 199, holding that releases executed by an attorney at law are *prima facie* valid, Kan. Comp. Laws (1885), c. 68, §§ 5, 6, providing that a mortgage may be released by the mortgagee or his attorney.

Kentucky.— Noble *v.* State Bank, 3 A. K. Marsh. (Ky.) 262; Louisville, etc., R. Co. *v.* Newsome, 13 Ky. L. Rep. 174.

Louisiana.— New Orleans *v.* Steinhardt, 52 La. Ann. 1043, 27 So. 586; Postal Telegraphic Cable Co. *v.* Louisville, etc., R. Co., 43 La. Ann. 522, 9 So. 119; Barnes *v.* Profilet, 5 La. Ann. 117; Kelly *v.* Benedict, 5 Rob. (La.) 138, 39 Am. Dec. 530; Bonnefoy *v.* Landry, 4 Rob. (La.) 23; Hempkin *v.* Bowmar, 16 La. 363; Tipton *v.* Mayfield, 10 La. 189; Etie *v.* Cade, 4 La. 383; Dangerfield *v.* Thruston, 8 Mart. N. S. (La.) 232. See also Wood *v.* Wood, 32 La. Ann. 801; Payne *v.* Ferguson, 23 La. Ann. 581.

Maryland.— Kelso *v.* Stigar, 75 Md. 376, 24 Atl. 18; Dorsey *v.* Kyle, 30 Md. 512, 96 Am. Dec. 617 note; Henck *v.* Todhunter, 7

fore, that he will not be required to show his authority unless it is properly[67] called for.[68]

2. Who May Demand — a. Court — (i) *Generally.* In spite of this favoring presumption, however, there is a well-recognized discretion in the court to call for proof of an attorney's authority when it sees fit.[69]

Harr. & J. (Md.) 275, 16 Am. Dec. 300; Kent *v.* Ricards, 3 Md. Ch. 392; African Methodist Bethel Church *v.* Carmack, 2 Md. Ch. 143. See also McCauley *v.* State, 21 Md. 556.

Massachusetts.—Steffe *v.* Old Colony R. Co., 156 Mass. 262, 30 N. E. 1137.

Michigan.—Corbitt *v.* Timmerman, 95 Mich. 581, 55 N. W. 437, 35 Am. St. Rep. 586; Norberg *v.* Heineman, 59 Mich. 210, 26 N. W. 481; Wilcox *v.* Kassick, 2 Mich. 165.

Minnesota.—Gemmell *v.* Rice, 13 Minn. 400.

Mississippi.— Schirling *v.* Scites, 41 Miss. 644.

Missouri.— State *v.* Crumb, 157 Mo. 545, 57 S. W. 1030, an action brought by a school board under Mo. Rev. Stat. (1889), § 8040.

Nebraska.—Orient Ins. Co. *v.* Hayes, (Nebr. 1901) 85 N. W. 57; Vorce *v.* Page, 28 Nebr. 294, 44 N. W. 452; White *v.* Merriam, 16 Nebr. 96, 19 N. W. 703 (wherein the authority of an attorney to receive service of a notice was presumed from an appearance to correct the record).

Nevada.— State *v.* California Min. Co., 13 Nev. 203.

New Hampshire.— Beckley *v.* Newcomb, 24 N. H. 359.

New Jersey.—Norris *v.* Douglass, 5 N. J. L. 960; Dey *v.* Hathaway Printing Tel., etc., Co., 41 N. J. Eq. 419, 4 Atl. 675; Easton, etc., R. Co. *v.* Greenwich Tp., 25 N. J. Eq. 565; Gifford *v.* Thorn, 9 N. J. Eq. 702.

New York.— Howard *v.* Smith, 33 N. Y. Super. Ct. 124, 42 How. Pr. (N. Y.) 300; Bogardus *v.* Livingston, 2 Hilt. (N. Y.) 236; American Ins. Co. *v.* Oakley, 9 Paige (N. Y.) 496, 38 Am. Dec. 561; Bank Com'rs *v.* Buffalo Bank, 6 Paige (N. Y.) 497.

Pennsylvania.—Miller *v.* Preston, 154 Pa. St. 63, 25 Atl. 1041; Betz *v.* Valer, 15 Phila. (Pa.) 324, 39 Leg. Int. (Pa.) 190.

South Carolina.— Sanders *v.* Price, 56 S. C. 1, 33 S. E. 731.

South Dakota.— Noyes *v.* Belding, 5 S. D. 603, 59 N. W. 1069.

Texas.—Fowler *v.* Morrill, 8 Tex. 153; Merritt *v.* Clow, 2 Tex. 582. See also Holloman *v.* Middleton, 23 Tex. 537.

Virginia.—Fisher *v.* March, 26 Gratt. (Va.) 765.

West Virginia.— Low *v.* Settle, 22 W. Va. 387.

Wisconsin.— Andrews *v.* Thayer, 30 Wis. 228; Shroudenbeck *v.* Phœnix F. Ins. Co., 15 Wis. 632.

Canada.— Wilson *v.* Street, 8 N. Brunsw. 251; Brossard *v.* Chartrand, 8 Quebec Super. Ct. 518.

See, generally, Appearances, 3 Cyc. 531, note 86.

See 5 Cent. Dig. tit. "Attorney and Client," § 95.

Possession of documents by the attorney raises a strong presumption of his authority. Harris *v.* Galbraith, 43 Ill. 309; Reed *v.* Curry, 35 Ill. 536; Moss *v.* Moss, 9 L. C. Jur. 328; Wilson *v.* Kenwood, 13 Quebec Super. Ct. 390. See also Dupuis *v.* Archambault, 7 Quebec Q. B. 393.

67. A mere request to show authority is not sufficient, for attorneys are not bound to gratify the opposite party with a sight of their authority on slight or frivolous grounds. Tally *v.* Reynolds, 1 Ark. 99, 31 Am. Dec. 737; Danville, etc., R. Co. *v.* Rhodes, 180 Pa. St. 157, 40 Wkly. Notes Cas. (Pa.) 5, 36 Atl. 648; Hellman *v.* McWhennie, 3 Rich. (S. C.) 364. See also Duvernay *v.* St. Barthelemy, 1 Rev. Lég. 714.

68. State *v.* Carothers, 1 Greene (Iowa) 464; Howe *v.* Anderson, (Ky. 1890) 14 S. W. 216; Silkman *v.* Boiger, 4 E. D. Smith (N. Y.) 236; Chapman *v.* Chevis, 9 Leigh (Va.) 297.

Where the party is a corporation this is equally true. Proprietors, etc., of Addison *v.* Bishop, 2 Vt. 231; Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204.

69. *Arkansas.*— Cartwell *v.* Menifee, 2 Ark. 356.

California.— San Francisco Sav. Union *v.* Long, 123 Cal. 107, 55 Pac. 708 [*reversing* (Cal. 1898) 53 Pac. 907].

Colorado.— Great West Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; Colorado Coal, etc., Co. *v.* Carpita, 6 Colo. App. 248, 40 Pac. 248.

Delaware.— State *v.* Houston, 3 Harr. (Del.) 15.

Kentucky.— Belt *v.* Wilson, 6 J. J. Marsh. (Ky.) 495, 22 Am. Dec. 88; McAlexander *v.* Wright, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93.

Louisiana.— Roselius *v.* Delachaise, 5 La. Ann. 481, 52 Am. Dec. 597.

Maine.— Prentiss *v.* Kelley, 41 Me. 436.

Mississippi.—McKiernan *v.* Patrick, 4 How. (Miss.) 333.

New York.— Hollins *v.* St. Louis, etc., R. Co., 57 Hun (N. Y.) 139, 11 N. Y. Suppl. 27, 32 N. Y. St. 230, 25 Abb. N. Cas. (N. Y.) 93; New York *v.* Purdy, 36 Barb. (N. Y.) 266, 13 Abb. Pr. (N. Y.) 434, 22 How. Pr. (N. Y.) 506; Ninety-Nine Plaintiffs *v.* Vanderbilt, 4 Duer (N. Y.) 632, 1 Abb. Pr. (N. Y.) 193, 10 How. Pr. (N. Y.) 324; Hirshfield *v.* Landman, 3 E. D. Smith (N. Y.) 208. See also Wilcox *v.* Clement, 4 Den. (N. Y.) 160, and *compare* People *v.* Murray, 2 Misc. (N. Y.) 152, 23 N. Y. Suppl. 160, 50 N. Y. St. 535, 23 N. Y. Civ. Proc. 71.

South Carolina.— Allen *v.* Green, 1 Bailey (S. C.) 448.

Tennessee.—*Ex p.* Gillespie, 3 Yerg. (Tenn.) 324.

(II) *Compelling Disclosure of Client's Address.* As an accessory power, the court has a right to compel an attorney to disclose the name and residence of his alleged client.[70]

b. Parties. Moreover, either party to a suit may question an attorney's right to represent his alleged client;[71] but a stranger to the record cannot make such an objection.[72]

3. Time to Demand. The authority of an attorney to represent his alleged client cannot be questioned at the trial,[73] and such an objection should, it seems, be taken at the first term.[74] The application for plaintiff's[75] attorney to show authority should be made before a plea is filed.[76]

4. Court in Which to Demand. The court where the wrongful appearance was entered or the unauthorized suit brought is the proper tribunal to pass upon the question of authority,[77] which is ordinarily a question to be decided by the judges.[78]

5. Manner of Demanding — a. In General. The question of an attorney's authority to represent an alleged client cannot, it is held, be raised collaterally,[79]

United States.— King of Spain *v.* Oliver, 2 Wash. C. C. (U. S.) 429, 14 Fed. Cas. No. 7,814; Standefer *v.* Dowlin, Hempst. (U. S.) 209, 22 Fed. Cas. No. 13,284*a*. *Compare* Eriko *v.* Bomford, 1 Hayw. & H. (U. S.) 261, 8 Fed. Cas. No. 4,517.

Where an attorney advocated inconsistent interests, this power would be exercised. Talliaferro *v.* Porter, Wright (Ohio) 610.

70. Brown *v.* Payson, 6 N. H. 443; Corbett *v.* Gibson, 18 Hun (N. Y.) 49; Corbett *v.* De Corneau, 45 N. Y. Super. Ct. 637, 5 Abb. N. Cas. (N. Y.) 169; Ninety-Nine Plaintiffs *v.* Vanderbilt, 4 Duer (N. Y.) 632, 1 Abb. Pr. (N. Y.) 193, 10 How. Pr. (N. Y.) 324; Post *v.* Schneider, 13 N. Y. Suppl. 396, 36 N. Y. St. 324; Walton *v.* Fairchild, 4 N. Y. Suppl. 552, 24 N. Y. St. 314. But see Havana City R. Co. *v.* Ceballos, 25 Misc. (N. Y.) 660, 56 N. Y. Suppl. 360 (holding that the power of a foreign corporation to authorize suit could not be considered); Ransom *v.* Montreal, 1 L. C. L. J. 94 (holding that an attorney may be called on to declare the residence of his client, but cannot be compelled to answer, though it would be no breach of professional etiquette for him to do so).

71. *California.*— People *v.* Mariposa Co., 39 Cal. 683.

Hawaii.— Spencer *v.* Bailey, 1 Hawaii 205; Gregory *v.* Hanna, 1 Hawaii 118.

Kentucky.—McAlexander *v.* Wright, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93.

New Jersey.— Hess *v.* Cole, 23 N. J. L. 116.

New York.— Stewart *v.* Stewart, 56 How. Pr. (N. Y.) 256.

Canada.— Robe *v.* Reid, 1 C. L. Chamb. (U. C.) 98; Shaw *v.* Ormiston, 2 Ont. Pr. 152; Smith *v.* Turnbull, 1 Ont. Pr. 88. But see Chisholm *v.* Sheldon, 1 Grant Ch. (U. C.) 294, holding that a defendant in equity has no right to call upon plaintiff's solicitor to produce his authority for using a plaintiff's name, and particularly where no improper conduct in using such name is positively alleged and verified.

72. Pond *v.* Lockwood, 8 Ala. 669; Hirsch *v.* Fleming, 77 Ga. 594, 31 S. E. 9; Bryans *v.* Taylor, Wright (Ohio) 245.

73. *Indiana.*— Indiana, etc., R. Co. *v.* Maddy, 103 Ind. 200, 2 N. E. 574.

Kentucky.— Louisville, etc., R. Co. *v.* Newsome, 13 Ky. L. Rep. 174.

Maine.— Upham *v.* Bradley, 17 Me. 423.

Michigan.— Norberg *v.* Heineman, 59 Mich. 210, 26 N. W. 481.

New Hampshire.— Manchester Bank *v.* Fellows, 28 N. H. 302.

New York.—People *v.* Lamb, 85 Hun (N. Y.) 171, 32 N. Y. Suppl. 584, 65 N. Y. St. 839.

North Carolina.— Rowland *v.* Gardner, 69 N. C. 53.

Vermont.— Spaulding *v.* Swift, 18 Vt. 214.

See 5 Cent. Dig. tit. "Attorney and Client," § 99.

74. Knowlton *v.* Plantation No. 4, 14 Me. 20; Low *v.* Settle, 22 W. Va. 387; Rogers *v.* Crommelin, 1 Cranch C. C. (U. S.) 536, 20 Fed. Cas. No. 12,009. See also Mix *v.* People, 116 Ill. 265, 4 N. E. 783 (holding that delay of two years was fatal); Noble *v.* State Bank, 3 A. K. Marsh. (Ky.) 262 (holding that question cannot be raised for the first time in the court of appeals); Mason *v.* Stewart, 6 La. Ann. 736 (several years' delay held fatal); O'Flynn *v.* Eagle, 7 Mich. 306 (holding delay from May till October was fatal).

75. Defendant's attorney may be required to show his authority even after he has filed a plea at plaintiff's demand. Blood *v.* Westbrook, 50 Mich. 443, 15 N. W. 544.

76. Reece *v.* Reece, 66 N. C. 377; Campbell *v.* Galbreath, 5 Watts (Pa.) 423; Mercier *v.* Mercier, 2 Dall. (Pa.) 142, 1 L. ed. 324; Sheetz *v.* Whitaker, 7 Wkly. Notes Cas. (Pa.) 570.

Pleading the general issue seems to be a waiver of all objections to authority. Lucas *v.* Georgia Bank, 2 Stew. (Ala.) 147.

77. Krause *v.* Hampton, 11 Iowa 457; Clark *v.* Holliday, 9 Mo. 711.

78. Savery *v.* Savery, 3 Iowa 271; Newhart *v.* Wolfe, 2 Pennyp. (Pa.) 295.

79. *Indiana.*— Pressley *v.* Lamb, 105 Ind. 171, 4 N. E. 682; Bush *v.* Bush, 46 Ind. 70.

Louisiana.— Patrick's Succession, 20 La. Ann. 204.

Michigan.—Corbitt *v.* Timmerman, 95 Mich. 581, 55 N. W. 437, 35 Am. St. Rep. 586.

or on a demurrer,[80] nor should it be set up in a pleading;[81] but must be raised on motion directly for that purpose, and supported by affidavits.[82]

b. Affidavits. The affidavits should state facts showing why the motion ought to be granted, and it is not enough to allege generally, on belief and information, that the attorney acts without authority.[83] Affidavits by the party whom the attorney professes to represent are naturally entitled to much more weight.[84]

c. Notice. There should be notice of the motion, and an *ex parte* request for a rule for an attorney to show his authority has been held bad.[85]

d. Order or Rule. An order or rule on an attorney to produce his authority should be specific.[86]

6. Evidence — a. In General. The proof of an attorney's authority to represent a party to a litigation must be by good legal evidence,[87] and the attorney himself is a competent witness.[88]

b. Burden of Proof. The burden of proof is on the side denying the attor-

Nevada.— Deegan *v.* Deegan, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742.

New York.— *Compare* Donohue *v.* Hungerford, 1 N. Y. App. Div. 528, 37 N. Y. Suppl. 628, 73 N. Y. St. 78; Ferguson *v.* Crawford, 70 N. Y. 253, 26 Am. Rep. 589.

South Carolina.— Dillard *v.* Crocker, Speers Eq. (S. C.) 20.

But see Shelton *v.* Tiffin, 6 How. (U. S.) 163, 12 L. ed. 387.

80. State *v.* Baxter, 38 Ark. 462; Gibson *v.* State, 59 Miss. 341.

81. Robinson *v.* Robinson, 32 Mo. App. 88; North Brunswick Tp. *v.* Booraem, 10 N. J. L. 257.

In Kentucky a defendant may dispute his attorney's right to appear by a bill in equity. Courtney *v.* Dyer, 1 Ky. L. Rep. 134.

82. *Arkansas.*— Cartwell *v.* Menifee, 2 Ark. 356.

California.— Turner *v.* Caruthers, 17 Cal. 431.

Colorado.— Dillon *v.* Rand, 15 Colo. 372, 25 Pac. 185.

Georgia.— Lester *v.* McIntosh, 101 Ga. 675, 29 S. E. 7.

Illinois.—Williams *v.* Butler, 35 Ill. 544.

Indiana.— Hughes *v.* Osborn, 42 Ind. 450.

Iowa.— State *v.* Beardsley, 108 Iowa 396, 79 N. W. 138; Savery *v.* Savery, 8 Iowa 217.

Kentucky.— Howe *v.* Anderson, (Ky. 1890) 14 S. W. 216.

Louisiana.— Fisher *v.* Moore, 12 Rob. (La.) 95; Johnson *v.* Brandt, 10 Mart. (La.) 638; Hayes *v.* Cuny, 9 Mart. (La.) 87.

New York.— People *v.* Lamb, 85 Hun (N. Y.) 171, 32 N. Y. Suppl. 584, 65 N. Y. St. 839. See also Watrous *v.* Kearney, 79 N. Y. 496.

Texas.— Bridges *v.* Samuelson, 73 Tex. 522, 11 S. W. 539. Tex. Rev. Stat. art. 237, requires motions for this purpose to be in writing and under oath.

United States.— Bonnifield *v.* Thorp, 71 Fed. 924.

83. *California.*— People *v.* Mariposa Co., 39 Cal. 683.

Kentucky.— Louisville, etc., R. Co. *v.* Newsome, 13 Ky. L. Rep. 174.

Missouri.— Valle *v.* Picton, 91 Mo. 207, 3 S. W. 860 [*reversing* 16 Mo. App. 178, on other grounds]; Robinson *v.* Robinson, 32 Mo. App. 88.

Wisconsin.— Wright *v.* Allen, 26 Wis. 661.

United States.— Bonnifield *v.* Thorp, 71 Fed. 924; Standefer *v.* Dowlin, Hempst. (U. S.) 209, 22 Fed. Cas. No. 13,284*a*.

Contra, New York *v.* Purdy, 36 Barb. (N. Y.) 266, 13 Abb. Pr. (N. Y.) 434, 22 How. Pr. (N. Y.) 506, where, however, the affidavits were not denied.

Affidavits deemed sufficient in McAlexander *v.* Wright, 3 T. B. Mon. (Ky.) 189, 16 Am. Dec. 93.

Affidavits deemed insufficient in the following cases:

Illinois.— Famous Mfg. Co. *v.* Wilcox, 180 Ill. 246, 54 N. E. 211.

Iowa.— Savery *v.* Savery, 8 Iowa 217.

Michigan.— O'Flynn *v.* Eagle, 7 Mich. 306.

New York.—Republic of Mexico *v.* De Arangoiz, 5 Duer (N. Y.) 643 [*affirming* 1 Abb. Pr. (N. Y.) 437]; Post *v.* Haight, 1 How. Pr. (N. Y.) 171.

Vermont.— Doolittle *v.* Gookin, 10 Vt. 265.

84. Bell *v.* Farwell, 89 Ill. App. 638.

85. Farrington *v.* Wright, 1 Minn. 241; Beckley *v.* Newcomb, 24 N. H. 359; Com. *v.* Serfass, 5 Pa. Co. Ct. 139, 3 Del. Co. (Pa.) 418.

86. Turner *v.* Davis, 2 Den. (N. Y.) 187.

Effect of rule.—A rule to file a warrant of attorney acts as a stay of all proceedings. Meyer *v.* Littell, 2 Pa. St. 177; Dunn *v.* Stone Co., 11 Wkly. Notes Cas. (Pa.) 95; Reese *v.* Church of Messiah, 1 Wkly. Notes Cas. (Pa.) 416.

Costs.—Where the power of attorney is not filed before the dilatory exception demanding it, costs will be awarded on the exception. Westcott *v.* Archambault, 21 L. C. Jur. 307.

87. Daughdrill *v.* Daughdrill, 108 Ala. 321, 19 So. 185; Hardin *v.* Ho-yo-po-nubby, 27 Miss. 567; Caniff *v.* Myers, 15 Johns. (N. Y.) 246.

88. Bigler *v.* Toy, 68 Iowa 687, 28 N. W. 17; Hirshfield *v.* Landman, 3 E. D. Smith (N. Y.) 208; Caniff *v.* Myers, 15 Johns. (N. Y.) 246; Beaubien *v.* Allaire, 1 Quebec Q. B. 275; St. Pierre *v.* Lepage, 6 Quebec Super. Ct. 511; Burroughs *v.* Lachute, 6 Quebec Super. Ct. 393; Chagnon *v.* St. Jean, 3 Quebec Super. Ct. 459.

ney's authority;[89] but, after the party the attorney professes to represent has denied his authority, the burden of showing authority is on the attorney.[90]

e. Sufficiency. Although in former times it was customary and even necessary for attorneys to file in court warrants showing their right to represent clients, this practice has long been discarded,[91] and it is generally[92] no longer necessary,[93] either in the case of an individual or of a corporation, for an attorney to have a warrant of attorney,[94] authority by parol being sufficient.[95]

C. Incidents of Relation — 1. In General. Where the relation of attorney and client exists the law of principal and agent is generally applicable, and the client is bound, according to the ordinary rules of agency, by the acts of the attorney within the scope of the latter's authority.[96] This is true, assuming that

89. *Alabama.*— Stubbs *v.* Leavitt, 30 Ala. 352.

New Jersey.—Mutual L. Ins. Co. *v.* Pinner, 43 N. J. Eq. 52, 10 Atl. 184; Dey *v.* Hathaway Printing Tel., etc., Co., 41 N. J. Eq. 419, 4 Atl. 675.

Texas.— Holder *v.* State, 35 Tex. Crim. 19, 29 S. W. 793.

Wisconsin.— Schlitz *v.* Meyer, 61 Wis. 418, 21 N. W. 243; Thomas *v.* Steele, 22 Wis. 207.

United States.— Bonnifield *v.* Thorp, 71 Fed. 924.

90. Dangerfield *v.* Thruston, 8 Mart. N. S. (La.) 233; Stewart *v.* Stewart, 56 How. Pr. (N. Y.) 256. See also Felton *v.* Asbestos Packing Co., 7 Quebec 265.

91. With the general disuse of warrants, the question of their due execution has become unimportant. In the following cases, however, warrants of attorney were held to be sufficiently executed and to be valid: Strean *v.* Lloyd, 128 Ill. 493, 21 N. E. 533; Graham *v.* Andrews, 11 Misc. (N. Y.) 649, 32 N. Y. Suppl. 795, 66 N. Y. St. 177, 24 N. Y. Civ. Proc. 263; Culver *v.* Barney, 14 Wend. (N. Y.) 161; Day *v.* Adams, 63 N. C. 254; Johnson *v.* Sikes, 49 N. C. 70; Danville, etc., R. Co. *v.* Rhodes, 180 Pa. St. 157, 40 Wkly. Notes Cas. (Pa.) 5, 36 Atl. 648; Grubb *v.* Serrill, 1 Del. Co. (Pa.) 141. See also Mississippi Cent. R. Co. *v.* Southern R. Assoc., 8 Phila. (Pa.) 107.

92. In Canada it seems that, where suit is commenced in favor of a non-resident, except where begun by plaintiff's affidavit (McLaren *v.* Hall, 2 Leg. N. 178), a power of attorney must be filed (Globe Mut. L. Ins. Co. *v.* Sun Mut. L. Ins. Co., 22 L. C. Jur. 38, 1 Leg. N. 139; Howard *v.* Yule, 4 Montreal Super. Ct. 420). But notice of such filing need not be given (Bank of Commerce *v.* Papineau, 20 L. C. Jur. 306), and the production of a general authorization to sue for debts due to an absentee is sufficient. It is not necessary that the attorney *ad litem* be named therein (Major *v.* Paris, 28 L. C. Jur. 104, 7 Leg. N. 266).

93. There is, however, no objection to a written warrant, and many mistakes regarding the exact limits of authority would be avoided by adhering to the former practice. In case a written warrant is given, an attorney is bound to produce it when properly called upon to do so. State *v.* Tilghman, 6 Iowa 496.

94. *Alabama.*— Gaines *v.* Tombeckbee Bank, Minor (Ala.) 50.

Maine.— Penobscot Boom Corp. *v.* Lamson, 16 Me. 224, 33 Am. Dec. 656.

Maryland.— Henck *v.* Todhunter, 7 Harr. & J. (Md.) 275, 16 Am. Dec. 300.

Michigan.— Farmers, etc., Bank *v.* Troy City Bank, 1 Dougl. (Mich.) 457.

Mississippi.—Hardin *v.* Ho-yo-po-nubby, 27 Miss. 567.

Pennsylvania.— Campbell *v.* Galbreath, 5 Watts (Pa.) 423; Lynch *v.* Com., 16 Serg. & R. (Pa.) 368, 16 Am. Dec. 582.

Wisconsin.— Shroudenbeck *v.* Phœnix F. Ins. Co., 15 Wis. 632.

See 5 Cent. Dig. tit. "Attorney and Client," § 105.

95. *Illinois.*— Leslie *v.* Fischer, 62 Ill. 118.

Indiana.— Dougherty *v.* Andrews, 19 Ind. 406.

New Hampshire.— Manchester Bank *v.* Fellows, 28 N. H. 302.

New York.— Hirshfield *v.* Landman, 3 E. D. Smith (N. Y.) 208.

Wisconsin.— Walker *v.* Rogan, 1 Wis. 597.

The rule regarding those not admitted as attorneys seems to be stricter. See Stevens *v.* Fuller, 55 N. H. 443.

In a case of doubt a court has decided in favor of the attorney's authority. Massieu's Succession, 24 La. Ann. 237.

Sufficient authority was shown in the following cases:

Illinois.— Lockwood *v.* Mills, 39 Ill. 602.

Indiana.— Hughes *v.* Osborn, 42 Ind. 450.

Iowa.— Savery *v.* Savery, 8 Iowa 217.

New York.—Delhi *v.* Graham, 3 Hun (N. Y.) 407; Bush *v.* Miller, 13 Barb. (N. Y.) 481; Stewart *v.* Stewart, 56 How. Pr. (N. Y.) 256.

South Carolina.— Bacon *v.* Smith, 1 Brev. (S. C.) 426.

Tennessee.— Rogers *v.* Park, 4 Humphr. (Tenn.) 480.

West Virginia.— Low *v.* Settle, 22 W. Va. 387.

Wisconsin.— Grignon *v.* Schmitz, 18 Wis. 620.

Canada.— Herr *v.* Toms, 32 U. C. Q. B. 423.

Insufficient authority was shown in Westbrook *v.* Blood, 50 Mich. 443, 15 N. W. 544; Dawson *v.* Dumont, 20 Can. Supreme Ct. 709.

96. *Arkansas.*— Wood *v.* Wood, 59 Ark. 441, 27 S. W. 641, 43 Am. St. Rep. 42, 28 L. R. A. 157; Lawson *v.* Bettison, 12 Ark. 401.

California.— Sampson *v.* Ohleyer, 22 Cal. 200.

there has been no collusion, and that the adverse party did not know of the excess of actual authority, even though the attorney has disobeyed private instructions, or, by his negligent act or omission, has forfeited some right of his client, so long as the act came within the general scope of the authority.[97]

2. Notice and Knowledge. It may be stated as a general rule that notice to an attorney is notice to the client employing him,[98] and that knowledge of the attorney is knowledge of the client.[99] This statement, however, is subject to

Indiana.— Nave *v.* Baird, 12 Ind. 318.
Maine.— Rice *v.* Wilkins, 21 Me. 558; Fairbanks *v.* Stanley, 18 Me. 296.
Maryland.— African Methodist Bethel Church *v.* Carmack, 2 Md. Ch. 143.
Missouri.— State *v.* Lewis, 9 Mo. App. 321.
New York.—Russell *v.* Lane, 1 Barb. (N. Y.) 519.
North Carolina.— Beck *v.* Bellamy, 93 N. C. 129.
Texas.— Chambers *v.* Hodges, 23 Tex. 104.
England.— Painter *v.* Abel, 2 H. & C. 113, 9 Jur. N. S. 549, 33 L. J. Exch. 60, 8 L. T. Rep. N. S. 287, 11 Wkly. Rep. 651.
Canada.— Bailey *v.* Bailey, 2 Ch. Chamb. (U. C.) 58.
See, generally, Principal and Agent.

97. *Alabama.*— Albertson *v.* Goldsby, 28 Ala. 711, 65 Am. Dec. 380.
Arkansas.— Scroggin *v.* Hammett Grocer Co., 66 Ark. 183, 49 S. W. 820; Wood *v.* Wood, 59 Ark. 441, 27 S. W. 641, 43 Am. St. Rep. 42, 28 L. R. A. 157; Jamison *v.* May, 13 Ark. 600; Lawson *v.* Bettison, 12 Ark. 401.
Illinois.— Hardin *v.* Osborne, 60 Ill. 93.
Louisiana.— Girard *v.* Hirsch, 6 La. Ann. 651.
Maine.— White *v.* Johnson, 67 Me. 287.
Maryland.— Kent *v.* Ricards, 3 Md. Ch. 392; African Methodist Bethel Church *v.* Carmack, 2 Md. Ch. 143.
Minnesota.— Rogers *v.* Greenwood, 14 Minn. 333.
Missouri.— State *v.* Hawkins, 28 Mo. 366; State *v.* Lewis, 9 Mo. App. 321.
New York.— Palen *v.* Starr, 7 Hun (N. Y.) 422; Leet *v.* McMaster, 51 Barb. (N. Y.) 236.
North Carolina.—Beck *v.* Bellamy, 93 N. C. 129.
Texas.— Chambers *v.* Hodges, 23 Tex. 104.
Wisconsin.— Lee *v.* Buckheit, 46 Wis. 246, 49 N. W. 977.
Wyoming.— W. W. Kimball Co. *v.* Payne, (Wyo. 1901) 64 Pac. 673.
Compare Cram *v.* Sickel, 51 Nebr. 828, 71 N. W. 724, 61 Am. St. Rep. 478, holding that a debtor is bound to take notice of the extent of the authority of an attorney who holds for collection a claim against him.

98. *Alabama.*— Price *v.* Carney, 75 Ala. 546.
California.— Beirce *v.* Red Bluff Hotel Co., 31 Cal. 160.
Georgia.— Whitten *v.* Jenkins, 34 Ga. 297.
Hawaii.— Tisdale *v.* Bark H. W. Almy, 4 Hawaii 503.
Illinois.— Williams *v.* Tatnall, 29 Ill. 553.
Iowa.— Allen *v.* McCalla, 25 Iowa 464, 96 Am. Dec. 56; Jones *v.* Bamford, 21 Iowa 217; Walker *v.* Ayres, 1 Iowa 449.
Minnesota.— Bates *v.* A. E. Johnson Co., 79 Minn. 354, 82 N. W. 649.
Mississippi.— Edwards *v.* Hillier, 70 Miss. 803, 13 So. 692.
New York.— Hyde *v.* Bloomingdale, 23 Misc. (N. Y.) 728, 51 N. Y. Suppl. 1025.
North Carolina.— Hulbert *v.* Douglas, 94 N. C. 122; Pierce *v.* Perkins, 17 N. C. 250.
South Carolina.— Peeples *v.* Warren, 51 S. C. 560, 29 S. E. 659.
Texas.— Van Hook *v.* Walton, 28 Tex. 59; Givens *v.* Taylor, 6 Tex. 315.
Vermont.—Vermont Min., etc., Co. *v.* Windham County Bank, 44 Vt. 489.
United States.— Rogers *v.* Palmer, 102 U. S. 263, 26 L. ed. 164; Brown *v.* Jefferson County Nat. Bank, 19 Blatchf. (U. S.) 315, 9 Fed. 258.
Canada.— Real Estate Invest. Co. *v.* Metropolitan Bldg. Soc., 3 Ont. 476.
See 5 Cent. Dig. tit. "Attorney and Client," § 92.

Notice to the judgment debtor's attorney of the assignment of a judgment is not sufficient notice to the judgment debtor to perfect title to the judgment in the assignee. Daniels *v.* Pratt, 6 Lea (Tenn.) 443.

99. *Connecticut.*— Sweeney *v.* Pratt, 70 Conn. 274, 39 Atl. 182, 66 Am. St. Rep. 101.
District of Columbia.— Patten *v.* Warner, 11 App. Cas. (D. C.) 149.
Georgia.— Brown *v.* Oattis, 55 Ga. 416.
Illinois.— Haas *v.* Sternbach, 156 Ill. 44, 41 N. E. 51 [*affirming* 50 Ill. App. 476]; Webber *v.* Clark, 136 Ill. 256, 26 N. E. 360, 32 N. E. 748.
Indian Territory.— Dorrance *v.* McAlester, 1 Indian Terr. 473, 45 S. W. 141.
Iowa.— Walker *v.* Schreiber, 47 Iowa 529.
Kentucky.— Summers *v.* Taylor, 4 Ky. L. Rep. 290.
Maine.— Blake *v.* Clary, 83 Me. 154, 21 Atl. 841.
Maryland.— Shartzer *v.* Mountain Lake Park Assoc., 86 Md. 335, 37 Atl. 786; Baltimore *v.* Whittington, 78 Md. 231, 27 Atl. 984.
Missouri.— Bank of Commerce *v.* Hoeber, 88 Mo. 37, 57 Am. Rep. 359.
New York.— Taft *v.* Wright, 47 How. Pr. (N. Y.) 1.
Pennsylvania.— McDonald *v.* Todd, 1 Grant (Pa.) 17; Mutual Bldg., etc., Assoc.'s Case, 19 Pa. Co. Ct. 504.
Texas.— Riordan *v.* Britton, 69 Tex. 198, 7 S. W. 50, 5 Am. St. Rep. 37.
Washington.— Hyman *v.* Barmon, 6 Wash. 516, 33 Pac. 1076; Wells *v.* McMahon, 3 Wash. Terr. 532, 18 Pac. 73.
United States.— Wight *v.* Muxlow, 8 Ben. (U. S.) 52, 29 Fed. Cas. No. 17,679.

the qualification that the notice must come to the attorney after the employment has begun; and, though the English rule is different,[1] the prevailing doctrine in the United States makes it necessary that the attorney gain the knowledge while engaged in his client's business in order that it may affect the latter with constructive knowledge.[2] Where, however, an attorney acts in his own behalf, he is chargeable with knowledge though he acquired his information while acting in his professional capacity in behalf of a client.[3]

3. SCOPE OF AUTHORITY — a. In General — (I) *IN CONDUCT OF LITIGATION* — (A) *In General.* An attorney's authority is not limited to the mere prosecution of the suit; but extends to everything necessary to the protection and promotion of the interests committed to his care so far as they are affected by proceedings in the court where he represents his client.[4] The details of pro-

See 5 Cent. Dig. tit. "Attorney and Client," § 92.

Knowledge of an attorney held not to bind client in another action in which client had employed another attorney. Cartwright *v.* Everett, 7 Hawaii 216.

Knowledge acquired by defendant's attorney after judgment against defendant of the creditor's general assignment is not notice to the debtor. Chicago Sugar-Refining Co. *v.* Jackson Brewing Co., (Tenn. Ch. 1898) 48 S. W. 275.

Presumption as to withholding.—Where such motives exist in the mind of a solicitor as would be sufficient, with ordinary men, to induce them to withhold information from the client, the presumption is, that it was withheld; and the uncommunicated knowledge of the solicitor is not imputed to the client as notice. Cameron *v.* Hutchison, 16 Grant Ch. (U. C.) 526.

1. **In England** the test is not whether the attorney acquired the information while engaged in his client's business, but whether the knowledge was actually present in the attorney's mind at the time of the subsequent transaction. Dresser *v.* Norwood, 17 C. B. N. S. 466, 10 Jur. N. S. 851, 34 L. J. C. P. 48, 11 L. T. Rep. N. S. 111, 12 Wkly. Rep. 1030, 112 E. C. L. 466; Mountford *v.* Scott, 1 Turn. & R. 274, 12 Eng. Ch. 274. In an early case in England (Warrick *v.* Warrick, 3 Atk. 291) the court laid down a rule which was the forerunner of the present American doctrine. The modification made by the English courts has been accepted nowhere in the United States except in Vermont. Abell *v.* Howe, 43 Vt. 403 [*citing* with approval Dresser *v.* Norwood, 17 C. B. N. S. 466, 10 Jur. N. S. 851, 34 L. J. C. P. 48, 11 L. T. Rep. N. S. 111, 12 Wkly. Rep. 1030, 112 E. C. L. 466]; Hart *v.* Farmers, etc., Bank, 33 Vt. 252.

2. *Alabama.*— McCormick *v.* Joseph, 83 Ala. 401, 3 So. 796; Pepper *v.* George, 51 Ala. 190; Mundine *v.* Pitts, 14 Ala. 84.

California.— Chapman *v.* Hughes, (Cal. 1900) 60 Pac. 974; Wittenbrock *v.* Parker, 102 Cal. 93, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L. R. A. 197.

Illinois.— Herrington *v.* McCullum, 73 Ill. 476; Campbell *v.* Benjamin, 69 Ill. 244; McCormick *v.* Wheeler, 36 Ill. 114, 85 Am. Dec. 388; Dunlap *v.* Wilson, 32 Ill. 517.

Kansas.— Atchison, etc., R. Co. *v.* Benton, 42 Kan. 698, 22 Pac. 698.

Louisiana.— Adams *v.* Henning, 9 La. Ann. 225.

Michigan.— Warner *v.* Hall, 53 Mich. 371, 19 N. W. 40; Larzelere *v.* Starkweather, 38 Mich. 96.

Minnesota.— Trentor *v.* Pothen, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 225.

Missouri.— Ford *v.* French, 72 Mo. 250.

New Hampshire.—Tucker *v.* Tilton, 55 N. H. 223.

New Jersey.— Fidelity Trust Co. *v.* Baker, 60 N. J. Eq. 170, 47 Atl. 6.

New York.— Denton *v.* Ontario County Nat. Bank, 150 N. Y. 126, 44 N. E. 781; Olyphant *v.* Phyfe, 48 N. Y. App. Div. 1, 62 N. Y. Suppl. 688; McCutcheon *v.* Dittman, 23 N. Y. App. Div. 285, 48 N. Y. Suppl. 360; Hoover *v.* Greenbaum, 62 Barb. (N. Y.) 188. See also Hope F. Ins. Co. *v.* Cambrelling, 1 Hun (N. Y.) 493, 3 Thomps. & C. (N. Y.) 495; Van Saun *v.* Farley, 4 Daly (N. Y.) 165.

North Carolina.— Arrington *v.* Arrington, 114 N. C. 151, 19 S. E. 351.

Pennsylvania.— Hood *v.* Fahnestock, 8 Watts (Pa.) 489, 34 Am. Dec. 489.

South Carolina.— Steinmeyer *v.* Steinmeyer, 55 S. C. 9, 33 S. E. 15.

Tennessee.—Neilson *v.* Weber, (Tenn. 1901) 64 S. W. 20; Kirklin *v.* Atlas Sav., etc., Assoc., (Tenn. Ch. 1900) 60 S. W. 149.

Texas.— Meuley *v.* Zeigler, 23 Tex. 88; Taylor *v.* Evans, (Tex. Civ. App. 1894) 29 S. W. 172, 16 Tex. Civ. App. 409, 41 S. W. 877; Smith *v.* Wilson, 1 Tex. Civ. App. 115, 20 S. W. 1119.

Washington.— Pacific Mfg. Co. *v.* Brown, 8 Wash. 347, 36 Pac. 273.

Wisconsin.— Melius *v.* Pabst Brewing Co., 93 Wis. 153, 66 N. W. 518, 57 Am. St. Rep. 899.

See 5 Cent. Dig. tit. "Attorney and Client," §§ 92, 93.

3. Salter *v.* Dunn, 1 Bush (Ky.) 311; Butler *v.* Morse, 66 N. H. 429, 23 Atl. 90; Gay *v.* Parpart, 106 U. S. 679, 1 S. Ct. 456, 27 L. ed. 256; Brent *v.* Maryland, 18 Wall. (U. S.) 430, 21 L. ed. 777; Galpin *v.* Page, 18 Wall. (U. S.) 350, 21 L. ed. 959.

4. Paxton *v.* Cobb, 2 La. 137. See also Kent *v.* Ricards, 3 Md. Ch. 392.

An attorney employed in anticipation of suit has as much authority to bind his client

cedure should be entirely within his hands[5] and the client should not interfere.[6] The acts of an attorney in the presence of the court concerning the trial are the same as those of the party himself,[7] and are binding on him.[8]

(B) *Before Judgment* — (1) ACCEPTING SERVICE OF PROCESS. A general retainer does not authorize an attorney to accept service of process by which the court acquires jurisdiction over the party;[9] but after the court has acquired juris-

in reference thereto before as if employed after the institution thereof. Dentzel *v.* City, etc., R. Co., 90 Md. 434, 45 Atl. 201.

He may determine the forum where suit is brought (McGeorge *v.* Bigstone Gap Imp. Co., 88 Fed. 599), or the means of foreclosing a mortgage (Burgess *v.* Stevens, 76 Me. 559); and, where employed without specific instructions, may take what steps he deems necessary (Foster *v.* Wiley, 27 Mich. 244, 15 Am. Rep. 185; Eickman *v.* Troll, 29 Minn. 124, 12 N. W. 347; Poucher *v.* Blanchard, 86 N. Y. 256).

He has no power to consent to an amendment which will make a receiver personally liable (Erskine *v.* McIlrath, 60 Minn. 485, 62 N. W. 1130), nor, when acting for a defendant corporation, can he, under his general authority, compromise the suit on terms involving the permanent future employment by the corporation of plaintiff (East Line, etc., R. Co. *v.* Scott, 72 Tex. 70, 10 S. W. 99, 13 Am. St. Rep. 753).

5. Mott *v.* Foster, 45 Cal. 72; San Jose Funded Debt Com'rs *v.* Younger, 29 Cal. 147, 87 Am. Dec. 164; Edgerton *v.* Brackett, 11 N. H. 218; Read *v.* French, 28 N. Y. 285; Ulster County *v.* Brodhead, 44 How. Pr. (N. Y.) 411; Anonymous, 1 Wend. (N. Y.) 108; Nightingale *v.* Oregon Cent. R. Co., 2 Sawy. (U. S.) 338, 18 Fed. Cas. No. 10,264, 17 Int. Rev. Rec. 61, 93, 5 Chic. Leg. N. 243, 5 Leg. Gaz. (Pa.) 61, 4 Leg. Op. (Pa.) 622. See also O'Connell *v.* Montreal, 4 L. C. Jur. 56, 10 L. C. Rep. 19; Seguin *v.* Gaudet, 12 Leg. N. 266; Lefebvre *v.* Castonguay, 13 Quebec Super. Ct. 467.

6. Crescent Canal Co. *v.* Montgomery, 124 Cal. 134, 56 Pac. 797; Wylie *v.* Sierra Gold Co., 120 Cal. 485, 52 Pac. 809; Webb *v.* Dill, 18 Abb. Pr. (N. Y.) 264; Shaw *v.* Nickerson, 7 U. C. Q. B. 541. But see Reeder *v.* Lockwood, 30 Misc. (N. Y.) 531, 62 N. Y. Suppl. 713; Clark *v.* Kingsland, 1 Sm. & M. (Miss.) 248; Yoakley *v.* Hawley, 5 Lea (Tenn.) 670.

Effect of client's interference.—A stipulation by the party himself is not binding (McConnell *v.* Brown, 40 Ind. 384; Bonnifield *v.* Thorp, 71 Fed. 924; Earhart *v.* U. S., 30 Ct. Cl. 343), nor will interference by the client be allowed to injure the adverse party (McBratney *v.* Rome, etc., R. Co., 87 N. Y. 467; Homans *v.* Tyng, 56 N. Y. App. Div. 383, 67 N. Y. Suppl. 792; Pilger *v.* Gou, 21 How. Pr. (N. Y.) 155; Goodrich *v.* Mott, 9 Vt. 395).

7. Coonan *v.* Loewenthal, 129 Cal. 197, 61 Pac. 940.

8. *Alabama.*— Rosenbaum *v.* State, 33 Ala. 354.

California.— Mott *v.* De Reyes, 45 Cal. 379.

Colorado.— Warner *v.* Gunnison, 2 Colo. App. 430, 31 Pac. 238.

Kentucky.— Smith *v.* Dixon, 3 Metc. (Ky.) 438.

Maryland.— Henck *v.* Todhunter, 7 Harr. & J. (Md.) 275, 16 Am. Dec. 300; Thornburg *v.* Macauley, 2 Md. Ch. 425; African Methodist Bethel Church *v.* Carmack, 2 Md. Ch. 143.

New Jersey.—McDowell *v.* Perrine, 36 N. J. Eq. 632.

North Carolina.— Guy *v.* Manuel, 89 N. C. 83; Greenlee *v.* McDowell, 39 N. C. 481.

South Carolina.— *Ex p.* Jones, 47 S. C. 393, 25 S. E. 285.

United States.— Manning *v.* Hayden, 5 Sawy. (U. S.) 360, 16 Fed. Cas. No. 9,043, 8 Am. L. Rec. 38, 7 Reporter 423, 424, 1 San Fran. L. J. 85, 13 West. Jur. 317, 318.

Though the attorney is only employed to conduct the trial, the same rule holds good. Smith *v.* Black, 51 Md. 247; Peteler Portable R. Mfg. Co. *v.* Northwestern Adamant Mfg. Co., 60 Minn. 127, 61 N. W. 1024; Deen *v.* Milne, 4 N. Y. St. 129; Devlin *v.* New York, 15 Abb. Pr. N. S. (N. Y.) 31.

The client is not responsible for defamatory utterances by the attorney. Monroe *v.* H. Weston Lumber Co., 50 La. Ann. 142, 23 So. 247.

9. *Connecticut.*— Whitly *v.* Barker, 1 Root (Conn.) 406.

Minnesota.— Masterson *v.* Le Claire, 4 Minn. 163.

Missouri.— Bradley *v.* Welch, 100 Mo. 258, 12 S. W. 911.

New York.— McGarry *v.* New York County, 7 Rob. (N. Y.) 464.

North Carolina.— Starr *v.* Hall, 87 N. C. 381.

Pennsylvania.— Com. *v.* Overseers of Poor, 4 Kulp (Pa.) 87; McPherson *v.* McPherson, 2 Leg. Chron. (Pa.) 342.

South Carolina.— Reed *v.* Reed, 19 S. C. 548.

Washington— Ashcraft *v.* Powers, 22 Wash. 440, 61 Pac. 161.

See also Hefferman *v.* Burt, 7 Iowa 320, 71 Am. Dec. 445; Sullivan *v.* Susong, 40 S. C. 154, 18 S. E. 268 (in which cases defendant failed, because he did not raise his objection soon enough); Ingram *v.* Richardson, 2 La. Ann. 839 (in which case there seems to have been express authority).

Presumption as to authority.—Where an attorney assumes to acknowledge service of summons, or to waive it, the court will presume, in the absence of proof to the contrary, that he was authorized specially so to do.

Kansas.— Hendrix *v.* Fuller, 7 Kan. 331.

Louisiana.— Taylor *v.* Sutton, 6 La. Ann. 709; Courey *v.* Brenham, 1 La. Ann. 397.

Minnesota.— Backus *v.* Burke, 63 Minn. 272, 65 N. W. 459.

diction over defendant's person the attorney may accept service of all necessary and proper papers during the progress of the cause.[10]

(2) Changing Venue. An attorney may, without any special authority, change the venue of an action.[11]

(3) Confessing Judgment. The prevailing view seems to be that the power of an attorney to confess judgment for his client is implied,[12] though some disinclination to follow this rule has been shown.[13] In every case, however, the record of the judgment would be *prima facie* evidence that the attorney who confessed it was properly authorized.[14] It has also been held that an attorney may, by virtue of his employment, consent to a decree in behalf of his client.[15]

(4) Dismissal, Discontinuance, and Retraxit As the dismissal of a suit does not bar the bringing of another for the same cause of action, the attorney of

South Carolina.— Felder *v.* Johnson, 1 Bailey (S. C.) 624.

West Virginia.— Marling *v.* Robrecht, 13 W. Va. 440.

See also Northern Cent. R. Co. *v.* Rider, 45 Md. 24.

10. Taylor *v.* Hill, 115 Cal. 143, 44 Pac. 336, 46 Pac. 922; Com. *v.* Schooley, 5 Kulp (Pa.) 53.

11. *Ex p.* Dennis, 48 Ala. 304; Jones *v.* Horsey, 4 Md. 306, 59 Am. Dec. 81; Shaft *v.* Phœnix Mut. L. Ins. Co., 67 N. Y. 544, 23 Am. Rep. 138. But see State *v.* Gratiot, 17 Wis. 245.

12. *Georgia.*— Taylor *v.* American Freehold Land Mortg. Co., 106 Ga. 238, 32 S. E. 153; Webster *v.* Dundee Mortg., etc., Co., 93 Ga. 278, 20 S. E. 310; Lyon *v.* Williams, 42 Ga. 168.

Indiana.— Thompson *v.* Pershing, 86 Ind. 303; Hudson *v.* Allison, 54 Ind. 215; Devenbaugh *v.* Nifer, 3 Ind. App. 379, 29 N. E. 923.

Iowa.— Potter *v.* Parsons, 14 Iowa 286. *Contra,* Ohlquest *v.* Farwell, 71 Iowa 231, 32 N. W. 277.

Kentucky.—Holbert *v.* Montgomery, 5 Dana (Ky.) 11; Talbot *v.* McGee, 4 T. B. Mon. (Ky.) 375. But, where a defendant was constructively summoned, an attorney, appointed to defend him, under Ky. Civ. Code, § 44, is not authorized to consent to a judgment against him. Anderson *v.* Sutton, 2 Duv. (Ky.) 480.

New Jersey.— Gifford *v.* Thorn, 9 N. J. Eq. 702, 722.

New York.— Denton *v.* Noyes, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237. But an attorney retained by one of two joint debtors cannot appear for both and consent to judgment against them. Blodget *v.* Conklin, 9 How. Pr. (N. Y.) 442.

North Carolina.—Hairston *v.* Garwood, 123 N. C. 345, 31 S. E. 653.

Pennsylvania.— Flanigen *v.* Philadelphia, 51 Pa. St. 491; Cyphert *v.* McClune, 22 Pa. St. 195; Tanner *v.* Hopkins, 12 Wkly. Notes Cas. (Pa.) 238; Sherman *v.* Brenner, 1 Wkly. Notes Cas. (Pa.) 193. See also King *v.* Cartee, 1 Pa. St. 147.

Tennessee.— Jones *v.* Williamson, 5 Coldw. (Tenn.) 371.

See 5 Cent. Dig. tit. "Attorney and Client," § 137.

Conditional judgment.— Counsel may enter into an agreement permitting judgment to be admitted for plaintiff, subject to a credit to be ascertained by referees. Farmers Bank *v.* Sprigg, 11 Md. 389.

An attorney authorized to confess judgment cannot confess judgment on a note for more than is actually due (Askew *v.* Goddard, 17 Ill. App. 377); consent to the entry of judgment after the case has been discontinued by the non-appearance of plaintiff (Gilbert *v.* Vanderpool, 15 Johns. (N. Y.) 242); or confess judgment on a simple contract in another state after it is barred by the statute of limitations of the *locus contractus* (Brown *v.* Parker, 28 Wis. 21). See also Tuppery *v.* Hertung, 46 Mo. 135; Walker *v.* Grayson, 86 Va. 337, 10 S. E. 51; Dilley *v.* Van Wie, 6 Wis. 209.

13. Pfister *v.* Wade, 69 Cal. 133, 10 Pac. 369; Wadhams *v.* Gay, 73 Ill. 415; People *v.* Lamborn, 2 Ill. 123; Edwards *v.* Edwards, 29 La. Ann. 597; Girard *v.* Hirsch, 6 La. Ann. 651; Durnford *v.* Clark, 3 La. 199; McNamee *v.* O'Brien, 9 N. Brunsw. 548. See also Watt *v.* Clark, 12 Ont. Pr. 359.

14. *Alabama.*— Hill *v.* Lambert, Minor (Ala.) 91.

Georgia.— Dobbins *v.* Dugree, 39 Ga. 394.

Illinois.— Wilson *v.* Spring, 64 Ill. 14. See also Martin *v.* Judd, 60 Ill. 78.

Louisiana.—Dockham *v.* Potter, 27 La. Ann. 73.

Michigan.— Arnold *v.* Nye, 23 Mich. 286.

New Jersey.— Price *v.* Ward, 25 N. J. L. 225.

Texas.— Merritt *v.* Clow, 2 Tex. 582.

15. *California.*— Holmes *v.* Rogers, 13 Cal. 191.

Georgia.— Williams *v.* Simmons, 79 Ga. 649, 7 S. E. 133.

Illinois.— Haas *v.* Chicago Bldg. Soc., 80 Ill. 248.

Montana.— Jubilee Placer Co. *v.* Hossfeld, 20 Mont. 234, 50 Pac. 716.

New York.— *In re* Maxwell, 66 Hun (N. Y.) 151, 21 N. Y. Suppl. 209, 49 N. Y. St. 154.

Tennessee.— Jones *v.* Williamson, 5 Coldw. (Tenn.) 371.

United States.— Farmers' Trust, etc., Bank *v.* Ketchum, 4 McLean (U. S.) 120, 8 Fed. Cas. No. 4,670.

record has implied authority to discontinue an action if he sees fit,[16] or to discontinue against one of several defendants.[17] But the entry of a retraxit bars all further proceedings,[18] and, therefore, it must be entered by the client personally.[19]

(5) Indorsing Client's Name on Writ. An attorney is, by his employment to commence a suit, empowered to indorse his client's name on the writ.[20]

(6) Issuing Attachment. An attorney employed to collect a claim by suit has authority to issue an attachment thereon,[21] and his client will be responsible if the attachment is unjustifiable.[22] It naturally follows that an attorney can control the minor details of the attachment;[23] but to release a perfected one has been held to be beyond his power.[24]

(7) Making Affidavits. The power to make necessary affidavits is implied, provided, of course, that the attorney has the necessary information to enable him to make them.[25]

(8) Making Stipulations. Stipulations are agreements or informal contracts, made in reference to some step in the litigation, and, consequently, will usually come within the implied powers of a general retainer.[26] This rule does not obtain

16. *California.*—McLeran *v.* McNamara, 55 Cal. 508.
Illinois.— Gillett *v.* Booth, 6 Ill. App. 423.
Louisiana.— Paxton *v.* Cobb, 2 La. 137.
Missouri.— Davis *v.* Hall, 90 Mo. 659, 3 S. W. 382.
New York.— Barrett *v.* Third Ave. R. Co., 45 N. Y. 628; Gaillard *v.* Smart, 6 Cow. (N. Y.) 385.
Washington.— Simpson *v.* Brown, 1 Wash. Terr. 247.
Canada.— Stephens *v.* Higgins, 3 Quebec Pr. 155.
Contra, Rhutasel *v.* Rule, 97 Iowa 20, 65 N. W. 1013.

17. Fling *v.* Trafton, 13 Me. 295. *Compare* Kurrus *v.* Mayo, 4 Ill. App. 106, wherein the question of authority was said to be for the jury.

18. Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159; Wohlford *v.* Compton, 79 Va. 333; U. S. *v.* Parker, 120 U. S. 89, 7 S. Ct. 454, 30 L. ed. 601.

19. *Alabama.*— Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159.
Colorado.— Hallack *v.* Loft, 19 Colo. 74, 34 Pac. 568.
Indiana.— Lambert *v.* Sandford, 2 Blackf. (Ind.) 137, 18 Am. Dec. 149. See also Barnard *v.* Daggett, 68 Ind. 305.
New York.—Gorham *v.* Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549.
Pennsylvania.— Lowry *v.* McMillan, 8 Pa. St. 157, 49 Am. Dec. 501.

20. Harmon *v.* Watson, 8 Me. 286; Chadwick *v.* Upton, 3 Pick. (Mass.) 442; Miner *v.* Smith, 6 N. H. 219. See Weathers *v.* Ray, 4 Dana (Ky.) 474, holding that the general authority of an attorney does not include a right to indorse a writ that the suit is for the benefit of a third party.

21. Kirksey *v.* Jones, 7 Ala. 622; Oberne *v.* O'Donnell, 35 Ill. App. 180; Morgan *v.* Joyce, 66 N. H. 538, 27 Atl. 225; Pierce *v.* Strickland, 2 Story (U. S.) 292, 19 Fed. Cas. No. 11,147.

22. Fairbanks *v.* Stanley, 18 Me. 296; Poucher *v.* Blanchard, 86 N. Y. 256; Oestrich *v.* Gilbert, 9 Hun (N. Y.) 242; Feury *v.* McCormick Harvesting Mach. Co., 6 S. D. 396, 61 N. W. 162.
A plaintiff is not responsible where his attorney attaches without authority (Graham *v.* Reno, 5 Colo. App. 330, 38 Pac. 835) or maliciously (Foster *v.* Pitts, 63 Ark. 387, 38 S. W. 1114).

23. Farnham *v.* Gilman, 24 Me. 250; Jenney *v.* Delesdernier, 20 Me. 183; Pierce *v.* Strickland, 2 Story (U. S.) 292, 19 Fed. Cas. No. 11,147.

24. Quarles *v.* Porter, 12 Mo. 76; Wilson *v.* Jennings, 3 Ohio St. 528; Kirk's Appeal, 87 Pa. St. 243, 30 Am. Rep. 357; Dollar Sav. Bank *v.* Robb, 4 Brewst. (Pa.) 106; Ludden, etc., Southern Music House *v.* Sumter, 45 S. C. 186, 22 S. E. 738, 55 Am. St. Rep. 761. *Contra,* Monson *v.* Hawley, 30 Conn. 51, 79 Am. Dec. 233; Benson *v.* Carr, 73 Me. 76; Moulton *v.* Bowker, 115 Mass. 36, 15 Am. Rep. 72 (before judgment); Rice *v.* O'Keefe, 6 Heisk. (Tenn.) 638.

25. *Georgia.*— Murphy *v.* Winter, 18 Ga. 690.
Iowa.— Wright *v.* Parks, 10 Iowa 342, verifying petition in scire facias.
Kansas.— Manley *v.* Headley, 10 Kan. 88, to obtain an attachment.
Louisiana.— Austin *v.* Latham, 19 La. 88; Clark *v.* Morse, 16 La. 575; Simpson *v.* Lombas, 14 La. Ann. 103 (to obtain an order of seizure and sale).
South Carolina.—Brooks *v.* Brooks, 16 S. C. 621, application for a commission to examine witnesses.
Texas.— Willis *v.* Lyman, 22 Tex. 268.
See, generally, Affidavits.

26. Lockwood *v.* Black Hawk County, 34 Iowa 235; Suspension Bridge *v.* Bedford, 10 N. Y. St. 850; Gorham *v.* Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549; Pierce *v.* Perkins, 17 N. C. 250. See also Kent *v.* Ricards, 3 Md. Ch. 392; Howe *v.* Lawrence, 22 N. J. L. 99.
An attorney may stipulate for an extension of time (Wadsworth *v.* Montgomery First Nat. Bank, 124 Ala. 440, 27 So. 460; Southern Kansas R. Co. *v.* Pavey, 57 Kan. 521, 46 Pac. 969; Brooks *v.* Cavanaugh, 11 La. Ann. 183; Read *v.* French, 28 N. Y. 285; Litt *v.*

in all cases, however, as for example where the stipulation was entered into under a mistake of fact or the like.[27]

(9) Reviving Suit. Where revival is merely a matter of procedure,[28] the attorney may consent to a revival, as after the death of a party,[29] or after a nonsuit.[30]

(10) Serving Notices and Making Demands. The attorney is also authorized to serve necessary notices and to make demands, and the effect is as valid as if the client acted in person.[31]

(11) Submission to Arbitration. An attorney who has been employed to bring or defend a cause is held to be invested with implied power to submit[32] a

Stewart, 62 N. Y. Suppl. 1114; Haas *v.* Gaddis, 1 Wash. 89, 23 Pac. 1010. See also Beardsley *v.* Pope, 88 Hun (N. Y.) 560, 34 N. Y. Suppl. 846, 68 N. Y. St. 784 [*reversing* 11 Misc. (N. Y.) 117, 32 N. Y. Suppl. 926, 66 N. Y. St. 351]); that judgment in a cause be the same as in another cause which involves the same questions (Ohlquest *v.* Farwell, 71 Iowa 231, 32 N. W. 277; Eidam *v.* Finnegan, 48 Minn. 53, 50 N. W. 933, 16 L. R. A. 507; North Missouri R. Co. *v.* Stephens, 36 Mo. 150, 88 Am. Dec. 138; Furniture Co. *v.* Moser, 48 Mo. App. 543; Galbreath *v.* Rogers, 30 Mo. App. 401; Schaeffer *v.* Siegel, 9 Mo. App. 594. *Compare* Dewar *v.* Orr, 3 Ch. Chamb. (U. C.) 224), provided the issues in the two cases are precisely similar (Louisville Trust Co. *v.* Stone, 88 Fed. 407 [*affirmed* in 174 U. S. 429, 19 S. Ct. 875, 43 L. ed. 1034]); that one judge may give the decision of the court (Walker *v.* Rogan, 1 Wis. 597), or that the decision of a demurrer be final (Franklin *v.* National Ins. Co., 43 Mo. 491. But see Baron *v.* Cohen, 62 How. Pr. (N. Y.) 367, holding that counsel who is employed merely to argue the demurrer cannot so stipulate). So, an attorney may enter into an agreement for an amicable action (Cook *v.* Gilbert, 8 Serg. & R. (Pa.) 567; Wilmington Mills Mfg. Co. *v.* Gardner, 2 Wkly. Notes Cas. (Pa.) 486; Van Beil *v.* Shive, 17 Phila. (Pa.) 104, 41 Leg. Int. (Pa.) 154); may state a case for the judgment of the court (Whitcomb *v.* Kephart, 50 Pa. St. 85), or agree that a certain point shall not be raised at the trial (Lorimer *v.* Lorimer, 124 Mich. 631, 83 N. W. 609; Stephenson *v.* McCombs, 1 U. C. Q. B. 456); and stipulations of attorneys regarding pleadings will, ordinarily, bind their clients (McCann *v.* McLennan, 3 Nebr. 25; Cook *v.* Allen, 67 N. Y. 578. See also Ball *v.* Leonard, 24 Ill. 146; Hohns *v.* Johnston, 12 Heisk. (Tenn.) 155). He may also bind his client by stipulations regarding the fees to be paid a commissioner to take evidence (Fairchild *v.* Michigan Cent. R. Co., 8 Ill. App. 591), or to a referee (Mark *v.* Buffalo, 87 N. Y. 184); but the attorney would be liable if he did not disclose his principal (Good *v.* Rumsey, 50 N. Y. App. Div. 280, 63 N. Y. Suppl. 981). Stipulations in regard to attorney's fees bound the client in Letcher *v.* Letcher, 50 Mo. 137; People *v.* Westchester County, 15 N. Y. Suppl. 580, 39 N. Y. St. 798; but not in Luzerne Bldg., etc., Assoc. *v.* Peoples' Sav. Bank, 142 Pa. St. 121, 6 Kulp (Pa.) 92, 21 Atl. 806; and stipulations for continuances were enforced in Strong *v.* District of Columbia, 3 MacArthur (D. C.) 499; Stinnard *v.* New York F. Ins. Co., 1 How. Pr. (N. Y.) 169; but not in Robert *v.* Commercial Bank, 13 La. 528, 33 Am. Dec. 570; Power *v.* Kent, 1 Cow. (N. Y.) 172; Nightingale *v.* Oregon Cent. R. Co., 2 Sawy. (U. S.) 338, 18 Fed. Cas. No. 10,264, 5 Chic. Leg. N. 243, 17 Int. Rev. Rec. 61, 93, 5 Leg. Gaz. (Pa.) 61, 4 Leg. Op. (Pa.) 622.

27. Howe *v.* Lawrence, 22 N. J. L. 99.

Stipulations entered into under misapprehension of fact will generally not be binding (Harvey *v.* Thorpe, 28 Ala. 250, 65 Am. Dec. 344; New York, etc., R. *v.* Martin, 158 Mass. 313, 33 N. E. 578); but a client may waive his rights to object to a stipulation on the score of lack of authority, by his seeming acquiescence (Patterson *v.* Read, 43 N. J. Eq. 18, 10 Atl. 807; Ducker *v.* Rapp, 67 N. Y. 464; Ives *v.* Ives, 80 Hun (N. Y.) 136, 29 N. Y. Suppl. 1053, 61 N. Y. St. 657).

Where the effect of attorney's stipulation is to release a surety, it has been held not to bind the client. Quinn *v.* Lloyd, 7 Rob. (N. Y.) 538, 5 Abb. Pr. N. S. (N. Y.) 281, 36 How. Pr. (N. Y.) 378. *Contra*, Phillips *v.* Rounds, 33 Me. 357.

28. See Cullison *v.* Lindsay, 108 Iowa 124, 78 N. W. 847, holding that an attorney is not authorized to commence affirmative proceedings to keep alive a judgment which he has for collection.

29. Clark *v.* Parish, 1 Bibb (Ky.) 547. See also Cox *v.* New York Cent., etc., R. Co., 63 N. Y. 414, holdiug that an attorney could stipulate that death should not abate the action.

30. Reinholdt *v.* Alberti, 1 Binn. (Pa.) 469. But see Hay *v.* Cole, 11 B. Mon. (Ky.) 70.

31. *Alabama.*— Spence *v.* Rutledge, 11 Ala. 557.

Illinois.— Champion Iron Fence Co. *v.* Wernsing, 19 Ill. App. 42.

Massachusetts.— Pettis *v.* Kellogg, 7 Cush. (Mass.) 456; Heard *v.* Lodge, 20 Pick. (Mass.) 53, 32 Am. Dec. 197.

New Hampshire.—Stevens *v.* Reed, 37 N. H. 49.

Wisconsin.— Elwell *v.* Prescott, 38 Wis. 274.

See also Tingley *v.* Parshall, 11 Nebr. 443, 9 N. W. 571.

32. An oral agreement to this effect made in open court and entered by the clerk will be good. Stokely *v.* Robinson, 34 Pa. St.

pending[33] suit to arbitration,[34] and may agree that the award be final and without power of appeal.[35] It also seems clear that an attorney cannot, without special authority from his client, make material amendments in the terms of a reference once agreed upon.[36]

(12) WAIVER. It has also been held that by virtue of a general retainer, an attorney may waive mere informalities and technicalities,[37] a verifica-

315; Millar *v.* Criswell, 3 Pa. St. 449. See also German-American Ins. Co. *v.* Buckstaff, 38 Nebr. 135, 56 N. W. 692.

33. Where there is no suit pending, attorneys have not implied power to submit to arbitration. Stinerville, etc., Stone Co. *v.* White, 25 Misc. (N. Y.) 314, 54 N. Y. Suppl. 577. See also Daniels *v.* New London, 58 Conn. 156, 19 Atl. 573, 7 L. R. A. 563; Jenkins *v.* Gillespie, 10 Sm. & M. (Miss.) 31, 48 Am. Dec. 732; Morse Arb. & Award 15.

34. *Alabama.*— Beverly *v.* Stephens, 17 Ala. 701; Scarborough *v.* Reynolds, 12 Ala. 252. See also Wright *v.* Evans, 53 Ala. 103.

California.— Bates *v.* Vischer, 2 Cal. 355.

Colorado.— Lee *v.* Grimes, 4 Colo. 185.

Georgia.— McElreath *v.* Middleton, 89 Ga. 83, 14 S. E. 906; Wade *v.* Powell, 31 Ga. 1.

Kentucky.— Smith *v.* Dixon, 3 Metc. (Ky.) 438; Talbot *v.* McGee, 4 T. B. Mon. (Ky.) 375.

Louisiana.— King *v.* King, 104 La. 420, 29 So. 205.

Maryland.— White *v.* Davidson, 8 Md. 169, 63 Am. Dec. 699. See also Jones *v.* Horsey, 4 Md. 306, 59 Am. Dec. 81.

Massachusetts.—Everett *v.* Charlestown, 12 Allen (Mass.) 93; Buckland *v.* Conway, 16 Mass. 396.

New Hampshire.— Brooks *v.* New Durham, 55 N. H. 559; Pike *v.* Emerson, 5 N. H. 393, 22 Am. Dec. 468.

New Jersey.— Paret *v.* Bayonne, 39 N. J. L. 559.

New York.— Tilton *v.* U. S. Life Ins. Co., 8 Daly (N. Y.) 84; Tiffany *v.* Lord, 40 How. Pr. (N. Y.) 481; Gorham *v.* Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549. *Compare* McPherson *v.* Cox, 86 N. Y. 472.

North Carolina.— Morris *v.* Grier, 76 N. C. 410.

Ohio.— Champaign County *v.* Norton, 1 Ohio 270.

Pennsylvania.— Williams *v.* Tracey, 95 Pa. St. 308; Coleman *v.* Grubb, 23 Pa. St. 393; Babb *v.* Stromberg, 14 Pa. St. 397; Wilson *v.* Young, 9 Pa. St. 101; Cahill *v.* Benn, 6 Binn. (Pa.) 99; Somers *v.* Balabrega, 1 Dall. (Pa.) 164, 1 L. ed. 831. *Compare* Pullen *v.* Rianhard, 1 Whart. (Pa.) 514.

South Carolina.— Markley *v.* Amos, 8 Rich. (S. C.) 468 (by rule of court only); Smith *v.* Bossard, 2 McCord Eq. (S. C.) 406.

West Virginia.— McGinnis *v.* Curry, 13 W. Va. 29, in open court but not *in pais.*

United States.— Alexandria Canal Co. *v.* Swann, 5 How. (U. S.) 83, 12 L. ed. 60; Holker *v.* Parker, 7 Cranch (U. S.) 436, 3 L. ed. 396; Abbe *v.* Rood, 6 McLean (U. S.) 106, 1 Fed. Cas. No. 6; Denny *v.* Brown, 7 Fed. Cas. No. 3,805.

England.— Filmer *v.* Delber, 1 Chit. 193 note, 3 Taunt. 486, 12 Rev. Rep. 688, 18 E. C. L. 115; Smith *v.* Troup, 7 C. B. 757, 6 Dowl. & L. 679, 18 L. J. C. P. 209, 62 E. C. L. 757; Faviell *v.* Eastern Counties R. Co., 6 Dowl. & L. 54, 2 Exch. 344, 17 L. J. Exch. 223, 297. See also Biddell *v.* Dowse, 6 B. & C. 255, 9 D. & R. 404, 28 Rev. Rep. 574, 13 E. C. L. 125 (in court below *sub nom.* Dowse *v.* Coxe, 3 Bing. 20, 3 L. J. C. P. O. S. 127, 10 Moore C. P. 272, 28 Rev. Rep. 565, 11 E. C. L. 20).

Canada.— Oakes *v.* Halifax, 4 Can. Supreme Ct. 640.

Contra, Haynes *v.* Wright, 4 Hayw. (Tenn.) 63.

See 5 Cent. Dig. tit. "Attorney and Client," § 152.

Where submitted subject to the client's approval, the latter must approve in order to make the award binding. Markley *v.* Amos, 2 Bailey (S. C.) 603.

Where title to real estate affected.—An attorney cannot affect his client's title to real estate by entering into an agreement for submission (Naglee *v.* Ingersoll, 7 Pa. St. 185; Huston *v.* Mitchell, 14 Serg. & R. (Pa.) 307, 16 Am. Dec. 506; Pearson *v.* Morrison, 2 Serg. & R. (Pa.) 20. See also Lew *v.* Nolan, 8 Pa. Dist. 531, 30 Pittsb. Leg. J. N. S. (Pa.) 47, 17 Lanc. L. Rev. 21), but a question of boundary may be submitted, decision to be final till appealed from (Evars *v.* Kamphaus, 59 Pa. St. 379; Babb *v.* Stromberg, 14 Pa. St. 397).

35. Brooks *v.* New Durham, 55 N. H. 559; Smith *v.* Barnes, 9 Misc. (N. Y.) 368, 29 N. Y. Suppl. 692, 60 N. Y. St. 631; Sargeant *v.* Clark, 108 Pa. St. 588; Williams *v.* Danziger, 91 Pa. St. 232. See also Bingham *v.* Guthrie, 19 Pa. St. 418; Wilson *v.* Young, 9 Pa. St. 101, in which latter case the court said that it would disregard an agreement that no exceptions should be taken to the filing of a referee.

36. Daniels *v.* New London, 58 Conn. 156, 19 Atl. 573, 7 L. R. A. 563; Jenkins *v.* Gillespie, 10 Sm. & M. (Miss.) 31, 48 Am. Dec. 732; Willis *v.* Willis, 12 Pa. St. 159; Wilson *v.* United Counties, 11 U. C. C. P. 548.

37. State *v.* Tuller, 34 Conn. 280; Coleman *v.* Coleman, 5 Hawaii 300; Hanson *v.* Hoitt, 14 N. H. 56; Alton *v.* Gilmanton, 2 N. H. 520; Gorham *v.* Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549. But see Forbes *v.* Hamilton, Ky. Dec. 89, where it was held that an attorney had no implied power to release errors on the record.

Waiver of defenses.— Under Minn. Comp. Stat. c. 82, § 10, authorizing an attorney to bind his client by stipulations, he was allowed to waive all but one of several defenses (Bingham *v.* Winona County, 6 Minn.

tion,[38] formal notice of proceedings in a case,[39] or objections to evidence or the manner of taking it.[40]

(c) *After Judgment* — (1) Appeal. At common law, an attorney's employment ended with the entry of judgment for or against his client,[41] and, while this rule has been qualified, it still holds to the extent that an attorney cannot, without some further retainer, institute proceedings to appeal from a judgment.[42] It seems, however, to come within the scope of a general employment to agree not to take an appeal;[43] and, once an appeal is taken and an attorney employed to prosecute or defend it, he has general power to grant extensions of time[44] and manage other details.

(2) Control Over Judgment — (a) In General. In spite of the strict rule above mentioned,[45] it appears that an attorney, by virtue of his general authority, may receive the money due on a judgment and may satisfy it;[46] but the assign-

136); but in Warwick *v.* Marlatt, 25 N. J. Eq. 188, an attorney's waiver of the defense of usury did not bind his client. See also Spaulding *v.* Allen, 19 Ohio Cir. Ct. 608, 10 Ohio Cir. Dec. 397.

Waiver of jury trial.— It seems to be within the power of an attorney to waive the right of trial by jury (Windmiller *v.* Chapman, 38 Ill. App. 276; Whitestown Milling Co. *v.* Zahn, 9 Ind. App. 270, 36 N. E. 653); but in Hadden *v.* Clark, 2 Grant (Pa.) 107, it was held that an attorney could not waive an inquisition by the jury impaneled by a sheriff.

38. Smith *v.* Mulliken, 2 Minn. 319.

39. Garrigan *v.* Dickey, 1 Ind. App. 421, 27 N. E. 713; Smith *v.* Cunningham, 59 Kan. 552, 53 Pac. 760; Barlow *v.* Steel, 65 Mo. 611; McDonough *v.* Daly, 3 Mo. App. 606; People *v.* Boyd, 2 Edw. (N. Y.) 516.

40. Lacoste *v.* Robert, 11 La. Ann. 33; Alton *v.* Gilmanton, 2 N. H. 520; Garrett *v.* Hanshue, 53 Ohio St. 482, 42 N. E. 256, 35 L. R. A. 321; Daniel *v.* Ray, 1 Hill (S. C.) 32. *Compare* McClurg *v.* Willard, 5 Watts (Pa.) 275, holding that an attorney employed merely to take a deposition cannot waive objections to evidence.

41. See *infra*, III, D, 1.

42. *Alabama.*— Riddle *v.* Hanna, 25 Ala. 484.

Georgia.— Road Com'rs *v.* Griffin, etc., Plank-Road Co., 9 Ga. 487. *Compare* Nisbet *v.* Lawson, 1 Ga. 275, ratification.

Illinois.— Covill *v.* Phy, 24 Ill. 37.

Iowa.—Hopkins *v.* Mallard, 1 Greene (Iowa) 117.

Kentucky.— Holbert *v.* Montgomery, 5 Dana (Ky.) 11.

Louisiana.— Ikerd *v.* Borland, 35 La. Ann. 337.

Maryland.— National Park Bank *v.* Lanahan, 60 Md. 477.

New Jersey.— Delaney *v.* Husband, 64 N. J. L. 275, 45 Atl. 265.

Tennessee.— Coles *v.* Anderson, 8 Humphr. (Tenn.) 489.

Wisconsin.— Hooker *v.* Brandon, 75 Wis. 8, 43 N. W. 741.

See Appeal and Error, 2 Cyc. 639, note 5.

Compare Ricketson *v.* Torres, 23 Cal. 636; Norberg *v.* Heineman, 59 Mich. 210, 26 N. W. 481 (in which cases it was held that authority would be presumed, though in both there was evidence of authority); Davis *v.* Wakelee, 156 U. S. 680, 15 S. Ct. 555, 39 L. ed. 578.

In some cases apparently contra (Adams *v.* Robinson, 1 Pick. (Mass.) 461; Grosvenor *v.* Danforth, 16 Mass. 74; Spaulding's Appeal, 33 N. H. 479), the question of form alone and not of authority was passed upon.

In determining the question of authority, which should be raised by an appearance of the party in person or by counsel (Thompson *v.* House, 23 Tex. 178), very satisfactory evidence will be required to overcome the presumption in favor of the attorney, especially where supplemented by his affidavit that he had authority (Ring *v.* Charles Vogel Paint, etc., Co., 46 Mo. App. 374).

43. Mackey *v.* Daniel, 59 Md. 484; Ward *v.* Hollins, 14 Md. 158; Pike *v.* Emerson, 5 N. H. 393, 22 Am. Dec. 468; Galbreath *v.* Colt, 4 Yeates (Pa.) 551. *Contra*, Bates *v.* Voorhees, 20 N. Y. 525; People *v.* New York, 11 Abb. Pr. (N. Y.) 66; La Société Canadienne-Francaise de Construction *v.* Daveluy, 20 Can. Supreme Ct. 449.

Waiver of appeal taken.—An attorney cannot waive an appeal once taken. State Bank *v.* Green, 8 Nebr. 297, 1 N. W. 210.

44. Louisville, etc., R. Co. *v.* Boland, 70 Ind. 595; State *v.* Kitchen, 41 N. J. L. 229; Hoffenberth *v.* Muller, 12 Abb. Pr. N. S. (N. Y.) 221. *Contra*, Pendleton *v.* Pendleton, 1 Thomps. & C. (N. Y.) 95.

45. See *supra*, III, C, 3, a, (I), (C), (1).

46. *Alabama.*— Frazier *v.* Parks, 56 Ala. 363.

Arkansas.— Conway County *v.* Little Rock, etc., R. Co., 39 Ark. 50; Miller *v.* Scott, 21 Ark. 396.

Colorado.— Black *v.* Drake, 2 Colo. 330.

Connecticut.— Brackett *v.* Norton, 4 Conn. 517, 10 Am. Dec. 179.

Iowa.—McCarver *v.* Nealey, 1 Greene (Iowa) 360.

Kentucky.— Canterberry *v.* Com., 1 Dana (Ky.) 415.

Maryland.— Baltimore, etc., R. Co. *v.* Fitzpatrick, 36 Md. 619, attorney employed by *prochein ami*.

Massachusetts.— Lewis *v.* Gamage, 1 Pick. (Mass.) 347; Langdon *v.* Potter, 13 Mass. 319.

Missouri.— Roberts *v.* Nelson, 22 Mo. App. 28, attorney co-owner of judgment.

ment of the judgment by the client revokes this authority[47] and the attorney has no right to execute a satisfaction of judgment in behalf of his client, without payment,[48] although there is a presumption that such an entry of satisfaction was made by special authority.[49] Nor has an attorney authority to accept satisfaction of a judgment for less than the full amount due;[50] though there is no objection to his entering a *remittitur* when an excessive verdict prevents a cause from going to judgment.[51] An important limitation on the control over judgment is that the attorney has no power to sell or assign it.[52]

Pennsylvania.—Weist *v.* Lee, 3 Yeates (Pa.) 47. See also Bracken *v.* City, 27 Pittsb. Leg. J. (Pa.) 202.

South Carolina.— Mordecai *v.* Charleston County, 8 S. C. 100; Public Account Com'rs *v.* Rose, 1 Desauss. (S. C.) 461.

Tennessee.— Maxwell *v.* Owen, 7 Coldw. (Tenn.) 630.

Texas.— Cartwright *v.* Jones, 13 Tex. 1.

Virginia.— Wilson *v.* Stokes, 4 Munf. (Va.) 455; Branch *v.* Burnley, 1 Call (Va.) 147.

Wisconsin.— Flanders *v.* Sherman, 18 Wis. 575.

United States.— Erwin *v.* Blake, 8 Pet. (U. S.) 18, 8 L. ed. 852.

See 5 Cent. Dig. tit. "Attorney and Client," § 204.

An attorney is not entitled to receive payment after two years (Chautauque County Bank *v.* Risley, 4 Den. (N. Y.) 480), or if only specially employed (Cameron *v.* Stratton, 14 Ill. App. 270).

47. Trumbull *v.* Nicholson, 27 Ill. 149; Robinson *v.* Brennan, 90 N. Y. 208; Mordecai *v.* Charleston County, 8 S. C. 100.

48. *Colorado.*— McMurray *v.* Marsh, 12 Colo. App. 95, 54 Pac. 852.

Georgia.— Phillips *v.* Dobbins, 56 Ga. 617.

Kansas.— Rounsaville *v.* Hazen, 33 Kan. 71, 5 Pac. 422.

Kentucky.— Harrow *v.* Farrow, 7 B. Mon. (Ky.) 126, 45 Am. Dec. 60.

Louisiana.— Morgan *v.* His Creditors, 19 La. 84.

Maine.— Wilson *v.* Wadleigh, 36 Me. 496.

New York.— Beers *v.* Hendrickson, 45 N. Y. 665.

49. Wyckoff *v.* Bergen, 1 N. J. L. 248; Miller *v.* Preston, 154 Pa. St. 63, 25 Atl. 1041; Wheeler *v.* Alderman, 34 S. C. 533, 13 S. E. 673, 27 Am. St. Rep. 842; Wills *v.* Chandler, 1 McCrary (U. S.) 276, 2 Fed. 273, 9 Reporter 808.

50. *Alabama.*— Robinson *v.* Murphy, 69 Ala. 543.

Illinois.— People *v.* Cole, 84 Ill. 327; Miller *v.* Lane, 13 Ill. App. 648.

Maryland.— Rohr *v.* Anderson, 51 Md. 205.

Massachusetts.— Lewis *v.* Gamage, 1 Pick. (Mass.) 347.

New Jersey.— Faughnan *v.* Elizabeth, 58 N. J. L. 309, 33 Atl. 212.

New York.— Wood *v.* New York, 44 N. Y. App. Div. 299, 60 N. Y. Suppl. 759; Woodford *v.* Rasbach, 6 N. Y. Civ. Proc. 315. *Compare* Benedict *v.* Smith, 10 Paige (N. Y.) 126.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Christman, 4 Pennyp. (Pa.) 271; Ely *v.* Lamb, 10 Pa. Co. Ct. 209.

Texas.— Peters *v.* Lawson, 66 Tex. 336, 17 S. W. 734.

West Virginia.— Watt *v.* Brookover, 35 W. Va. 323, 13 S. E. 1007, 29 Am. St. Rep. 811.

United States.— Jeffries *v.* Union Mut. L. Ins. Co., 1 McCrary (U. S.) 114, 1 Fed. 450; Pierce *v.* Brown, 8 Biss. (U. S.) 534, 19 Fed. Cas. No. 11,143.

Under special authority, receiving less than the amount of the judgment is not objectionable (Vickery *v.* McClellan, 61 Ill. 311); but the special instructions must be followed (Harrow *v.* Farrow, 7 B. Mon. (Ky.) 126, 45 Am. Dec. 60).

When made in open court it has been held that, in the absence of any limitation of his authority known to the adverse party or which such party could, by reasonable inquiry, have learned, an attorney of record has authority, by agreement, to effect a final disposition of his client's cause by entry and satisfaction of judgment on payment of a stipulated sum. Beliveau *v.* Amoskeag Mfg. Co., 68 N. H. 225, 40 Atl. 734, 73 Am. St. Rep. 577, 44 L. R. A. 167.

51. Mead *v.* Buckner, 2 La. 286; Case *v.* Hawkins, 53 Miss. 702; Pickett *v.* Ford, 4 How. (Miss.) 246. See also Trope *v.* Kerns, 83 Cal. 553, 23 Pac. 691.

52. *Alabama.*— Boren *v.* McGehee, 6 Port. (Ala.) 432, 31 Am. Dec. 695.

Kansas.— Mayer *v.* Sparks, 3 Kan. App. 602, 45 Pac. 249.

Kentucky.— Smiley *v.* U. S. Building, etc., Assoc., (Ky. 1901) 62 S. W. 853.

Louisiana.— Walden *v.* Grant, 8 Mart. N. S. (La.) 565.

Maine.— Wilson *v.* Wadleigh, 36 Me. 496.

Mississippi.— Rice *v.* Troup, 62 Miss. 186; Head *v.* Gervais, Walk. (Miss.) 431, 12 Am. Dec. 577.

Missouri.— Wyatt *v.* Fromme, 70 Mo. App. 613.

Nebraska.— Henry, etc., Co. *v.* Halter, 58 Nebr. 685, 79 N. W. 616.

Ohio.— Boyle *v.* Beattie, 2 Cinc. Super. Ct. (Ohio) 490.

Pennsylvania.— Bosler *v.* Searight, 149 Pa. St. 241, 24 Atl. 303; Rowland *v.* Slate, 58 Pa. St. 196; Fassitt *v.* Middleton, 47 Pa. St. 214, 86 Am. Dec. 535 [*affirming* 5 Phila. (Pa.) 196, 20 Leg. Int. (Pa.) 357]; Campbell's Appeal, 29 Pa. St. 401, 72 Am. Dec. 641; Ely *v.* Lamb, 10 Pa. Co. Ct. 209.

South Carolina.— Mayer *v.* Blease, 4 S. C. 10; Noonan *v.* Gray, 1 Bailey (S. C.) 437.

Tennessee.— Maxwell *v.* Owen, 7 Coldw.

(b) Collecting. Under a general retainer, an attorney may also take affirmative measures to collect a judgment.[53]

(c) Staying Execution or Vacating Judgment. Where a stay of execution is moderate, it is within an attorney's power to grant one,[54] and, when the court would vacate a judgment on motion, he may agree to have it done by consent.[55]

(3) Control Over Execution. After an attorney has had an execution issue on a judgment, he may, by force of his original retainer, receive payment on it, and such payment will bind his client;[56] but he cannot discharge an execution on payment of less than the full amount.[57] It is also within the scope of his general employment to direct the sheriff as to the time and manner of enforcing the execution,[58] and all directions given to the sheriff and representations made to him regarding the return of the execution are binding on the client.[59] It seems that

(Tenn.) 630; Baldwin *v.* Merrill, 8 Humphr. (Tenn.) 132.

See 5 Cent. Dig. tit. "Attorney and Client," § 179.

Ratification of assignment.—Where an attorney assigns a judgment to a third person, who pays it in full, the judgment creditor ratifies his attorney's action by failing to disaffirm it and restore the money. Dunn *v.* Springmeier, 7 Ohio Dec. (Reprint) 339, 2 Cinc. L. Bul. (Ohio) 127.

An attorney cannot file a judgment as a claim in equity proceedings. Horsey *v.* Chew, 65 Md. 555, 5 Atl. 466.

53. *Alabama.*— Albertson *v.* Goldshy, 28 Ala. 711, 65 Am. Dec. 380.

Minnesota.— Nelson *v.* Jenks, 51 Minn. 108, 52 N. W. 1081.

Missouri.— Vaughn *v.* Fisher, 32 Mo. App. 29.

New York.— Ward *v.* Roy, 69 N. Y. 96; Steward *v.* Biddlecum, 2 N. Y. 103; Cruikshank *v.* Goodwin, 20 N. Y. Suppl. 757, 49 N. Y. St. 603; Shaunessy *v.* Traphagen, 13 N. Y. St. 754.

Pennsylvania.— McDonald *v.* Todd, 1 Grant (Pa.) 17.

South Carolina.— Hyams *v.* Michel, 3 Rich. (S. C.) 303.

Canada.— Hett *v.* Pun Pong, 18 Can. Supreme Ct. 290; Foisy *dit* Freniere *v.* Wurtele, 18 Rev. Lég. 577.

The authority of the attorney was presumed in Simpson *v.* Lombas, 14 La. Ann. 103; Rowlett *v.* Shepherd, 7 Mart. N. S. (La.) 513.

He may have execution issue on the judgment (Farmers Bank *v.* Mackall, 3 Gill (Md.) 447; Simpkins *v.* Page, 1 Code Rep. (N. Y.) 107; Erwin *v.* Blake, 8 Pet. (U. S.) 18, 8 L. ed. 852; Union Bank *v.* Geary, 5 Pet. (U. S.) 99, 8 L. ed. 60; Wills *v.* Chandler, 1 McCrary (U. S.) 276, 2 Fed. 273, 9 Reporter 808), and the client is liable if the attorney has this done while an appeal is pending (Foster *v.* Wiley, 27 Mich. 244, 15 Am. Rep. 185). Although an attorney directed an execution sale contrary to his client's instructions, the purchaser's title was held good. Russell *v.* Geyer, 4 Mo. 384.

54. Millandon *v.* McMicken, 7 Mart. N. S. (La.) 34; Wieland *v.* White, 109 Mass. 392; Silvis *v.* Ely, 3 Watts & S. (Pa.) 420. *Contra*, Doe *v.* Ingersoll, 11 Sm. & M. (Miss.) 249, 49 Am. Dec. 57 (postponing a lien); Pendexter *v.* Vernon, 9 Humphr. (Tenn.) 83.

55. Read *v.* French, 28 N. Y. 285; Schelly *v.* Zink, 13 Hun (N. Y.) 538; Clussman *v.* Merkel, 3 Bosw. (N. Y.) 402. But see Quinn *v.* Lloyd, 7 Rob. (N. Y.) 538, 5 Abb. Pr. N. S. (N. Y.) 281, 36 How. Pr. (N. Y.) 378.

56. *Maine.*—White *v.* Johnson, 67 Me. 287; Gray *v.* Wass, 1 Me. 257.

Mississippi.— Butler *v.* Jones, 7 How. (Miss.) 587, 40 Am. Dec. 82.

Missouri.— Milliken *v.* McBroom, 38 Mo. 342.

Pennsylvania.— Henderson's Appeal, 4 Pennyp. (Pa.) 229.

South Carolina.— Mayer *v.* Blease, 4 S. C. 10; State *v.* Easterling, 1 Rich. (S. C.) 310.

Virginia.—Wilson *v.* Stokes, 4 Munf. (Va.) 455.

57. Jewett *v.* Wadleigh, 32 Me. 110; Lewis *v.* Gamage, 1 Pick. (Mass.) 347. See also Brock *v.* McLean, Taylor (U. C.) 398.

58. *Alabama.*— Smith *v.* Gayle, 58 Ala. 600.

Illinois.— Smyth *v.* Harvie, 31 Ill. 62, 83 Am. Dec. 202.

Indiana.— State *v.* Boyd, 63 Ind. 428.

Maine.—Jenney *v.* Delesdernier, 20 Me. 183.

New Hampshire.— Stevens *v.* Colby, 46 N. H. 163.

New York.— Corning *v.* Southland, 3 Hill (N. Y.) 552; Walters *v.* Sykes, 22 Wend. (N. Y.) 566; Gorham *v.* Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549.

Pennsylvania.— Lynch *v.* Com., 16 Serg. & R. (Pa.) 368, 16 Am. Dec. 582.

Vermont.—Willard *v.* Goodrich, 31 Vt. 597; Kimball *v.* Perry, 15 Vt. 414.

United States.— Erwin *v.* Blake, 8 Pet. (U. S.) 18, 8 L. ed. 852.

Compare Wallbridge *v.* Hall, 4 Manitoba 341, holding that an attorney has no implied authority to give instructions to a sheriff to seize any particular goods.

59. McClure *v.* Colclough, 5 Ala. 65; White *v.* Johnson, 67 Me. 287; Howard *v.* Whittemore, 9 N. H. 133.

Wrongful arrest.—Where an attorney has authority to arrest the judgment debtor on an execution against the person, it has been held that the client is liable if a wrongful arrest is made. Guilleaume *v.* Rowe, 94 N. Y. 268, 46 Am. Rep. 141; Sleight *v.* Leavenworth, 5 Duer (N. Y.) 122; Newberry *v.* Lee,

an attorney has no power to release property which has been levied on,[60] or to discharge a debtor from arrest except on payment in full of the judgment,[61] to renew an execution,[62] to appoint an appraiser,[63] or to agree that the proceeds of an execution be paid to a surety.[64]

(4) CONTROL OVER JUDICIAL SALE. The attorney may give the sheriff binding directions regarding the execution sale,[65] and if the attorney obtains a wrongful order of sale the client is liable therefor.[66] So, also, it is proper for an attorney to purchase property for his client at an execution sale,[67] but he may not buy for one only when he represents several joint parties.[68]

(II) *IN MATTERS NOT IMMEDIATELY CONNECTED WITH LITIGATION* — (A) *Acknowledging Client's Indebtedness.* An attorney has no implied power to bind his client by acknowledging a debt.[69]

(B) *Binding Client by Contract* — (1) IN GENERAL. Ordinarily, there is no implied power vested in an attorney to bind his client by contract,[70] and a general

3 Hill (N. Y.) 523. *Contra,* Moore *v.* Cohen, 128 N. C. 345, 38 S. E. 919.

Wrongful levy.— It has been held that where an attorney directs the wrongful levy of an execution, his client is liable therefor. Howell *v.* Caryl, 50 Mo. App. 440; Gillingham *v.* Clark, 1 Phila. (Pa.) 51, 7 Leg. Int. (Pa.) 50; Feury *v.* McCormick Harvesting Mach. Co., 6 S. D. 396, 61 N. W. 162. *Contra,* Welsh *v.* Cochran, 63 N. Y. 181, 20 Am. Rep. 519; Guilfoyle *v.* Seeman, 41 N. Y. App. Div. 516, 58 N. Y. Suppl. 668; Wiegmann *v.* Morimura, 12 Misc. (N. Y.) 37, 33 N. Y. Suppl. 39, 66 N. Y. St. 537; Tischer *v.* Hetherington, 11 Misc. (N. Y.) 575, 32 N. Y. Suppl. 795, 66 N. Y. St. 178.

60. Banks *v.* Evans, 10 Sm. & M. (Miss.) 35, 48 Am. Dec. 734.

61. Bowe *v.* Campbell, 2 N. Y. Civ. Proc. 232, 63 How. Pr. (N. Y.) 167; Simonton *v.* Barrell, 21 Wend. (N. Y.) 362; Gorham *v.* Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549; Kellogg *v.* Gilbert, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335; Jackson *v.* Bartlett, 8 Johns. (N. Y.) 361; Crary *v.* Turner, 6 Johns. (N. Y.) 51; Treasurers *v.* McDowell, 1 Hill (S. C.) 184, 26 Am. Dec. 166. *Contra,* Scott *v.* Seiler, 5 Watts (Pa.) 235.

Presumption as to authority.—An order to discharge, served upon a sheriff and signed by the attorney, carries with it the presumption that it was duly authorized. Davis *v.* Bowe, 118 N. Y. 55, 23 N. E. 166, 27 N. Y. St. 862 [*affirming* 54 N. Y. Super. Ct. 520, 25 N. Y. Wkly. Dig. 455].

62. Cheever *v.* Mirrick, 2 N. H. 376.

63. Dodge *v.* Prince, 4 Vt. 191.

64. Luce *v.* Foster, 42 Nebr. 818, 60 N. W. 1027.

65. Lynch *v.* Com., 16 Serg. & R. (Pa.) 368, 16 Am. Dec. 582.

Reasonable stipulations regarding the sale are within the scope of a general retainer (Nelson *v.* Cook, 19 Ill. 440; Reamer's Appeal, 18 Pa. St. 510; Farmers' Trust, etc., Bank *v.* Ketchum, 4 McLean (U. S.) 120, 8 Fed. Cas. No. 4,670. See also Story *v.* Hawkins, 8 Dana (Ky.) 12, where a confirmation of sale by attorneys was held authorized), but improper arrangements regarding the manner of sale will not be binding on the client (Krouschnable *v.* Knoblauch, 21 Minn. 56; Person *v.* Leathers, 67 Miss. 548, 7 So. 391; Philadelphia F. Assoc. *v.* Ruby, 58 Nebr. 730, 79 N. W. 723).

Regarding attorney's receipt to sheriff see Pearson *v.* Morrison, 2 Serg. & R. (Pa.) 20.

66. Vaughn *v.* Fisher, 32 Mo. App. 29.

67. Fabel *v.* Boykin, 55 Ala. 383. See also Rogers *v.* Rogers, (Tenn. Ch. 1895) 35 S. W. 890.

68. Hawley *v.* Cramer, 4 Cow. (N. Y.) 717; Leisenring *v.* Black, 5 Watts (Pa.) 303, 30 Am. Dec. 322.

69. Poussin's Succession, 27 La. Ann. 296; Hill *v.* Barlow, 6 Rob. (La.) 142; Barr *v.* Rader, 31 Oreg. 225, 49 Pac. 962; Thomas *v.* Wiltbank, 6 Wkly. Notes Cas. (Pa.) 477.

Statute of limitations.— The same is true regarding an acknowledgment to take a case out of the statute of limitations. Pequamick Co. *v.* Brady, 1 Phila. (Pa.) 220, 8 Leg. Int. (Pa.) 126; Steele *v.* Jennings, 1 McMull. (S. C.) 297.

70. *Illinois.*— Chicago Gen. R. Co. *v.* Murray, 174 Ill. 259, 51 N. E. 245; Wabash, etc., R. Co. *v.* McDougall, 126 Ill. 111, 18 N. E. 291, 9 Am. St. Rep. 539, 1 L. R. A. 207. *Compare* Elgin, etc., R. Co. *v.* Fletcher, 128 Ill. 619, 21 N. E. 577, where the stipulations were made in court.

Iowa.— Rayburn *v.* Kuhl, 10 Iowa 92.

Kansas.— Marbourg *v.* Smith, 11 Kan. 554.

Maine.— Ireland *v.* Todd, 36 Me. 149.

Maryland.— Lyon *v.* Hires, 91 Md. 411, 46 Atl. 985; Doub *v.* Barnes, 1 Md. Ch. 127.

Missouri.— Ratican *v.* Union Depot Co., 80 Mo. App. 528; Wonderly *v.* Martin, 69 Mo. App. 84.

New Jersey.— Hogan *v.* Hutton, 20 N. J. L. 82.

New York.— See Bogart *v.* De Bussy, 6 Johns. (N. Y.) 94.

Pennsylvania.— Miller *v.* Hulme, 126 Pa. St. 277, 17 Atl. 587; Pearson *v.* Morrison, 2 Serg. & R. (Pa.) 20; Thomas *v.* Wiltbank, 36 Leg. Int. (Pa.) 105.

Tennessee.—Rice *v.* Hunt, 12 Heisk. (Tenn.) 344; Pendexter *v.* Vernon, 9 Humphr. (Tenn.) 83.

Virginia.— Herbert *v.* Alexander, 2 Call (Va.) 498.

Washington.— Haynes *v.* Tacoma, etc., R. Co., 7 Wash. 211, 34 Pac. 922.

retainer does not authorize an attorney to bid and purchase for his client,[71] or to enter into agreements regarding his client's property.[72] It seems, however, that contracts of indemnity come within the general scope when they directly affect some step in the litigation.[73]

(2) By Executing Bonds. An attorney employed to conduct an appeal has implied power to execute an appeal bond,[74] and one empowered to collect a debt has implied power to execute an attachment bond;[75] but replevin and injunction bonds seem to come within a different category, and authority to execute them will not be implied.[76]

(c) *Disposing of Client's Money or Other Property.* Without express instructions an attorney is not authorized to dispose of his client's money in any other way than by turning it over to the client,[77] although his agreement to hold funds subject to the decision of an appellate court has been upheld.[78] The attorney has no greater power to deal with property of his client other than money[79] and it has been held that he cannot sell or assign the claim of his client.[80]

United States.— Haselton *v.* Florentine Marble Co., 94 Fed. 701.

Canada.— Cameron *v.* Brooke, 15 Grant Ch. (U. C.) 693.

Compare Ward *v.* Wilson, 17 Tex. Civ. App. 28, 43 S. W. 833, where the stipulations were made in court.

71. Lasley *v.* Lackey, 4 Ky. L. Rep. 896; Averill *v.* Williams, 4 Den. (N. Y.) 295, 47 Am. Dec. 252; Beardsley *v.* Root, 11 Johns. (N. Y.) 464, 6 Am. Dec. 386; Washington *v.* Johnson, 7 Humphr. (Tenn.) 468; Savery *v.* Sypher, 6 Wall. (U. S.) 157, 18 L. ed. 822; Fife *v.* Bohlen, 22 Fed. 878. But see Russell *v.* Geyer, 4 Mo. 384.

72. *Colorado.*— Hagerman *v.* Bates, 5 Colo. App. 391, 38 Pac. 1100.

Illinois.— Brooks *v.* Kearns, 86 Ill. 547.

Iowa.— Stuck *v.* Reese, 15 Iowa 122.

Kentucky.— Corbin *v.* Mulligan, 1 Bush (Ky.) 297.

Maryland.— Howard *v.* Carpenter, 11 Md. 259.

Massachusetts.—Hubbard *v.* Shaw, 12 Allen (Mass.) 120.

Minnesota.— Krouschnable *v.* Knoblauch, 21 Minn. 56.

Pennsylvania.— Jamestown, etc., R. Co. *v.* Egbert, 152 Pa. St. 53, 25 Atl. 151; Naglee *v.* Ingersoll, 7 Pa. St. 185; Burkhardt *v.* Schmidt, 10 Phila. (Pa.) 118, 31 Leg. Int. (Pa.) 92.

Washington.—Scully *v.* Book, 3 Wash. 182, 28 Pac. 556.

73. Hayes *v.* O'Connell, 9 Ala. 488; Schoregge *v.* Gordon, 29 Minn. 367, 13 N. W. 194; Ford *v.* Williams, 13 N. Y. 577, 67 Am. Dec. 83; Clark *v.* Randall, 9 Wis. 135, 76 Am. Dec. 252. See also Muirhead *v.* Sheriff, 14 Can. Supreme Ct. 735. *Contra*, Nutt *v.* Merrill, 40 Me. 237; Luce *v.* Foster, 42 Nebr. 818, 60 N. W. 1027, in which cases it appeared that the attorney had been instructed not to take the action which required the bond. See also White *v.* Davidson, 8 Md. 169, 63 Am. Dec. 699.

74. Nisbet *v.* Lawson, 1 Ga. 275; Bach *v.* Ballard, 13 La. Ann. 487; Adams *v.* Robinson, 1 Pick. (Mass.) 461; Luce *v.* Foster, 42 Nebr. 818, 60 N. W. 1027. *Contra*, Gordon *v.* Camp, 2 Fla. 23; Clark *v.* Courser, 29 N. H. 170; *Ex p.* Holbrook, 5 Cow. (N. Y.) 35.

When not authorized to appeal an attorney has no authority to execute an appeal bond. Coles *v.* Anderson, 8 Humphr. (Tenn.) 489.

Necessity of authority under seal.— The doctrine of agency — that authority to an agent to execute a sealed instrument must be under seal — applies to attorneys. Clark *v.* Courser, 29 N. H. 170; Murray *v.* Peckam, 15 R. I. 297, 3 Atl. 662.

75. Trowbridge *v.* Weir, 6 La. Ann. 706; Alexander *v.* Burns, 6 La. Ann. 704; Dillon *v.* Watkins, 2 Speers (S. C.) 445.

76. Gauthier *v.* Gardenal, 44 La. Ann. 884, 11 So. 463; State Bank *v.* Wilson, 19 La. Ann. 1; Narragaugus *v.* Wentworth, 36 Me. 339. See also Cunningham *v.* Tucker, 14 Fla. 251; Simpson *v.* Knight, 12 Fla. 144; Fornes *v.* Wright, 91 Iowa 392, 59 N. W. 51.

77. *Illinois.*— Bloomington *v.* Heiland, 67 Ill. 278; Swartz *v.* Earls, 53 Ill. 237.

Kansas.—Mitchell *v.* Milhoan, 11 Kan. 617.

Kentucky.— Hale *v.* Passmore, 4 Dana (Ky.) 70.

New York.— Hawkins *v.* Avery, 32 Barb. (N. Y.) 551; Peyser *v.* Wilcox, 64 How. Pr. (N. Y.) 525.

Texas.—Gordon *v.* Sanborn, (Tex. Civ. App. 1896) 35 S. W. 291.

But see Carpenter *v.* Goin, 19 N. H. 479; Webb *v.* White, 18 Tex. 572, allowing an attorney some discretion under special circumstances.

78. Halliday *v.* Stuart, 151 U. S. 229, 14 S. Ct. 302, 38 L. ed. 141.

79. Spinks *v.* Athens Sav. Bank, 108 Ga. 376, 33 S. E. 1003; Beard *v.* Westerman, 32 Ohio St. 29.

Delivery of deed as security.—An attorney is not empowered by his general authority to deliver a deed made by his client as security for a loan, nor to receive the money thereon. Hammerslough *v.* Cheatham, 84 Mo. 13.

80. *Alabama.*—Kirk *v.* Glover, 5 Stew. & P. (Ala.) 340.

Illinois.— Hays *v.* Cassell, 70 Ill. 669.

Ohio.— Card *v.* Walbridge, 18 Ohio 411.

Pennsylvania.—Rowland *v.* Slate, 58 Pa. St. 196.

It has also been held that he cannot sell or assign a note put into his hands for collection.[81]

(D) *Settlement or Collection of Client's Claim* — (1) ACCEPTING SECURITY. An attorney under a general retainer to collect a claim has no authority to receive security for it,[82] nor can he agree to any change in securities already given.[83]

(2) EXTENDING TIME OF PAYMENT. No implied power exists, under a general retainer, to grant additional time to a client's debtor.[84]

(3) COMPROMISING. As a general rule, an attorney without special power is not authorized to compromise his client's claim.[85] There is, however, no objec-

South Carolina.—Annely *v.* De Saussure, 12 S. C. 488; Mayer *v.* Blease, 4 S. C. 10; Noonan *v.* Gray, 1 Bailey (S. C.) 437.

Vermont.— Penniman *v.* Patchin, 5 Vt. 346. But see Painter *v.* Gibson, 88 Iowa 120, 55 N. W. 84.

81. *Alabama.*— Craig *v.* Ely, 5 Stew. & P. (Ala.) 354.

Indiana.—Russell *v.* Drummond, 6 Ind. 216.

Kansas.— Eggan *v.* Briggs, 23 Kan. 710.

Missouri.— Goodfellow *v.* Landis, 36 Mo. 168; Feinier *v.* Puetz, 77 Mo. App. 405.

New Hampshire.— Child *v.* Eureka Powder Works, 44 N. H. 354; White *v.* Hildreth, 13 N. H. 104.

North Carolina.—Sherrill *v.* Weisiger Clothing Co., 114 N. C. 436, 19 S. E. 365.

Indorsing check.—An attorney has no authority to indorse his client's name on a check. Chatham Bank *v.* Hochstadter, 27 Alb. L. J. 133.

82. *Arkansas.*— Walker *v.* Scott, 13 Ark. 644.

Georgia.— Jeter *v.* Haviland, 24 Ga. 252.

Indiana.— Holliday *v.* Thomas, 90 Ind. 398.

Iowa.— Roberts *v.* Rumley, 58 Iowa 301, 12 N. W. 323.

West Virginia.— Kent *v.* Chapman, 18 W. Va. 485.

Contra, Dolan *v.* Van Demark, 35 Kan. 304, 10 Pac. 848. See also Rice *v.* Wilkins, 21 Me. 558.

83. Richardson Drug Co. *v.* Dunagan, 8 Colo. App. 308, 46 Pac. 227; Tankersley *v.* Anderson, 4 Desauss. (S. C.) 44; Scott *v.* Atchison, 38 Tex. 384.

84. *Alabama.*— Lockhart *v.* Wyatt, 10 Ala. 231, 44 Am. Dec. 481.

Illinois.— Nolan *v.* Jackson, 16 Ill. 272.

Indiana.— Osborn *v.* Storms, 65 Ind. 321.

New York.— Heyman *v.* Beringer, 1 Abb. N. Cas. (N. Y.) 315.

Pennsylvania.— Beatty *v.* Hamilton, 127 Pa. St. 71, 17 Atl. 755.

Contra, Crawford *v.* Nolan, 70 Iowa 97, 30 N. W. 32, where, however, security was given.

85. *Alabama.*— Senn *v.* Joseph, 106 Ala. 454, 17 So. 543.

Arkansas.— Pickett *v.* Merchants' Nat. Bank, 32 Ark. 346.

California.—Ambrose *v.* McDonald, 53 Cal. 28; Preston *v.* Hill, 50 Cal. 43, 19 Am. Rep. 647.

Colorado.— Hallack *v.* Loft, 19 Colo. 74, 34 Pac. 568.

Connecticut.— Derwort *v.* Loomer, 21 Conn. 245.

Delaware.—Wood *v.* Bangs, 2 Pennew. (Del.) 435, 48 Atl. 189.

Georgia.— Kaiser *v.* Hancock, 106 Ga. 217, 32 S. E. 123; Sonneborn *v.* Moore, 105 Ga. 497, 30 S. E. 947; Kidd *v.* Huff, 105 Ga. 209, 31 S. E. 430; McIntyre *v.* Meldrim, 63 Ga. 58.

Illinois.— Wadhams *v.* Gay, 73 Ill. 415; Nolan *v.* Jackson, 16 Ill. 272.

Indiana.— Repp *v.* Wiles, 3 Ind. App. 167, 29 N. E. 441.

Iowa.— Martin *v.* Capital Ins. Co., 85 Iowa 643, 52 N. W. 534.

Kansas.— Jones *v.* Inness, 32 Kan. 177, 4 Pac. 95.

Kentucky.— Smith *v.* Dixon, 3 Metc. (Ky.) 438; Cox *v.* Adelsdorf, 21 Ky. L. Rep. 421, 51 S. W. 616; Brown *v.* Bunger, 19 Ky. L. Rep. 1527, 43 S. W. 714; Lexington, etc., Min. Co. *v.* Welburn, 11 Ky. L. Rep. 307.

Louisiana.— Phelps *v.* Preston, 9 La. Ann. 488; Dupre *v.* Splane, 16 La. 51; Woodrow *v.* Hennen, 6 Mart. N. S. (La.) 158.

Maryland.— Fritchey *v.* Bosley, 56 Md. 94; Hamburger *v.* Paul, 51 Md. 219.

Massachusetts.— Dalton *v.* West End St. R. Co., 159 Mass. 221, 34 N. E. 261, 38 Am. St. Rep. 410.

Michigan.—Eaton *v.* Knowles, 61 Mich. 625, 28 N. W. 740.

Missouri.— Melcher *v.* Exchange Bank, 85 Mo. 362; Semple *v.* Atkinson, 64 Mo. 504; Spears *v.* Ledergerber, 56 Mo. 465; Walden *v.* Bolton, 55 Mo. 405; Grumley *v.* Webb, 48 Mo. 562; Davidson *v.* Rozier, 23 Mo. 387; Barton *v.* Hunter, 59 Mo. App. 610; Willard *v.* S. Seegel Gas-Fixture Co., 47 Mo. App. 1; Lewis *v.* Baker, 24 Mo. App. 682; Roberts *v.* Nelson, 22 Mo. App. 28.

Nebraska.— Smith *v.* Jones, 47 Nebr. 108, 66 N. W. 19, 53 Am. St. Rep. 519; Hamrich *v.* Combs, 14 Nebr. 381, 15 N. W. 731.

New York.— Mandeville *v.* Reynolds, 5 Hun (N. Y.) 338 [*affirmed* in 68 N. Y. 528]; Smith *v.* Bradhurst, 18 Misc. (N. Y.) 546, 41 N. Y. Suppl. 1002; Tito *v.* Seabury, 18 Misc. (N. Y.) 283, 41 N. Y. Suppl. 1041; De Witt *v.* Greener, 11 N. Y. Civ. Proc. 327; Shaw *v.* Kidder, 2 How. Pr. (N. Y.) 244.

North Carolina.— Moye *v.* Cogdell, 69 N. C. 93.

Ohio.— Holden *v.* Lippert, 12 Ohio Cir. Ct. 767.

Pennsylvania.— Brockley *v.* Brockley, 122 Pa. St. 1, 15 Atl. 646; Isaacs *v.* Zugsmith, 103 Pa. St. 77; Mackey *v.* Adair, 99 Pa. St. 143; Stokely *v.* Robinson, 34 Pa. St. 315; Filby *v.* Miller, 25 Pa. St. 264; North Whitehall Tp. *v.* Keller, 12 Wkly. Notes Cas. (Pa.)

tion to giving an attorney special authority to compromise,[86] and, in rare instances, the nature of the business may be such that a power to compromise would be

177; Callahan *v.* Quigley, 6 Pa. Dist. 494; Schuylkill River Road, 20 Pa. Co. Ct. 559.

Rhode Island.— Whipple *v.* Whitman, 13 R. I. 512, 43 Am. Rep. 42.

South Carolina.— Gilliland *v.* Gasque, 6 S. C. 406; Treasurers *v.* McDowell, 1 Hill (S. C.) 184, 26 Am. Dec. 166.

Tennessee.— Mathews *v.* Massey, 4 Baxt. (Tenn.) 450.

Texas.—Adams *v.* Roller, 35 Tex. 711; Taylor *v.* Evans, 16 Tex. Civ. App. 409, 41 S. W. 877 [*affirming* (Tex. 1894) 29 S. W. 172]; Cook *v.* Greenberg, (Tex. Civ. App. 1896) 34 S. W. 687.

Vermont.— Vail *v.* Conant, 15 Vt. 314.

Washington.— High *v.* Emerson, 23 Wash. 103, 62 Pac. 455.

West Virginia.— Crotty *v.* Eagle, 35 W. Va. 143, 13 S. E. 59.

United States.—Holker *v.* Parker, 7 Cranch (U. S.) 436, 3 L. ed. 396; Harper *v.* National L. Ins. Co., 56 Fed. 281, 17 U. S. App. 48, 5 C. C. A. 505; Bates *v.* Seabury, 1 Sprague (U. S.) 433, 2 Fed. Cas. No. 1,104, 21 L. Rep. 666.

Canada.— Rex *v.* Pinsoneault, 22 L. C. Jur. 58, 6 Rev. Lég. 703; Nova Scotia Bank *v.* Morrow, 17 N. Bransw. 343.

Contra, Bonney *v.* Morrill, 57 Me. 368; Levy *v.* Brown, 56 Miss. 83. In England, also, although there is some conflict of judicial utterance on this subject, the decided cases seem to allow an attorney under a general retainer to compromise a claim for his client. The rule is sometimes qualified by saying that the attorney must act with reasonable care and skill and *bona fide* for the best interests of his client (Strauss *v.* Francis, L. R. 1 Q. B. 379, 7 B. & S. 365, 12 Jur. N. S. 486, 35 L. J. Q. B. 133, 14 L. T. Rep. N. S. 326, 14 Wkly. Rep. 634; Prestwich *v.* Poley, 18 C. B. N. S. 806, 114 E. C. L. 806; Chambers *v.* Mason, 5 C. B. N. S. 59, 5 Jur. N. S. 148, 28 L. J. C. P. 10, 94 E. C. L. 59; Brady *v.* Curran, 2 Ir. R. C. L. 314, 16 Wkly. Rep. 514; Thomas *v.* Harris, 27 L. J. Exch. 353; Berry *v.* Mullen, L. R. 5 Eq. 368; Butler *v.* Knight, L. R. 2 Exch. 109, 36 L. J. Exch. 66, 15 L. T. Rep. N. S. 621, 15 Wkly. Rep. 407); and the settlement must not be made in defiance of the client's instructions (Choun *v.* Parrot, 14 C. B. N. S. 74, 9 Jur. N. S. 1290, 32 L. J. C. P. 197, 8 L. T. Rep. N. S. 391, 11 Wkly. Rep. 608, 108 E. C. L. 74; Fray *v.* Voules, 1 E. & E. 839, 5 Jur. N. S. 1253, 28 L. J. Q. B. 232, 7 Wkly. Rep. 446, 102 E. C. L. 839).

See 5 Cent. Dig. tit "Attorney and Client," § 209.

Where the compromise was reasonable the court has, in some cases, expressed unwillingness to disturb it. Potter *v.* Parsons, 14 Iowa 286; White *v.* Davidson, 8 Md. 169, 63 Am. Dec. 699; Black *v.* Rogers, 75 Mo. 441; Williams *v.* Nolan, 58 Tex. 708; Roller *v.* Wooldridge, 46 Tex. 485. See also Chowning *v.* Willis, 18 Tex. Civ. App. 625, 40 S. W. 395.

The client's residence in another state does not affect the general rule. Housenick *v.* Miller, 93 Pa. St. 514; Granger *v.* Batchelder, 54 Vt. 248, 41 Am. Rep. 846.

Assignments for the benefit of creditors being usually in the nature of compromises, it seems that an attorney should have special authority in order to assent to them for his client. Doub *v.* Barnes, 4 Gill (Md.) 1. See, generally, Vernon *v.* Morton, 8 Dana (Ky.) 247; Jones *v.* Horsey, 4 Md. 306, 59 Am. Dec. 81; Hatch *v.* Smith, 5 Mass. 42; Gordon *v.* Coolidge, 1 Sumn. (U. S.) 537, 10 Fed. Cas. No. 5,606.

Discharging a claim on part payment is a species of compromise, and, so, beyond the powers implied from a general employment.

Alabama.— Hall Safe, etc., Co. *v.* Harwell, 88 Ala. 441, 6 So. 750.

Iowa.— Bigler *v.* Toy, 68 Iowa 687, 28 N. W. 17.

Louisiana.— Pickett *v.* Bates, 3 La. Ann. 627.

Maryland.— Hamburger *v.* Paul, 51 Md. 219; Maddux *v.* Bevan, 39 Md. 485.

Missouri.— Vanderline *v.* Smith, 18 Mo. App. 55.

New Jersey.— Watts *v.* Frenche, 19 N. J. Eq. 407.

Ohio.— Countee *v.* Armstrong, 9 Ohio Dec. (Reprint) 62, 10 Cinc. L. Bul. 339.

Texas.— Pierrepont *v.* Sassee, 1 Tex. App. Civ. Cas. § 1294.

Wisconsin.— Kelly *v.* Wright, 65 Wis. 236, 26 N. W. 610.

United States.— Bates *v.* Seabury, 1 Sprague (U. S.) 433, 2 Fed. Cas. No. 1,104, 21 L. Rep. 666; Abbe *v.* Rood, 6 McLean (U. S.) 106, 1 Fed. Cas. No. 6.

86. Special authority was sufficiently shown in the following cases:

California.—Chaffey *v.* Dexter, (Cal. 1884) 4 Pac. 980.

Illinois.— Vickery *v.* McClellan, 61 Ill. 311.

Indiana.— Freeman *v.* Brehm, (Ind. App. 1892) 30 N. E. 712.

Iowa.— Reid *v.* Dickinson, 37 Iowa 56.

Kentucky.— Glass *v.* Thompson, 9 B. Mon. (Ky.) 235.

Louisiana.— Phelps *v.* Hodge, 6 La. Ann. 524.

Maine.— Chapman *v.* Lothrop, 39 Me. 431.

Maryland.— Little *v.* Edwards, 69 Md. 499, 16 Atl. 134; Fritchey *v.* Bosley, 56 Md. 94.

Massachusetts.— Doon *v.* Donaher, 113 Mass. 151; Peru Steel, etc., Co. *v.* Whipple File, etc., Mfg. Co., 109 Mass. 464.

Mississippi.— Levy *v.* Brown, 56 Miss. 83; Garvin *v.* Lowry, 7 Sm. & M. (Miss.) 24.

Missouri.— Black *v.* Rogers, 75 Mo. 441; Grumley *v.* Webb, 48 Mo. 562.

New Jersey.—Phillips *v.* Pullen, 50 N. J. L. 439, 14 Atl. 222.

South Carolina.— Hewitt *v.* Darlington Phosphate Co., 43 S. C. 5, 20 S. E. 804.

Wisconsin.— Mygatt *v.* Tarbell, 85 Wis. 457, 55 N. W. 1031; Mallory *v.* Mariner, 15 Wis. 172.

United States.— Quesnel *v.* Mussy, 1 Dall. (U. S.) 449, 1 L. ed. 218.

inferred, in which cases the act of the attorney in agreeing to the compromise would bind the client.[87]

(4) Receiving Payment — (a) In Money. Receiving payment on a claim[88] which he has been employed to collect[89] is within the scope of an attorney's general employment.[90] Hence it has been held that payment[91] or tender[92] to the attor-

87. *Illinois.*— People *v.* Quick, 92 Ill. 580.
Indiana.— Union Mut. L. Ins. Co. *v.* Buchanan, 100 Ind. 63; Turner *v.* Campbell, 59 Ind. 279.
Iowa.— Matter of Heath, 83 Iowa 215, 48 N. W. 1037; Ohlquest *v.* Farwell, 71 Iowa 231, 32 N. W. 277.
Minnesota.— Albee *v.* Hayden, 25 Minn. 267.
New Jersey.—Phillips *v.* Pullen, 50 N. J. L. 439, 14 Atl. 222.
New York.— Carstens *v.* Schmalholz, 16 Daly (N. Y.) 26, 8 N. Y. Suppl. 529, 29 N. Y. St. 493.
Wisconsin.— Chilton *v.* Willford, 2 Wis. 1, 60 Am. Dec. 399.
United States.— Jeffries *v.* Union Mut. L. Ins. Co., 1 McCrary (U. S.) 117, 1 Fed. 450.

88. **Payment on mortgage.**— It has been held that an attorney is authorized to receive money paid on a mortgage. Harbach *v.* Colvin, 73 Iowa 638, 35 N. W. 663; Conner *v.* Watson, 27 Misc. (N. Y.) 444, 59 N. Y. Suppl. 213. *Contra, In re* Grundysen, 53 Minn. 346, 55 N. W. 557; Insurance Co. *v.* Roberts, 6 Phila. (Pa.) 516, 25 Leg. Int. (Pa.) 28. See also McMahon *v.* Bardinger, (Pa. 1886) 4 Atl. 379 (decided on special facts); *In re* Flint, 8 Ont. Pr. 361; Gillen *v.* Kingston Roman Catholic Episcopal Corp., 7 Ont. 146.

89. **Evidence of authority where suit not instituted.**—Where the payment is made on a claim without the institution of a suit, possession of the instrument which is evidence of the claim is usually necessary to show authority in the attorney to receive payment (Patten *v.* Fullerton, 27 Me. 58; Whelan *v.* Reilly, 61 Mo. 565; Ward *v.* Beals, 14 Nebr. 114, 15 N. W. 353; Megary *v.* Funtis, 5 Sandf. (N. Y.) 376; Williams *v.* Walker, 2 Sandf. Ch. (N. Y.) 325; Hudson *v.* Johnson, 1 Wash. (Va.) 9), and, without the security, authority to accept payment will not be implied (Smith *v.* Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Williams *v.* Walker, 2 Sandf. Ch. (N. Y.) 325; Bryant *v.* Hamlin, 3 Pa. Dist. 385. But see Ely *v.* Lamb, 10 Pa. Co. Ct. 209).

Authority to receive interest does not imply authority to receive principal. Smith *v.* Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Central Trust Co. *v.* Folsom, 26 N. Y. App. Div. 40, 49 N. Y. Suppl. 670; Williams *v.* Walker, 2 Sandf. Ch. (N. Y.) 325; *In re* Tracy, 21 Ont. App. 454.

Where the attorney's authority has been revoked, payment to him will bind the creditor unless the debtor had notice of the revocation. Ruckman *v.* Alwood, 44 Ill. 183; Yoakum *v.* Tilden, 3 W. Va. 167, 100 Am. Dec. 738.

90. **For cases of special employment, where attorney was not authorized to receive payment,** see Nolan *v.* Jackson, 16 Ill. 272; Test *v.* Larsh, 98 Ind. 301; Com. *v.* Commissioners, 1 Chest. Co. (Pa.) 349. See also Ambrose *v.* McDonald, 53 Cal. 28.

91. *Arkansas.*— Williams *v.* State, 65 Ark. 159, 46 S. W. 186.
Kentucky.— Ely *v.* Harvey, 6 Bush (Ky.) 620.
Maine.— White *v.* Johnson, 67 Me. 287; Ducett *v.* Cunningham, 39 Me. 386; McLaine *v.* Bachelor, 8 Me. 324.
Missouri.— Carroll County *v.* Cheatham, 48 Mo. 385.
New York.— Hawkins *v.* Avery, 32 Barb. (N. Y.) 551; Tito *v.* Seabury, 18 Misc. (N. Y.) 283, 41 N. Y. Suppl. 1041.
South Carolina.— Treasurers *v.* McDowell, 1 Hill (S. C.) 184, 26 Am. Dec. 166; Public Account Com'rs *v.* Rose, 1 Desauss. (S. C.) 461.
Tennessee.— Planters' Bank *v.* Massey, 2 Heisk. (Tenn.) 360.
Virginia.— Johnson *v.* Gibbons, 27 Gratt. (Va.) 632.
United States.—Bates *v.* Seabury, 1 Sprague (U. S.) 433, 2 Fed. Cas. No. 1,104, 21 L. Rep. 666.
See 5 Cent. Dig. tit. "Attorney and Client," § 190.

Legal tender.—An attorney may refuse to accept anything except legal tender. Glass *v.* Davidson, 1 Baxt. (Tenn.) 47.

Confederate notes.—Where an attorney received payment of his client's claim in Confederate notes, the receipt was held not binding on the client. Davis *v.* Lee, 20 La. Ann. 248; Garthwaite *v.* Wentz, 19 La. Ann. 196; Clark *v.* Thomas, 4 Heisk. (Tenn.) 419; Harper *v.* Harvey, 4 W. Va. 539.

Depreciated money.— It has been held in numerous cases that an attorney has no authority to receive depreciated money in satisfaction of a claim.
Alabama.—Chapman *v.* Cowles, 41 Ala. 103, 91 Am. Dec. 508; West *v.* Ball, 12 Ala. 340.
Arkansas.— Lawson *v.* Bettison, 12 Ark. 401.
Illinois.— Trumbull *v.* Nicholson, 27 Ill. 149.
Louisiana.— Railey *v.* Bagley, 19 La. Ann. 172; Dunbar *v.* Morris, 3 Rob. (La.) 278.
Maine.— Lord *v.* Burbank, 18 Me. 178.
Mississippi.— Gasquet *v.* Warren, 2 Sm. & M. (Miss.) 514.
North Carolina.— Moye *v.* Cogdell, 69 N. C. 93.

92. Ferrea *v.* Tubbs, 125 Cal. 687, 58 Pac. 308; McIniffe *v.* Wheelock, 1 Gray (Mass.) 600; Brown *v.* Mead, 68 Vt. 215, 34 Atl. 950; Erwin *v.* Blake, 8 Pet. (U. S.) 18, 8 L. ed. 852. See also Blumberg *v.* Life Interests, etc., Corp., [1897] 1 Ch. 171, 66 L. J. Ch. 127, 75 L. T. Rep. N. S. 627, 45 Wkly. Rep. 246;

ney[93] is equally effective as payment or tender to the client. The power to receive payment includes the power to receive partial payments,[94] and amounts less than the face of the claim act as payment *pro tanto*.[95] An attorney is also authorized to receive money paid to a clerk of court in behalf of his client.[96] He cannot, however, receive payment before it is due,[97] or after a default has become absolute by non-payment.[98]

(b) In Other Than Money. In general, it is held that an attorney who has received a claim for collection has no power, in the absence of special authority, to accept a substitute for money in payment of such claim.[99] Thus it has been held that he cannot receive notes of a third person[1] nor bonds[2] in payment,

Mitcheson *v.* Bell, 11 Quebec Super. Ct. 461.

93. Payment to attorney's agent.— Where payment is made to some agent selected by the attorney into whose hands a claim has been put for collection, the debt is not discharged unless the amount is actually paid over to the client or to the original attorney. Kellogg *v.* Norris, 10 Ark. 18; Clegg *v.* Baumberger, 110 Ind. 536, 9 N. E. 700; Brown *v.* Bull, 3 Mass. 211. But see Schroeder *v.* Gillespie, 2 Pa. Dist. 221.

94. Pickett *v.* Bates, 3 La. Ann. 627; Whelan *v.* Reilly, 61 Mo. 565; Williams *v.* Walker, 2 Sandf. Ch. (N. Y.) 325.

95. Guay *v.* Andrews, 8 La. Ann. 141; Bates *v.* Seabury, 1 Sprague (U. S.) 433, 2 Fed. Cas. No. 1,104, 21 L. Rep. 666.

Fraudulent part payment is not binding on the client. Chalfants *v.* Martin, 25 W. Va. 394.

96. Newman *v.* Kiser, 128 Ind. 258, 26 N. E. 1006; Hiller *v.* Ivy, 37 Miss. 431.

97. Smith *v.* Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Hulbert *v.* Nolte, 5 Ohio Dec. (Reprint) 485, 6 Am. L. Rec. 246, 7 Ohio Dec. (Reprint) 398, 2 Cinc. L. Bul. 294 [*affirmed* in 37 Ohio St. 445].

98. Gable *v.* Hain, 1 Penr. & W. (Pa.) 264.

99. *Alabama.*— Cost *v.* Genette, 1 Port. (Ala.) 212; Gullett *v.* Lewis, 3 Stew. (Ala.) 23.

Arkansas.— Moore *v.* Murrell, 56 Ark. 375, 19 S. W. 973; Lawson *v.* Bettison, 12 Ark. 401.

Illinois.— Lochenmeyer *v.* Fogarty, 112 Ill. 572; Nolan *v.* Jackson, 16 Ill. 272.

Indiana.— McCormick *v.* Walter A. Wood Mowing, etc., Mach. Co., 72 Ind. 518.

Iowa.—Bigler *v.* Toy, 68 Iowa 687, 28 N. W. 17; Drain *v.* Doggett, 41 Iowa 682; McCarver *v.* Nealey, 1 Greene (Iowa) 360.

Kansas.— Herriman *v.* Shomon, 24 Kan. 387, 36 Am. Rep. 261.

Kentucky.— Smith *v.* Schenck, 9 B. Mon. (Ky.) 405.

Louisiana.— Phelps *v.* Preston, 9 La. Ann. 488; Perkins *v.* Grant, 2 La. Ann. 328.

Maryland.— Maddux *v.* Bevan, 39 Md. 485; Kent *v.* Ricards, 3 Md. Ch. 392.

Michigan.— Pitkin *v.* Harris, 69 Mich. 133, 37 N. W. 61.

Mississippi.— Mangum *v.* Ball, 43 Miss. 288, 5 Am. Rep. 488; Hoopes *v.* Burnett, 26 Miss. 428; Coopwood *v.* Baldwin, 25 Miss. 129; Garvin *v.* Lowry, 7 Sm. & M. (Miss.) 24; Keller *v.* Scott, 2 Sm. & M. (Miss.) 81; Clark *v.* Kingsland, 1 Sm. & M. (Miss.) 248.

Missouri.— Vanderline *v.* Smith, 18 Mo. App. 55.

Nebraska.— Cram *v.* Sickel, 51 Nebr. 828, 71 N. W. 724, 66 Am. St. Rep. 478.

New York.— Lewis *v.* Woodruff, 15 How. Pr. (N. Y.) 539.

North Carolina.— Moye *v.* Cogdell, 69 N. C. 93.

Pennsylvania.— Stackhouse *v.* O'Hara, 14 Pa. St. 88; Huston *v.* Mitchell, 14 Serg. & R. (Pa.) 307, 16 Am. Dec. 506; Cake *v.* Olmstead, 1 Am. L. J. N. S. 169.

South Carolina.— Public Account Com'rs *v.* Rose, 1 Desauss. (S. C.) 461.

Tennessee.— Baldwin *v.* Merrill, 8 Humphr. (Tenn.) 132.

Texas.— Anderson *v.* Boyd, 64 Tex. 108; Wright *v.* Daily, 26 Tex. 730.

Virginia.— Wilkinson *v.* Holloway, 7 Leigh (Va.) 277.

West Virginia.— Kent *v.* Chapman, 18 W. Va. 485.

See 5 Cent. Dig. tit. "Attorney and Client," § 200.

An attorney cannot bind his client by an agreement to apply the proceeds from property in payment of a claim. Black *v.* Drake, 2 Colo. 330; Smock *v.* Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780. The client may repudiate the attorney's act. O'Reiley *v.* Call, 7 Ky. L. Rep. 516. See also W. W. Kimball Co. *v.* Payne, (Wyo. 1901) 64 Pac. 673.

1. *Georgia.*—Jeter *v.* Haviland, 24 Ga. 252.

Illinois.— Lochenmeyer *v.* Fogarty, 112 Ill. 572.

Indiana.— Jones *v.* Ransom, 3 Ind. 327; Miller *v.* Edmonston, 8 Blackf. (Ind.) 291.

Louisiana.—Greenwell *v.* Roberts, 7 La. 63.

Massachusetts.— Langdon *v.* Potter, 13 Mass. 319.

Mississippi.— Garvin *v.* Lowry, 7 Sm. & M. (Miss.) 24.

Missouri.— Houx *v.* Russell, 10 Mo. 246.

New York.— Heyman *v.* Beringer, 1 Abb. N. Cas. (N. Y.) 315. But see Livingston *v.* Radcliff, 6 Barb. (N. Y.) 201.

Tennessee.—Kenny *v.* Hazeltine, 6 Humphr. (Tenn.) 62.

See 5 Cent. Dig. tit. "Attorney and Client," § 201.

2. *Alabama.*— Kirk *v.* Glover, 5 Stew. & P. (Ala.) 340.

Illinois.— McClintock *v.* Helberg, 64 Ill.

in the absence of such special authority, nor can the attorney substitute his personal debt.[3]

(5) RELEASING. An attorney has no implied power to release his client's claim,[4] and where there is security for the client's demand cannot surrender it to his client's detriment.[5] Neither has he implied authority to release sureties on an obligation running to his client.[6]

b. Admissions — (i) *IN GENERAL.* An attorney has the same power to bind his client by his admissions that any special agent has in this respect, the rule being that statements by an agent, made strictly in the course of his employment, may be used as admissions against the principal.[7]

App. 190 [*affirmed* in 168 Ill. 384, 48 N. E. 145].

New York.—Chatham Bank *v.* Hochstadter, 27 Alb. L. J. 133.

Texas.— Portis *v.* Ennis, 27 Tex. 574.

Virginia.— Smock *v.* Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780.

3. *Alabama.*— Cost *v.* Genette, 1 Port. (Ala.) 212; Gullett *v.* Lewis, 3 Stew. (Ala.) 23.

Louisiana.— Hicky *v.* Sharp, 4 La. 335; Nolan *v.* Rogers, 4 Mart. N. S. (La.) 145.

Mississippi.— Keller *v.* Scott, 2 Sm. & M. (Miss.) 81; Wenans *v.* Lindsey, 1 How. (Miss.) 577.

North Carolina.— Child *v.* Dwight, 21 N. C. 171.

Pennsylvania.— Chambers *v.* Miller, 7 Watts (Pa.) 63.

Virginia.— Wilkinson *v.* Holloway, 7 Leigh (Va.) 277.

West Virginia.— Wiley *v.* Mahood, 10 W. Va. 206.

United States.— Kingston *v.* Kincaid, 1 Wash. C. C. (U. S.) 454, 14 Fed. Cas. No. 7,822.

See 5 Cent. Dig. tit. "Attorney and Client," § 202.

4. *Louisiana.*— Millaudon *v.* McMicken, 7 Mart. N. S. (La.) 34.

Maine.— Jenney *v.* Delesdernier, 20 Me. 183. But see Fogg *v.* Sanborn, 48 Me. 432, holding that, by reason of Me. Rev. Stat. c. 82, § 44, no action can be maintained upon a claim intrusted to an attorney for collection and by him discharged for any consideration, however small.

New Jersey.—Dickerson *v.* Hodges, 43 N. J. Eq. 45, 10 Atl. 111.

New York.— Barrett *v.* Third Ave. R. Co., 45 N. Y. 628. See also Wells *v.* Evans, 20 Wend. (N. Y.) 251.

Pennsylvania.— Tompkins *v.* Woodford, 1 Pa. St. 156.

South Carolina.— Armstrong *v.* Hurst, 39 S. C. 498, 18 S. E. 150; Gilliland *v.* Gasque, 6 S. C. 406.

Texas.— Hickey *v.* Stringer, 3 Tex. Civ. App. 45, 21 S. W. 716.

Vermont.— Carter *v.* Talcott, 10 Vt. 471.

Wisconsin.— Kelly *v.* Kelly, 86 Wis. 170, 56 N. W. 637; Webster *v.* Stadden, 14 Wis. 277.

See 5 Cent. Dig. tit. "Attorney and Client," § 210.

Object of release immaterial.— That the object is a *bona fide* one to benefit the client does not increase the authority; and an attorney cannot release his client's debtor in order to make the latter a competent witness.

Alabama.— Ball *v.* State Bank, 8 Ala. 590, 42 Am. Dec. 649.

Georgia.— McCurdy *v.* Terry, 33 Ga. 49.

Louisiana.— Weigel's Succession, 18 La. Ann. 49; Stocking's Succession, 6 La. Ann. 229.

Maine.— Springer *v.* Whipple, 17 Me. 351; York Bank *v.* Appleton, 17 Me. 55.

Massachusetts.—Shores *v.* Caswell, 13 Metc. (Mass.) 413.

New York.— Bowne *v.* Hyde, 6 Barb. (N. Y.) 392; Murray *v.* House, 11 Johns. (N. Y.) 464.

South Carolina.— Marshall *v.* Nagel, 1 Bailey (S. C.) 308.

5. Doub *v.* Barnes, 1 Md. Ch. 127; Terhune *v.* Colton, 10 N. J. Eq. 21; Tankersley *v.* Anderson, 4 Desauss. (S. C.) 44; Engelbach *v.* Simpson, 12 Tex. Civ. App. 188, 33 S. W. 596.

6. *Kentucky.*— Harrodsburg Sav. Inst. *v.* Chinn, 7 Bush (Ky.) 539; Givens *v.* Briscoe, 3 J. J. Marsh. (Ky.) 529. See also Duvall *v.* Waggener, 2 B. Mon. (Ky.) 183, wherein it was held that the attorney was liable to the client for wrongfully releasing sureties on a replevin bond.

Louisiana.— Roberts *v.* Smith, 3 La. Ann. 205.

Mississippi.—Union Bank *v.* Govan, 10 Sm. & M. (Miss.) 333.

New York.— Quinn *v.* Lloyd, 7 Rob. (N. Y.) 538, 5 Abb. Pr. N. S. (N. Y.) 281, 36 How. Pr. (N. Y.) 378; East River Bank *v.* Kennedy, 9 Bosw. (N. Y.) 543.

United States.—Varnum *v.* Bellamy, 4 McLean (U. S.) 87, 28 Fed. Cas. No. 16,886.

7. See, generally, EVIDENCE; PRINCIPAL AND AGENT.

A client is not bound by casual statements made by an attorney in a letter (McGarry *v.* McGarry, 9 Pa. Super. Ct. 71, 43 Wkly. Notes Cas. (Pa.) 268, 29 Pittsb. Leg. J. N. S. (Pa.) 236. See also, to same general effect, Stewart *v.* Sprague, 71 Mich. 50, 38 N. W. 673; St. Louis, etc., R. Co. *v.* Epperson, 97 Mo. 300, 10 S. W. 478; Lewis *v.* Duane, 141 N. Y. 302, 36 N. E. 322, 57 N. Y. St. 410), or by remarks dropped in conversation (Treadway *v.* Sioux City, etc., R. Co., 40 Iowa 526; 1 Greenleaf Ev. § 186. See also Saunders *v.* McCarthy, 8 Allen (Mass.) 42).

(II) *Special Powers.* By virtue of the peculiar nature of their employment, the admissions of attorneys of record generally[8] bind their clients in all matters relating to the progress and trial[9] of the cause;[10] but, to this end, they must be distinct and formal and made with the express purpose of dispensing with the formal proof of some fact at the trial.[11] When the admissions take the form of mutual concessions for a scheme of trial they are irrevocable.[12] Whether admissions by an attorney for a former trial are of binding effect at a subsequent one seems to be a doubtful point, but the general doctrine allows them to be put in evidence even where they are not final.[13]

c. Delegation of Authority. As an attorney is chosen with particular reference to his fitness and capacity, the established doctrine of agency that *delegatus non potest delegare* applies to him with especial force. So, it has been held that an attorney employed to prosecute a suit cannot delegate his authority to another attorney,[14] and where a claim has been put into an attorney's hands for collection he cannot authorize another to collect it.[15] Neither can an attorney employ

8. **An admission of an erroneous point of law is not binding.** Mitchell *v.* Cotton, 3 Fla. 134; Arthur *v.* Homestead F. Ins. Co., 78 N. Y. 462, 34 Am. Rep. 550.

An admission made under mistake of fact would not be binding. Gates *v.* Brinkley, 4 Lea (Tenn.) 710. See also Parker *v.* McBee, 61 Miss. 134.

Where grave questions involving the public interest are involved it has been held that admissions by counsel will not relieve the court from considering such questions. State *v.* Parkinson, 5 Nev. 15.

9. **At hearing.**— Admissions made by the attorney at a hearing are binding on the client. Wilson *v.* Spring, 64 Ill. 14; Talbot *v.* McGee, 4 T. B. Mon. (Ky.) 375; Oliver *v.* Bennett, 65 N. Y. 559. See also Kelly *v.* Dow, 9 N. Brunsw. 435.

Before trial.— It has been doubted whether an attorney could make a binding admission before a suit was pending. West *v.* Cavins, 74 Ind. 265. In Marshall *v.* Cliff, 4 Campb. 133, however, such an admission was held binding, but the attorney had been specially retained to conduct an anticipated suit. See also State *v.* Easterling, 1 Rich. (S. C.) 310.

10. *Alabama.*— Starke *v.* Kenan, 11 Ala. 818.

Louisiana.— Municipality No. 2 *v.* Orleans Cotton Press, 18 La. 122, 36 Am. Dec. 624.

Maryland.— Farmers Bank *v.* Sprigg, 11 Md. 389; Kent *v.* Ricards, 3 Md. Ch. 392.

Massachusetts.— Lewis *v.* Sumner, 13 Metc. (Mass.) 269.

Mississippi.— Wenans *v.* Lindsey, 1 How. (Miss.) 577.

Missouri.— Pratt *v.* Conway, 148 Mo. 291, 49 S. W. 1028, 71 Am. St. Rep. 602.

New Hampshire.— Alton *v.* Gilmanton, 2 N. H. 520.

South Carolina.— Cooke *v.* Pennington, 7 S. C. 385; Bollmann *v.* Bollmann, 6 S. C. 29.

Texas.— Fowler *v.* Morrill, 8 Tex. 153.

11. Scott *v.* Chambers, 62 Mich. 532, 29 N. W. 94; Daniel *v.* Ray, 1 Hill (S. C.) 32; Tomeny *v.* German Nat. Bank, 9 Heisk. (Tenn.) 493.

12. *Georgia.*— Luther *v.* Clay, 100 Ga. 236, 28 S. E. 46, 39 L. R. A. 95.

Illinois.— Wilson *v.* Spring, 64 Ill. 14.

Massachusetts.— Lewis *v.* Sumner, 13 Metc. (Mass.) 269.

Minnesota.— Smith *v.* Mulliken, 2 Minn. 319.

New Hampshire.— Page *v.* Brewster, 54 N. H. 184; Burbank *v.* Rockingham Mut. F. Ins. Co., 24 N. H. 550, 57 Am. Dec. 300; Pike *v.* Emerson, 5 N. H. 393, 22 Am. Dec. 468.

South Carolina.— Smith *v.* Bossard, 2 McCord Eq. (S. C.) 406.

Vermont.— Smith *v.* Hollister, 32 Vt. 695.

Wisconsin.— See Lee *v.* Lord, 75 Wis. 35, 43 N. W. 799, 44 N. W. 771.

England.— Doe *v.* Bird, 7 C. & P. 6, 32 E. C. L. 473; Elton *v.* Larkins, 5 C. & P. 385, 1 M. & Rob. 196, 24 E. C. L. 617.

13. Perry *v.* Simpson Waterproof Mfg. Co., 40 Conn. 313; King *v.* Shepard, 105 Ga. 473, 30 S. E. 634; Luther *v.* Clay, 100 Ga. 236, 28 S. E. 46, 39 L. R. A. 95; 1 Greenleaf Ev. (16th ed.) § 186 note.

14. *Alabama.*— Johnson *v.* Cunningham, 1 Ala. 249; Hitchcock *v.* McGehee, 7 Port. (Ala.) 556.

Florida.— Hendry *v.* Benlisa, 37 Fla. 609, 20 So. 800, 34 L. R. A. 283.

Illinois.— Morgan *v.* Roberts, 38 Ill. 65; Cornelius *v.* Wash, 1 Ill. 98, 12 Am. Dec. 145.

Indiana.— Clegg *v.* Baumberger, 110 Ind. 536, 9 N. E. 700.

New York.— Buckley *v.* Buckley, 18 N. Y. Suppl. 607, 45 N. Y. St. 827.

West Virginia.— Crotty *v.* Eagle, 35 W. Va. 143, 13 S. E. 59.

Executory contract not assignable.— An executory contract for an attorney's personal services is not assignable. Sloan *v.* Williams, 138 Ill. 43, 27 N. E. 531, 12 L. R. A. 496; Hilton *v.* Crooker, 30 Nebr. 707, 47 N. W. 3; Ratcliff *v.* Baird, 14 Tex. 43.

Submission to arbitration.— The authority to submit a cause to arbitration cannot be delegated. Wright *v.* Evans, 53 Ala. 103.

15. Danley *v.* Crawl, 28 Ark. 95; Kellogg *v.* Norris, 10 Ark. 18; Dickson *v.* Wright, 52 Miss. 585, 24 Am. Rep. 677.

It is entirely proper for an attorney to employ his law partner to collect certain claims placed in his hands for collection. Singer *v.* Steele, 24 Ill. App. 58.

Receiving money on claim.— An attorney

counsel to aid him, at the expense of his client,[16] although he may hire assistants at his own expense and charge the client with a reasonable value for the entire labor.[17] It is, however, so necessary and customary to employ the services of certain persons during the progress of a lawsuit that an attorney may, without special authority, make his client liable for the value of the work done, as by ordering printers to print briefs,[18] hiring official stenographers to transcribe testimony,[19] or getting sheriffs to serve process.[20] It has been held, also, that an attorney may employ an expert witness by virtue of his general authority, and make the client liable for such expert's fees.[21]

d. Ratification by Client. As a general rule, any act of an attorney which might have been authorized can be ratified,[22] but the client must have acted with complete knowledge of the circumstances or he will not be bound.[23] Ratification may be inferred from, or shown by, numerous circumstances,[24] the commonest

cannot delegate his power to receive money on a claim. O'Conner *v.* Arnold, 53 Ind. 203; Masecar *v.* Chambers, 4 U. C. Q. B. 171. *Contra*, McEwen *v.* Mazyck, 3 Rich. (S. C.) 210.

Special authority may be granted for this purpose (Planters' Bank *v.* Massey, 2 Heisk. (Tenn.) 360), but the death of the client would revoke the special authority to delegate the authority (Watt *v.* Watt, 2 Barb. Ch. (N. Y.) 371). See also Kingston Bank *v.* Roosa, 2 How. Pr. (N. Y.) 8.

16. Porter *v.* Elizalde, 125 Cal. 204, 57 Pac. 899; Briggs *v.* Georgia, 10 Vt. 68; *Ex p.* James, 8 N. Brunsw. 286; Taylor *v.* Alexander, 12 Quebec Super. Ct. 159; Augé *v.* Filiatrault, 10 Quebec Super. Ct. 157. See also Armour *v.* Dinner, 4 Terr. L. Rep. (Can.) 30.

17. Vilas *v.* Bundy, 106 Wis. 168, 81 N. W. 812.

18. Weisse *v.* New Orleans, 10 La. Ann. 46; Williamson-Stewart Paper Co. *v.* Bosbyshell, 14 Mo. App. 534; Tyrrel *v.* Hammerstein, 33 Misc. (N. Y.) 505, 67 N. Y. Suppl. 717. But the printer might trust entirely to the credit of the attorney. Livingstone Middleditch Co. *v.* New York Dentistry College, 31 Misc. (N. Y.) 259, 64 N. Y. Suppl. 140.

19. Miller *v.* Palmer, 19 Ind. App. 624, 49 N. E. 975, 25 Ind. App. 357, 58 N. E. 213, 81 Am. St. Rep. 107; Thornton *v.* Tuttle, 7 N. Y. St. 801, 20 Abb. N. Cas. (N. Y.) 308, 26 N. Y. Wkly. Dig. 405; Harry *v.* Hilton, 11 Abb. N. Cas. (N. Y.) 448, 64 How. Pr. (N. Y.) 199.

20. Feusier *v.* Virginia City, 3 Nev. 58; Fox *v.* Deering, 7 S. D. 443, 64 N. W. 520.

An attorney cannot bind his client by directing a sheriff to run a restaurant (Alexander *v.* Deneveaux, 53 Cal. 663) or to employ a watchman (Deal *v.* Tower, 1 Phila. (Pa.) 268, 8 Leg. Int. (Pa.) 238).

The client is not relieved from his obligation to the sheriff by reason of embezzlement by the attorney. Selz *v.* Guthman, 62 Ill. App. 624.

21. Mulligan *v.* Cannon, 41 N. Y. Suppl. 279, 25 N. Y. Civ. Proc. 348.

This was not allowed where the witness knew his services were not desired (Packard *v.* Stephani, 85 Hun (N. Y.) 197, 32 N. Y. Suppl. 1016), or where the attorney had abundant opportunity to consult with his client (Knight *v.* Buser, 6 Ohio Dec. (Reprint) 772, 8 Am. L. Rec. 28).

22. *Alabama.*— Kirk *v.* Glover, 5 Stew. & P. (Ala.) 340.

Arkansas.— Whiting *v.* Beebe, 12 Ark. 421.

Colorado.— Roberts *v.* Denver, etc., R. Co., 8 Colo. App. 504, 46 Pac. 880. But see Black *v.* Drake, 2 Colo. 330.

Illinois.— Chapman *v.* Burt, 77 Ill. 337.

Indiana.— Wakeman *v.* Jones, 1 Ind. 517.

Iowa.— Fanning *v.* Minnesota R. Co., 37 Iowa 379.

Kansas.— Dresser *v.* Wood, 15 Kan. 344.

Minnesota.— Olmstead *v.* Firth, 60 Minn. 126, 61 N. W. 1017; Hodgins *v.* Heaney, 17 Minn. 45.

New Hampshire.— Lisbon *v.* Holton, 51 N. H. 209.

North Carolina.— Moye *v.* Cogdell, 69 N. C. 93.

Pennsylvania.— Bowman *v.* Bowman, 1 Pearson (Pa.) 465.

Washington.— Denney *v.* Parker, 10 Wash. 218, 38 Pac. 1018.

United States.— Hughes County *v.* Ward, 81 Fed. 314; Mayer *v.* Foulkrod, 4 Wash. C. C. (U. S.) 503, 16 Fed. Cas. No. 9,342.

Compare Baldwin *v.* Merrill, 8 Humphr. (Tenn.) 132.

See 5 Cent. Dig. tit. "Attorney and Client," § 154.

23. Hitchcock *v.* McGehee, 7 Port. (Ala.) 556; Garvin *v.* Lowry, 7 Sm. & M. (Miss.) 24; Williams *v.* Reed, 3 Mason (U. S.) 405, 29 Fed. Cas. No. 17,733.

24. There was ratification in the following cases:

Arkansas.— Byers *v.* Fowler, 14 Ark. 86.

California.— Odd Fellows Sav. Bank *v.* Brander, 124 Cal. 255, 56 Pac. 1109.

District of Columbia.— Hazleton *v.* Le Duc, 10 App. Cas. (D. C.) 379.

Georgia.— Clark *v.* Morrison, 80 Ga. 393, 6 S. E. 171.

Iowa.— Ryan *v.* Doyle, 31 Iowa 53; Hefferman *v.* Burt, 7 Iowa 320, 71 Am. Dec. 445.

Kansas.— Rasure *v.* McGrath, 23 Kan. 597.

Louisiana.— Brooks *v.* Poirier, 10 La. Ann. 512.

Maine.— Cutts *v.* York Mfg. Co., 18 Me. 190.

Missouri.— Hays *v.* Merkle, 70 Mo. App. 509.

being acquiescence by the client[25] or the acceptance by him of benefits resulting from the attorney's acts.[26]

D. Duration of Relation — 1. In General. In the absence of disturbing events, the employment of an attorney continues as long as the suit or business upon which he is engaged is pending,[27] and ordinarily comes to an end with the completion of the special task for which the attorney was employed.[28] At common law the obtaining of a final judgment was such a termination of a suit as brought the relation to a close.[29]

New York.—Van Campen *v.* Bruns, 54 N. Y. App. Div. 86, 66 N. Y. Suppl. 344; Pratt *v.* Scott, 18 N. Y. Suppl. 507.

Pennsylvania.— Bingham *v.* Guthrie, 19 Pa. St. 418.

United States.— Robb *v.* Vos, 155 U. S. 13, 15 S. Ct. 4, 39 L. ed. 52; Stowe *v.* U. S., 19 Wall. (U. S.) 13, 22 L. ed. 144.

There was no ratification in the following cases:

Illinois.— Bell *v.* Farwell, 189 Ill. 414, 59 N. E. 955; Cameron *v.* Stratton, 14 Ill. App. 270.

Indiana.— Hammond *v.* Evans, 23 Ind. App. 501, 55 N. E. 784.

Iowa.— Hartman Steel Co. *v.* Hoag, 104 Iowa 269, 73 N. W. 611.

Kentucky.—Lasley *v.* Lackey, 4 Ky. L. Rep. 896.

New York.— Bassford *v.* Swift, 17 Misc. (N. Y.) 149, 39 N. Y. Suppl. 337.

Texas.— Carter *v.* Roland, 53 Tex. 540.

Virginia.— Wilkinson *v.* Holloway, 7 Leigh (Va.) 277.

West Virginia.— Wiley *v.* Mahood, 10 W. Va. 206.

Canada.— *Re* Monteith, 12 Ont. Pr. 288.

25. *Alabama.*— Gardner *v.* Mobile, etc., R. Co., 102 Ala. 635, 15 So. 271, 48 Am. St. Rep. 84.

Louisiana.—Maraist *v.* Caillier, 30 La. Ann. 1087.

Mississippi.— Bower *v.* Henshaw, 53 Miss. 345; Anketell *v.* Torrey, 7 Sm. & M. (Miss.) 467.

North Carolina.— Rogers *v.* McKenzie, 81 N. C. 122.

Pennsylvania.— Filby *v.* Miller, 25 Pa. St. 264.

Virginia.— Johnson *v.* Gibbons, 27 Gratt. (Va.) 632.

Washington.— Lambert *v.* Gillette, (Wash. 1901) 64 Pac. 784.

Continuing to employ an attorney after knowledge of his misconduct estops a client from making subsequent objections. Smith *v.* Quarles, (Tenn. Ch. 1897) 46 S. W. 1035.

26. *Alabama.*— Leach *v.* Williams, 8 Ala. 759.

Illinois.— Wetherbee *v.* Fitch, 117 Ill. 67, 7 N. E. 513; Marshall *v.* Moore, 36 Ill. 321.

Indiana.—Travellers Ins. Co. *v.* Patten, 119 Ind. 416, 20 N. E. 790.

Louisiana.— Culverhouse *v.* Marx, 39 La. Ann. 809, 2 So. 607; Beau *v.* Drew, 15 La. Ann. 461.

Maine.— Vose *v.* Treat, 58 Me. 378; Narraguagus *v.* Wentworth, 36 Me. 339; Patten *v.* Fullerton, 27 Me. 58.

Minnesota.— Ruggles *v.* Swanwick, 6 Minn. 526.

Missouri.—Semple *v.* Atkinson, 64 Mo. 504; Southgate *v.* Atlantic, etc., R. Co., 61 Mo. 89.

New Jersey.— Tooker *v.* Sloan, 30 N. J. Eq. 394.

New York.— Patterson *v.* McGovern, 44 N. Y. App. Div. 310, 60 N. Y. Suppl. 714; Chadwick *v.* Manning, 7 N. Y. Suppl. 623, 27 N. Y. St. 31; Benedict *v.* Smith, 10 Paige (N. Y.) 126.

North Carolina.— Christian *v.* Yarborough, 124 N. C. 72, 32 S. E. 383.

Ohio.— Julier *v.* Julier, 62 Ohio St. 90, 56 N. E. 661, 78 Am. St. Rep. 697; Dunn *v.* Springmeier, 7 Ohio Dec. (Reprint) 339, 2 Cinc. L. Bul. 127.

Pennsylvania.— Filby *v.* Miller, 25 Pa. St. 264.

27. *Kansas.*— Smith *v.* Cunningham, 59 Kan. 552, 53 Pac. 760.

New York.— Bathgate *v.* Haskin, 59 N. Y. 533.

Tennessee.— Love *v.* Hall, 3 Yerg. (Tenn.) 407.

Vermont.—Langdon *v.* Castleton, 30 Vt. 285.

Washington.— Sturgiss *v.* Dart, 23 Wash. 244, 62 Pac. 858.

United States.— Manning *v.* Hayden, 5 Sawy. (U. S.) 360, 16 Fed. Cas. No. 9,043, 8 Am. L. Rec. 38, 7 Reporter 423, 424, 1 San Fran. L. J. 85, 13 West. Jur. 317, 318.

28. As where an action has been dismissed (Hay *v.* Cole, 11 B. Mon. (Ky.) 70; Dennis *v.* Jones, 31 Miss. 606; Grames *v.* Hawley, 50 Fed. 319. See also Jordan *v.* Tarver, 92 Ga. 379, 17 S. E. 351; Clarke *v.* Union F. Ins. Co., 10 Ont. Pr. 339) or a nonsuit is obtained (Hoffman *v.* Cage, 31 Tex. 595. But see Scott *v.* Elmendorf, 12 Johns. (N. Y.) 315), or where some event, apart from the litigation proper, happens to put an end to the controversy (Tenney *v.* Berger, 48 N. Y. Super. Ct. 11; Dooley *v.* Dooley, 9 Lea (Tenn.) 306; Pemberton *v.* Lockett, 21 How. (U. S.) 257, 16 L. ed. 137).

29. *Indiana.*— Hillegass *v.* Bender, 78 Ind. 225.

Kentucky.— Ball *v.* Lively, 2 J. J. Marsh. (Ky.) 181; Richardson *v.* Talbot, 2 Bibb (Ky.) 382.

Louisiana.— Dangerfield *v.* Thruston, 8 Mart. N. S. (La.) 232.

Minnesota.— Berthold *v.* Fox, 21 Minn. 51.

New York.— Adams *v.* Ft. Plain Bank, 23 How. Pr. (N. Y.) 45. *Compare* Schelly *v.* Zink, 13 Hun (N. Y.) 538; Lusk *v.* Hastings, 1 Hill (N. Y.) 656, the latter case holding

2. Effect of Death — a. Of Attorney. Where an individual attorney is employed in a proceeding, his death stops at once[30] all further acts in his client's behalf; and, where a firm is retained and one partner dies, this also seems to end the relationship.[31] The dissolution of the partnership, however, has not the same effect, and the client can still look to the partners to act jointly in respect to his business.[32]

b. Of Client. The death of the client vacates the power of the attorney, and the latter is neither required nor authorized to do anything further.[33] Thus, after the client's death, he cannot admit a previous mistake,[34] or remit part of a

that authority continues until final judgment is actually perfected.

South Carolina.— Mordecai *v.* Charleston County, 8 S. C. 100; Mayer *v.* Blease, 4 S. C. 10; Treasurers *v.* McDowall, 1 Hill (S. C.) 184, 26 Am. Dec. 166; Public Account Com'rs *v.* Rose, 1 Desauss. (S. C.) 461.

United States.— Kamm *v.* Stark, 1 Sawy. (U. S.) 547, 14 Fed. Cas. No. 7,604, 3 Chic. Leg. N. 242, 13 Int. Rev. Rec. 134.

Canada.— Tabb *v.* Beckett, 9 Quebec Super. Ct. 159; Searson *v.* Small, 5 U. C. Q. B. 259. See also Darling *v.* Weller, 22 U. C. Q. B. 363.

Receiving notices.— In states where statutes exist authorizing an attorney to collect a judgment any time within two years, it has been held that service on attorneys of notice of motion to vacate judgment was valid. Miller *v.* Miller, 37 How. Pr. (N. Y.) 1 (two years after judgment); Drury *v.* Russell, 27 How. Pr. (N. Y.) 130 (four years after judgment); Branch *v.* Walker, 92 N. C. 87; Flanders *v.* Sherman, 18 Wis. 575. See also Magnolia Metal Co. *v.* Sterlingworth R. Supply Co., 37 N. Y. App. Div. 366, 56 N. Y. Suppl. 16, where the court compelled attorneys to accept a service of notice for former clients.

30. After an attorney has died, service of the notice, required by the code, to appoint another stays proceedings for thirty days. Hickox *v.* Weaver, 15 Hun (N. Y.) 375. See also People *v.* Plymouth Plank Road Co., 32 Mich. 248.

Actual notice to appoint another attorney must be given. Hildreth *v.* Harvey, 3 Johns. Cas. (N. Y.) 300.

It is only necessary, on the death of an attorney in a suit, to notify the other side of his death, and the appointment of another in his place. Montreal Bank *v.* Harrison, 4 Ont. Pr. 331.

31. McGill *v.* McGill, 2 Metc. (Ky.) 258.

In Canada, if one of two or more attorneys of a firm dies or is removed, the party for whom they act is held to be represented, to all intents, by the surviving attorney or attorneys. Stearns *v.* Ross, 5 Montreal Q. B. 1; Alchin *v.* Buffalo, etc., R. Co., 2 Ch. Chamb. (U. C.) 45; Morin *v.* Henderson, 21 L. C. Jur. 83; Tidmarsh *v.* Stephens, 1 L. C. Jur. 16, 6 L. C. Rep. 194, 5 R. J. R. Q. 65; McCarthy *v.* Hart, 9 L. C. Rep. 395; Dubois *v.* Dubois, 5 L. C. Rep. 167, 4 R. J. R. Q. 322; Brunelle *v.* McGreevy, 12 Quebec 85; Wright *v.* Canadian Pac. R. Co., 19 Quebec Super. Ct. 105; Giguere *v.* Compagnie de Chemin de Fer Quebec, etc., 3 Quebec Super. Ct. 405; Tassé *v.* Laberge, (Quebec Super. Ct. Feb. 1871) Quebec Consol. Dig. 59; Charby *v.* Charby, 17 Rev. Lég. 374; Dawson *v.* Macdonald, 10 Rev. Lég. 640; Richardson *v.* Tabb, 4 Rev. Lég. 388; Valin *v.* Anderson, 2 Rev. Crit. 110.

32. McCoon *v.* Galbraith, 29 Pa. St. 293; Downs *v.* Allen, 23 Blatchf. (U. S.) 54, 22 Fed. 805.

33. *California.*— Pedlar *v.* Stroud, 116 Cal. 461, 48 Pac. 371; Moyle *v.* Landers, 78 Cal. 99, 20 Pac. 241, 12 Am. St. Rep. 22; Judson *v.* Love, 35 Cal. 463.

Indiana.— Clegg *v.* Baumberger, 110 Ind. 536, 9 N. E. 700; Harness *v.* State, 57 Ind. 1.

Kentucky.— Campbell *v.* Kincaid, 3 T. B. Mon. (Ky.) 68; Clark *v.* Parish, 1 Bibb (Ky.) 547.

Louisiana.— Graham *v.* Hendricks, 24 La. Ann. 477.

Maryland.— Matter of Young, 3 Md. Ch. 461.

Massachusetts.— Gleason *v.* Dodd, 4 Metc. (Mass.) 333. See also Kelley *v.* Riley, 106 Mass. 339, 8 Am. Rep. 336.

Missouri.— Prior *v.* Kiso, 96 Mo. 303, 9 S. W. 898.

New Jersey.— Wood *v.* Hopkins, 3 N. J. L. 263.

New York.—Van Campen *v.* Bruns, 54 N. Y. App. Div. 86, 66 N. Y. Suppl. 344; Austin *v.* Monroe, 4 Lans. (N. Y.) 67; Avery *v.* Jacob, 15 N. Y. Suppl. 564, 38 N. Y. St. 1026; Adams *v.* Nellis, 59 How. Pr. (N. Y.) 385; Putnam *v.* Van Buren, 7 How. Pr. (N. Y.) 31; Anderson *v.* Anderson, 20 Wend. (N. Y.) 585.

Ohio.— Cisna *v.* Beach, 15 Ohio 300, 45 Am. Dec. 576; Villhauer *v.* Toledo, 5 Ohio Dec. (Reprint) 8, 32 Cinc. L. Bul. 154.

Texas.— Gray *v.* Cooper, 23 Tex. Civ. App. 3, 56 S. W. 105.

United States.— Eagleton Mfg. Co. *v.* West, etc., Mfg. Co., 18 Blatchf. (U. S.) 218, 2 Fed. 774. See also Maury *v.* Fitzwater, 88 Fed. 768.

See 5 Cent. Dig. tit. "Attorney and Client," § 127.

Where the attorney's authority is coupled with an interest it has been suggested that the authority would not end with the death of the client. Price *v.* Haeberle, 25 Mo. App. 201; Villhauer *v.* Toledo, 5 Ohio Dec. (Reprint) 8, 32 Cinc. L. Bul. 154. *Compare* Wylie *v.* Coxe, 16 How. (U. S.) 415, 14 L. ed. 753, wherein it was held that an attorney's contract to perform services for a portion of the amount recovered is not dissolved by the death of the claimant.

34. Cook *v.* Parham, 63 Ala. 456.

verdict.[35] Nor can he receive money in satisfaction of a judgment,[36] or take any further steps in regard to the litigation proper.[37]

3. EFFECT OF DISABILITIES. Certain disabilities on the attorney have the effect of ending the relation, as where an attorney is appointed to a position which causes his duties to conflict with the interests of his client,[38] or he is disbarred.[39] A permanent removal from the state also terminates the relation,[40] though it seems not without an order of substitution.[41]

4. SUBSTITUTION OR WITHDRAWAL — a. Right to Change — (I) *OF ATTORNEY.* An attorney may, for lawful cause[42] and on reasonable notice, withdraw from a suit at any stage in the proceedings.[43]

(II) *OF CLIENT.* The client has a right[44] to change[45] his attorney at any stage in the proceeding, and without assigning any cause or reason for so doing,[46] even

35. Rundles *v.* Jones, 3 Ind. 35.

36. Lochenmeyer *v.* Fogarty, 112 Ill. 572; Turnan *v.* Temke, 84 Ill. 286; Risley *v.* Fellows, 10 Ill. 531; Clark *v.* Richards, 3 E. D. Smith (N. Y.) 89; Farrand *v.* Land, etc., Imp. Co., 86 Fed. 393, 30 C. C. A. 128.

37. Bourguinon *v.* Boudousquie, 3 La. 526; Stith *v.* Winbush, 3 La. 442; Giles *v.* Eaton, 54 Me. 186; Matter of Beckwith, 90 N. Y. 667; Lapaugh *v.* Wilson, 43 Hun (N. Y.) 619; Amoré *v.* La Mothe, 5 Abb. N. Cas. (N. Y.) 146. *Contra*, Whartenby *v.* Reay, 92 Cal. 74, 28 Pac. 56.

38. Ward *v.* Hollins, 14 Md. 158; Farmers Bank *v.* Mackall, 3 Gill (Md.) 447; Maillet *v.* Séré, 17 L. C. Jur. 139. See also Sauvageau *v.* Robertson, 9 L. C. Rep. 224.

Where one member of a firm ceases to practise, in consequence of his appointment to a judicial office incompatible with the exercise of his profession, the client, party to a pending suit, is sufficiently represented by the remaining member or members of the firm, so that the latter may make a motion or take other proceedings in the client's behalf. Glass *v.* Eveleigh, 18 Quebec Super. Ct. 531, 3 Quebec Pr. 357.

39. Moyers *v.* Graham, 15 Lea (Tenn.) 57.

40. Hommedieu *v.* Stowell, 18 Abb. Pr. (N. Y.) 336; Chautauque County Bank *v.* Risley, 6 Hill (N. Y.) 375; Jones *v.* U. S., 15 Ct. Cl. 204.

41. Faughnan *v.* Elizabeth, 58 N. J. L. 309, 33 Atl. 212.

42. **An order for a change ought not to be made** on the mere application of the attorney, on the ground that he is unable to proceed in the suit in consequence of non-payment of court fees (Kelly *v.* Dow, 9 N. Brunsw. 256), or because a client employs additional counsel (Morgan *v.* Roberts, 38 Ill. 65).

43. Cullison *v.* Lindsay, 108 Iowa 124, 78 N. W. 847; Tenney *v.* Berger, 48 N. Y. Super. Ct. 11; Thomas *v.* Morrison, (Tex. Civ. App. 1898) 46 S. W. 46; Bricker *v.* Ansell, 1 Ch. Chamb. (U. C.) 367. See also Thompson *v.* Dickinson, 159 Mass. 210, 34 N. E. 262; De Bellefeuille *v.* Beaudry, 4 Rev. de Jur. 173.

It is in the discretion of the court to allow an attorney *ad litem* to withdraw from the case, on giving notice to the adverse party and his own client. Archambault *v.* Westcott, 23 L. C. Jur. 293; Loranger *v.* Filiatrault, 2 Quebec Super. Ct. 356.

44. **Such applications are, ordinarily, allowed as a matter of course** (Root *v.* McIlvaine, 22 Ky. L. Rep. 7, 56 S. W. 498; Halbert *v.* Gibbs, 16 N. Y. App. Div. 126, 45 N. Y. Suppl. 113, 4 N. Y. Annot. Cas. 232; Matter of McCusker, 32 Misc. (N. Y.) 47, 66 N. Y. Suppl. 105; De Witt *v.* Stender, 5 N. Y. Suppl. 602, 24 N. Y. St. 101; Newberne *v.* Jones, 63 N. C. 606), though the terms upon which the order is made lie within the discretion of the court (see *infra*, III, D, 4, c). In special cases, however, such motions have been refused, which refusal usually occurs where the compensation of attorney was to consist of part of the sum recovered. Steenburgh *v.* Miller, 11 N. Y. App. Div. 286, 42 N. Y. Suppl. 333; Matter of Davis, 7 Daly (N. Y.) 1; Lodge *v.* Gaunt, 16 Wkly. Notes Cas. (Pa.) 438; Gulf, etc., R. Co. *v.* Miller, 21 Tex. Civ. App. 609, 53 S. W. 709. See also Rundberg *v.* Belcher, 118 Cal. 589, 50 Pac. 670.

45. **Order associating counsel.**— While provision is made by the code for the substitution of an attorney after notice to the adverse party, the court is not authorized thereby to make an order associating a new attorney with other attorneys in the case. Prescott *v.* Salthouse, 53 Cal. 221.

46. *California.*—Woodbury *v.* Nevada Southern R. Co., 121 Cal. 165, 53 Pac. 450; Lee *v.* San Joaquin County Super. Ct., 112 Cal. 354, 44 Pac. 666.

New Hampshire.— Wells *v.* Hatch, 43 N. H. 246.

New York.— Matter of Prospect Ave., 85 Hun (N. Y.) 257, 32 N. Y. Suppl. 1013, 66 N. Y. St. 497, 1 N. Y. Annot. Cas. 347; Ogden *v.* Devlin, 45 N. Y. Super. Ct. 631; Hazlett *v.* Gill, 5 Rob. (N. Y.) 611.

Wisconsin.— Ryan *v.* Martin, 18 Wis. 672.

United States.— Yates *v.* Milwaukee, 10 Wall. (U. S.) 497, 19 L. ed. 984; Texas *v.* White, 10 Wall. (U. S.) 483, 19 L. ed. 992; Isaacs *v.* Abraham, 13 Fed. Cas. No. 7,094, 6 Reporter 737; Redfield *v.* U. S., 27 Ct. Cl. 473.

Where there is just cause the same privilege, of course, exists. Trust *v.* Repoor, 15 How. Pr. (N. Y.) 570; Moyers *v.* Graham, 15 Lea (Tenn.) 57.

though an irrevocable power of attorney has been given.[47] The client himself, however, must desire the change.[48]

b. How Made — (I) *On Application of Attorney.* An attorney seeking to withdraw must make an application to the court, for the relation does not terminate formally till there is a withdrawal of record,[49] and he cannot deny his authority to act for a client, especially where it will embarrass the adversary in the conduct of the litigation.[50]

(II) *On Application of Client* — (A) *In General.* Ordinarily, the discharged attorney assents to the change, and, his assent being filed, on an order entered substituting the new attorney, the change is complete.[51] If this consent of record cannot be obtained, however, the dissatisfied client must make an application to the court to have a new attorney of record substituted; and the order of substitution must be entered on the record before the change is completed.[52]

(B) *After Judgment.* After judgment there can be a change of attorneys without an order of substitution, either for the purpose of taking further proceedings to collect the judgment[53] or in appealing from it.[54]

c. Terms. In granting an order of substitution the court may impose terms, in determining which the attendant circumstances are to be taken into account. In those cases where the attorney was entirely free from blame, it has been variously ordered that his fees must be paid,[55] that his expenses and costs must be

47. People *v.* Norton, 16 Cal. 436; Carver *v.* U. S., 7 Ct. Cl. 499.

48. Hackley *v.* Muskegon Cir. Judge, 58 Mich. 454, 25 N. W. 462. See also Faulkner *v.* Hendy, 99 Cal. 172, 33 Pac. 899; Mann *v.* Lambe, 5 L. C. Jur. 98.

49. *Illinois.*— Chicago Public Stock Exch. *v.* McClaughry, 50 Ill. App. 358.

Indiana.— Symmes *v.* Major, 21 Ind. 443.

Maryland.— Henck *v.* Todhunter, 7 Harr. & J. (Md.) 275, 16 Am. Dec. 300.

Montana.— Roush *v.* Fort, 3 Mont. 175.

North Carolina.— Branch *v.* Walker, 92 N. C. 87.

United States.— U. S. *v.* Curry, 6 How. (U. S.) 106, 12 L. ed. 363.

50. Hickox *v.* Fels, 86 Ill. App. 216; Halbert *v.* Gibbs, 16 N. Y. App. Div. 126, 45 N. Y. Suppl. 113, 79 N. Y. St. 113; Love *v.* Hall, 3 Yerg. (Tenn.) 407. See also McKeigue *v.* Janesville, 68 Wis. 50, 31 N. W. 298.

51. Cohen *v.* Smith, 33 Ill. App. 344; Krekeler *v.* Thaule, 49 How. Pr. (N. Y.) 138; Manning *v.* Hayden, 5 Sawy. (U. S.) 360, 16 Fed. Cas. No. 9,043, 8 Am. L. Rec. 38, 7 Reporter 423, 424, 1 San Fran. L. J. 85, 13 West. Jur. 317, 318; Gardner *v.* U. S., 11 Ct. Cl. 724.

No adjudication is necessary where the attorneys in a case consent to a substitution of attorneys, the substitution being complete on notice given to the opposite counsel. Huot *dit* Dulude *v.* McGill, 7 L. C. Jur. 123; Bailey *v.* Bailey, 2 Ch. Chamb. (U. C.) 57; *In re* Mylne, 1 Ch. Chamb. (U. C.) 199. See also Auldjo *v.* Prentice, 1 Dorion (Quebec) 125.

52. *Illinois.*— Chicago Public Stock Exch. *v.* McClaughry, 50 Ill. App. 358.

New Hampshire.— Beliveau *v.* Amoskeag Mfg. Co., 68 N. H. 225, 40 Atl. 734, 73 Am. St. Rep. 577, 44 L. R. A. 167.

New York.— Krekeler *v.* Thaule, 73 N. Y. 608; Miller *v.* Shall, 67 Barb. (N. Y.) 446; Hoffman *v.* Van Nostrand, 14 Abb. Pr. (N. Y.) 336; Parker *v.* Williamsburgh, 13 How. Pr. (N. Y.) 250; Mumford *v.* Murray, Hopk. (N. Y.) 369. See also Felt *v.* Nichols, 21 Misc. (N. Y.) 404, 47 N. Y. Suppl. 951.

North Carolina.— Walton *v.* Sugg, 61 N. C. 98, 93 Am. Dec. 580.

United States.— Wilkinson *v.* Tilden, 21 Blatchf. (U. S.) 192, 14 Fed. 778; Sloo *v.* Law, 4 Blatchf. (U. S.) 268, 22 Fed. Cas. No. 12,958.

As between the parties, themselves, however, the attorney's authority ceases before all the formal steps are taken. Quinn *v.* Lloyd, 7 Rob. (N. Y.) 538, 5 Abb. Pr. N. S. (N. Y.) 281, 36 How. Pr. (N. Y.) 378; Felt *v.* Nichols, 21 Misc. (N. Y.) 404, 47 N. Y. Suppl. 951.

53. State *v.* Gulick, 17 N. J. L. 435; Knox *v.* Randall, 24 Minn. 479; Hinkley *v.* St. Anthony Falls Water Power Co., 9 Minn. 55; Ward *v.* Sands, 10 Abb. N. Cas. (N. Y.) 60; Egan *v.* Rooney, 38 How. Pr. (N. Y.) 121; Thorp *v.* Fowler, 5 Cow. (N. Y.) 446. See also Dodge *v.* Schell, 12 Fed. 515, 10 Abb. N. Cas. (N. Y.) 465.

54. Magnolia Metal Co. *v.* Sterlingworth R. Supply Co., 37 N. Y. App. Div. 366, 56 N. Y. Suppl. 16; Davis *v.* Solomon, 25 Misc. (N. Y.) 695, 56 N. Y. Suppl. 80, 28 N. Y. Civ. Proc. 420; Webb *v.* Milne, 10 N. Y. Civ. Proc. 27; Ward *v.* Sands, 10 Abb. N. Cas. (N. Y.) 60; Pratt *v.* Allen, 19 How. Pr. (N. Y.) 450; McLaren *v.* Charrier, 5 Paige (N. Y.) 530. Shuler *v.* Maxwell, 38 Hun (N. Y.) 240 [*affirmed* in 101 N. Y. 657], reaching the opposite conclusion, may be distinguished on the ground that it was a foreclosure proceeding, and the attorney was obliged to look after the sale after obtaining judgment.

55. *New Jersey.*— Laird *v.* Laird, (N. J. 1886) 3 Atl. 339.

settled for,[56] and that he must be protected by a lien for his charges.[57] Where an attorney is clearly at fault, he would not ordinarily be protected in this way,[58] and when both parties are to blame the discretion lodged in the court is even greater.[59]

d. Notice of Change to Adverse Party. After the consent of record has been filed or the order of substitution obtained, notice of the substitution must be given to the opposing attorney,[60] and, until such notice has been given, the adversary is justified in dealing solely with the original attorney of record[61] and in disregarding acts of the new attorney.[62] Acknowledging the new attorney by dealing with him would effect a waiver of notice.[63] Written notice is sufficient, and it is not necessary for a copy of the order of substitution to be served.[64]

e. Effect. The substitution of a new attorney by a party in place of the one who previously represented him is an acquiescence in all the proceedings of the first attorney, there being no disavowal, notwithstanding any irregularity in the proceeding.[65]

IV. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT.

A. In General. It is the duty of an attorney to bring to the conduct of his client's business the ordinary legal knowledge and skill common to members of

New York.— Matter of Mitchell, 57 N. Y. App. Div. 22, 67 N. Y. Suppl. 961; Philadelphia *v.* Postal Tel. Cable Co., 1 N. Y. App. Div. 387, 37 N. Y. Suppl. 291, 72 N. Y. St. 617; Greenfield *v.* New York, 28 Hun (N. Y.) 320; Ogden *v.* Devlin, 45 N. Y. Super. Ct. 631; People's Bank *v.* Thompson, 30 N. Y. Suppl. 858, 63 N. Y. St. 165, 24 N. Y. Civ. Proc. 62; Ulster County *v.* Brodhead, 44 How. Pr. (N. Y.) 411; Chatfield *v.* Hewlett, 2 Dem. Surr. (N. Y.) 191. See also Creighton *v.* Ingersoll, 20 Barb. (N. Y.) 541.

Utah.— Sandberg *v.* Victor Gold, etc., Min. Co., 18 Utah 66, 55 Pac. 74.

Washington.— Payette *v.* Willis, 23 Wash. 299, 63 Pac. 254.

United States.—*In re* Herman, 50 Fed. 517; Sloo *v.* Law, 4 Blatchf. (U. S.) 268, 22 Fed. Cas. No. 12,958.

Canada.—See Meyers *v.* Robertson, 1 Grant Ch. (U. C.) 439; Montrait *v.* Williams, 24 L. C. Jur. 144; Winteler *v.* Davidson, 9 Leg. N. 11; McClanaghan *v.* Gauthier, 4 Quebec Super. Ct. 72.

A reference to determine the amount of compensation may be ordered. Yuengling *v.* Betz, 58 N. Y. App. Div. 8, 68 N. Y. Suppl. 574; Matter of Public Works Dept., 58 N. Y. App. Div. 459, 69 N. Y. Suppl. 413.

56. Creighton *v.* Ingersoll, 20 Barb. (N. Y.) 541; Wolf *v.* Trochelman, 7 Rob. (N. Y.) 611; Hoffman *v.* Van Nostrand, 14 Abb. Pr. (N. Y.) 336; Trust *v.* Repoor, 15 How. Pr. (N. Y.) 570; Wilkinson *v.* Tilden, 21 Blatchf. (U. S.) 192, 14 Fed. 778; Carver *v.* U. S., 7 Ct. Cl. 499.

57. Curtis *v.* Richards, (Ida. 1895) 40 Pac. 57; Matter of Public Works Dept., 58 N. Y. App. Div. 459, 69 N. Y. Suppl. 413; Howland *v.* Taylor, 6 Hun (N. Y.) 237; Hazlett *v.* Gill, 7 Rob. (N. Y.) 611; Stewart *v.* Fleck, 6 N. Y. St. 524; Prentiss *v.* Livingston, 60 How. Pr. (N. Y.) 380; Ulster County *v.* Brodhead, 44 How. Pr. (N. Y.) 411; Ronald *v.* Mutual Reserve Fund L. Assoc., 30 Fed. 228; Wilkinson *v.* Tilden, 21 Blatchf. (U. S.) 192, 14 Fed. 778.

58. Barkley *v.* New York Cent., etc., R. Co., 42 N. Y. App. Div. 597, 59 N. Y. Suppl. 742; Reynolds *v.* Kaplan, 3 N. Y. App. Div. 420, 38 N. Y. Suppl. 764, 74 N. Y. St. 99; Whitman *v.* Seibert, 59 N. Y. Suppl. 185; Sloo *v.* Law, 4 Blatchf. (U. S.) 268, 22 Fed. Cas. No. 12,958. See also Philadelphia *v.* Postal Tel. Cable Co., 1 N. Y. App. Div. 387, 37 N. Y. Suppl. 291, 72 N. Y. St. 617.

59. Matter of H., 93 N. Y. 381; Tuck *v.* Manning, 53 Hun (N. Y.) 455, 6 N. Y. Suppl. 140, 25 N. Y. St. 130, 17 N. Y. Civ. Proc. 175.

60. *Illinois.*— Chicago Public Stock Exch. *v.* McClaughry, 50 Ill. App. 358.

Michigan.—Comfort *v.* Stockbridge, 38 Mich. 342.

Minnesota.—McFarland *v.* Butler, 11 Minn. 72.

Missouri.— Milliken *v.* McBroom, 38 Mo. 342.

New York.— Krekeler *v.* Thaule, 49 How. Pr. (N. Y.) 138; Robinson *v.* McClellan, 1 How. Pr. (N. Y.) 90.

Wisconsin.— Boyd *v.* Stone, 5 Wis. 240.

Canada.—Steel *v.* Manning, 8 Can. L. J. 167.

Waiver of notice.— Such notice may be waived by the opposite party or his attorney. Livermore *v.* Webb, 56 Cal. 489.

61. Hoppin *v.* Winnemucca First Nat. Bank, 25 Nev. 84, 56 Pac. 1121; Parker *v.* Williamsburgh, 13 How. Pr. (N. Y.) 250; Waterhouse *v.* Freeman, 13 Wis. 339.

62. Jerome *v.* Boeram, 1 Wend. (N. Y.) 293.

63. Withers *v.* Little, 56 Cal. 370; Magnolia Metal Co. *v.* Sterlingworth R. Supply Co., 37 N. Y. App. Div. 366, 56 N. Y. Suppl. 16.

64. Bogardus *v.* Richtmeyer, 3 Abb. Pr. (N. Y.) 179; Dorlon *v.* Lewis, 7 How. Pr. (N. Y.) 132.

65. Burroughs *v.* Molson, 8 L. C. Rep. 494, 6 R. J. R. Q. 317.

the legal profession, to act toward his client with the most scrupulous good faith and fidelity, and to exercise, in the course of his employment, that reasonable care and diligence which is usually exercised by lawyers. He is not bound to possess or exercise the highest degree of skill, care, and diligence; nor is he an insurer or guarantor of the results of his work.[66] For the consequences of a failure to perform these duties the attorney is generally liable to his client,[67] although it has been held that he is only liable for gross negligence.[68]

B. Duties — 1. In General. It is the duty of an attorney to make known to his client any interest he may have in the matter concerning which he is employed,[69] to be faithful to the interests of his client,[70] and to render correct accounts[71] where he is called upon to account. To make proper payments[72]

66. *California.*— Gambert *v.* Hart, 44 Cal. 542.

Georgia.—O'Barr *v.* Alexander, 37 Ga. 195; Cox *v.* Sullivan, 7 Ga. 144, 50 Am. Dec. 386.

Illinois.— Stevens *v.* Walker, 55 Ill. 151; Morrison *v.* Burnett, 56 Ill. App. 129; Strodtman *v.* Menard County, 56 Ill. App. 120.

Indiana.— Kepler *v.* Jessupp, 11 Ind. App. 241, 37 N. E. 655.

Kansas.— Haverty *v.* Haverty, 35 Kan. 438, 11 Pac. 364.

Maine.— Wilson *v.* Russ, 20 Me. 421.

Massachusetts.— Caverly *v.* McOwen, 123 Mass. 574.

Michigan.— Babbitt *v.* Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

New York.— Hatch *v.* Fogerty, 33 N. Y. Super. Ct. 166; Bowman *v.* Tallman, 27 How. Pr. (N. Y.) 212.

Ohio.— Grindle *v.* Rush, 7 Ohio, pt. II, 123; Gallaher *v.* Thompson, Wright (Ohio) 466.

Pennsylvania.—Watson *v.* Muirhead, 57 Pa. St. 161, 98 Am. Dec. 213; Lynch *v.* Com., 16 Serg. & R. (Pa.) 368, 16 Am. Dec. 582.

Rhode Island.—Holmes *v.* Peck, 1 R. I. 242.

Washington.— Isham *v.* Parker, 3 Wash. 755, 29 Pac. 835.

United States.— Spangler *v.* Sellers, 5 Fed. 882.

See 5 Cent. Dig. tit. "Attorney and Client," § 218.

67. Jones *v.* White, 90 Ind. 255; Reilly *v.* Cavanaugh, 29 Ind. 435; Thompson *v.* Lobdell, 7 Rob. (La.) 369; Young *v.* Lindsay, 3 Wkly. Notes Cas. (Pa.) 169.

68. Evans *v.* Watrous, 2 Port. (Ala.) 205; Pennington *v.* Yell, 11 Ark. 212, 52 Am. Dec. 262; Suydam *v.* Vance, 2 McLean (U. S.) 99, 23 Fed. Cas. No. 13,657; Purves *v.* Landell, 12 Cl. & F. 91, 8 Eng. Reprint 1332.

69. Williams *v.* Reed, 3 Mason (U. S.) 405, 418, 29 Fed. Cas. No. 17,733, where Story, J., said: "An attorney is bound to disclose to his client every adverse retainer, and even every prior retainer, which may affect the discretion of the latter. No man can be supposed to be indifferent to the knowledge of facts, which work directly on his interests, or bear on the freedom of his choice of counsel. When a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements, which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest, which may betray his judgment, or endanger his fidelity."

70. *Illinois.*— Michigan Stove Co. *v.* Harwood Hardware Co., 71 Ill. App. 240.

New York.— Hatch *v.* Fogerty, 33 N. Y. Super. Ct. 166.

North Carolina.— Arrington *v.* Arrington, 116 N. C. 170, 21 S. E. 181; Gooch *v.* Peebles, 105 N. C. 411, 11 S. E. 415.

South Carolina.—Taylor *v.* Barker, 30 S. C. 238, 9 S. E. 115.

Texas.— Heilbroner *v.* Douglass, 32 Tex. 215.

Advice as to incurring costs.— It is the duty of a solicitor to inform his client, when a trustee, as to the advisability of taking proceedings and incurring costs, when it may become a question whether the costs will have to be paid out of his private funds or out of the trust fund or estate. Hagarty, C. J., in Butterfield *v.* Wells, 4 Ont. 168.

Attending court.— Duty of attorney and counsel in a cause to attend court until cause is disposed of. Bowes *v.* Sutherland, 4 N. Brunsw. 1.

Entering rules.— It is the duty of counsel to see that rules obtained by them are properly entered in the minutes of the court. *Ex p.* Glass, 7 N. Brunsw. 88.

71. Where an attorney is called upon to account he is bound to show in detail what he has done with his client's money, and to justify its retention or expenditure. He cannot merely state that he has received it for counsel fees and for moneys which he has paid out for his client. Matter of Raby, 29 N. Y. App. Div. 225, 51 N. Y. Suppl. 552.

72. Applying proceeds according to agent's instructions.—An attorney may rightfully apply the proceeds of a claim placed in his hands for collection as directed by the party from whom he received it, who was controlling the claim in the name of, and as the agent of, the owner of such claim. Long *v.* Sampson, 4 Ky. L. Rep. 532.

To whom payment should be made.— In Marvin *v.* Ellwood, 11 Paige (N. Y.) 365, the court laid down the general proposition that it is the duty of an attorney who collects money for a client to pay it over to such client whenever he can do it with safety. See also Boulden *v.* Hebel, 17 Serg. & R. (Pa.) 312; Penny *v.* Caldwell, 1 Bailey (S. C.) 345. But an attorney who collects money for an agent may discharge himself by paying it over either to the agent or to the true owner (Wallace *v.* Peck, 12 Ala. 768), though he cannot discharge himself by paying it to the payee

of money belonging to his client[73] is also the duty of an attorney where the payment falls within the scope of his employment.

2. Acquiring Property Adversely — a. In General. An attorney can in no case, without the client's consent, buy and hold, otherwise than in trust, any adverse title or interest touching the thing to which his employment relates, or put himself in an adverse position.[74]

b. At Judicial Sale. When an attorney purchases at a judicial sale property in relation to which he has, in some way, acted in a professional capacity,[75] the law presumes that he acted for his client and regards him as the trustee of his client respecting the property, unless he can show satisfactorily that he has purchased for himself with his client's consent, and that the transaction was in every way fair[76] and not to the client's disadvantage. The burden is on the attorney,

of a note, when the latter is not, in fact, the true owner (Wallace *v.* Peck, 12 Ala. 768; Lewis *v.* Peck, 10 Ala. 142). Where, however, the note is payable to a third person and not indorsed, a payment by the attorney to the payee will discharge him from all liability to the person who placed the same in his hands. Peck *v.* Wallace, 19 Ala. 219. In some instances, moreover, persons other than clients are entitled to an accounting and payment from attorneys as a result of dealings between the attorneys and their clients. Newcastle *v.* Bellard, 3 Me. 369 (holding that, where an attorney had collected moneys for the treasurer of a town in that capacity, he was liable for the amount, in an action for money had and received, at the suit of the town, and that, in such action, he could not set off any demand of his own against the treasurer in his private capacity); Gillespie *v.* Mulholland, 12 Misc. (N. Y.) 40, 33 N. Y. Suppl. 33, 66 N. Y. St. 532 [*affirming* 8 Misc. (N. Y.) 511, 28 N. Y. Suppl. 754, 59 N. Y. St. 407] (wherein an application to compel an attorney to pay over money collected by him was granted, it appearing that the original owner of the claim, who employed the attorney, agreed to transfer it to the petitioner pending the action for its collection, but was advised by the attorney not to do so at that time, and the assignment was, therefore, not executed until judgment was recovered).

When attorney holds money in trust.— Attorneys who withdraw from a sheriff money deposited with the latter as security for a judgment that may be rendered in an action hold the money in trust for both parties to the action, the same as it was held by the sheriff. Hathaway *v.* Patterson, 45 Cal. 294. So, too, an attorney, intrusted with the collection of debts, who receives notes of third persons for collection as collateral security for such debts, becomes thereby a trustee for both debtor and creditor. Scott *v.* Wickliffe, 1 B. Mon. (Ky.) 353.

73. Bougher *v.* Scobey, 16 Ind. 151, 23 Ind. 583; Kelley *v.* Repetto, (N. J. 1901) 49 Atl. 429; McCraken *v.* Harned, 59 N. J. Eq. 190, 44 Atl. 959; Matter of Raby, 29 N. Y. App. Div. 225, 51 N. Y. Suppl. 552; Marvin *v.* Ellwood, 11 Paige (N. Y.) 365; McDaniels *v.* Cutler, 3 Brewst. (Pa.) 57.

74. *Illinois.*— Trotter *v.* Smith, 59 Ill. 240.

Indiana.— Hughes *v.* Willson, 128 Ind. 491, 26 N. E. 50.

Iowa.— Phillips *v.* Blair, 38 Iowa 649.

Maine.— Briggs *v.* Hodgdon, 78 Me. 514, 7 Atl. 387.

Michigan.— Humphrey *v.* Hurd, 31 Mich. 436.

Mississippi.— Cameron *v.* Lewis, 56 Miss. 601.

Missouri.— Eoff *v.* Irvine, 108 Mo. 378, 18 S. W. 907, 32 Am. St. Rep. 609.

New York.— Giddings *v.* Eastman, 5 Paige (N. Y.) 561.

Pennsylvania.— Smith *v.* Brotherline, 62 Pa. St. 461; Henry *v.* Raiman, 25 Pa. St. 354, 64 Am. Dec. 703; Galbraith *v.* Elder, 8 Watts (Pa.) 81; Hockenbury *v.* Carlisle, 5 Watts & S. (Pa.) 348.

Vermont.— Davis *v.* Smith, 43 Vt. 269.

United States.— Baker *v.* Humphrey, 101 U. S. 494, 25 L. ed. 1065.

Canada.—Howard *v.* Harding, 18 Grant Ch. (U. C.) 181; Graves *v.* Henderson, 8 Grant Ch. (U. C.) 1.

Effect of termination of relation.— It has been held that if an attorney be retained to defend a particular title to real estate he can never thereafter, unless his client consents, buy the opposing title without holding it in trust for those then having the title he was employed to sustain. Henry *v.* Raiman, 25 Pa. St. 354, 64 Am. Dec. 703.

Taking mortgage to secure attorney's personal claim.— Where a client left notes given for the purchase-price of machinery with his attorney for collection, the notes stating that the machinery should belong to the client until paid for, and the attorney took a mortgage on the machinery, and recorded it, to secure an indebtedness to himself, the attorney's mortgage did not take priority over his client's subsequent mortgage, for the reason that an attorney cannot subordinate the rights and interests of his client to his own. Taylor *v.* Barker, 30 S. C. 238, 9 S. E. 115.

75. An attorney who sustains no professional relation to the parties concerned may purchase property at judicial sales the same as other persons. Taylor *v.* Boardman, 24 Mich. 287; Bowers *v.* Virden, 56 Miss. 595; Christian *v.* O'Neal, 46 Miss. 669; Sallade's Appeal, 36 Pa. St. 429.

76. Where the attorney acted in perfect fairness and good faith and in no manner in opposition to the interest of his client, it has been held that the mere relation of attorney and client does not, of itself, disable the at-

and, if his interest as a purchaser may conflict with his duty as an attorney, the sale will be held void or the attorney charged as a trustee,[77] at the option[78] of the client.[79]

torney of a judgment creditor from buying for his own account at a sale in execution. Hyams *v.* Herndon, 36 La. Ann. 879; Relf *v.* Ives, 10 La. 509. See also Hess *v.* Voss, 52 Ill. 472; Page *v.* Stubbs, 39 Iowa 537; McKenna *v.* Van Blarcom, 109 Wis. 271, 85 N. W. 322.

Purchases by an attorney were upheld in the following cases:

Arkansas.— Pack *v.* Crawford, 29 Ark. 489.

California.— Porter *v.* Peckham, 44 Cal. 204.

Iowa.— Baker *v.* Davenport First Nat. Bank, 77 Iowa 615, 42 N. W. 452; Baker *v.* Davis, 35 Iowa 184.

Louisiana.— Relf *v.* Ives, 10 La. 509.

Minnesota.— Rogers *v.* Gaston, 43 Minn. 189, 45 N. W. 427.

Missouri.— Grayson *v.* Weddle, 63 Mo. 523.

Ohio.— Wade *v.* Pettibone, 14 Ohio 557 [*affirming* 11 Ohio 57, 37 Am. Dec. 408].

Pennsylvania.—Devinney *v.* Norris, 8 Watts (Pa.) 314; Dobbins *v.* Stevens, 17 Serg. & R. (Pa.) 13.

South Carolina.— Wilson *v.* Cantrell, 40 S. C. 114, 18 S. E. 517; Le Conte *v.* Irwin, 19 S. C. 554.

United States.— The Ruby, 38 Fed. 622.

Purchases by an attorney were not upheld in Kreitzer *v.* Crovatt, 94 Ga. 694, 21 S. E. 585; Crayton *v.* Spullock, 87 Ga. 326, 13 S. E. 561; Gooch *v.* Peebles, 105 N. C. 411, 11 S. E. 415; *In re* Taylor Orphan Asylum, 36 Wis. 534.

77. *Alabama.*—Pearce *v.* Gamble, 72 Ala. 341.

Arkansas.— Wright *v.* Walker, 30 Ark. 44.

Georgia.— Kennedy *v.* Redwine, 59 Ga. 327.

Illinois.— Herr *v.* Payson, 157 Ill. 244, 41 N. E. 732.

Iowa.— Reickhoff *v.* Brecht, 51 Iowa 633, 2 N. W. 522; Harper *v.* Perry, 28 Iowa 57.

Kansas.— Cunningham *v.* Jones, 37 Kan. 477, 15 Pac. 572, 1 Am. St. Rep. 257.

Kentucky.— Smith *v.* Thompson, 7 B. Mon. (Ky.) 305; Busey *v.* Hardin, 2 B. Mon. (Ky.) 407; Howell *v.* McCreery, 7 Dana (Ky.) 388.

Louisiana.— Brigham *v.* Newton, 49 La. Ann. 1539, 22 So. 777.

Michigan.— Taylor *v.* Young, 56 Mich. 285, 22 N. W. 799.

Mississippi.— Johnson *v.* Outlaw, 56 Miss. 541.

Missouri.— Bliss *v.* Prichard, 67 Mo. 181; Aultman *v.* Loring, 76 Mo. App. 66; Burke *v.* Daly, 14 Mo. App. 542.

Nebraska.— Olson *v.* Lamb, 56 Nebr. 104, 76 N. W. 433, 71 Am. St. Rep. 670.

New York.— Johnstone *v.* O'Connor, (N. Y. 1900) 57 N. E. 1113; Case *v.* Carroll, 35 N. Y. 385; Hawley *v.* Cramer, 4 Cow. (N. Y.) 717.

Ohio.— Wade *v.* Pettibone, 11 Ohio 57, 37 Am. Dec. 408.

Pennsylvania.— Fisher *v.* Knox, 13 Pa. St. 622, 53 Am. Dec. 503; Downey *v.* Gerrard, 3 Grant (Pa.) 64; Leisenring *v.* Black, 5 Watts (Pa.) 303, 30 Am. Dec. 322; Cleavinger *v.* Reimar, 3 Watts & S. (Pa.) 486; Albright *v.* Mercer, 14 Pa. Super. Ct. 63.

Texas.— Thomas *v.* Morrison, 92 Tex. 329, 48 S. W. 500.

West Virginia.— Newcomb *v.* Brooks, 16 W. Va. 32.

Wisconsin.— Ellis *v.* Allen, 99 Wis. 598, 74 N. W. 537, 75 N. W. 949; O'Dell *v.* Rogers, 44 Wis. 136.

United States.— Stockton *v.* Ford, 11 How. (U. S.) 232, 13 L. ed. 676; Manning *v.* Hayden, 5 Sawy. (U. S.) 360, 16 Fed. Cas. No. 9,043, 8 Am. L. Rec. 38, 7 Reporter 423, 424, 1 San Fran. L. J. 85, 13 West. Jur. 317, 318.

England.— *Ex p.* James, 8 Ves. Jr. 337.

See 5 Cent. Dig. tit. "Attorney and Client," § 251.

"This rule is alike necessary to preserve the dignity and integrity of the legal profession, and to protect the interests of a dependent and confiding clientage; and in the enforcement of it courts will not hesitate, because the injury to the client does not fully appear, or a positive intention on the part of the attorney to gain an advantage is not shown." Manning *v.* Hayden, 5 Sawy. (U. S.) 360, 381, 16 Fed. Cas. No. 9,043, 8 Am. L. Rec. 38, 7 Reporter 423, 424, 1 San Fran. L. J. 85, 13 West. Jur. 317, 318.

78. Laches.— A client must exercise his right to treat the attorney as a trustee for his benefit within a reasonable time. What constitutes a reasonable time depends upon the facts of each case and rests in the discretion of the court.

Illinois.— Herr *v.* Payson, 157 Ill. 244, 41 N. E. 732.

Iowa.— Eckrote *v.* Myers, 41 Iowa 324.

Mississippi.— Johnson *v.* Outlaw, 56 Miss. 541.

Missouri.— Ward *v.* Brown, 87 Mo. 468 (nine years); Bliss *v.* Prichard, 67 Mo. 181 (eight years); Wilber *v.* Robinson, 29 Mo. App. 157.

Ohio.— Wade *v.* Pettibone, 11 Ohio 57, 37 Am. Dec. 408.

See, however, Manning *v.* Hayden, 5 Sawy. (U. S.) 360, 16 Fed. Cas. No. 9,043, 8 Am. L. Rec. 38, 7 Reporter 423, 424, 1 San Fran. L. J. 85, 13 West. Jur. 317, 318, where a lapse of eleven years was held, under all the circumstances of the case, not to be laches.

Prompt action is especially incumbent on the client where there has been no moral turpitude in the conduct of the attorney, or where a delay in the assertion of the client's rights will affect the position of the parties to the transaction, or the value of the property. Johnson *v.* Outlaw, 56 Miss. 541.

79. Third persons cannot set up the right of the attorney's client to treat the attorney as trustee. It is solely a question between the attorney and his client. Leach *v.* Fowler, 22 Ark. 143; Estes *v.* Boothe, 20 Ark. 583.

e. Outstanding Claims Against Client. An attorney cannot, without his client's consent, buy and hold for himself or a third person claims outstanding against his client or his client's estate, but will hold such claims as trustee for his client or the estate.[80]

3. Dealings With Client — a. In General. Owing to the confidential and fiduciary relation between an attorney and his client and to the influence of the attorney over his client growing out of that relation,[81] courts of law, and especially of equity, scrutinize most closely all transactions between an attorney and his client.[82] To sustain a transaction of advantage to himself with his client,

See also Alwood *v.* Mansfield, 59 Ill. 496; Cowan *v.* Barret, 18 Mo. 257; Purcell *v.* Enright, 31 N. J. Eq. 74; Holland Trust Co. *v.* Hogan, 17 N. Y. Suppl. 919, 44 N. Y. St. 577; Giddings *v.* Eastman, 5 Paige (N. Y.) 561.

80. *California.*— Sutliff *v.* Clunie, (Cal. 1894) 37 Pac. 224.

Georgia.— Larey *v.* Baker, 86 Ga. 468, 12 S. E. 684.

Illinois.— Sutherland *v.* Reeve, 151 Ill. 384, 38 N. E. 130.

Indiana.— Manhattan Cloak, etc., Co. *v.* Dodge, 120 Ind. 1, 21 N. E. 344, 6 L. R. A. 369.

Kentucky.— Smith *v.* Craft, 22 Ky. L. Rep. 643, 58 S. W. 500; Shanklin *v.* Meyler, 5 Ky. L. Rep. 296.

England.— Carter *v.* Palmer, 8 Cl. & F. 657, 8 Eng. Reprint 256, holding that although the confidential employment ceases, the disability continues as long as the reasons on which it is founded continue to operate.

81. **Reason for rule.**— "It is obvious that this relation must give rise to great confidence between the parties, and to very strong influence over the actions and rights and interests of the client. The situation of an attorney or solicitor puts it in his power to avail himself, not only of the necessities of his client, but of his good nature, liberality and credulity, to obtain undue advantages, bargains and gratuities. Hence, the law, with a wise providence, not only watches over all the transactions of parties in this predicament, but it often interposes to declare transactions void which, between other persons, would be held unobjectionable." Story Eq. Juris. § 310 [*quoted* in Gruby *v.* Smith, 13 Ill. App. 43, 45]. See also Gray *v.* Emmons, 7 Mich. 533, 548.

82. *California.*— Kisling *v.* Shaw, 33 Cal. 425, 91 Am. Dec. 644.

Connecticut.— Mills *v.* Mills, 26 Conn. 213.

Illinois.— Sutherland *v.* Reeve, 151 Ill. 384, 38 N. E. 130; Rolfe *v.* Rich, 149 Ill. 436, 35 N. E. 352; Staley *v.* Dodge, 50 Ill. 43; Jennings *v.* McConnel, 17 Ill. 148; Gruby *v.* Smith, 13 Ill. App. 43.

Indiana.— McCormick *v.* Malin, 5 Blackf. (Ind.) 509.

Iowa.— Ryan *v.* Ashton, 42 Iowa 365; Polson *v.* Young, 37 Iowa 196 (conveyance in part consideration of excessive fees).

Kansas.— Yeamans *v.* James, 27 Kan. 195.

Kentucky.— Dodge *v.* Foulks, 11 B. Mon. (Ky.) 178; Downing *v.* Major, 2 Dana (Ky.) 228; Bibb *v.* Smith, 1 Dana (Ky.) 580.

New Jersey.— Dunn *v.* Dunn, 42 N. J. Eq. 431, 7 Atl. 842; Cleine *v.* Englebrecht, 41 N. J. Eq. 498, 5 Atl. 718.

New York.— Mason *v.* Ring, 3 Abb. Dec. (N. Y.) 210, 2 Abb. Pr. N. S. (N. Y.) 322; Turnbull *v.* Banks, 22 N. Y. App. Div. 508, 48 N. Y. Suppl. 40 (mortgage to secure excessive fee); Haight *v.* Moore, 37 N. Y. Super. Ct. 161; Barry *v.* Whitney, 3 Sandf. (N. Y.) 696, Code Rep. N. S. (N. Y.) 101; Gallup *v.* Henderson, 6 N. Y. Suppl. 914, 25 N. Y. St. 506, 507 [*affirmed* in 127 N. Y. 667, 28 N. E. 254, 38 N. Y. St. 1015]; Starr *v.* Vanderheyden, 9 Johns. (N. Y.) 253, 6 Am. Dec. 275; Howell *v.* Ransom, 11 Paige (N. Y.) 538; Ellis *v.* Messervie, 11 Paige (N. Y.) 467; Lewis *v.* J. A., 4 Edw. (N. Y.) 599; De Rose *v.* Fay, 4 Edw. (N. Y.) 40.

South Carolina.—Miles *v.* Ervin, 1 McCord Eq. (S. C.) 524, 16 Am. Dec. 623.

Tennessee.—Rose *v.* Mynatt, 7 Yerg. (Tenn.) 30.

Washington.— Gaffney *v.* Jones, 18 Wash. 311, 51 Pac. 461.

England.— Newman *v.* Payne, 4 Bro. Ch. 350, 2 Ves. Jr. 199; Savery *v.* King, 5 H. L. Cas. 627, 2 Jur. N. S. 503, 25 L. J. Ch. 482, 4 Wkly. Rep. 571, 10 Eng. Reprint 1046; Gibson *v.* Jeyes, 6 Ves. Jr. 266, 5 Rev. Rep. 295.

Canada.— See Dewar *v.* Sparling, 18 Grant Ch. (U. C.) 633; Grantham *v.* Hawke, 4 Grant Ch. (U. C.) 582; Davis *v.* Hawke, 4 Grant Ch. (U. C.) 394; Galbraith *v.* Irving, 8 Ont. 751.

See 5 Cent. Dig. tit. "Attorney and Client," § 239.

Transactions between attorney and client were upheld in the following cases:

Alabama.—Ware *v.* Russell, 70 Ala. 174, 45 Am. Rep. 82.

California.— Cousins *v.* Partridge, 79 Cal. 224, 21 Pac. 745.

Illinois.— Donahoe *v.* Chicago Cricket Club, 177 Ill. 351, 52 N. E. 351.

Kansas.— Yeamans *v.* James, 27 Kan. 195.

Kentucky.— Davis *v.* Smith, 11 Ky. L. Rep. 216, 11 S. W. 810.

Louisiana.—McElrath *v.* Dupuy, 2 La. Ann. 520.

New York.— Zogbaum *v.* Parker, 66 Barb. (N. Y.) 341.

Oregon.— Ah Foe *v.* Bennett, 35 Oreg. 231, 58 Pac. 508; Bingham *v.* Salene, 15 Oreg. 208, 14 Pac. 523, 3 Am. St. Rep. 152.

the attorney has the burden of showing, not only that he used no undue influence, but that he gave his client all the information and advice which it would have been his duty to give if he himself had not been interested, and that the transaction was as beneficial to the client as it would have been had the client dealt with a stranger.[83]

b. Agreements For Additional Compensation. An agreement made between an attorney and his client, after the fiduciary relation has commenced, whereby the attorney is to secure greater compensation than was at first, either expressly or impliedly, agreed upon, is valid and enforceable only to the extent of reasonable compensation for the attorney's services.[84]

United States.— Goldthwaite *v.* Whitney, 50 Fed. 668.

Canada.— Bell *v.* Cochrane, 5 Brit. Col. 211; McLennan *v.* McDonald, 14 Grant Ch. (U. C.) 61; Rees *v.* Wittrock, 6 Grant Ch. (U. C.) 418.

83. *California.*— Felton *v.* Le Breton, 92 Cal. 457, 28 Pac. 490; Kisling *v.* Shaw, 33 Cal. 425, 91 Am. Dec. 644.

Illinois.— Willin *v.* Burdette, 172 Ill. 117, 49 N. E. 1000; Elmore *v.* Johnson, 143 Ill. 513, 32 N. E. 413, 36 Am. St. Rep. 401, 21 L. R. A. 366; Zeigler *v.* Hughes, 55 Ill. 288; Jennings *v.* McConnel, 17 Ill. 148; Ward *v.* Yancey, 78 Ill. App. 368; Faris *v.* Briscoe, 78 Ill. App. 242.

Iowa.— Ryan *v.* Ashton, 42 Iowa 365.

Kansas.— Yeamans *v.* James, 27 Kan. 195; Matthews *v.* Robinson, 7 Kan. App. 118, 53 Pac. 81.

Kentucky.— Carter *v.* West, 93 Ky. 211, 14 Ky. L. Rep. 191, 19 S. W. 592; Richardson *v.* Hagan, 9 Ky. L. Rep. 196.

Maine.— Dunn *v.* Record, 63 Me. 17.

Maryland.— Merryman *v.* Euler, 59 Md. 588, 43 Am. Rep. 564.

New Hampshire.—Whipple *v.* Barton, 63 N. H. 613, 3 Atl. 922.

New Jersey.—Porter *v.* Bergen, 54 N. J. Eq. 405, 34 Atl. 1067; Condit *v.* Blackwell, 22 N. J. Eq. 481; Brown *v.* Bulkley, 14 N. J. Eq. 451.

New York.—Couse *v.* Horton, 23 N. Y. App. Div. 198, 49 N. Y. Suppl. 132; Haight *v.* Moore, 37 N. Y. Super. Ct. 161; Evans *v.* Ellis, 5 Den. (N. Y.) 640; Hawley *v.* Cramer, 4 Cow. (N. Y.) 717; Howell *v.* Ransom, 11 Paige (N. Y.) 538; De Rose *v.* Fay, 4 Edw. (N. Y.) 40; Berrein *v.* McLane, Hoffm. (N. Y.) 421.

South Carolina.—Miles *v.* Ervin, 1 McCord Eq. (S. C.) 524, 16 Am. Dec. 623.

Tennessee.— Planters' Bank *v.* Hornberger, 4 Coldw. (Tenn.) 531.

Texas.— Cooper *v.* Lee, 75 Tex. 114, 12 S. W. 483.

United States.—U. S. *v.* Coffin, 83 Fed. 337; Rogers *v.* R. E. Lee Min. Co., 3 McCrary (U. S.) 76, 9 Fed. 721, 14 Centr. L. J. 168, 13 Reporter 39.

England.— Savery *v.* King, 5 H. L. Cas. 627, 2 Jur. N. S. 503, 25 L. J. Ch. 482, 4 Wkly. Rep. 571, 10 Eng. Reprint 1046; Gibson *v.* Jeyes, 6 Ves. Jr. 266, 5 Rev. Rep. 295.

See 5 Cent. Dig. tit. "Attorney and Client," § 248.

Effect of termination of relation.— The rule applies even after the relation of attorney and client has ceased, where the influence of that relation still continues (Mason *v.* Ring, 3 Abb. Dec. (N. Y.) 210, 2 Abb. Pr. N. S. (N. Y.) 322; Wood *v.* Downes, 18 Ves. Jr. 120, 11 Rev. Rep. 160; Wright *v.* Proud, 13 Ves. Jr. 136); but where the relation and influence have entirely ceased, so that the parties are dealing at arm's length, to avoid the transaction the former client must show that it was procured by the attorney by actual fraud (Tancre *v.* Reynolds, 35 Minn. 476, 29 N. W. 171). Even though a decree of divorce has been obtained, the fiduciary relations are not terminated, provided the attorney continues to attend to the arranging of property matters between the parties; and a deed made during that time by the client to the attorney is made while the fiduciary relation exists. Willin *v.* Burdette, 172 Ill. 117, 49 N. E. 1000.

84. *Alabama.*—White *v.* Tolliver, 110 Ala. 300, 20 So. 97; Dickinson *v.* Bradford, 59 Ala. 581, 31 Am. Rep. 23; Lecatt *v.* Sallee, 3 Port. (Ala.) 115, 29 Am. Dec. 249.

Iowa.— Bolton *v.* Daily, 48 Iowa 348.

Kentucky.— Bibb *v.* Smith, 1 Dana (Ky.) 580.

New York.— Haight *v.* Moore, 37 N. Y. Super. Ct. 161.

Ohio.—Carlton *v.* Dustin, 9 Ohio Dec. (Reprint) 51, 10 Cinc. L. Bul. 294.

Tennessee.—Rose *v.* Mynatt, 7 Yerg. (Tenn.) 30; Phillips *v.* Overton, 4 Hayw. (Tenn.) 291.

Texas.— Waterbury *v.* Laredo, 68 Tex. 565, 5 S. W. 81.

Virginia.— Thomas *v.* Turner, 87 Va. 1, 12 S. E. 149, 668.

Canada.— See Ford *v.* Mason, 16 Ont. Pr. 25.

See 5 Cent. Dig. tit. "Attorney and Client," § 241.

To sustain a confession of judgment from a client to his attorney, the latter must show that such confession was made with entire fairness and after a full knowledge of all the circumstances. Yonge *v.* Hooper, 73 Ala. 119; De Rose *v.* Fay, 4 Edw. (N. Y.) 40; Matter of Post, 3 Edw. (N. Y.) 365; Wise *v.* Hardin, 5 S. C. 325.

Effect of statutes authorizing contract for compensation.— A code which, in extending the rights of attorneys by allowing them to contract with their clients as to compensation beyond the allowances given by statute,

c. Assignments of Judgments. An assignment of a judgment by a client to his attorney is not necessarily void, but, owing to the confidential relations of the parties, the law casts upon the attorney the burden of establishing its perfect fairness, equity, and adequacy of consideration.[85]

d. Fraudulent Transfers. Where a transfer of property is made from a client to his attorney, for the purpose of defrauding creditors, the parties are not regarded as *in pari delicto*, but the client will be relieved if it can be done without injury to an innocent purchaser.[86]

e. Gifts. While a gift from a client to an attorney, during the relation, is not void *ipso facto*,[87] it is viewed by the courts with the greatest suspicion.[88]

f. Sales. The law does not absolutely prohibit[89] a sale of property[90] by a client to his attorney, and such a sale will be sustained when the transaction is open, honest, and fair, and no undue influence has been used by the attorney,[91] but the burden of proving fairness is on the latter.[92]

relieved attorneys from a disability which before existed, did not relieve their dealings with their clients from the supervision which the courts have at all times exercised. Haight *v.* Moore, 37 N. Y. Super. Ct. 161. See also Whitehead *v.* Kennedy, 69 N. Y. 462.

Agreement of indemnity.— It has been held that an agreement by an attorney that, in consideration of defendant's appealing from a judgment against him and paying the attorney a certain fee, the latter would pay whatever judgment was ultimately recovered against the defendant on appeal, is void as against public policy, and cannot be enforced by either the attorney or the client. Adye *v.* Hanna, 47 Iowa 264, 29 Am. Rep. 484. See also Lindsey *v.* Jones, 23 Ala. 835; Boardman *v.* Thompson, 25 Iowa 487; Struckmeyer *v.* Lamb, 64 Minn. 57, 65 N. W. 930; Morrill *v.* Graham, 27 Tex. 646.

85. Morrison *v.* Smith, 130 Ill. 304, 23 N. E. 241; Newberg *v.* Schwab, 49 N. Y. Super. Ct. 232, 5 N. Y. Civ. Proc. 19; Monaghan *v.* Downs, 3 Kulp (Pa.) 133. See also Anonymous, 16 Abb. Pr. (N. Y.) 423; Howell *v.* Ransom, 11 Paige (N. Y.) 538.

86. Herrick *v.* Lynch, 150 Ill. 283, 37 N. E. 221 [*affirming* 49 Ill. App. 657]; Place *v.* Hayward, 117 N. Y. 487, 23 N. E. 25, 27 N. Y. St. 710; Ford *v.* Harrington, 16 N. Y. 285; Goodenough *v.* Spencer, 15 Abb. Pr. N. S. (N. Y.) 248, 46 How. Pr. (N. Y.) 347.

87. "A client, for example, may naturally entertain a kindly feeling towards an attorney or solicitor by whose assistance he has long benefited; and he may fairly and wisely desire to benefit him by a gift. . . . No law that is tolerable among civilized men, men who have the benefits of civility, without the evils of excessive refinement and overdone subtlety, can ever forbid such a transaction, provided the client be of mature age and of sound mind, and there be nothing to show that the deception was practiced." Hunter *v.* Atkins, 3 Myl. & K. 113, 135, 10 Eng. Ch. 113.

88. Nesbit *v.* Lockman, 34 N. Y. 167; Harris *v.* Tremenheere, 15 Ves. Jr. 34, 10 Rev. Rep. 5. See also Wright *v.* Proud, 13 Ves. Jr. 136, 138, where Lord Erskine rendered a *dictum* that "independent of all fraud, an attorney shall not take a gift from his client, while the relation subsists; though the transaction may be, not only free from fraud, but the most moral in its nature;" "a dictum," Lord Brougham observed in Hunter *v.* Atkins, 3 Myl. & K. 113, 136, 10 Eng. Ch. 113, "reduced . . . to this, that it is almost impossible for a gift from a client to attorney to stand, because the difficulty is extreme of showing that everything was voluntary and fair, and with full warning and perfect knowledge."

89. Such contracts are voidable at the election of the client (Rogers *v.* R. E. Lee Min. Co., 3 McCrary (U. S.) 76, 9 Fed. 721, 14 Centr. L. J. 168, 13 Reporter 39), whether or not false representations were made to induce him to sell his claim, or even if the claim was sold for an adequate price (Lane *v.* Black, 21 W. Va. 617).

90. Subject-matter of suit.— The purchase, by an attorney from his client, of the subject-matter of a suit, *pendente lite*, has been held absolutely void, both on general principles and because it is champerty. West *v.* Raymond, 21 Ind. 305; Handlin *v.* Davis, 81 Ky. 34, 4 Ky. L. Rep. 675; Berrien *v.* McLane, Hoffm. (N. Y.) 420; Hall *v.* Hallet, 1 Cox Ch. 134, 1 Rev. Rep. 3; Wood *v.* Downes, 18 Ves. Jr. 120, 11 Rev. Rep. 160. But see Lewis *v.* Broun, 36 W. Va. 1, 14 S. E. 444, holding that a purchase of the subject-matter of a suit could not be avoided, where such purchase had been ratified and confirmed by the client.

91. Laclede Bank *v.* Keeler, 109 Ill. 385; Mitchell *v.* Colby, 95 Iowa 202, 63 N. W. 769; Oakes *v.* Smith, 17 Grant Ch. (U. C.) 660. See also *In re* Bartlett, 1 U. C. Q. B. 252; Paul *v.* Johnson, 12 Grant Ch. (U. C.) 474.

An attorney assuming the position of purchaser and adviser is bound to observe the utmost good faith toward the party with whom he is dealing, and to draft all papers with sufficient care and professional skill, so as to make them express the real understanding and agreement of the parties. Payne *v.* Avery, 21 Mich. 524.

92. Ross *v.* Payson, 160 Ill. 349, 43 N. E. 399; Roby *v.* Colehour, 135 Ill. 300, 25 N. E. 777; Zeigler *v.* Hughes, 55 Ill. 288; Howell *v.* Ransom, 11 Paige (N. Y.) 538. *Compare*

C. Liabilities — 1. In General — a. For Fraud. An attorney is liable for fraud if he conceals an adverse interest held by him whereby his client suffers loss.[93] It also being his duty to advise his client promptly whenever he has information which it is important the client should receive, he is liable for fraud if he conceals any such material fact which should have been communicated to his client.[94] Actual fraud is not necessary.[95]

b. For Money Collected. As the relation between attorney and client in regard to money collected is in general the fiduciary one of agent and principal, an attorney who fails to pay over[96] money or property collected is liable for its value[97] as of the time of the conversion.[98] If, however, it has been customary for an attor-

Jenkins *v.* Einstein, 3 Biss. (U. S.) 128, 13 Fed. Cas. No. 7,265.

93. Gibbons *v.* Hoag, 95 Ill. 45; Hoopes *v.* Burnett, 26 Miss. 428.

Mere concealment of the fact of an adverse retainer is not a necessary presumption of fraud. Williams *v.* Reed, 3 Mason (U. S.) 405, 29 Fed. Cas. No. 17,733.

Treble damages.— Under a statute making an attorney who has been guilty of any deceit with intent to defraud any party liable for treble damages, it has been held that the transaction must have reference to a pending suit. Looff *v.* Lawton, 97 N. Y. 478.

Annulment of transaction.— Where an attorney has misled his client by fraudulent concealment of material matters or by false statements, the transaction will be annulled. McLead *v.* Applegate, 127 Ind. 349, 26 N. E. 830.

94. Hoopes *v.* Burnett, 26 Miss. 428; Baker *v.* Humphrey, 101 U. S. 494, 25 L. ed. 1065.

95. Hoopes *v.* Burnett, 26 Miss. 428; Wheaton *v.* Newcombe, 48 N. Y. Super. Ct. 215; Baker *v.* Humphrey, 101 U. S. 494, 25 L. ed. 1065.

A client cannot maintain an action against her attorney for alleged bad faith in securing for her a compromise settlement in an action in which nothing could have been legally recovered, where the settlement was the result of proper negotiations, and was only accepted after consultation with her father, although at the time she was a minor. Phillips *v.* Rhodes, 2 Colo. App. 70, 29 Pac. 1011.

96. Loss through third persons.— As the responsibility of an attorney for money collected is that of an ordinary bailee, he will not be responsible for its loss through default of third persons if he has acted to the best of his skill and with a *bona fide* and ordinary degree of attention, and provided that the relation between him and his client has not been changed to that of debtor and creditor. Rogers *v.* Hopkins, 70 Ga. 454; Pidgeon *v.* Williams, 21 Gratt. (Va.) 251. But see Naltner *v.* Dolan, 108 Ind. 500, 8 N. E. 289, 58 Am. Rep. 61 (holding an attorney liable who deposited money, in good faith in his own name, but without mingling it with his own funds, in a bank of good standing which soon afterward failed); Grayson *v.* Wilkinson, 5 Sm. & M. (Miss.) 268 (holding an attorney liable where money was lost in transmission contrary to the client's instructions).

Assignment of the benefit of a suit, though written by the plaintiff's attorney, does not bind him to pay the money to the assignee — he is liable only to the assignor. Lee *v.* Chambers, 3 J. J. Marsh. (Ky.) 506.

97. Liability for interest.—An attorney is liable for interest on money collected for the period during which he has treated it as his own, or after demand and refusal or other equivalent act; or where he has failed to notify his client of the collection within a reasonable time.

Alabama.—Smith *v.* Alexander, 87 Ala. 387, 6 So. 51.

Georgia.— Nisbet *v.* Lawson, 1 Ga. 275.

Illinois.— Chapman *v.* Burt, 77 Ill. 337.

Indiana.— Walpole *v.* Bishop, 31 Ind. 156.

Iowa.— Johnson *v.* Semple, 31 Iowa 49; Mansfield *v.* Wilkerson, 26 Iowa 482.

Kentucky.— Cord *v.* Taylor, 5 Ky. L. Rep. 852.

Louisiana.— Dwight *v.* Simon, 4 La. Ann. 490.

New York.— Williams *v.* Storrs, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340.

Ohio.— State *v.* Ampt, 6 Ohio Dec. (Reprint) 699, 7 Am. L. Rec. 469.

United States.— Sneed *v.* Hanly, Hempst. (U. S.) 659, 22 Fed. Cas. No. 13,136.

Compare Hauxhurst *v.* Hovey, 26 Vt. 544 (holding that an attorney is not liable for interest before demand, unless he has received special instructions to remit as fast as collected, or is in default in rendering an account); Chagnon *v.* St. Jean, 3 Quebec Super. Ct. 459 (holding that a lawyer is not obliged to pay interest on sums of money received at different times, and belonging to his client, when the latter has not put him in default, or when there has been no accounting between them).

An attorney who buys his client's note at less than its face value, and then collects from the client its full value, is liable for interest, on the excess of the amount received by him over the amount paid, from the date of its receipt. Andrews *v.* Wilbur, (Cal. 1895) 41 Pac. 790.

Where the attorney tenders an insufficient amount after deducting his fees, the client will be entitled to interest on the sum due from the attorney to the time of verdict. Ketcham *v.* Thorp, 91 Ill. 611.

98. Commonwealth Bank *v.* Patton, 4 J. J. Marsh. (Ky.) 190; Thacker *v.* Dun, 1 Mo. App. 41; Cotton *v.* Sharpstein, 14 Wis. 226, 80 Am. Dec. 774. But see Gathright *v.* Mar-

ney in dealing with his client to treat money collected as his own, and he appropriates it to his own use, this does not constitute a conversion, but creates a mere contract relation of debtor and creditor.[99] He may retain enough of the money collected to pay his own fees, but he has no lien on the rest;[1] and it is his duty, after collection, to notify his client immediately, or, at all events, within a reasonable time.[2]

c. For Negligence — (1) *In General.* An attorney[3] must use a reasonable degree of care and skill and possess, to a reasonable extent, the knowledge requisite to a proper performance of the duties of his profession, and is liable for damage to the client resulting as a proximate consequence of the lack of such skill or knowledge, or from the failure to exercise it.[4] This liability exists, even

shall, 1 Hen. & M. (Va.) 427; Botts *v.* Crenshaw, Chase (U. S.) 224, 3 Fed. Cas. No. 1,690.

Action on covenants of receipt for notes for collection.—A client can maintain an action on the covenants of an attorney's receipt for notes received by him for collection. Ironton Rolling Mills Co. *v.* Ross, 6 Bush (Ky.) 103.

An attorney is liable for amount bid by him at an execution sale, where he bade in the property in his own name and entered satisfaction of the execution to the extent of such bid as for cash received. Warren *v.* Hawkins, 49 Mo. 137.

Where an attorney conceals the amount collected and induces his client to consent to a settlement for less, he is liable to such client for the balance received by him, less a reasonable fee for collection. Riegi *v.* Phelps, 4 N. D. 272, 60 N. W. 402.

Where an attorney received property for his client and discharged a judgment, if the property has availed the attorney as money and he refuses to account, it may be recovered in assumpsit for money had and received at the price he took for it. Christy *v.* Douglas, Wright (Ohio) 485.

Denying client's title to judgment — Estoppel.— An attorney who has collected a judgment for his client is estopped from denying the latter's title thereto. Mabler *v.* Hyman, 17 N. Y. Suppl. 588, 43 N. Y. St. 540. See also Williams *v.* King, (Easter T. 1 Wm. IV) Robinson & J. Dig. Can. 311.

Tender before conversion no defense.— An attorney is not excused by once making a tender of the money collected for his client, if he subsequently converts it. Clegg *v.* Baumberger, 110 Ind. 536, 9 S. E. 700.

99. Cotton *v.* Sharpstein, 14 Wis. 226, 80 Am. Dec. 774.

1. Conyers *v.* Gray, 67 Ga. 329. See also Robinson *v.* Hawes, 56 Mich. 135, 22 N. W. 222.

2. Jett *v.* Hempstead, 25 Ark. 462; Voss *v.* Bachop, 5 Kan. 59.

3. **One who falsely represents himself as an attorney** is accountable to his client with the same strictness as though he were an attorney. Miller *v.* Whelan, 158 Ill. 544, 42 N. E. 59; Foulks *v.* Falls, 91 Ind. 315. See, however, Wakeman *v.* Hazleton, 3 Barb. Ch. (N. Y.) 148.

4. *California.*— Matter of Kruger, 130 Cal. 621, 63 Pac. 31.

Georgia.— O'Barr *v.* Alexander, 37 Ga. 195.

Indiana.— Stott *v.* Harrison, 73 Ind. 17.

Louisiana.— Thompson *v.* Lobdell, 7 Rob. (La.) 369.

Massachusetts.—Drury *v.* Butler, 171 Mass. 171, 50 N. E. 527.

New York.— Gihon *v.* Albert, 7 Paige (N. Y.) 278.

Pennsylvania.— Miller *v.* Wilson, 24 Pa. St. 114. See also Worrall's Estate, 1 Del. Co. (Pa.) 377.

Rhode Island.— Forrow *v.* Arnold, 22 R. I. 305, 47 Atl. 693.

Wisconsin.— Malone *v.* Gerth, 100 Wis. 166, 75 N. W. 972.

Canada.— Grover *v.* Gamble, 6 U. C. Q. B. O. S. 561.

A mere expression of opinion, not involving the exercise of legal knowledge, does not subject an attorney to liability. Reumping *v.* Wharton, 56 Nebr. 536, 76 N. W. 1076. See also Alexander *v.* Small, 2 U. C. Q. B. 298.

Not liable for every mistake.—"It must not be understood that an attorney is liable for every mistake that may occur in practice, or that he may be held responsible to his client for every error of judgment in the conduct of his client's cause. Instead of that, the rule is, that if he act with a proper degree of skill and with reasonable care and to the best of his knowledge, he will not be held responsible." Clifford, J., in National Sav. Bank *v.* Ward, 100 U. S. 195, 25 L. ed. 621, 622. He is not responsible for the consequences of his client's failure to keep him advised of his residence (Harris *v.* Govett, 3 Wkly. Notes Cas. (Pa.) 560), nor, it seems, for not urging for his client the defense that the agreement sued upon was made on a Sunday, as it is not part of his professional duty to take all dishonest advantages (Vail *v.* Duggan, 7 U. C. Q. B. 568); and before an attorney, who has been employed to defend a suit, and has failed to do so, so that judgment is rendered against his client, can be made liable for the whole amount of the judgment thus recovered, he must have been informed by his client what was the nature of the defense he was expected to make (Grayson *v.* Wilkinson, 5 Sm. & M. (Miss.) 268; Benton *v.* Craig, 2 Mo. 198).

A client who is a lawyer is estopped to plead the negligence of his attorney when his acquiescence in the latter's course is the result of a personal examination of the author-

though the attorney acts gratuitously.[5] The act complained of, however, must be done while the relation of attorney and client exists, and must be within the scope of the attorney's employment.[6]

(II) *Ignorance of Law.* An attorney must be acquainted with the statutes and the settled rules of law and practice in the courts prevailing in the locality wherein he practices, and is responsible for loss to his client resulting from ignorance thereof.[7] But an error of judgment upon a controverted point of law does not render him liable for damages resulting from such error.[8]

(III) *In Collection of Demands.* An attorney must exercise reasonable

ities and his individual knowledge and superior skill as a lawyer. Carr *v.* Glover, 70 Mo. App. 242.

5. Lawall *v.* Groman, 180 Pa. St. 532, 37 Atl. 98, 57 Am. St. Rep. 662.

6. *Indiana.*— Hillegass *v.* Bender, 78 Ind. 225.

Maryland.— Watson *v.* Calvert Bldg., etc., Assoc., 91 Md. 25, 45 Atl. 879.

Michigan.— Gott *v.* Brigham, 41 Mich. 227, 2 N. W. 5, wherein plaintiff employed an attorney to loan money for her, and advise her in respect thereto until payment. He loaned the money, taking a note payable to himself, which note he indorsed and delivered to plaintiff, who retained it. It was not protested, and the indorser was discharged. The court held that he was not liable for failing to advise her how to charge him as indorser, since the original employment could not extend to cases in which his interests were antagonistic to his client's.

New Jersey.— Fenaille *v.* Coudert, 44 N. J. L. 286.

Oregon.— Currey *v.* Butcher, 37 Oreg. 380, 61 Pac. 631.

United States.— Farrand *v.* Land, etc., Imp. Co., 86 Fed. 393, 30 C. C. A. 128.

Acts of custodian.—An attorney who has taken possession of property by direction of the mortgagee is not liable for the subsequent neglect of the custodian, selected by the mortgagee and placed in charge thereof, in permitting such property to be seized under execution. Gaines *v.* Becker, 7 Ill. App. 315.

An attorney whose office has been broken open and papers stolen therefrom, without negligence on his part, is not liable for the loss. Hill *v.* Barney, 18 N. H. 607.

Preventing contemplated business venture. — An attorney is under no duty to dissuade his client from entering upon a contemplated business venture, and assumes no responsibility of loss which may come from the client's ill venture. He need give his professional aid only in carrying the venture into effect. Cohn *v.* Heusner, 9 Misc. (N. Y.) 482, 30 N. Y. Suppl. 244, 61 N. Y. St. 92.

7. Goodman *v.* Walker, 30 Ala. 482, 496, 68 Am. Dec. 134 (wherein the court said: "If the law governing the bringing of this suit was well and clearly defined, both in the text-books, and in our own decisions; and if the rule had existed, and been published, long enough to justify the belief that it was known to the profession, then a disregard of such rule by an attorney-at-law renders him accountable for the losses caused by such negligence or want of skill; negligence, if knowing the rule, he disregarded it; want of skill, if he was ignorant of the rule"); Citizens' Loan Fund, etc., Assoc. *v.* Friedley, 123 Ind. 143, 146, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L. R. A. 669 (wherein the court said: "He [an attorney] will be liable if his client's interests suffer on account of his failure to understand and apply those rules and principles of law that are well established and clearly defined in the elementary books, or which have been declared in adjudged cases that have been duly reported and published a sufficient length of time to have become known to those who exercise reasonable diligence in keeping pace with the literature of the profession"); Hillegass *v.* Bender, 78 Ind. 225; Breedlove *v.* Turner, 9 Mart. (La.) 353; A. B.'s Estate, Tuck. Surr. (N. Y.) 247.

8. *Indiana.*— Citizens' Loan Fund, etc., Assoc. *v.* Friedley, 123 Ind. 143, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L. R. A. 669.

New York.—Poucher *v.* Blanchard, 86 N. Y. 256; Bowman *v.* Tallman, 3 Abb. Dec. (N. Y.) 182 note, 40 How. Pr. (N. Y.) 1; Avery *v.* Jacob, 59 N. Y. Super. Ct. 585, 15 N. Y. Suppl. 564, 38 N. Y. St. 1026; Patterson *v.* Powell, 31 Misc. (N. Y.) 250, 62 N. Y. Suppl. 1035, 64 N. Y. Suppl. 43, 7 N. Y. Annot. Cas. 381.

Tennessee.— Hill *v.* Mynatt, (Tenn. Ch. 1900) 59 S. W. 163, 52 L. R. A. 883.

Texas.— Morrill *v.* Graham, 27 Tex. 646.

United States.— Marsh *v.* Whitmore, 21 Wall. (U. S.) 178, 22 L. ed. 482 [*affirming* 1 Hask. (U. S.) 391, 16 Fed. Cas. No. 9,122]; Ahlhauser *v.* Butler, 57 Fed. 121.

Canada.— Vallieres *v.* Bernier, 2 Rev. de Lég. 471; Trenholme *v.* Mitchell, 20 Rev. Lég. 355.

See also Shadburne *v.* Daly, 76 Cal. 355, 18 Pac. 403; Hastings *v.* Halleck, 13 Cal. 203.

Assuming correctness of state decision.—An attorney cannot be charged with negligence when he accepts as a correct exposition of the law a decision of the supreme court of his state in advance of any decision thereon by the United States supreme court. Marsh *v.* Whitmore, 21 Wall. (U. S.) 178, 22 L. ed. 482 [*affirming* 1 Hask. (U. S.) 391, 16 Fed. Cas. No. 9,122].

Proceeding under statute subsequently held unconstitutional.— An attorney cannot be charged with carelessness or incompetency for proceeding under an unconstitutional statute, which had not been declared unconstitutional at the time of such proceeding. Poucher *v.* Blanchard, 86 N. Y. 256.

care and diligence and reasonable skill and knowledge in the collection of demands and execution of business intrusted to his professional management,[9] and if guilty of default in either respect he is liable to his client for the actual loss sustained thereby.[10] In the absence of an understanding or agreement with his client, an attorney is bound to sue out all processes necessary to the collection of a demand, unless he requests specific instructions from his client;[11] or unless he is influenced by a prudent regard for the interests of the creditor.[12]

(IV) *In Examination of Title.* An attorney employed to investigate the title of land is liable only for the want of ordinary care and skill.[13]

9. Scope of employment.—An attorney is liable only for those acts which are within the scope of his professional employment. Moore *v.* Winston, 66 Ala. 296; Stubbs *v.* Beene, 37 Ala. 627; Odlin *v.* Stetson, 17 Me. 244, 35 Am. Dec. 248; McAdoo *v.* Lummis, 43 Tex. 227.

10. *Illinois.*— Stevens *v.* Walker, 55 Ill. 151.

Indiana.— Moorman *v.* Wood, 117 Ind. 144, 19 N. E. 739.

Kentucky.— Townsend *v.* Dittoe, 6 Ky. L. Rep. 290.

Louisiana.— King *v.* Fourchy, 47 La. Ann. 354, 16 So. 814.

Mississippi.—Fitch *v.* Scott, 3 How. (Miss.) 314, 34 Am. Dec. 86.

Pennsylvania.— Waln *v.* Beaver, 161 Pa. St. 605, 29 Atl. 114, 493; Riddle *v.* Poorman, 3 Penr. & W. (Pa.) 224.

Texas.— Oldham *v.* Sparks, 28 Tex. 425.

Canada.— Gould *v.* Blanchard, 29 Nova Scotia 361.

See also Palmer *v.* Ashley, 3 Ark. 75; Sevier *v.* Holliday, 2 Ark. 512; Cummins *v.* McLain, 2 Ark. 402; Wilson *v.* Russ, 20 Me. 421.

Embarrassing collection when client solvent.— An attorney who undertakes the collection of a debt, and by his negligence puts it in such a situation as to embarrass the creditor in obtaining payment and to render the debt of less value, is liable to his client, though the debtor always has been and still is able to pay the debt. Wilson *v.* Coffin, 2 Cush. (Mass.) 316.

Receiving depreciated currency.— An attorney who, without authority, receives money, not passing at its face value, in payment of a debt left with him for collection, is liable for its face value even though it was customary to receive such money in payment. Wickliffe *v.* Davis, 2 J. J. Marsh. (Ky.) 69; Lord *v.* Burbank, 18 Me. 178. See also West *v.* Ball, 12 Ala. 340; Botts *v.* Crenshaw, Chase (U. S.) 224, 3 Fed. Cas. No. 1,690. But *compare* Pidgeon *v.* Williams, 21 Gratt. (Va.) 251, where an attorney who accepted Confederate treasury notes in payment of a claim placed with him for collection, at a time when such notes constituted the only currency in use and were but slightly depreciated, was held not responsible to his client for the ultimate loss on such notes, when the client did not instruct the attorney not to accept payment in such currency.

11. Dearborn *v.* Dearborn, 15 Mass. 316; Crooker *v.* Hutchinson, 2 D. Chipm. (Vt.) 117. See also Stubbs *v.* Beene, 37 Ala. 627.

Presumption as to manner of collection.— An attorney who receives a claim for collection will be presumed to have received it for collection by suit. But those matters which lie outside of the regular line of professional attorneyship and which partake rather of the character of agencies, rest on a different principle, and, in the absence of an express engagement so to do, an attorney is not bound to perform them. Stubbs *v.* Beene, 37 Ala. 627.

12. Gaar *v.* Hughes, (Tenn. Ch. 1895) 35 S. W. 1092; Morgan *v.* Giddings, (Tex. 1886) 1 S. W. 369; Crooker *v.* Hutchinson, 2 D. Chipm. (Vt.) 117. See also Hopkins *v.* Willard, 14 Vt. 474.

13. National Sav. Bank *v.* Ward, 100 U. S. 195, 25 L. ed. 621. See also Byrnes *v.* Palmer, 18 N. Y. App. Div. 1, 45 N. Y. Suppl. 479.

Advising as to value of security.—An attorney who is employed merely to examine the title to property on the security of which his client contemplates advancing money, and to prepare the necessary legal documents, is not chargeable with neglect of duty in failing to advise his client as to the value of the security. Cohn *v.* Heusner, 9 Misc. (N. Y.) 482, 30 N. Y. Suppl. 244, 61 N. Y. St. 92. But an attorney who certifies that a security is a good one thereby warrants that the title to property shall not only be found good at the end of a contested litigation, but that it is free from any grave doubt or serious question of its validity. Page *v.* Trutch, 18 Fed. Cas. No. 10,668, 5 Am. L. Rec. 155, 3 Centr. L. J. 559, 8 Chic. L. N. 385, 1 Cinc. L. Bul. 224, 22 Int. Rev. Rec. 281, 3 N. Y. Wkly. Dig. 167, 24 Pittsb. Leg. J. (Pa.) 11. See also Peters *v.* Weller, 30 U. C. Q. B. 4.

Certifying completeness of abstract of title. — Where an attorney certifies an abstract of title to real estate to be a "full and true and complete abstract of the title" it is to be presumed that it covers suits as well as conveyances affecting the title. Thomas *v.* Schee, 80 Iowa 237, 45 N. W. 539.

Defendant was not liable where plaintiff, in 1854, employed him to examine the title to certain lands, and took a deed, and afterward it was discovered that, in 1851, a portion had been sold for taxes, but that, when plaintiff purchased, he had still a year to redeem and, in 1857, the sheriff made a deed to the purchaser. Ross *v.* Strathy, 16 U. C. Q. B. 430. See also Freehold Loan Co. *v.* McArthur, 5 Manitoba 207.

(v) *In Management of Actions.* An attorney is also liable to his client[14] for a want of ordinary care and diligence[15] in the management of an action.[16] He is not bound to institute collateral suits without special instructions to do so.[17] If, however, he undertakes something outside his strict professional duty, and does it so negligently that his client is injured, he is liable.[18] The degree of negligence necessary for liability is a question for the jury.[19]

d. For Unauthorized Acts — (i) *In General* — (a) *Appearance.* An attorney is liable for his unauthorized appearance to any party who may be injured thereby;[20] but if such unauthorized appearance proves to be beneficial to the

14. Relationship of attorney and client must exist at the time of the act complained of. Stephens *v.* White, 2 Wash. (Va.) 203. See also Kenny *v.* Armstrong, 4 U. C. Q. B. 196.

15. Fraud is not essential to render an attorney liable to his client for the mismanagement of a suit. Breedlove *v.* Turner, 9 Mart. (La.) 353.

Failure to defend suit.— If an attorney be employed to defend a suit, and fail to do so, he is liable to the party injured to the extent of damages actually suffered. If, however, the attorney can show that the defense he was employed to make was not a good one, he would be liable at most only to nominal damages. Grayson *v.* Wilkinson, 5 Sm. & M. (Miss.) 268.

Want of professional skill cannot be predicated on an attorney's proceeding to try a cause on a theory which is contrary to an alleged principle of law, where both the trial justice and the general term of the supreme court deny the alleged principle of law and sustain the attorney's theory (Avery *v.* Jacob, 59 N. Y. Super. Ct. 585, 15 N. Y. Suppl. 564, 38 N. Y. St. 1026), or the attorney errs in a matter of judgment (Avery *v.* Jacob, 59 N. Y. Super. Ct. 585, 15 N. Y. Suppl. 564, 38 N. Y. St. 1026; Meredith *v.* Woodward, 16 Wkly. Notes Cas. (Pa.) 146; Morgan *v.* Giddings, (Tex. 1886) 1 S. W. 369); or on a failure to bring suit in the name of the father as well as in the name of the son, where an attorney is employed by the father of a minor son who has received injuries through the negligence of a third party, to sue such third party for damages (Youngman *v.* Miller, 98 Pa. St. 196). Neither is it gross negligence to unite in a single suit at law several debts, some of which are secured by mortgage and some not. Williams *v.* Reed, 3 Mason (U. S.) 405, 29 Fed. Cas. No. 17,733. See also Garser *v.* Boyd, 12 Wkly. Notes Cas. (Pa.) 16; Allison *v.* Weldon, 9 N. Brunsw. 631; Wade *v.* Ball, 20 U. C. C. P. 302.

16. *California.*— Drais *v.* Hogan, 50 Cal. 121.

Illinois.— People *v.* Cole, 84 Ill. 327.

Indiana.— Skillen *v.* Wallace, 36 Ind. 319; Walpole *v.* Carlisle, 32 Ind. 415.

Maine.— Smallwood *v.* Norton, 20 Me. 83, 37 Am. Dec. 39.

Massachusetts.— Varnum *v.* Martin, 15 Pick. (Mass.) 440; Phillips *v.* Bridge, 11 Mass. 242.

Mississippi.— Coopwood *v.* Baldwin, 25 Miss. 129.

New Jersey.— Griggs *v.* Drake, 21 N. J. L. 169.

Pennsylvania.— McWilliams *v.* Hopkins, 4 Rawle (Pa.) 382.

Vermont.— Crooker *v.* Hutchinson, 1 Vt. 73.

New and unusual mode of pleading.— If an attorney, without any assignable reason and without precedent, adopts a new and unusual mode of pleading, in consequence of which his client suffers loss, the attorney is answerable in an action for negligence. Carrigan *v.* Andrews, 6 N. Brunsw. 485.

"Where a given time is allowed by the law for the performance of an act, and the attorney performs the act within that time, he cannot be rendered responsible for negligence." Holmes *v.* Peck, 1 R. I. 242.

17. Pennington *v.* Yell, 11 Ark. 212, 52 Am. Dec. 262.

It is not a part of an attorney's duty to make affidavit (Spencer *v.* Kinnard, 12 Tex. 180), and it has been held that there is no liability for failing to make an affidavit in attachment (Foulks *v.* Falls, 91 Ind. 315). So, the mere entry of a judgment by an attorney, without more, imposes on him no liability to notify his client or revive the judgment when the lien is about to expire. Cook *v.* Foster, (Pa. 1886) 6 Atl. 150.

18. Walker *v.* Goodman, 21 Ala. 647.

19. Walker *v.* Goodman, 21 Ala. 647.

20. *Alabama.*— Wheeler *v.* Bullard, 6 Port. (Ala.) 352.

Arkansas.— Tally *v.* Reynolds, 1 Ark. 99, 31 Am. Dec. 737.

Iowa.— Harshey *v.* Blackmarr, 20 Iowa 161, 89 Am. Dec. 520; Piggott *v.* Addicks, 3 Greene (Iowa) 427, 56 Am. Dec. 547.

Kansas.— Reynolds *v.* Fleming, 30 Kan. 106, 1 Pac. 61, 46 Am. Ren. 86.

Louisiana.— Marvel *v.* Manouvrier, 14 La. Ann. 3, 74 Am. Dec. 424; Walworth *v.* Henderson, 9 La. Ann. 339.

Maryland.— Fowler *v.* Lee, 10 Gill & J. (Md.) 358, 32 Am. Dec. 172; Munnikuyson *v.* Dorsett, 2 Harr. & G. (Md.) 374.

Massachusetts.— Smith *v.* Bowditch, 7 Pick. (Mass.) 137.

Michigan.— Arno *v.* Wayne Cir. Judge, 42 Mich. 362, 4 N. W. 147.

Mississippi.— Schirling *v.* Scites, 41 Miss. 644.

New Hampshire.—Smyth *v.* Balch, 40 N. H. 363; Bunton *v.* Lyford, 37 N. H. 512, 75 Am. Dec. 144.

New Jersey.— Ward *v.* Price, 25 N. J. L. 225; Den *v.* Hendrickson, 15 N. J. L. 102.

client, it has been held that there can be no recovery by the latter against the attorney.[21]

(B) *Compromise.* An attorney who compromises his client's debt without authority is liable to him from the date of such compromise.[22]

(C) *Consent to Judgment, or to Vacation Thereof.* An attorney is liable for confessing judgment, or consenting to the vacation thereof, without authority.[23]

(II) *Violation of Instructions.* An attorney is bound[24] to follow his client's instructions so far as the rules of law and the orders of the court will permit;[25] and he is, accordingly, liable to his client for acts in violation of his instructions or in excess of his authority, whereby the latter is injured.[26]

2. For Acts of Associates. Whenever an attorney intrusts a matter placed in his hands by a client to another attorney, without the express or implied consent of the client, he is liable to his client for injury resulting from the negligent or wrongful acts of the second attorney.[27]

New York.—Ferguson *v.* Crawford, 70 N. Y. 253, 26 Am. Rep. 589; Sperry *v.* Reynolds, 65 N. Y. 179; Brown *v.* Nichols, 42 N. Y. 26, 9 Abb. Pr. N. S. (N. Y.) 1; Watrous *v.* Kearney, 11 Hun (N. Y.) 584; Powers *v.* Trenor, 3 Hun (N. Y.) 3, 5 Thomps. & C. (N. Y.) 231; Ellsworth *v.* Campbell, 31 Barb. (N. Y.) 134; Armstrong *v.* Craig, 18 Barb. (N. Y.) 387; Allen *v.* Stone, 10 Barb. (N. Y.) 547; Bogardus *v.* Livingstone, 2 Hilt. (N. Y.) 236; Runberg *v.* Johnson, 11 N. Y. Civ. Proc. 283; Williams *v.* Van Valkenburg, 16 How. Pr. (N. Y.) 144; Ingalls *v.* Sprague, 10 Wend. (N. Y.) 672; Adams *v.* Gilbert, 9 Wend. (N. Y.) 499; Grazebrook *v.* McCreedie, 9 Wend. (N. Y.) 437; People *v.* Bradt, 7 Johns. (N. Y.) 539; Denton *v.* Noyes, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237; Jackson *v.* Stewart, 6 Johns. (N. Y.) 34; American Ins. Co. *v.* Oakley, 9 Paige (N. Y.) 496, 38 Am. Dec. 561.

Pennsylvania.— Cyphert *v.* McClune, 22 Pa. St. 195.

Vermont.— Spaulding *v.* Swift, 18 Vt. 214; Coit *v.* Sheldon, 1 Tyler (Vt.) 300.

Wisconsin.— Cleveland *v.* Hopkins, 55 Wis. 387, 13 N. W. 225.

United States.— Field *v.* Gibbs, Pet. C. C. (U. S.) 155, 9 Fed. Cas. No. 4,766.

See 5 Cent. Dig. tit. "Attorney and Client," § 230.

Estoppel.—Where an attorney, without authority, appears for defendant in proceedings to foreclose a mortgage, the bringing of suit, against the purchasers of the land, to set aside the mortgage sale is not such an election to repudiate the acts of the attorney as to estop plaintiffs from claiming the money in another action paid to such attorneys. Robb *v.* Roelker, 66 Fed. 23.

If a party has any remedy other than against the attorney, it is by application to the court that rendered the judgment, or by writ of error, and not by audita querela. Abbott *v.* Dutton, 44 Vt. 546, 8 Am. Rep. 394. See also Den *v.* Hendrickson, 15 N. J. L. 102; Brown *v.* Nichols, 42 N. Y. 26, 9 Abb. Pr. N. S. (N. Y.) 1.

21. Harrington *v.* Huntley, 4 Alb. L. J. 367.

22. Woodrow *v.* Hennen, 6 Mart. (La.) 156. See also Lombard *v.* Whiting, Walk. (Miss.) 229.

23. Thompson *v.* Pershing, 86 Ind. 303; Clussman *v.* Merkel, 3 Bosw. (N. Y.) 402; Denton *v.* Noyes, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237; Cyphert *v.* McClune, 22 Pa. St. 195; Jones *v.* Williamson, 5 Coldw. (Tenn.) 371.

24. It is a fair presumption that an attorney acts according to the instructions of his client, unless in a case of such negligence that a violation may be inferred. Holmes *v.* Peck, 1 R. I. 242.

Instructions advantageous to attorney.— Where an attorney acts in accordance with the instructions of his client, who is also his debtor, even though such action be to his own advantage and to the prejudice of other creditors, the transaction is legitimate and free from all taint of fraud. Harris' Appeal, (Pa. 1886) 6 Atl. 761.

25. Nave *v.* Baird, 12 Ind. 318; Anonymous, 1 Wend. (N. Y.) 108. See also Lord *v.* Hamilton, 34 Oreg. 443, 56 Pac. 525.

26. *Indiana.*— O'Halloran *v.* Marshall, 8 Ind. App. 394, 35 N. E. 926.

Massachusetts.— Gilbert *v.* Williams, 8 Mass. 51, 5 Am. Dec. 77.

New York.— Armstrong *v.* Craig, 18 Barb. (N. Y.) 387, wherein it was said that if an attorney violates the instructions of his client, and a loss ensues, the court will not, usually, interfere if the attorney is responsible and the opposite party has acquired rights, but will leave the client to his remedy against the attorney.

Pennsylvania.— Cox *v.* Livingston, 2 Watts & S. (Pa.) 103, 37 Am. Dec. 486.

Texas.—Fox *v.* Jones, (Tex. 1889) 14 S. W. 1007.

Canada.— Hett *v.* Pun Pong, 18 Can. Supreme Ct. 290.

27. *Arkansas.*—Cummins *v.* McLain, 2 Ark. 402.

Illinois.— Walker *v.* Stevens, 79 Ill. 193.

Indiana.— Abbott *v.* Smith, 4 Ind. 452; Pollard *v.* Rowland, 2 Blackf. (Ind.) 22.

Kansas.— Cummins *v.* Heald, 24 Kan. 600, 36 Am. Rep. 264.

Maine.— See Smallwood *v.* Norton, 20 Me. 83, 37 Am. Dec. 39.

Pennsylvania.—Morgan *v.* Tener, 83 Pa. St. 305, 3 Wkly. Notes Cas. (Pa.) 398 [*reversing* 1 Wkly. Notes Cas. (Pa.) 283, 10 Phila. (Pa.)

3. For Acts of Partners. As the employment of a member of a firm of attorneys is that of the entire firm, an attorney is liable to a client for the negligence, lack of skill, or wrongful acts of a partner, even though he may have had no participation in, or knowledge of, the transaction.[28] Such acts, however, in order to make the attorney liable, must be done while the relation of attorney and client subsists between the firm and the client.[29]

D. Remedies of Client — 1. Action — a. For Money Collected — (I) *Form of Action.* When an attorney wrongfully withholds money which he has collected, his client may bring an action at law against him for the amount so withheld;[30] but a bill in equity for an accounting will not lie unless, for some particular reason, the remedy at law is not adequate, and it appears that the power of the court of equity is necessary to complainant's remedy.[31] With reference to the form of the action at law it has been held that assumpsit,[32] case,[33] and account

412, 32 Leg. Int. (Pa.) 98]; Bullitt *v.* Baird, 27 Leg. Int. (Pa.) 171.

Canada.—Herr *v.* Toms, 32 U. C. Q. B. 423.

28. *Alabama.*— Cook *v.* Bloodgood, 7 Ala. 683.

Illinois.— Smyth *v.* Harvie, 31 Ill. 62, 83 Am. Dec. 202.

Louisiana.— Dwight *v.* Simon, 4 La. Ann. 490.

Nebraska.— Ganzer *v.* Schiffbauer, 40 Nebr. 633, 59 N. W. 98.

New York— Warner *v.* Griswold, 8 Wend. (N. Y.) 665.

South Carolina.— Poole *v.* Gist, 4 McCord (S. C.) 259.

Tennessee.—Porter *v.* Vance, 14 Lea (Tenn.) 629.

Canada.—Ouimet *v.* Bergevin, 22 L. C. Jur. 265; Julien *v.* Prevost, 8 Leg. N. 143.

Compare Richardson *v.* Richardson, 100 Mich. 364, 59 N. W. 178 (holding that the fact that one member of a firm of attorneys employed to manage a will contest conspired with one of the heirs to cheat the others out of their share of a settlement, after the money had been paid over to the attorney in fact of the contesting heirs, does not render the firm liable for a diversion of the funds where it acted in good faith until the settlement was made and money paid over); *Ex p.* Flood, 23 N. Brunsw. 86 (holding that where one member of a firm of attorneys receives money for investment, and misappropriates it without the knowledge or consent of the other, it ought to be clearly shown that the latter was guilty of personal misconduct, or, at least, of neglect of duty as a member of the firm, in consequence of the misconduct of his partner, before the court will interfere on a summary application to compel him to pay money).

Effect of associating partner.—An attorney, in whose hands notes are placed for collection, will be individually liable for neglect, or for money had and received, though he gave notice that he had afterward associated with him a partner in the practice of his profession who collected the money, unless the client recognized the partnership in the transaction of his business. Mardis *v.* Shackleford. 4 Ala. 493.

Effect of dissolution.—Where a claim is placed in the hands of attorneys who are partners, and, before the money is collected, the partnership is dissolved, and afterward one of them receives the money and neglects to pay it over to plaintiff, both attorneys are liable as copartners. Smyth *v.* Harvie, 31 Ill. 62, 83 Am. Dec. 202; Wilkinson *v.* Griswold, 12 Sm. & M. (Miss.) 669; Poole *v.* Gist, 4 McCord (S. C.) 259. But see Ayrault *v.* Chamberlin, 26 Barb. (N. Y.) 83.

29. Ayrault *v.* Chamberlin, 26 Barb. (N. Y.) 83. See also Thompson *v.* Robinson, 16 Ont. App. 175.

30. *Illinois.*—Tinkham *v.* Heyworth, 31 Ill. 519.

Indiana.— Bougher *v.* Scobey, 16 Ind. 151.

Kentucky.— Ellis *v.* Henry, 5 J. J. Marsh. (Ky.) 247.

Missouri.— Houx *v.* Russell, 10 Mo. 246.

New York.— Sackett *v.* Breen, 50 Hun (N. Y.) 602, 3 N. Y. Suppl. 473.

Pennsylvania.— Campbell *v.* Boggs, 48 Pa. St. 524; Bredin *v.* Kingland, 4 Watts (Pa.) 420.

South Carolina.— Palmer *v.* Thomson, 4 Rich. (S. C.) 607.

Vermont.— Smalley *v.* Soragen, 30 Vt. 2; Scott *v.* Lance, 21 Vt. 507.

Where the professional relation involves a series of acts and duties, an attorney is not suable until the relation is dissolved. Glenn *v.* Cuttle, 2 Grant (Pa.) 273.

31. Crothers *v.* Lee, 29 Ala. 337; Powers *v.* Cray, 7 Ga. 206.

32. Ellis *v.* Henry, 5 J. J. Marsh. (Ky.) 247; Houx *v.* Russell, 10 Mo. 246. See also Cameron *v.* Clarke, 11 Ala. 259 (holding that an attorney who has a note for collection and receives payment in chattels may be sued on a parol promise to pay his principal; but, if the principal elects to consider such receipt as a payment, he may maintain an action for money had and received); Burke *v.* Stillwell, 23 Ark. 294.

33. Tinkham *v.* Heyworth, 31 Ill. 519. See also Pratt *v.* Brewster, 52 Conn. 65. holding that, where an attorney has converted money collected by him to his own use, he is liable for the wrongful act in an action framed in tort, and that it makes no difference that an action might have been maintained on the implied contract, or that he had an express contract to pay over the money.

render[34] will lie against an attorney who fails to pay over money collected by him.

(II) *Conditions Precedent*—(A) *Demand and Refusal.* As it is the duty of an attorney to notify his client immediately, or, at least, within a reasonable time, that he has in his hands money collected for his client, if he does so notify him,[35] in the absence of instructions to remit, no action to recover the money will lie until after demand and refusal,[36] unless demand has been waived or there are circumstances which excuse it.[37]

(B) *Release.* Where an administrator turned over the balance in his hands to the attorney for the distributees, with directions to hold it in trust for them, but not to pay it to them till they had duly and properly signed a release, they cannot maintain an action against the attorney to recover their respective shares without first tendering the releases, as a compliance with the condition precedent which the administrator had placed on its payment.[38]

34. Bredin *v.* Kingland, 4 Watts (Pa.) 420.

Book-account.— Where an attorney, without authority from his client, settled and discharged a judgment by taking therefor notes payable at a future time, partly in money and partly in personal property, and subsequently sold the notes for less than their amount, the client's claim against the attorney for the difference between the amount of the judgment or the notes and money received by him was not a proper subject of charge on book, and could not be recovered in an action of book-account. Smalley *v.* Soragen, 30 Vt. 2. See, generally, Accounts and Accounting, 1 Cyc. 493 *et seq.*

35. The presumption is, in the absence of proof, that an attorney gave notice of the collection of money, and that the client made demand therefor within a reasonable time. Voss *v.* Bachop, 5 Kan. 59.

36. *Alabama.*— Mardis *v.* Shackleford, 4 Ala. 493.

Arkansas.— Whitehead *v.* Wells, 29 Ark. 99; Jett *v.* Hempstead, 25 Ark. 462; Denton *v.* Embury, 10 Ark. 228; Warner *v.* Bridges, 6 Ark. 385; Taylor *v.* Spears, 6 Ark. 381, 8 Ark. 429, 44 Am. Dec. 519; Palmer *v.* Ashley, 3 Ark. 75; Sevier *v.* Holliday, 2 Ark. 512; Cummins *v.* McLain, 2 Ark. 402.

Indiana.— Claypool *v.* Gist, 108 Ind. 424, 9 N. E. 382; Kyser *v.* Wells, 60 Ind. 261; Pierse *v.* Thornton, 44 Ind. 235; Black *v.* Hersch, 18 Ind. 342, 81 Am. Dec. 362.

Kansas.— Voss *v.* Bachop, 5 Kan. 59.

Kentucky.— Castleman *v.* Southern Mut. L. Ins. Co., 14 Bush (Ky.) 197, 201; Cord *v.* Taylor, 5 Ky. L. Rep. 852.

Missouri.— Beardslee *v.* Boyd, 37 Mo. 180.

New York.— People *v.* Brotherson, 36 Barb. (N. Y.) 662; Walradt *v.* Maynard, 3 Barb. (N. Y.) 584; Satterlee *v.* Frazer, 2 Sandf. (N. Y.) 141; Banner *v.* D'Auby, 34 Misc. (N. Y.) 525, 69 N. Y. Suppl. 897. See also Lillie *v.* Hoyt, 5 Hill (N. Y.) 395, 40 Am. Dec. 360; Stafford *v.* Richardson, 15 Wend. (N. Y.) 302; Rathbun *v.* Ingalls, 7 Wend. (N. Y.) 320; *Ex p.* Ferguson, 6 Cow. (N. Y.) 596; Taylor *v.* Bates, 5 Cow. (N. Y.) 376; Ferris *v.* Paris, 10 Johns. (N. Y.) 285.

Pennsylvania.— Krause *v.* Dorrance, 10 Pa. St. 462, 51 Am. Dec. 496. *Compare* Glenn *v.* Cuttle, 2 Grant (Pa.) 273.

South Carolina.—Madden *v.* Watts, 59 S. C. 81, 37 S. E. 209.

Virginia.—Taylor *v.* Armstead, 3 Call (Va.) 200.

Contra, Shepherd *v.* Crawford, 71 Ga. 458; Chapman *v.* Burt, 77 Ill. 337; Pinkham *v.* Heyworth, 31 Ill. 519; Hollenbeck *v.* Stanberry, 38 Iowa 325 (holding that the commencement of an action against an attorney for money collected constitutes a sufficient demand); Coffin *v.* Coffin, 7 Me. 298 [*distinguishing* Staples *v.* Staples, 4 Me. 532].

Demand on one of two attorneys in partnership who receives money is a demand on both, and renders both liable. McFarland *v.* Crary, 8 Cow. (N. Y.) 253.

It is not necessary that the demand should be made at the attorney's residence or place of business, unless he objects on that ground, and an intimation from a client to his attorney, who has collected money, that the client wishes it paid over is sufficient. Gilbert *v.* Palmer, 6 N. Brunsw. 667.

37. *Indiana.*—Kyser *v.* Wells, 60 Ind. 261; Black *v.* Hersch, 18 Ind. 342, 81 Am. Dec. 362.

Kansas.— Voss *v.* Bachop, 5 Kan. 59.

New York.— Walradt *v.* Maynard, 3 Barb. (N. Y.) 584; Rathbun *v.* Ingalls, 7 Wend. (N. Y.) 320.

Pennsylvania.— Krause *v.* Dorrance, 10 Pa. St. 462, 51 Am. Dec. 496.

South Carolina.—Madden *v.* Watts, 59 S. C. 81, 37 S. E. 209.

Demand before suit is not necessary where the attorney has agreed to pay over moneys when collected, and has failed to do so. Mardis *v.* Shackleford, 4 Ala. 493.

No demand is necessary, by the party entitled to money, where an attorney receives it as for his client, knowing that it belongs to another, the act of receiving being wrongful (Mowery *v.* Webb, 6 Ky. L. Rep. 360), or by the client where the attorney fails to give information of its receipt, and converts the money or otherwise applies it illegally (Nisbet *v.* Lawson, 1 Ga. 275).

38. Matter of Smyley, 19 N. Y. Suppl. 266, 46 N. Y. St. 824.

(III) *PLEADINGS*—(A) *Complaint, Declaration, or Petition.*[39] Where demand and refusal is a condition precedent, plaintiff must aver such demand and refusal.[40] He need not, however, aver that defendant was retained for reward,[41] that defendant promised to account for the moneys which he collected,[42] or that the latter fraudulently embezzled, misapplied, or converted the money.[43] Neither is it necessary for him to state the particulars of the account or to furnish a bill of particulars, unless under a special order.[44]

(B) *Plea.* Under the general issue the attorney may show a lien[45] or claim for services.[46]

(IV) *DEFENSES*—(A) *In General*—(1) APPLICATION OF FUND AS DIRECTED. Where money is applied in good faith by an attorney in accordance with an agreement entered into between his clients, this is a defense in an action against the attorney, though there was a failure of consideration among the clients.[47]

(2) GARNISHMENT BY CLIENT'S CREDITOR. In an action against an attorney for money collected, it is a defense that, before he had had an opportunity to account, the money had been garnished[48] by a creditor of the client.[49]

(3) STATUTE OF LIMITATIONS. An attorney is not debarred from the provisions of the statute of limitations, in an action against him for money collected, because of the relationship existing between him and his client.[50]

(B) *Counter-Claim.* It has been held that an attorney, when sued by his client for money collected for the latter, may set up, by way of counter-claim,

39. For forms of complaints, declarations, and petitions in actions to recover money collected by an attorney see Pratt *v.* Brewster, 52 Conn. 65; Nisbet *v.* Lawson, 1 Ga. 275; Fletcher *v.* Cummings, 33 Nebr. 793, 51 N. W. 144; Grinnell *v.* Sherman, 14 N. Y. Suppl. 544, 38 N. Y. St. 587.

Parties.—In an action against an attorney for conversion of money collected by him, his partner need not be joined as a defendant. Pratt *v.* Brewster, 52 Conn. 65.

40. Pierse *v.* Thornton, 44 Ind. 235; Beardslee *v.* Boyd, 37 Mo. 180.

Sufficient averment.—An averment that defendant neglected and refused to pay a certain sum of money, though requested so to do, is a sufficient allegation of payment. Fletcher *v.* Cummings, 33 Nebr. 793, 51 N. W. 144.

41. Nisbet *v.* Lawson, 1 Ga. 275. See also McRaven *v.* Dameron, 82 Cal. 57, 23 Pac. 33, holding that a complaint which shows that defendant was plaintiffs' attorney in certain litigation, and that he received certain money which he failed to deliver or account for to plaintiffs, states the contract sufficiently, in the absence of a special demurrer, and that findings as to the terms of such contract were within the issues tendered.

42. Nisbet *v.* Lawson, 1 Ga. 275.

43. Grinnell *v.* Sherman, 14 N. Y. Suppl. 544, 38 N. Y. St. 587.

44. West *v.* Brewster, 1 Duer (N. Y.) 647.

45. Patrick *v.* Hazen, 10 Vt. 183.

46. Beardsley *v.* Knight, 10 Vt. 185, 33 Am. Dec. 193.

47. Strohecker *v.* Hoffman, 19 Pa. St. 223. See also Guthrie's Appeal, 92 Pa. St. 269.

48. A mere notice to an attorney not to pay over to plaintiff the money collected, given by persons claiming to be interested in the fund, will not justify him in detaining the same in his hands. The claimant should resort to an injunction. Dunn *v.* Vannerson, 7 How. (Miss.) 579. See also Charteris *v.* Miller, 14 U. C. Q. B. 62.

49. Ewing *v.* Freeman, 103 Ga. 811, 30 S. E. 637.

50. Kimbro *v.* Waller, 21 Ala. 376; Cook *v.* Rivers, 13 Sm. & M. (Miss.) 328, 53 Am. Dec. 88; Downey *v.* Garard, 24 Pa. St. 52; Kinney *v.* McClure, 1 Rand. (Va.) 284. But *compare* Dougall *v.* Cline, 6 U. C. Q. B. 546, from which it seems that the court may prevent an attorney pleading the statute of limitations to defeat a client's just claim, but cannot prevent the attorney's executors from so doing.

When period begins to run.—In some jurisdictions it has been held that, in absence of fraud on the attorney's part, the statutory period begins to run from the time of collection. Cook *v.* Rives, 13 Sm. & M. (Miss.) 328, 53 Am. Dec. 88; Aultman *v.* Adams, 35 Mo. App. 503; Hawkins *v.* Walker, 4 Yerg. (Tenn.) 187. See also Smith *v.* Owen, 7 Lea (Tenn.) 53. In others it runs only from the date of client's demand (Denton *v.* Embury, 10 Ark. 228; Roberts *v.* Armstrong, 1 Bush (Ky.) 263, 89 Am. Dec. 624; Sneed *v.* Hanly, Hempst. (U. S.) 659, 22 Fed. Cas. No. 13,136), unless the client has failed, after notice of the collection, to make demand within a reasonable time, in which case it runs from the date of notice (Leigh *v.* Williams, 64 Ark. 165, 41 S. W. 323; Whitehead *v.* Wells, 29 Ark. 99; Jett *v.* Hempstead, 25 Ark. 462; Schofield *v.* Woolley, 98 Ga. 548, 25 S. E. 769, 58 Am. St. Rep. 315; McDowell *v.* Potter, 8 Pa. St. 189, 49 Am. Dec. 503).

The operation of the statute is prevented by payment by the attorney of the principal or interest. Torrence *v.* Strong, 4 Oreg. 39.

a demand for services, and is entitled to set off other claims which he may have against his client.[51]

(c) *Estoppel.* An attorney who has collected money for his client is estopped to deny that he is an attorney,[52] that plaintiff is a corporation when it sues in the same name used by him in obtaining the judgment,[53] or to claim that the client has no title to the moneys collected,[54] and may be estopped by laches from setting up an equitable defense.[55]

(v) *Evidence.* The burden of proof is on plaintiff to establish, upon all the evidence, his right to recover;[56] but, in an action against an attorney to recover a sum of money collected by him for plaintiff and held by him as compensation for legal services,[57] the burden is on defendant to prove the services and their value, and he can retain only enough to compensate him.[58]

(vi) *Damages.* The measure of damages in an action against an attorney by a client is the amount of money collected, with interest from the time it was demanded, or, if the attorney failed to give notice to his client or wilfully misappropriated the money or applied it to his own use, with interest from the date of its reception.[59]

b. For Negligence — (i) *In General.* A client[60] who has suffered damages as the result of his attorney's negligence[61] may recover therefor in an action at law.[62]

51. Noble *v.* Leary, 37 Ind. 186; Gopen *v.* Crawford, 53 How. Pr. (N. Y.) 278. See also Fargo Gas Light, etc., Co. *v.* Greer, 18 Ohio Cir. Ct. 589, 10 Ohio Cir. Dec. 164; Sanborn *v.* Plowman, 20 Tex. Civ. App. 484, 49 S. W. 639. *Compare* Bredin *v.* Kingland, 4 Watts (Pa.) 420, where the court held that a refusal on the part of an attorney to pay over or render an account deprived him of all right to claim compensation for his services.

Effect of client's death.—Where the client died, and afterward the attorneys collected the money, it was held, in the administrator's suit to recover the money from them, that the attorneys could not set off the sum due for their services before the client's death, but might do so for those rendered afterward. Lewis *v.* Kinealy, 2 Mo. App. 33.

52. McFarland *v.* Crary, 8 Cow. (N. Y.) 253.

53. McMath *v.* Com., 12 Ky. L. Rep. 251.

54. Fogerty *v.* Jordan, 2 Rob. (N. Y.) 319. See also Mahler *v.* Hyman, 17 N. Y. Suppl. 588, 43 N. Y. St. 540.

55. Cannon *v.* Sanford, 20 Mo. App. 590.

56. Ross *v.* Gerrish, 8 Allen (Mass.) 147, holding that an answer which admits the collection of the money, but avers that plaintiff was only a nominal party to the suit, although it admits a *prima facie* case for plaintiff, still leaves upon him the burden of proof.

Insufficient evidence.—Where, in an action of assumpsit for money collected by an attorney, the intestate of defendants, the money was traced into the coroner's hands, but there was no proof that the intestate had received it, the verdict for plaintiffs will be set aside and a new trial ordered. Hall *v.* Wright, 9 Rich. (S. C.) 392.

57. Where the attorney retains more than the client is willing to allow, the latter may maintain such an action without giving the bond required by statute in cases where it is sought to obtain the release of property from an attorney's lien. Armitage *v.* Sullivan, 69 Iowa 426, 29 N. W. 399.

58. Stanton *v.* Clinton, 52 Iowa 109, 2 N. W. 1027.

Question for jury.— The question of allowance of attorney's fees is for the jury. Gray *v.* Conyers, 70 Ga. 349.

59. Nisbet *v.* Lawson, 1 Ga. 275. See also Commonwealth Bank *v.* Patton, 4 J. J. Marsh. (Ky.) 190.

Interest.— An attorney is entitled to receive his costs and counsel fees as soon as the money is collected. It is, therefore, error to charge him with interest, from the time the money is collected, and deduct therefrom his counsel fees, without any credit for interest. Hover *v.* Heath, 3 Hun (N. Y.) 283.

Damages resulting from an unauthorized appearance in an independent action cannot be recovered in an action solely for money alleged to have been collected by defendants. Scott *v.* Kirschbaum, 47 Nebr. 331, 66 N. W. 443.

60. Rights of client's assignee.— Under 8 Vict. c. 48, the right to sue an attorney for negligence vests in the assignee of an insolvent plaintiff. Alexander *v.* A. B., 5 U. C. Q. B. 329. *Compare* Laidlaw *v.* O'Connor, 23 Ont. 696.

61. *California.*— Hinckley *v.* Krug, (Cal. 1893) 34 Pac. 118. See also Siddall *v.* Haight, 132 Cal. 320, 64 Pac. 410.

Indiana.— Nave *v.* Baird, 12 Ind. 318. See also Nickless *v.* Pearson, 81 Ind. 427, 84 Ind. 602.

Louisiana.—Spiller *v.* Davidson, 4 La. Ann. 171.

Maryland.— Cochrane *v.* Little, 71 Md. 323, 18 Atl. 698.

Ohio.— Harter *v.* Morris, 18 Ohio St. 492.

Tennessee.— Collier *v.* Pulliam, 13 Lea (Tenn.) 114; Bruce *v.* Baxter, 7 Lea (Tenn.) 477.

United States.— Spangler *v.* Sellers, 5 Fed. 882.

62. Newman *v.* Schueck, 58 Ill. App. 328; Brewster *v.* Frazier, 32 Md. 302.

Assumpsit is the proper form of action. Stimpson *v.* Sprague, 6 Me. 470.

(II) *Complaint, Declaration, or Petition.* In an action against an attorney for negligence it is sufficient for plaintiff to aver, generally, that defendant was retained as attorney, without stating the consideration.[63] Neither is it necessary for plaintiff to show that he was without fault,[64] or to state specific facts constituting the negligence.[65] When the action was for failure to collect a note it has been held that plaintiff must allege his title to the note.[66]

(III) *Defenses*—(A) *Champerty.* An attorney sued by his client for negligence and unskilfulness cannot set up champerty in the contract as a defense to the suit.[67]

(B) *Statute of Limitations.* It is a good defense that the client's right of action is barred by the statute of limitations.[68]

(C) *That Client Did Not Own Claim.* It has been held a good defense to an action by a client against an attorney for negligence in not instituting suit to recover a debt due to the former, that the debt was not due to him, but to a third person at the time when defendant was retained to institute the suit.[69]

(D) *That Client Prevented Collection.* It is a good defense that the client himself prevented the collection of the debt.[70]

(IV) *Evidence.* Plaintiff must prove defendant's employment,[71] and the want of reasonable care and skill in the performance of the stipulated service;[72]

A bill in equity will not lie against an attorney for damages for negligence, since there is an adequate remedy at law. Nancrede *v.* Voorhis, 32 N. J. Eq. 524; Marsh *v.* Whitmore, 1 Hask. (U. S.) 391, 16 Fed. Cas. No. 9,122; Williams *v.* Reed, 3 Mason (U. S.) 105, 29 Fed. Cas. No. 17,733. But the investigation of charges of fraudulent conduct in transactions between attorney and client belongs peculiarly to a court of equity, and cannot be conducted in a court of law without embarrassment. Broyles *v.* Arnold, 11 Heisk. (Tenn.) 484.

63. Cavillaud *v.* Yale, 3 Cal. 108, 58 Am. Dec. 388 (holding that, where it is alleged that he was retained in consideration of certain reasonable fees and rewards to be paid him, and no future time is stated as agreed upon for the payment of such fee, the declaration must aver payment, and the omission of this is error); Stephens *v.* White, 2 Wash. (Va.) 203; Bourne *v.* Diggles, 2 Chit. 311, 18 E. C. L. 651. *Compare* Eccles *v.* Stephenson, 3 Bibb (Ky.) 517, holding that it is not necessary to aver that plaintiff had paid to defendant, or secured him, a fee; but that an averment that defendant undertook to prosecute the suit for a fee thereafter to be paid, is sufficient.

64. Jones *v.* White, 90 Ind. 255.

65. Jones *v.* White, 90 Ind. 255; Vail *v.* Duggan, 7 U. C. Q. B. 568. See also Wilson *v.* Coffin, 2 Cush. (Mass.) 316, holding that such general allegation, if a defect, is cured by verdict.

Persons to whom payment should have been made.—A declaration alleging that certain notes, etc., were placed in the hands of an attorney, who undertook to collect them and pay the proceeds to the creditors of a firm named, and alleging, as a breach, a failure to collect and pay over the money, need not particularize by name the creditors to whom the money collected was to be paid. Mardis *v.* Shackleford, 6 Ala. 433.

Sufficient cause of action was shown in Walker *v.* Goodman, 21 Ala. 647; Evans *v.* Watrous, 2 Port. (Ala.) 205; Rosebud Min., etc., Co. *v.* Hughes, (Colo. App. 1901) 64 Pac. 247; Cochrane *v.* Little, 71 Md. 323, 18 Atl. 698; Phillips *v.* Dempsey, 18 U. C. Q. B. 177.

No cause of action was shown in Anderson *v.* Conklin, 11 Ky. L. Rep. 183; Elder *v.* Bogardus, Lalor (N. Y.) 116.

66. Sevier *v.* Holliday, 2 Ark. 512; Baker *v.* McArthur, 5 Ky. L. Rep. 185.

67. Goodman *v.* Walker, 30 Ala. 482, 68 Am. Dec. 134.

68. Hays *v.* Ewing, 70 Cal. 127, 11 Pac. 602; Rhines *v.* Evans, 66 Pa. St. 192, 5 Am. Rep. 364; Thomas *v.* Ervin, Cheves (S. C.) 22, 34 Am. Dec. 586.

The statute begins to run from a reasonable time after a claim has been placed in the attorney's hands for collection, for, in the absence of peremptory instructions, he is entitled to a reasonable time for beginning proceedings. McArthur *v.* Baker, 7 Ky. L. Rep. 441; Rhines *v.* Evans, 66 Pa. St. 192, 5 Am. Rep. 364; Downey *v.* Garard, 24 Pa. St. 52; Wilcox *v.* Plummer, 4 Pet. (U. S.) 172, 7 L. ed. 821.

69. Jackson *v.* Tilghman, 1 Miles (Pa.) 31. *Compare* Smallwood *v.* Norton, 20 Me. 83, 37 Am. Dec. 39, where an attorney was sued for negligence in not moving for a return of property in a replevin suit on nonsuit, and it was held that it was not competent for him to show, in reduction of damages, that plaintiff in replevin was the real owner of the property.

70. Ransom *v.* Cothran, 6 Sm. & M. (Miss.) 167; Fenaille *v.* Coudert, 44 N. J. L. 286; Benner *v.* Burton, 13 U. C. Q. B. 387. See also Read *v.* Patterson, 11 Lea (Tenn.) 430; Lynch *v.* Wilson, 22 U. C. Q. B. 226; O'Beirn *v.* Wilson, 6 U. C. C. P. 366.

71. National Sav. Bank *v.* Ward, 100 U. S. 195, 25 L. ed. 621.

72. *Arkansas.*—Pennington *v.* Yell, 11 Ark. 212, 52 Am. Dec. 262.

but, where a *prima facie* case of negligence is shown, the burden of proving adequate excuse is on the attorney.[73] An attorney's receipt for a claim, placed in his hands for collection, is admissible to prove the relation of attorney and client,[74] and is *prima facie* evidence of the genuineness and justness of the securities described in the receipt.[75] The record of the suit on the claim is also admissible against the attorney, to prove the final determination of that suit, although it was conducted by him in the name of another attorney.[76] The attorney will not be allowed to prove that he consulted a distinguished attorney respecting the proper course to be pursued by him, or that the arrangement made by him was, in the opinion of the witness, the best that could be made for his client's interest;[77] nor can he introduce a memorandum of instructions made in plaintiff's presence.[78] Expert evidence is admissible on the question of negligence.[79]

(v) *Questions of Law and Fact.* The question of negligence is generally held to be one of fact for the jury.[80]

(vi) *Damages.* The measure of damages in an action against an attorney for negligence is the amount of loss actually sustained;[81] but where a client has suf-

Mississippi.— Hoover *v.* Shackleford, 23 Miss. 520.

South Carolina.— Wright *v.* Ligon, Harp. Eq. (S. C.) 166.

Virginia.— Staples *v.* Staples, 85 Va. 76, 7 S. E. 199.

United States.— National Sav. Bank *v.* Ward, 100 U. S. 195, 25 L. ed. 621.

Failure to set up defense.—Where the negligence charged is the failure to set up a defense, based upon certain facts communicated to the attorney by his client, the latter must show by evidence the existence of such facts, and that they were susceptible of proof at the trial by the exercise of proper diligence on the part of his attorney. Hastings *v.* Halleck. 13 Cal. 203.

The withdrawal of an attorney from a suit creates no presumption that the subsequent adverse result to his client was due to his withdrawal. Cullison *v.* Lindsay, 108 Iowa 124, 78 N. W. 847.

73. Moorman *v.* Wood, 117 Ind. 144, 19 N. E. 739; Bourne *v.* Diggles, 2 Chit. 311, 18 E. C. L. 651; Gould *v.* Blanchard, 29 Nova Scotia 361.

74. Goodman *v.* Walker, 30 Ala. 482, 68 Am. Dec. 134; Smedes *v.* Elmendorf, 3 Johns. (N. Y.) 185.

75. Hair *v.* Glover, 14 Ala. 500. See, however, Sevier *v.* Holliday, 2 Ark. 512, where, in an action against an attorney for failure to collect a note, in which action the petition did not show title to the note in plaintiff, it was held that a receipt given by defendant to plaintiff for the note described, in which plaintiff did not appear as a party in any capacity, was not evidence of title in plaintiff.

76. Goodman *v.* Walker, 30 Ala. 482, 68 Am. Dec. 134.

77. Goodman *v.* Walker, 30 Ala. 482, 68 Am. Dec. 134.

78. Phelps *v.* Wilson, 13 U. C. C. P. 38.

79. Pennington *v.* Yell, 11 Ark. 212, 52 Am. Dec. 262; Cochrane *v.* Little, 71 Md. 323, 18 Atl. 698.

80. *Alabama.*— Pinkston *v.* Arrington, 98 Ala. 489, 13 So. 561; Evans *v.* Watrous, 2 Port. (Ala.) 205.

Arkansas.— Pennington *v.* Yell, 11 Ark. 212, 52 Am. Dec. 262.

Maryland.— Cochrane *v.* Little, 71 Md. 323, 18 Atl. 698.

New York.— Abeel *v.* Swann, 21 Misc. (N. Y.) 677, 47 N. Y. Suppl. 1088.

South Carolina.— Hogg *v.* Martin, Riley (S. C.) 156.

Contra, Gambert *v.* Hart, 44 Cal. 542.

81. *Arkansas.*—Pennington *v.* Yell, 11 Ark. 212, 52 Am. Dec. 262.

Georgia.— Cox *v.* Sullivan, 7 Ga. 144, 50 Am. Dec. 386.

Illinois.— Goldzier *v.* Poole, 82 Ill. App. 469.

Indiana.— Moorman *v.* Wood, 117 Ind. 144, 19 N. E. 739.

Iowa.— Jamison *v.* Weaver, 81 Iowa 212, 46 N. W. 996.

Kentucky.— Eccles *v.* Stephenson, 3 Bibb (Ky.) 517.

Maryland.— Watson *v.* Calvert Bldg., etc., Assoc., 91 Md. 25, 45 Atl. 879.

Massachusetts.— Dearborn *v.* Dearborn, 15 Mass. 316; Gilbert *v.* Williams, 8 Mass. 51, 5 Am. Dec. 77.

Mississippi.— Grayson *v.* Wilkinson, 5 Sm. & M. (Miss.) 268; Fitch *v.* Scott, 3 How. (Miss.) 314, 34 Am. Dec. 86.

New York.— Quinn *v.* Van Pelt, 56 N. Y. 417; Fay *v.* McGuire, 20 N. Y. App. Div. 569, 47 N. Y. Suppl. 286.

Pennsylvania.— Cox *v.* Livingston, 2 Watts & S. (Pa.) 103, 37 Am. Dec. 486.

Vermont.— Crooker *v.* Hutchinson, 2 D. Chipm. (Vt.) 117.

United States.— Suydam *v.* Vance, 2 McLean (U. S.) 99, 23 Fed. Cas. No. 13,657.

Canada.— Gould *v.* Blanchard, 29 Nova Scotia 361. *Compare* Bradbury *v.* Jarvis, 1 U. C. Q. B. 301, holding that, in an action against an attorney for discharging a debtor in custody on a capias ad satisfaciendum without any authority from plaintiffs, the damages are discretionary, and it is not in-

fered no special damages, he is entitled, at least, to nominal damages.[82] Punitive damages were held to be proper in a case where an attorney falsely gave a client information that led her to a second marriage and rendered her liable to indictment and prosecution for bigamy.[83]

2. Summary Remedies of Client — a. In General. An attorney may, without resort being had to an action, be summarily proceeded against[84] for wrongs done by him in his professional capacity.[85] The power to thus summarily proceed against an attorney, though usually conferred by statute,[86] exists in a court, by virtue of its control over its officers, independent of any statute.[87]

cumbent on the jury to give the whole amount of the debt.

Interest.—In Rootes *v.* Stone, 2 Leigh (Va.) 650, it was held that where an attorney, employed to collect debts, loses them by his negligence, he is chargeable with the principal of them, but not with interest thereon.

The employment of an attorney, after knowledge of his negligent conduct, is material, and should be submitted to the jury on the question of damages. Derrickson *v.* Cady, 7 Pa. St. 27.

82. Lilly *v.* Boyd, 72 Ga. 83; McLeod *v.* Boulton, 3 U. C. Q. B. 84. See also Arnold *v.* Robertson, 3 Daly (N. Y.) 298.

83. Hill *v.* Montgomery, 84 Ill. App. 300 [*affirmed* in 184 Ill. 220, 56 N. E. 320].

84. *Georgia.*— Foster *v.* Reid, 58 Ga. 221; Smith *v.* Bush, 58 Ga. 121.

Indiana.— Heffren *v.* Jayne, 39 Ind. 463, 13 Am. Rep. 281.

Iowa.— State *v.* Morgan, 80 Iowa 413, 45 N. W. 1070; Cross *v.* Ackley, 40 Iowa 493.

Louisiana. — Butchers' Union Slaughterhouse, etc., Co. *v.* Crescent City Live Stock Landing, etc., Co., 41 La. Ann. 355, 6 So. 508.

Mississippi.— Dunn *v.* Vannerson, 7 How. (Miss.) 579.

New Jersey.— Mundy *v.* Schantz, 52 N. J. Eq. 744, 30 Atl. 322.

New York.— Matter of Langslow, 167 N. Y. 314, 60 N. E. 590; Foster *v.* Townshend, 68 N. Y. 203; Berks *v.* Hotchkiss, 82 Hun (N. Y.) 27, 31 N. Y. Suppl. 16, 63 N. Y. St. 354; Matter of Wolf, 51 Hun (N. Y.) 407, 4 N. Y. Suppl. 239, 21 N. Y. St. 224; Matter of Silvernail, 45 Hun (N. Y.) 575; Matter of Mertian, 29 Hun (N. Y.) 459; Porter *v.* Parmly, 39 N. Y. Super. Ct. 219; Matter of Fincke, 6 Daly (N. Y.) 111; Batterson *v.* Osborne, 18 N. Y. Suppl. 431, 44 N. Y. St. 839; Sprague *v.* Horton, 18 N. Y. Suppl. 165, 46 N. Y. St. 17; Ackerman *v.* Wagner, 8 N. Y. Suppl. 457, 29 N. Y. St. 166; Grant's Case, 8 Abb. Pr. (N. Y.) 357, 17 How. Pr. (N. Y.) 260; *Ex p.* Staats, 4 Cow. (N. Y.) 76; People *v.* Smith, 3 Cai. (N. Y.) 221, Col. & C. Cas. (N. Y.) 497; Saxton *v.* Wyckoff, 6 Paige (N. Y.) 182.

Ohio.—Cotton *v.* Ashley, 11 Ohio Cir. Ct. 47.

Pennsylvania.— *In re* Kennedy, 120 Pa. St. 497, 14 Atl. 397, 6 Am. St. Rep. 724; Clark *v.* Clark, 17 Wkly. Notes Cas. (Pa.) 400.

Rhode Island.— Anderson *v.* Bosworth, 15 R. I. 443, 8 Atl. 339, 2 Am. St. Rep. 910; Burns *v.* Allen, 15 R. I. 32, 23 Atl. 35, 2 Am. St. Rep. 844.

Tennessee.—Jones *v.* Miller, 1 Swan (Tenn.) 151.

Texas.— Trammell *v.* Shropshire, 22 Tex. 327.

Virginia.—Taylor *v.* Armstead, 3 Call (Va.) 200.

United States.— Jeffries *v.* Laurie, 23 Fed. 786.

Canada.— Matter of Toms, 2 Ch. Chamb. (U. C.) 381; *Re* Carroll, 2 Ch. Chamb. (U. C.) 323; *Re* A. B., 3 Manitoba 316; *Ex p.* Flood, 23 N. Brunsw. 86; Kerr *v.* Thorne, 18 N. Brunsw. 625; Gunter *v.* Sharp, 17 N. Brunsw. 286; Gilbert *v.* Soney, 5 N. Brunsw. 679; Carruthers *v.* ———, Taylor (U. C.) 243.

See 5 Cent. Dig. tit. "Attorney and Client," § 266.

85. As to necessity of existence of relation of attorney and client see *infra*, IV, D, 2, c, (II).

86. See the statutes of the several states and the following cases:

Georgia.— Hawkins *v.* Smith, 56 Ga. 571.

Indiana.— Heffren *v.* Jayne, 39 Ind. 463, 13 Am. Rep. 281.

Iowa.— State *v.* Morgan, 80 Iowa 413, 45 N. W. 1070.

Kentucky. — Thomas *v.* Roberts, 5 Dana (Ky.) 189.

Louisiana.— West *v.* Carleton, 8 La. 253.

Mississippi.—Banks *v.* Cage, 1 How. (Miss.) 293.

Tennessee.—Jones *v.* Miller, 1 Swan (Tenn.) 151.

The right of the court to compel its attorneys to do their duty is not taken away by a statute providing for summary proceedings against attorneys receiving moneys for clients, and neglecting or refusing to pay the same when demanded. Cotton *v.* Ashley, 11 Ohio Cir. Ct. 47.

87. *Kentucky.*—Scott *v.* Wickliffe, 1 B. Mon. (Ky.) 353.

Louisiana. — Butchers' Union Slaughterhouse, etc., Co. *v.* Crescent City Live Stock Landing, etc., Co., 41 La. Ann. 355, 6 So. 508.

New Jersey.— Mundy *v.* Schantz, 52 N. J. Eq. 744, 30 Atl. 322.

Ohio.— Cotton *v.* Ashley, 11 Ohio Cir. Ct. 47.

Rhode Island.— Anderson *v.* Bosworth, 15 R. I. 443, 8 Atl. 339, 2 Am. St. Rep. 910; Burns *v.* Allen, 15 R. I. 32, 23 Atl. 35, 2 Am. St. Rep. 844.

United States.— Jeffries *v.* Laurie, 23 Fed. 786.

Canada.— *Re* A. B., 3 Manitoba 316; *Ex p.*

b. Jurisdiction. A state court has no jurisdiction to compel an attorney to pay over money collected by him under process of a federal court.[88]

c. When Remedy Authorized — (I) *In General.* The summary jurisdiction of the court, to be exercised by order to its attorneys, extends to any matter in which an attorney has been employed in his professional character.[89] An order for the payment of money will not be granted, however, unless the claim of the petitioner is free from doubt.[90]

(II) *Existence of Relation of Attorney and Client.* To give the right of proceeding summarily against an attorney it is essential that the relation of attorney and client should exist between the parties in relation to the matter which is the ground for the application.[91]

(III) *Pursuit of Other Remedy.* Bringing an action for the recovery of judgment against an attorney is a waiver of the right to proceed summarily against him.[92]

Flood, 23 N. Brunsw. 86; Kerr *v.* Thorne, 18 N. Brunsw. 625; Gunter *v.* Sharp, 17 N. Brunsw. 286; Gilbert *v.* Soney, 5 N. Brunsw. 679; *Re* McBrady, 19 Ont. Pr. 37.

88. Thomas *v.* Roberts, 5 Dana (Ky.) 189. See also Matter of Forster, 49 Hun (N. Y.) 114, 1 N. Y. Suppl. 619, 17 N. Y. St. 115, holding that the fact that defendant is an attorney and an officer of the supreme court does not give such court jurisdiction in a proceeding against him, by motion, to recover certain warrants drawn payable to petitioners, received by him as attorney and counselor of the court of commissioners of Alabama claims, and which he retains under a claim of lien, made in good faith.

Action in other state.—An attorney collecting money for his client may be compelled, by summary proceedings, to pay over the same as well where such moneys were collected in a proceeding instituted in another state as in domestic actions. Batterson *v.* Osborne, 18 N. Y. Suppl. 431, 44 N. Y. St. 839.

89. Anderson *v.* Bosworth, 15 R. I. 443, 8 Atl. 339, 2 Am. St. Rep. 910; Matter of Aitkin, 4 B. & Ald. 47, 22 Rev. Rep. 616, 6 E. C. L. 384; Matter of Knight, 1 Bing. 91, 8 E. C. L. 417.

To give the right of proceeding summarily against an attorney to compel the payment of money in his hands it is not essential that he should have received the money in any suit or legal proceeding, or that he should have been employed to commence legal proceedings. Matter of Dakin, 4 Hill (N. Y.) 42.

90. Post *v.* Evarts, 56 Hun (N. Y.) 641, 9 N. Y. Suppl. 370, 31 N. Y. St. 123. See also Texas *v.* White, 10 Wall. (U. S.) 483, 19 L. ed. 992, holding that a motion to pay into court the moneys collected will not be granted. but the parties will be left to their action, if the attorney is guilty of no bad faith or improper conduct and has a fair set-off against his client which the latter refuses to allow.

Assignment of claim.—An attorney will not, on a summary process, be ordered to pay over money collected for, and claimed by, his client, if an assignment of the client's claim to a third person has come indirectly to the attorney's knowledge. Bowen *v.* Smidt, 20 N. Y. Suppl. 735. 49 N. Y. St. 647. See also Murray *v.* Johnston, 6 N. Brunsw. 697, holding that the court will not compel an attorney, on a summary application, to pay over the proceeds of a judgment to a person claiming as assignee unless the latter's right is clear.

91. *Mississippi.*— McCreary *v.* Hoopes, 25 Miss. 428.

New Jersey.— Koenig *v.* Harned, (N. J. 1888) 13 Atl. 236.

New York.— Matter of Langslow, 167 N. Y. 314, 60 N. E. 590; Matter of Hillebrandt, 33 N. Y. App. Div. 191, 53 N. Y. Suppl. 352; Matter of Husson, 26 Hun (N. Y.) 130, 62 How. Pr. (N. Y.) 358; Bowen *v.* Smidt, 20 N. Y. Suppl. 735, 49 N. Y. St. 647; Matter of Sardy, 19 N. Y. Suppl. 575, 47 N. Y. St. 308; Matter of Attorney, 63 How. Pr. (N. Y.) 152; Matter of Dakin, 4 Hill (N. Y.) 42. *Compare* Wilmerdings *v.* Fowler, 14 Abb. Pr. N. S. (N. Y.) 249; Grant's Case, 8 Abb. Pr. (N. Y.) 357, 17 How. Pr. (N. Y.) 260.

Ohio.—Longworth *v.* Handy, 2 Disn. (Ohio) 75.

Pennsylvania.— *In re* Kennedy, 120 Pa. St. 497, 14 Atl. 397, 6 Am. St. Rep. 724.

England.— Matter of Aitkin, 4 B. & Ald. 47, 22 Rev. Rep. 616, 6 E. C. L. 384; *Ex p.* Clifton, 5 Dowl. P. C. 218, 2 Hurl. & W. 296; *In re* Fairthorne, 3 Dowl. & L. 548, 10 Jur. 287, 15 L. J. Q. B. 131, 1 Saund. & C. 40; *In re* Hilliard, 2 Dowl. & L. 919, 9 Jur. 664, 14 L. J. Q. B. 225.

Canada.— *Re* Osler, Cas. *t.* Wood (Man.) 205; Wilson *v.* Beatty, 12 Ont. App. 252.

See 5 Cent. Dig. tit. "Attorney and Client," § 267.

Judgment debtor and creditor.— The summary power of the court cannot be invoked where the relation of attorney and client has been merged in that of judgment debtor and creditor. Butchers' Union Slaughterhouse, etc., Co. *v.* Crescent City Live Stock Landing, etc., Co., 41 La. Ann. 355, 6 So. 508; Chevalon *v.* Schmidt, 11 Rob. (La.) 91; Windsor *v.* Brown, 15 R. I. 182, 9 Atl. 135, 2 Am. St. Rep. 892; *Ex p.* White Sewing Mach. Co., 31 N. Brunsw. 237. *Compare* Gabriel *v.* Schillinger Fire Proof Cement, etc., Co., 24 Misc. (N. Y.) 313, 52 N. Y. Suppl. 1127; *In re* Grey, [1892] 2 Q. B. 440, 61 L. J. Q. B. 795, 41 Wkly. Rep. 3.

92. Butchers' Union Slaughterhouse, etc., Co. *v.* Crescent City Live Stock Landing, etc., Co., 41 La. Ann. 355, 6 So. 508; Cottrell *v.*

d. Who May Invoke Remedy. A summary application to compel an attorney to pay over money collected in a professional capacity is entertained only on motion of a client.[93]

e. Defenses. An attorney, when proceeded against by motion under the statute, may insist upon any defense which it would be competent for him to make to an action if that form of remedy had been adopted.[94] But good faith in withholding money collected has been held to be no answer to a summary application to compel the payment of such money.[95]

f. Procedure — (i) *In General.* The summary power of the court must

Finlayson, 4 How. Pr. (N. Y.) 242, 2 Code Rep. (N. Y.) 116; Bohanan *v.* Peterson, 9 Wend. (N. Y.) 503. See also Dean *v.* Bigelow, 19 D. C. 570, holding that a rule will not be granted against an attorney, to compel him to pay over money collected for a client, where the client has filed a bill in equity against the attorney for the same purpose and the suit is ready for hearing. But see Gabriel *v.* Schillinger Fire Proof Cement, etc., Co., 24 Misc. (N. Y.) 313, 52 N. Y. Suppl. 1127, holding that where, on an attorney's failure to pay costs with money his client paid him for that purpose, the client paid them, and secured a judgment therefor against the attorney, execution on which was returned unsatisfied, a summary proceeding to compel him to repay the money, by motion in the cause in which the attorney was retained, was not barred by the client's pursuit of his remedy by action. To same effect is *In re* Grey, [1892] 2 Q. B. 440, 61 L. J. Q. B. 795, 41 Wkly. Rep. 3.

Action barred by limitation.—An attachment will not be granted against an attorney for the non-payment of money collected by him for a client, after the remedy by action is barred by the statute of limitations. People *v.* Brotherson, 36 Barb. (N. Y.) 662.

A proceeding by motion against a party for money collected as an attorney is no bar to a recovery in an action on the case for damages. Coopwood *v.* Baldwin, 25 Miss. 129.

93. Sloan *v.* Johnson, 14 Sm. & M. (Miss.) 47, holding that where an administrator placed a note for collection, the property of his intestate, in the hands of attorneys and they collected it, and the probate court afterward revoked the administrator's letters and appointed another administrator, the latter could not maintain the summary motion against the attorneys for refusing to pay over the money thus collected. But see Trammell *v.* Shropshire, 22 Tex. 327, holding that the summary remedy, given by Hartley Dig. Tex. art. 62, against an attorney for his failure to pay over money collected, extends to the case of an administrator, for whom, or for whose intestate, the attorney has collected money which the administrator is entitled to receive. See also Wilmerdings *v.* Fowler, 14 Abb. Pr. N. S. (N. Y.) 249, holding that an attorney who by fraud procures from the court an order by which he obtains money from a party may be proceeded against summarily, even though such party be not his client.

As to necessity of existence of relation of attorney and client see *supra*, IV, D, 2, c, (II).

As to parties to proceeding see *infra*, IV, D, 2, f, (IV).

Assignee of client.— The summary remedy by motion to compel an attorney to pay over money of his client is not available to an assignee of the client. Matter of Schell, 58 Hun (N. Y.) 440, 12 N. Y. Suppl. 790, 34 N. Y. St. 928 [*affirmed* in 128 N. Y. 67, 27 N. E. 957, 38 N. Y. St. 442]; Hess *v.* Joseph, 7 Rob. (N. Y.) 609; Bowen *v.* Smidt, 20 N. Y. Suppl. 735, 49 N. Y. St. 647; Longworth *v.* Handy, 2 Disn. (Ohio) 75.

Attorney of non-resident client.— That petitioners in a summary proceeding to compel an attorney at law to pay over certain funds alleged to have been received by him in his professional capacity are non-residents does not, of itself, excuse them from verifying their own statements, or authorize another attorney, on his own application, based on the unsworn and *ex parte* statements of his clients, to institute such a proceeding.

One of several co-plaintiffs cannot litigate his rights, as against the other plaintiffs, to the money recovered in the suit, by a motion against the attorney for not paying over the same. Trammell *v.* Shropshire, 22 Tex. 327.

94. Jones *v.* Miller, 1 Swan (Tenn.) 151.

Payment to third person.—Where an attorney assumed control over money payable to his client under a judgment, but, instead of taking the money into his possession, directed the actual custodian of the fund to pay it to a third person for the client's benefit, he cannot claim, in opposition to a summary proceeding to compel him to pay over such money, that he did not receive it. Kent *v.* Rockwell, 89 Hun (N. Y.) 88, 34 N. Y. Suppl. 1041, 69 N. Y. St. 13.

Refusal of client to give receipt.— It is no excuse for the refusal of an attorney to pay over that his client refuses to give a receipt on settlement. The duty is absolute to pay on demand, and the law imposes no obligation on a party receiving money to give an acquittance for it. Longworth *v.* Handy, 2 Disn. (Ohio) 75.

95. Hawkins *v.* Smith, 56 Ga. 571; Bowling Green Sav. Bank *v.* Todd, 52 N. Y. 489; Matter of Wolf, 51 Hun (N. Y.) 407, 4 N. Y. Suppl. 239, 21 N. Y. St. 224; Ackerman *v.* Wagener, 8 N. Y. Suppl. 457, 29 N. Y. St. 166; Matter of Chittenden, 4 N. Y. St. 606, 25 N. Y. Wkly. Dig. 403. But see *In re* Kennedy, 120 Pa. St. 497, 14 Atl. 397, 6 Am. St. Rep. 724, holding that if the answer to the

be invoked by application in the action in which the alleged misconduct was committed, and not in an action against the attorney to recover for such misconduct.[96]

(II) *Form of Proceeding.* The form of the proceeding is generally regulated by statute. It may be attachment for contempt,[97] disbarment,[98] or execution against the property.[99]

(III) *Demand.* Money collected by an attorney for his client must be demanded before the client can move for an attachment for its non-payment.[1]

(IV) *Parties.* Where a judgment recovered for a client by a firm of attorneys is paid to one member of the firm, who appropriates the proceeds to his own use, and refuses to pay any part of it to the client, the other member of the firm is not a necessary party to a summary proceeding by the client for an order compelling the payment to him of the amount received.[2]

rule should convince the court that the money was withheld in good faith and believed to be not more than an honest compensation, the rule will be dismissed and the petitioner remitted to his action at law. To same effect is Robb's Estate, 6 Pa. Co. Ct. 644; *In re* Harvey, 14 Phila. (Pa.) 287, 38 Leg. Int. (Pa.) 204.

See 5 Cent. Dig. tit. "Attorney and Client," § 269.

Appeal from judgment.—It is no answer, to a rule on an attorney to show cause why he should not pay over money collected after judgment against him, that he has appealed from such judgment. McMath *v.* Maus Bros. Boot, etc., Store, 12 Ky. L. Rep. 952, 15 S. W. 879.

The assertion of a lien by the attorney is not an answer to a summary application against him. Matter of Fincke, 6 Daly (N. Y.) 111; Gillespie *v.* Mulholland, 12 Misc. (N. Y.) 40, 33 N. Y. Suppl. 33, 66 N. Y. St. 532. But see Matter of Attorney, 63 How. Pr. (N. Y.) 152, holding that where a summary application is made requiring an attorney to surrender papers intrusted to his care, which he claims to hold by virtue of a lien for services rendered to the applicant, he cannot be required to surrender the same until the said lien is paid. See also McKibbin *v.* Nafis, 76 Hun (N. Y.) 344, 27 N. Y. Suppl. 723, 59 N. Y. St. 101.

96. Grangier *v.* Hughes, 56 N. Y. Super. Ct. 346, 3 N. Y. Suppl. 828. See also Heffren *v.* Jayne, 39 Ind. 463, 13 Am. Rep. 281.

Papers — How entitled.— The papers, upon an application to compel the attorney of defendant to pay plaintiff a sum of money deposited by defendant with his attorney, should not be entitled in the action, the application being *dehors* the action, and in no sense a step or proceeding in the action. Hess *v.* Joseph, 7 Rob. (N. Y.) 609.

Trial by jury.— In Georgia it has been held that the answer of an attorney, made to a rule against him for not paying over money collected for his client, is traversable, and the traverse is to be tried by a jury. Smith *v.* Bush, 58 Ga. 121. But in Louisiana it has been held that the statutes of 1809 and 1826, authorizing summary proceedings against counselors and attorneys at law who refuse to pay over money collected by them for clients, do not entitle them to the intervention of a jury. West *v.* Carleton, 8 La. 253.

97. **Attachment for contempt.**— Smith *v.* McLendon, 59 Ga. 523; Smith *v.* Bush, 58 Ga. 121; Forstman *v.* Schulting, 108 N. Y. 110, 15 N. E. 366; Bowling Green Sav. Bank *v.* Todd, 52 N. Y. 489; Matter of McBride, 6 N. Y. App. Div. 376, 39 N. Y. Suppl. 579; People *v.* Brotherson, 36 Barb. (N. Y.) 662; Wilmerdings *v.* Fowler, 14 Abb. Pr. N. S. (N. Y.) 249; Cottrell *v.* Finlayson, 4 How. Pr. (N. Y.) 242, 2 Code Rep. (N. Y.) 116; Bohanan *v.* Peterson, 9 Wend. (N. Y.) 503; *Ex p.* Staats, 4 Cow. (N. Y.) 76; People *v.* Wilson, 5 Johns. (N. Y.) 368; People *v.* Smith, 3 Cai. (N. Y.) 221, Col. & C. Cas. (N. Y.) 497; Matter of Bleakley, 5 Paige (N. Y.) 311; Cotton *v.* Ashley, 11 Ohio Cir. Ct. 47; *Re* A. B., 3 Manitoba 316; Carruthers *v.* ———, Taylor (U. C.) 243.

98. **Disbarment.**— Matter of Browne, 2 Colo. 553; Matter of Bleakley, 5 Paige (N. Y.) 311; Jeffries *v.* Laurie, 23 Fed. 786. See also Dawson *v.* Compton, 7 Blackf. (Ind.) 421; *Re* Bridgman, 16 Ont. Pr. 232.

As to disbarment, generally, see *supra*, II, B, 3.

99. **Execution against property.**— Smith *v.* Bush, 58 Ga. 121.

1. Cottrell *v.* Finlayson, 4 How. Pr. (N. Y.) 242, 2 Code Rep. (N. Y.) 116; *Ex p.* Ferguson, 6 Cow. (N. Y.) 596. But see Taylor *v.* Armstead, 3 Call (Va.) 200, holding that, on motion against an attorney for money received by him for his client, if notice be regularly given, and he appear and contest the claim, plaintiff is not bound to prove a demand and refusal to pay.

Failure of record to show demand.— Where the sole point of the answer is a denial that the money was collected, and the answer is found by the jury to be untrue, the judgment making absolute the rule will not be disturbed because the record contains no evidence of demand. Smith *v.* Bush, 58 Ga. 121.

2. Matter of Wolf, 51 Hun (N. Y.) 407, 4 N. Y. Suppl. 239, 21 N. Y. St. 224. But see Matter of Forster, 49 Hun (N. Y.) 114, 1 N. Y. Suppl. 619, 17 N. Y. St. 115, holding that, in a proceeding against an attorney to recover warrants, received by him as such and retained in good faith for the protection of rights which, as petitioners allege, do not

(v) *Evidence.* The answer of an attorney to a rule against him for money collected is not evidence for him except so far as responsive to the rule.[3]

(vi) *Matters Determinable.* Upon summary application for the payment of money collected by an attorney, the court may determine as to the existence of a special agreement fixing the rate of the attorney's compensation for prosecuting the action.[4]

(vii) *Reference.* The court may direct a reference to hear and report on the questions arising on a summary application to compel an attorney to pay over money collected.[5]

g. Measure of Liability. An attorney is not answerable in a summary proceeding against him for failure to pay over moneys collected for more than the sum actually collected.[6]

V. COMPENSATION OF ATTORNEY.

A. Right to Compel Payment — 1. In England. English barristers, advocates, and counsel are incapable of making contracts for compensation for their services, nor can they maintain an action for the reasonable value of work performed.[7] On the other hand, the fees of attorneys, solicitors, and proctors are

exist, the persons claiming such rights therein are necessary parties.

As to who may invoke remedy see *supra*, IV, D, 2, d.

Joinder of parties.— Where an attorney recovered judgments against the United States, in the court of commissioners of Alabama claims, for each of six different petitioners on distinct and separate claims belonging to each, they could not unite in one proceeding against him to obtain possession thereof. Matter of Forster, 49 Hun (N. Y.) 114, 1 N. Y. Suppl. 619, 17 N. Y. St. 115.

3. Foster *v.* Reid, 58 Ga. 221.

Admissions by failure to reply.—An answer filed by an attorney, setting up affirmative matter, does not cast any additional burden upon complainant, and the averments of the answer are not to be regarded as admitted because no reply was filed thereto. State *v.* Morgan, 80 Iowa 413, 45 N. W. 1070.

4. Porter *v.* Parmly, 39 N. Y. Super. Ct. 219.

Amount of compensation.— On a motion to compel an attorney to pay over to his clients moneys received by him in excess of what he is entitled to for his services, where it appears what services the attorney had performed, the court has only to fix a reasonable amount for his compensation. Ferdon *v.* Ferdon, 36 N. Y. Suppl. 741, 71 N. Y. St. 671.

5. Matter of Fincke, 6 Daly (N. Y.) 111; Gillespie *v.* Mulholland, 12 Misc. (N. Y.) 40, 33 N. Y. Suppl. 33, 66 N. Y. St. 532. But see Waterbury *v.* Eldridge, 5 N. Y. Suppl. 324, 24 N. Y. St. 429, holding that on petition to compel an attorney to pay over money collected, and which he claims a right to retain in payment for services rendered, where it appears that the attorney had rendered his bill for such services up to a certain date, which had been fully paid, and the value of his services since that date can be readily ascertained, it is proper for the court to decide that value, allow the attorney to retain it, and, without appointing a referee, order him to pay over the balance.

Indefinite claim.—In proceedings against an attorney to compel him to deliver property in his possession belonging to plaintiff, where it appears that, though the attorney's claim is exceedingly indefinite, yet some amount may be due him by reason of his retainer by plaintiff, a reference is properly ordered to ascertain the amount thereof, giving plaintiff the option of making a deposit sufficient to secure whatever amount may be established on the reference. Taylor Iron, etc., Co. *v.* Higgins, 20 N. Y. Suppl. 746, 49 N. Y. St. 645 [*affirmed* in 137 N. Y. 605, 33 N. E. 744, 51 N. Y. St. 930].

Hearing of report.—Where, upon the return of an order requiring an attorney to show cause why he should not be punished, as for a contempt, because of his failure to pay over to his client moneys collected for him, a reference is ordered, the court may, upon the coming in of the report, appoint a day for the hearing thereon, and direct that an attachment issue against the attorney, returnable upon the day of the hearing, for the purpose of securing his presence thereon. Matter of Steinert, 24 Hun (N. Y.) 246.

6. Langmade *v.* Glenn, 57 Ga. 525; Croft *v.* Hicks, 26 Tex. 383, which hold that an attorney cannot, in a summary proceeding, be made liable for failure, through negligence or other cause, to recover judgment for the full amount due the client.

Allowance of interest.—Where a judgment recovered for a client by a firm of attorneys is paid to one member of the firm, who appropriates the proceeds to his own use, and the amount which the client owes the firm for legal services is disputed, the order finding the amount due the client and directing its payment should allow interest only from the commencement of the proceeding. Matter of Wolf, 51 Hun (N. Y.) 407, 4 N. Y. Suppl. 239, 21 N. Y. St. 224.

7. Kennedy *v.* Broun, 13 C. B. N. S. 677, 9 Jur. N. S. 119, 32 L. J. C. P. 137, 7 L. T. Rep. N. S. 626, 11 Wkly. Rep. 284, 106 E. C. L. 677. See also Swinfen *v.* Chelmsford, 1 F. & F.

regulated strictly by statute,[8] and they are, by statute, authorized to enter into contracts with their clients for the payment for their service, either by gross sum, by percentage, or as salary;[9] but in case the services are rendered in respect to an action at law or a suit in equity, the solicitor must submit his bill to an officer of the court, to be taxed, before he receives his pay.

2. In the United States and Canada — a. Rule Stated — (i) *In General.* In the United States it has been held, generally, that members of all branches of the legal profession are entitled to fair compensation[10] for services rendered on a contract, express or implied,[11] and can enforce this right by action,[12] but, where an

619, 5 H. & N. 890, 6 Jur. N. S. 1035, 29 L. J. Exch. 382, 2 L. T. Rep. N. S. 406, 8 Wkly. Rep. 545.

8. Supreme Court of Judicature Acts of 1873 and 1875.

9. By the Attorneys and Solicitors' Act of 1870, 33 & 34 Vict. c. 28.

10. Unlawful charges.— In some states the amount which an attorney can charge for his services is regulated by statute, and it is an offense, making the attorney subject to a penalty, for him to charge more than the sum specified. It is held that the act of receiving illegal fees is one of official misconduct (Waters *v.* Whittemore, 22 Barb. (N. Y.) 593), but only one penalty can be exacted for several unlawful charges in the same bill (Tanner *v.* Croxall, 17 N. J. L. 332); and, if the bill of costs has been regularly taxed by the proper officer, the attorney is relieved from liability for excessive charges (Onondaga *v.* Briggs, 3 Den. (N. Y.) 173). These rules apply only to charges for such items as are fixed by statute (State *v.* Andrews, 51 N. H. 582; Onondaga *v.* Briggs, 3 Den. (N. Y.) 173; Hall *v.* Gird, 7 Hill (N. Y.) 586), and, where the statute exacts no penalty, the illegal fees cannot be recovered back (Rawson *v.* Porter, 9 Me. 119).

11. Services under assignment by court.— The appointment of attorneys by the court to defend criminals or to see that proceedings of an *ex parte* nature are fairly conducted is largely regulated by the various state statutes, and the right of the attorney to pay for services thus rendered depends upon the same statutes.

California.— Attorneys appointed in probate proceedings are entitled to reasonable compensation. Lee *v.* San Joaquin County Super. Ct., 112 Cal. 354, 44 Pac. 666.

Georgia.—A judge appointing an attorney under the provisions of the code has no power to order the payment of his fee. Creamer *v.* Creamer, 36 Ga. 618.

Iowa.— Iowa Code, § 5314, allows ten dollars to the attorney appointed for each man accused of felony that he defends (Clark *v.* Osceola County, 107 Iowa 502, 78 N. W. 198), but he must file an affidavit that he has not received compensation from any other source (State *v.* Behrens, 109 Iowa 58, 79 N. W. 387).

Kentucky.— Ky. Civ. Code, § 441, requires that an attorney acting under appointment must sign a statement of what he has done and file it with the papers in the case. Jackson *v.* McElroy, 2 Bush (Ky.) 132.

Michigan.—An order of the court directing an appeal is necessary in order that an attorney, appointed under How. Anno. Stat. Mich. § 9046, recover extra compensation for an appeal as allowed by the following section. De Long *v.* Muskegon County, 111 Mich. 568, 69 N. W. 1115.

New York.— N. Y. Code, § 460, enacts that one assigned to act as counsel to one permitted to sue *in forma pauperis* must act without compensation. Matter of Kelly, 12 Daly (N. Y.) 110. Section 308 of the code permits the appointment of counsel to defend persons accused of capital offenses, and the allowance of reasonable compensation, not exceeding five hundred dollars. In proper cases five hundred dollars may be allowed to each of the counsel employed. People *v.* Heiselbetz, 26 Misc. (N. Y.) 100, 55 N. Y. Suppl. 4, 5 N. Y. Annot. Cas. 165. An attorney is entitled to but one fee for both the trial and appeal. People *v.* Coler, 44 N. Y. App. Div. 183, 60 N. Y. Suppl. 656, 7 N. Y. Annot. Cas. 119; Matter of Purdy, 28 Misc. (N. Y.) 303, 59 N. Y. Suppl. 887. See also People *v.* Barone, 161 N. Y. 475, 55 N. E. 1091, 14 N. Y. Crim. 378; Whelan *v.* Manhattan R. Co., 86 Fed. 219.

12. *Delaware.*— Stevens *v.* Monges, 1 Harr. (Del.) 127.

Florida.— Carter *v.* Bennett, 6 Fla. 214.

Kansas.— McBratney *v.* Chandler, 22 Kan. 692, 31 Am. Rep. 213.

Kentucky.— Rust *v.* Larue, 4 Litt. (Ky.) 411, 14 Am. Dec. 172.

Louisiana.— Morrison *v.* Flournoy, 23 La. Ann. 593, even though the client did not expect to pay.

Maine.— Clay *v.* Moulton, 70 Me. 315.

Massachusetts.— Buckland *v.* Conway, 16 Mass. 396.

Missouri.— Webb *v.* Browning, 14 Mo. 354.

New Jersey.— In New Jersey the rule at one time obtained that counsel could not sue for compensation (Van Atta *v.* McKinney, 16 N. J. L. 235; Seeley *v.* Crane, 15 N. J. L. 35), and this is still true unless an express agreement to pay a definite sum can be shown (Hopper *v.* Ludlum, 41 N. J. L. 182 [*approved* in Zabriskie *v.* Woodruff, 48 N. J. L. 610, 7 Atl. 336]).

New York.— Stevens *v.* Adams, 23 Wend. (N. Y.) 57 [*affirmed* in 26 Wend. (N. Y.) 451].

Ohio.— Christy *v.* Douglas, Wright (Obio) 485.

Pennsylvania.— Gray *v.* Brackenridge, 2 Penr. & W. (Pa.) 75. The rule that counsel

attorney has a personal interest in the result, his services will, in the absence of an agreement to the contrary, be supposed to be gratuitous.[13] In Canada it is also settled that a barrister may maintain an action to recover his fees for services rendered as counsel.[14]

could not sue for compensation was once, however, in vogue. Brackenridge *v.* McFarlane, Add. (Pa.) 49.

South Carolina.— Goldthwaite *v.* Dent, 3 McCord (S. C.) 296 (holding this to be true though the attorney, by rule of court, was not permitted to argue the case); Duncan *v.* Breithaupt, 1 McCord (S. C.) 149.

Tennessee.— Newnan *v.* Washington, Mart. & Y. (Tenn.) 79.

Texas.— Baird *v.* Ratcliff, 10 Tex. 81.

Vermont.— Briggs *v.* Georgia, 10 Vt. 68

United States.— The federal court held, in 1817, that an attorney could not recover at law for services rendered as counsel, even though he proved an express promise to pay (Law *v.* Ewell, 2 Cranch C. C. (U. S.) 144, 15 Fed. Cas. No. 8,127); but it was subsequently held that a note given in payment of counsel fees could be enforced (Mowat *v.* Brown, 19 Fed. 87), and it seems doubtful whether the original distinction would be followed to-day, for it is not founded on any principle of law.

See 5 Cent. Dig. tit. "Attorney and Client," § 292.

Acting as lobbyist.—An attorney cannot recover compensation for acting merely as a lobbyist (McBratney *v.* Chandler, 22 Kan. 692, 31 Am. Rep. 213; Matter of Knapp, 8 Abb. N. Cas. (N. Y.) 308, 59 How. Pr. (N. Y.) 367), but the mere fact that his services were rendered before a legislative body does not deprive him of the right (McBratney *v.* Chandler, 22 Kan. 692, 31 Am. Rep. 213).

Division of compensation among attorneys who work jointly.— In the absence of special agreement, attorneys who jointly undertake to defend a lawsuit are entitled to share equally in the compensation (Henry *v.* Bassett, 75 Mo. 89; Hurst *v.* Durnell, 1 Wash. (U. S.) 438, 12 Fed. Cas. No. 6,928; D'Amour *v.* Bertrand, 26 L. C. Jur. 136), or, if they appear at different stages of the suit, the fees will be apportioned among them (Beddo *v.* U. S., 28 Ct. Cl. 69). In the following cases one attorney successfully recovered from his associate his share of the compensation for doing joint work: Henry *v.* Bassett, 75 Mo. 89; Brown *v.* Remington, 90 Hun (N. Y.) 214. 35 N. Y. Suppl. 621, 70 N. Y. St. 385; White *v.* Polhamus, 1 N. Y. City Ct. 421; Bundy *v.* McLean, 104 Wis. 263, 80 N. W. 445. *Contra*, English *v.* McConnel, 23 Ill. 513.

Reimbursement for moneys expended.— Where an attorney exceeds his authority in incurring expense or laying out money he cannot recover back the amounts from his client, although he acted in good faith (Hughes *v.* Zeigler, 69 Ill. 38; Gray *v.* Emmons, 7 Mich. 533; People *v.* Lockwood, 9 Daly (N. Y.) 68); but where an attorney was obliged to refund money after he had paid it over to his client, he successfully enforced his claim against the client for the amount he had been obliged to refund (Seevers *v.* Hamilton, 6 Iowa 199).

Substitute attorney.—Though a general rule forbids that an attorney delegate his authority (see *supra*, III, C, 3, c), yet, if an emergency makes it necessary for a substitute attorney to conduct part of the proceedings, the client cannot accept the services and later deny his liability to pay for them (Fenno *v.* English, 22 Ark. 170; Rust *v.* Larue, 4 Litt. (Ky.) 411, 14 Am. Dec. 172; Eggleston *v.* Boardman, 37 Mich. 14; Allcorn *v.* Butler, 9 Tex. 56). See also Meaney *v.* Rosenberg, 32 Misc. (N. Y.) 96, 65 N. Y. Suppl. 497, requiring that client must know all the facts before accepting the service of another attorney in order to create liability on his part to pay for such services.

13. *Georgia.*— Vanduzer *v.* McMillan, 37 Ga. 299.

Kentucky.— Lilly *v.* Pryse, 21 Ky. L. Rep. 1223, 54 S. W. 961.

Minnesota.—Humphreys *v.* Jacoby, 41 Minn. 226, 42 N. W. 1059.

South Carolina.— Martin *v.* Campbell, 11 Rich. Eq. Cas. (S. C.) 205.

Canada.— Peterboro *v.* Burnham, 12 U. C. C. P. 103. *Compare Re* Mimico Sewer Pipe, etc., Mfg. Co., 26 Ont. 289.

That such persons may stipulate for compensation see Cicotte *v.* St. Anne's Church Corp., 60 Mich. 552, 27 N. W. 682 (trustee of a church); Niles *v.* Muzzy, 33 Mich. 61, 20 Am. Rep. 670 (mayor of a city); Christie *v.* Sawyer, 44 N. H. 298 (director of corporation); Barker *v.* Cairo, etc., R. Co., 3 Thomps. & C. (N. Y.) 328 (director of corporation).

14. Mowat *v.* Brown, 19 Fed. 87; McDougall *v.* Campbell, 41 U. C. Q. B. 332; Reg. *v.* Doutre, 28 L. C. Jur. 209; Beaudry *v.* Ouimet, 9 L. C. Jur. 158; Devlin *v.* Tumblety, 2 L. C. Jur. 182; Desjardins *v.* Ducasse, 2 Leg. N. 270; Motton *v.* Brennan, 14 Nova Scotia 162, 1 Can. L. T. 663; Amyot *v.* Gugy, 2 Quebec 201; Christin *v.* Lacoste, 2 Quebec 142. *Contra*, McLeod *v.* Vaughan, 31 N. Brunsw. 134; Kerr *v.* Burns, 9 N. Brunsw. 604; *In re* Bayard, 6 N. Brunsw. 359. See also *Re* Fraser, 13 Ont. Pr. 409.

An advocate who acts for a person needy and unable to assert his rights without the gratuitous aid of officers of the law is himself deemed to have furnished his services and the aid of his position without fee. Mathieu *v.* Beauchamp, 11 Can. Supreme Ct. 307.

A solicitor who is also counsel will be allowed no retaining fee. *In re* McBride, 2 Ch. Chamb. (U. C.) 153.

Where an advocate appears personally in his own case and conducts it as attorney of record, he is entitled to the usual attorney's fees as well as the disbursements (Banks *v.* Burroughs, 12 Can. Supreme Ct. 184; Gugy *v.*

(II) *Retaining Fee.* The right to a retaining fee depends on the contract of the parties;[15] and it has been held that there is no general custom to charge one.[16] It seems clear that an attorney can charge only one fee of this sort in a single case, though if many attorneys are employed in one litigation, each may stipulate for his retaining fee.[17] Apart from the technical retaining fee, an attorney may always claim and receive reasonable compensation in advance;[18] he may also demand that costs be paid or secured,[19] and, in some instances, it might be safe for him to refuse to proceed with pending actions unless past services are paid for.[20]

(III) *Taxed Costs.* In some states, by statute, attorneys are entitled to the taxed costs.[21]

b. How Right May Be Affected — (I) *By Absence of License.* It is generally held that where one acts as an attorney without a proper license from the court he cannot recover by suit his fees for thus acting,[22] even if he sues to recover for services rendered as agent.[23] The failure to pay a license-tax required of attorneys seems to have the same effect upon the right to maintain an action for services;[24] but there is authority for the rule that a firm of attorneys may recover for services even though one partner has not been admitted to practice.[25]

(II) *By Conduct of Attorney* — (A) *Absence From Trial.* An attorney's presence at the trial is usually required, and his wrongful act in staying away would defeat his claim for compensation. But if, from any cause, he is relieved from attendance, his absence would not then affect his right to recover for services.[26]

(B) *Acting For Adverse Party.*[27] Since an attorney cannot serve conflicting interests, he can only claim pay for his services from one side.[28] Hence, an attorney employed by a corporation to free it from receivers forfeits his claim to compensation from the corporation by performing services for the receivers and accepting pay from them.[29]

(C) *Fraud or Misconduct.* Fraud or unfairness on the part of the attorney may also prevent him from recovering for services rendered;[30] but misconduct

Brown, 2 L. C. Jur. 222, 11 L. C. Jur. 141, 17 L. C. Rep. 33 [*overruling* Gugy *v.* Ferguson, 11 L. C. Rep. 409]); but an attorney, if also a barrister, cannot tax a counsel fee to himself for conducting his own cause at *nisi prius* (Smith *v.* Graham, 2 U. C. Q. B. 268); and, in the supreme court, advocates arguing their own case are not allowed fees (Langlois *v.* Valin, 3 Leg. N. 336).

15. Neighbors *v.* State, 41 Md. 478.

16. McLellan *v.* Hayford, 72 Me. 410, 30 Am. Rep. 343. But see Blackman *v.* Webb, 38 Kan. 668, 17 Pac. 464.

17. Schnell *v.* Schlernitzauer, 82 Ill. 439; Morton *v.* Croghan, 1 Cow. (N. Y.) 233. See also Matter of Schaller, 10 Daly (N. Y.) 57.

18. Reed *v.* Mellor, 5 Mo. App. 567.

19. Hall *v.* Crouse, 13 Hun (N. Y.) 557; Gleason *v.* Clark, 9 Cow. (N. Y.) 57; Castro *v.* Bennet, 2 Johns. (N. Y.) 296.

20. Avery *v.* Jacob, 15 N. Y. Suppl. 564, 38 N. Y. St. 1026. See also Cooley *v.* Doherty, 5 La. Ann. 163.

21. Gillis *v.* Holly, 19 Ala. 663; Union Mut. L. Ins. Co. *v.* Buchanan, 100 Ind. 63; Hamilton *v.* Hamilton, 10 Pa. Co. Ct. 255. See also Yorton *v.* Milwaukee, etc., R. Co., 62 Wis. 367, 21 N. W. 516, 23 N. W. 401. *Contra*, Bostick *v.* Cox, 28 Ark. 566; Ely *v.* Peet, 52 N. J. Eq. 734, 29 Atl. 817; Celluloid Mfg. Co. *v.* Chandler, 27 Fed. 9.

22. Hittson *v.* Browne, 3 Colo. 304; Hughes *v.* Dougherty, 62 Ill. App. 464; Sellers *v.* Phillips, 37 Ill. App. 74; East St. Louis *v.* Freels, 17 Ill. App. 339. See also Ames *v.* Gilman, 10 Metc. (Mass.) 239.

Costs will not be taxed in favor of an unlicensed attorney. Bullard *v.* Van Tassell, 3 How. Pr. (N. Y.) 402.

23. Tedrick *v.* Hiner, 61 Ill. 189.

24. McIver *v.* Clarke, 69 Miss. 408, 10 So. 581; Hall *v.* Bishop, 3 Daly (N. Y.) 109.

25. Harland *v.* Lilienthal, 53 N. Y. 438. *Contra*, Hittson *v.* Browne, 3 Colo. 304.

26. Douglass *v.* Eason, 36 Ala. 687; Pearson *v.* Darrington, 32 Ala. 227. See also Ballard *v.* Carr, 48 Cal. 74; Frost *v.* Frost, 1 Barb. Ch. (N. Y.) 492; Wendell *v.* Lewis, 8 Paige (N. Y.) 613.

27. Acting for another client seeking the same relief as defendant does not affect the attorney's right to compensation. Deering *v.* Schreyer, 27 Misc. (N. Y.) 237, 58 N. Y. Suppl. 485.

28. De Celis *v.* Brunson, 53 Cal. 372; MacDonald *v.* Wagner, 5 Mo. App. 56; Orr *v.* Tanner, 12 R. I. 94.

29. Strong *v.* International Bldg., etc., Union, 82 Ill. App. 426. But see Hughes *v.* Dundee Mortg., etc., Invest. Co., 21 Fed. 169.

30. *Connecticut.*— Brackett *v.* Norton, 4 Conn. 517, 10 Am. Dec. 179.

in regard to one matter will not prevent recovery for work done in a different employment, except, perhaps, that the client might avail himself of some right of set-off.[31]

(D) *Negligence.* When the services rendered are of no avail to the client on account of the negligence or mistake of the attorney, the latter cannot recover for them.[32] But a mistake which reasonable care would not prevent does not bar recovery,[33] nor would neglect of an unimportant matter defeat the right to recover for important services rendered without fault,[34] and a client may condone the attorney's misconduct.[35]

(III) *By Fact That Services Were of No Benefit.*[36] If an attorney is employed to carry a case to a higher court on appeal, he is entitled to pay for his services without regard to the merits of the appeal,[37] and, in general, his right to compensation is not lost because his services may have been of no benefit to his client, if they have been faithfully and intelligently rendered;[38] because his efforts were not successful in bringing the litigation to the desired conclusion;[39] or because his services were unnecessary, provided they were rendered in good faith.[40]

(IV) *By Premature Termination of Employment*—(A) *By Attorney's Abandonment of Cause.* Where an attorney is justified in abandoning his client's business or does so with the client's consent, he does not thereby forfeit his claim for compensation for work already done.[41] On the other hand it has

Georgia.— Larey *v.* Baker, 86 Ga. 468, 12 S. E. 684.

Iowa.— Bullis *v.* Easton, 96 Iowa 513, 65 N. W. 395.

Kansas.— McArthur *v.* Fry, 10 Kan. 233.

New York.— Andrews *v.* Tyng, 94 N. Y. 16; Chatfield *v.* Simonson, 92 N. Y. 209 [*affirming* 10 Daly (N. Y.) 295]; Quinn *v.* Van Pelt, 36 N. Y. Super. Ct. 279; Martin *v.* Platt, 5 N. Y. St. 284.

Entering into a champertous contract would not prevent an attorney from recovering for services previously rendered in the same case. Thurston *v.* Percival, 1 Pick. (Mass.) 415.

Failure to pay money over within a reasonable time has been held to prevent recovery. Fisher *v.* Knox, 13 Pa. St. 622, 53 Am. Dec. 503; Wills *v.* Kane, 2 Grant (Pa.) 60.

Refusing to pay over to the client money collected is a wrongful act which destroys an attorney's claim to compensation. Trapnall *v.* Byrd, 22 Ark. 10; Gray *v.* Conyers, 70 Ga. 349; McDowell *v.* Baker, 29 Ind. 481; Large *v.* Coyle, (Pa. 1888) 12 Atl. 343; Bredin *v.* Kingland, 4 Watts (Pa.) 420.

A client cannot recover back money paid as fees to an attorney who had forfeited his claim by rascality. McDonald *v.* Napier, 14 Ga. 89.

31. Richardson *v.* Richardson, 100 Mich. 364, 59 N. W. 178; Currie *v.* Cowles, 6 Bosw. (N. Y.) 452; Davis *v.* Smith, 48 Vt. 52.

32. *California.*— Hinckley *v.* Krug, (Cal. 1893) 34 Pac. 118.

Kentucky.— Thomas *v.* Mahone, 9 Bush (Ky.) 111.

New York.— Carter *v.* Tallcot, 36 Hun (N. Y.) 393; De Rose *v.* Fay, 4 Edw. (N. Y.) 40.

Vermont.— Nixon *v.* Phelps, 29 Vt. 198.

Wisconsin.— Armin *v.* Loomis, 82 Wis. 86, 51 N. W. 1097.

Canada.— Burnham *v.* Burns, 21 U. C. Q. B. 349.

Where there is a failure to make out the misconduct of the attorney, the dissatisfaction of the client with the result of the suit will not affect the attorney's right to his pay, and, in the following cases, alleged neglect did not defeat recovery: Hennen *v.* Bourgeat, 12 Rob. (La.) 522; Seymour *v.* Cagger, 13 Hun (N. Y.) 29; Clussman *v.* Merkel, 3 Bosw. (N. Y.) 402; Sackett *v.* Breen, 3 N. Y. Suppl. 473; Rush *v.* Cavenaugh, 2 Pa. St. 187; Miller's Estate, 5 Pa. Co. Ct. 522, 22 Wkly. Notes Cas. (Pa.) 11; Murphey *v.* Shepardson, 60 Wis. 412, 19 N. W. 356.

33. Fulton *v.* Davidson, 3 Heisk. (Tenn.) 614; Davidson *v.* Laurier, 1 Dorion (Quebec) 366.

34. Mason *v.* Ring, 2 Abb. Pr. N. S. (N. Y.) 322.

35. Gleason *v.* Kellogg, 52 Vt. 14.

36. **That a different course would have been more beneficial** does not affect the right to compensation. Harriman *v.* Baird, 6 N. Y. App. Div. 518, 39 N. Y. Suppl. 592 [*affirmed* in 158 N. Y. 691, 53 N. E. 1126].

37. Case *v.* Hotchkiss, 1 Abb. Dec. (N. Y.) 324, 3 Keyes (N. Y.) 334, 1 Transcr. App. (N. Y.) 285, 3 Abb. Pr. N. S. (N. Y.) 381, 37 How. Pr. (N. Y.) 283.

38. Bills *v.* Polk, 4 Lea (Tenn.) 494. But see Caverly *v.* McOwen, 126 Mass. 222; Baxter *v.* Lowe, 93 Fed. 358.

39. French *v.* Cunningham, 149 Ind. 632, 49 N. E. 797; Fenner *v.* McCan, 49 La. Ann. 600, 21 So. 768; Brackett *v.* Sears, 15 Mich. 244; Bowman *v.* Tallman, 2 Rob. (N. Y.) 385.

40. Tinney *v.* Pierrepont, 45 N. Y. Suppl. 977. See also Moran *v.* L'Etourneau, 118 Mich. 159, 76 N. W. 370.

41. *Alabama.*— Coopwood *v.* Wallace, 12 Ala. 790.

Hawaii.— Montgomery *v.* Montgomery, 2 Hawaii 677.

Massachusetts.— Powers *v.* Manning, 154 Mass. 370, 28 N. E. 290, 13 L. R. A. 258.

been held that, in the absence of due cause, an attorney's abandonment of the cause will bar recovery.[42]

(B) *By Death* — (1) OF ATTORNEY. Where the attorney dies before the services are completed, the client is not liable for the whole compensation, but must pay for the reasonable value of the work already completed.[43]

(2) OF CLIENT. The death of the client seems not to affect the right to fees when the attorney is acting under an express contract.[44] Where there is no special contract, the attorney's duty to proceed terminates with his client's death, and he is entitled to compensation for the services already rendered.[45]

(C) *By Client.* When an attorney makes a contract to perform certain services for an agreed sum and the client, without any valid excuse or reason,[46] discharges him or prevents the fulfilment of the contract, the attorney is entitled to recover the full contract price.[47] This is true though the agreement was for a contingent fee, provided the contingency had taken place;[48] though, where there is an express contract for fees conditional upon success, and the client prevents success, the attorney may recover on the contract.[49]

B. Liability of Client — 1. IN GENERAL — a. Necessity of Contract of Employment. A contract of employment by the client must be shown in order to fix his responsibility,[50] and it is not sufficient that the services were beneficial

New York.— Tenney *v.* Berger, 48 N. Y. Super. Ct. 11 [*affirmed* in 93 N. Y. 524, 45 Am. Rep. 263].

South Carolina.— Verner *v.* Sullivan, 26 S. C. 327, 2 S. E. 391.

Texas.— Baird *v.* Ratcliff, 10 Tex. 81. See also Campbell *v.* Dennis, 2 Tex. Unrep. Cas. 459.

Wisconsin.— Ryan *v.* Martin, 18 Wis. 672.

Canada.— Ford *v.* Spafford, 5 U. C. Q. B. O. S. 440.

42. Blanton *v.* King, 73 Mo. App. 148; Bolte *v.* Fichtner, 68 Hun (N. Y.) 147, 22 N. Y. Suppl. 725, 52 N. Y. St. 250; Buckley *v.* Buckley, 18 N. Y. Suppl. 607, 45 N. Y. St. 827; Cantrell *v.* Chism, 5 Sneed (Tenn.) 116; New York Southern Nat. Bank *v.* Curtis, (Tex. Civ. App. 1896) 36 S. W. 911. See also Weed *v.* Bond, 21 Ga. 195; Morgan *v.* Roberts, 38 Ill. 65.

43. Baylor *v.* Morrison, 2 Bibb (Ky.) 103; Clendinen *v.* Black, 2 Bailey (S. C.) 488, 23 Am. Dec. 149. See also Callahan *v.* Shotwell, 60 Mo. 398, where a portion of a payment in advance was recovered back upon the attorney's death. But see Hardin *v.* McKitrick, 5 J. J. Marsh. (Ky.) 667, where the attorney seems to have fully performed before his death.

44. Grapel *v.* Hodges, 49 Hun (N. Y.) 107, 1 N. Y. Suppl. 823, 17 N. Y. St. 83 [*affirmed* in 112 N. Y. 419, 20 N. E. 542, 21 N. Y. St. 845]; Headley *v.* Good, 24 Tex. 232 (note given for services); Jeffries *v.* New York Mut. L. Ins. Co., 110 U. S. 305, 4 S. Ct. 8, 28 L. ed. 156. See also Agnew *v.* Walden, 84 Ala. 502, 4 So. 672; Labauve's Succession, 34 La. Ann. 1187.

45. Avery *v.* Jacob, 15 N. Y. Suppl. 564, 38 N. Y. St. 1026.

46. If the client ends the employment for just cause, he does not thereby put himself under any obligation to the attorney for fees.

Arkansas.— Pennington *v.* Underwood, 56 Ark. 53, 19 S. W. 108.

Illinois.— Walsh *v.* Shumway, 65 Ill. 471.

Louisiana.— Rousseau *v.* Marionneaux, 28 La. Ann. 293.

Texas.— Merchants Nat. Bank *v.* Eustis, 8 Tex. Civ. App. 350, 28 S. W. 227.

Vermont.— Safford *v.* Vermont, etc., R. Co., 60 Vt. 185, 14 Atl. 91.

See also Cotzhausen *v.* New York Cent. Trust Co., 79 Wis. 613, 49 N. W. 158.

47. *Arkansas.*— Brodie *v.* Watkins, 33 Ark. 545, 34 Am. Rep. 49.

California.— Webb *v.* Trescony, 76 Cal. 621, 18 Pac. 796. See also Carter *v.* Baldwin, 95 Cal. 475, 30 Pac. 595.

Illinois.— Mt. Vernon *v.* Patton, 94 Ill. 65.

Minnesota.— Moyer *v.* Cantieny, 41 Minn. 242, 42 N. W. 1060.

Missouri.— Kersey *v.* Garton, 77 Mo. 645, 5 Ky. L. Rep. 2, 16 Centr. L. J. 472; McElhinney *v.* Kline, 6 Mo. App. 94.

Texas.— See Myers *v.* Crockett, 14 Tex. 257. *Compare* Copp *v.* Colorado Coal, etc., Co., 67 N. Y. Suppl. 970 (holding that the proper remedy is an action for breach of contract); Com. *v.* Terry, 11 Pa. Super. Ct. 547 (holding that an attorney can recover for services rendered up to the time of the discharge).

48. Bartlett *v.* Odd Fellows' Sav. Bank, 79 Cal. 218, 21 Pac. 743, 12 Am. St. Rep. 139; Mackie *v.* Howland, 3 App. Cas. (D. C.) 461; Bright *v.* Hewes, 18 La. Ann. 666; Commandeur *v.* Carrollton, 15 La. Ann. 7; Morel *v.* New Orleans, 12 La. Ann. 485. See also Craddock *v.* O'Brien, 104 Cal. 217, 37 Pac. 896.

Where both attorney and client were to blame for a disagreement which prevented the carrying out of the express contract, the attorney was allowed to recover reasonable compensation. Scobey *v.* Ross, 5 Ind. 445.

49. Majors *v.* Hickman, 2 Bibb (Ky.) 217; Bright *v.* Taylor, 4 Sneed (Tenn.) 159. See also Sulzbacher *v.* Wilkinson, 1 Tex. App. Civ. Cas. § 994.

50. Hersleb *v.* Moss, 28 Ind. 354; Cleveland, etc., R. Co. *v.* Shrum, 24 Ind. App. 96, 55 N. E. 515; Miles *v.* De Wolf, 8 Ind. App.

to him or the result valuable.[51] The absence of an express promise on the client's part to pay will not, however, prejudice recovery, if the employment is fairly made out from all the attendant circumstances,[52] and acquiescence by the client in the attorney's conduct may supply the place of a request to act, provided the case was such that the client might reasonably know that he would be expected to pay for the work.[53] The same would be true where the client, by his acts, induced the attorney to believe that his services were desired.[54]

b. Nature and Extent of Liability — (i) *In General.* The person to be looked to for compensation is not of necessity the one benefited, but the employer.[55] The latter's liability is personal, and the employer cannot defend by alleging a usage for the attorney to be paid out of the money collected.[56] There is no objection, however, to an agreement that the attorney shall look to a fund for compensation, and not to the personal liability of the client.[57] In some cases the right to be paid out of a fund is preferable to the personal claim, and sometimes such payment can be obtained by an attorney.[58]

153, 34 N. E. 114; Cooley *v.* Cecile, 8 La. Ann. 51; Roselius *v.* Delachaise, 5 La. Ann. 481, 52 Am. Dec. 597; White *v.* Esch, 78 Minn. 264, 80 N. W. 976; Burghart *v.* Gardner, 3 Barb. (N. Y.) 64; Hotchkiss *v.* Le Roy, 9 Johns. (N. Y.) 142.

A retainer, by one of two defendants, to act for both, would not make the one not assenting liable for the attorney's services. Prentiss *v.* Kelley, 41 Me. 436. See also Westmoreland *v.* Martin, 24 S. C. 238; Smith *v.* Dougherty, 37 Vt. 530.

51. Milligan *v.* Alabama Fertilizer Co., 89 Ala. 322, 7 So. 650; Seeley *v.* North, 16 Conn. 92; Chicago, etc., R. Co. *v.* Larned, 26 Ill. 218; Wailes *v.* Brown, 27 La. Ann. 411.

Thus, where an attorney and another were sued jointly for false imprisonment, and the attorney successfully defended both, he could not recover compensation for his services from his co-defendant. Muscott *v.* Stubbs, 24 Kan. 520.

52. Isham *v.* Parker, 3 Wash. 755, 29 Pac. 835. See also Cooper *v.* Delavan, 61 Ill. 96; Bell *v.* Smith, 28 Ill. App. 181; Cincinnati, etc., R. Co. *v.* Lee, 37 Ohio St. 479; Tindol *v.* Beasley, (Tex. Civ. App. 1897) 40 S. W. 155.

53. Cooper *v.* Hamilton, 52 Ill. 119.

54. Ector *v.* Wiggins, 30 Tex. 55.

The attorney was held liable for compensation, without a precedent request, in the following cases:

Georgia.— Hood *v.* Ware, 34 Ga. 328.

Illinois.— New Athens *v.* Thomas, 82 Ill. 259.

Kentucky.—Pittsburgh, etc., R. Co. *v.* Woolley, 12 Bush (Ky.) 451.

New Hampshire.— Goodall *v.* Bedel, 20 N. H. 205.

New York.— Parshley *v.* Brooklyn Third M. E. Church, 147 N. Y. 583, 42 N. E. 15, 70 N. Y. St. 346, 30 L. R. A. 574; Wright *v.* Smith, 13 Barb. (N. Y.) 414.

Rhode Island.— Ames *v.* Potter, 7 R. I. 265.

Tennessee.— Hill *v.* Childress, 10 Yerg. (Tenn.) 514.

Texas.— International, etc., R. Co. *v.* Clark, 81 Tex. 48, 16 S. W. 631.

Wisconsin.— Felker *v.* Haight, 33 Wis. 259.

The attorney was held not liable in Fraser *v.* Haggerty, 86 Mich. 521, 49 N. W. 616; Hooker *v.* Brandon, 75 Wis. 8, 43 N. W. 741; Millett *v.* Hayford, 1 Wis. 401.

55. Graham *v.* Taggart, 44 Mich. 383, 6 N. W. 852; Mitchell *v.* Bromberger, 1 Nev. 604; Kellogg *v.* Resse, 1 N. Y. Suppl. 291, 16 N. Y. St. 1002, 14 N. Y. Civ. Proc. 283. See also Hill *v.* Childress, 10 Yerg. (Tenn.) 514.

An attorney may disregard an agreement in a compromise that the opponent of the party employing him shall pay his fees, and insist on the personal liability of his employer. Safford *v.* Carroll, 23 La. Ann. 382.

Withdrawing an offer to pay after the services have been rendered will not alter his liability. Walsh *v.* Helena School Dist. No. 1, 17 Mont. 413, 43 Pac. 180.

Where an attorney is employed by several persons, it has been held that their liability is joint. Doutre *v.* Dempsey, 9 L. C. Jur. 176; Crepeau *v.* Beauchesne, 14 Quebec Super. Ct. 495. But in Frénette *v.* Bédard, 12 Leg. N. 362, it was said that this latter case was grounded on no valid reason, and it was held that clients who were defended by an advocate in the same case and by one defense were jointly and severally liable.

56. Bodfish *v.* Fox, 23 Me. 90, 39 Am. Dec. 611; Dickinson *v.* Devlin, 46 N. Y. Super. Ct. 232; Nichols *v.* Scott, 12 Vt. 47.

In a will contest the legatees employing an attorney are personally liable for his fees, notwithstanding it is customary to allow compensation out of the estate. Roll *v.* Mason, 9 Ind. App. 651, 37 N. E. 298; Becher's Estate, 5 Pa. Co. Ct. 115. See also Adams *v.* Landrum, 9 Ky. L. Rep. 287.

57. Leavitt *v.* Dodge, 16 N. Y. Suppl. 309, 41 N. Y. St. 581; Rogers *v.* O'Mary, 95 Tenn. 514, 32 S. W. 462.

58. Such payment was allowed in Davis *v.* Gemmell, 73 Md. 530, 21 Atl. 712; Clark *v.* Binninger, 1 Abb. N. Cas. (N. Y.) 421; Whitsett *v.* City Bldg., etc., Assoc., 3 Tenn. Ch. 526; Yourie *v.* Nelson, 1 Tenn. Ch. 614; McKay *v.* Harper, 6 Ont. Pr. 54.

Such payment was refused in Baxter *v.* Bates, 69 Ga. 587; *Ex p.* Lynch, 25 S. C. 193; Hume *v.* Commercial Bank, 13 Lea (Tenn.) 496; Moses *v.* Ocoee Bank, 1 Lea (Tenn.) 398.

(II) *In Special Cases of Employment* — (A) *By Agent* — (1) In General. Where the employment is arranged through an agent, the client's liability[59] depends on the authority of the agent to bind him in that respect, and the scope of the agent's authority depends on the rules and principles of the law of agency.[60]

(2) By Attorney. As an attorney has no implied power, under a general retainer, to employ associate counsel,[61] the client is not liable to counsel so employed.[62] Where there is special authority to employ associates, the client is liable for reasonable fees,[63] and may become so, even where the attorney is without antecedent authority to employ an associate, by conduct amounting to a ratification of the attorney's act in engaging one.[64] In the latter case, the assistant employed will not be affected by a secret agreement between the attorney and client that the former shall pay for the extra service.[65]

(B) *By One Joint Defendant.* One of several joint defendants has not authority, as agent, to employ counsel to act for all, and the others are not liable for the value of the attorney's services,[66] unless, by subsequent acquiescence, they

Where, by a decree in equity, payment out of a fund is ordered, the attorney cannot afterward bring an action at law on a *quantum meruit*, without alleging inability to obtain satisfaction of the equity decree. Connor *v.* Ashley, 41 S. C. 67, 19 S. E. 201.

59. Agent's liability.—The one assuming to act as agent has been held liable. Charles *v.* Eshleman, 5 Colo. 107. But in Pennsylvania it has been held that an action at law will not lie against a committee of a lunatic to recover for professional services. Wier *v.* Myers, 34 Pa. St. 377.

60. The agency was made out and the client held liable in the following cases:

Illinois.— Price *v.* Hay, 132 Ill. 543, 24 N. E. 620.

Indiana.— Indianapolis Chair Mfg. Co. *v.* Swift, 132 Ind. 197, 31 N. E. 800.

Louisiana.— Barker *v.* York, 3 La. Ann. 90.

Minnesota.—Wilson *v.* Minneapolis, etc., R. Co., 31 Minn. 481, 18 N. W. 291.

New York.— Simon *v.* Sheridan, etc., Co., 21 Misc. (N. Y.) 489, 47 N. Y. Suppl. 647; American Ins. Co. *v.* Oakley, 9 Paige (N. Y.) 496, 38 Am. Dec. 561.

Tennessee.— Yerger *v.* Aiken, 7 Baxt. (Tenn.) 539.

Texas.— Swayne *v.* Union Mut. L. Ins. Co., 92 Tex. 575, 50 S. W. 566.

Vermont.— Foot *v.* Rutland, etc., R. Co., 32 Vt. 633.

United States.— Tuttle *v.* Claflin, 86 Fed. 964.

Canada.— Atwater *v.* Importers, etc., Co., 31 L. C. Jur. 52; De Bellefeuille *v.* Mile End Municipality, 25 L. C. Jur. 13; Bernard *v.* Elliott, 12 Leg. N. 146; Globensky *v.* De Montigny, 2 Leg. N. 178; Tousignant *v.* Badeau, 11 Quebec 349; Auger *v.* Cornellier, 2 Quebec 293.

The authority of the agent was not proved in the following cases:

Mississippi.— Bush *v.* Southern Brewing Co., 69 Miss. 200, 13 So. 856.

Missouri.— Mussey *v.* Vanstone, 82 Mo. App. 353.

New York.— Randall *v.* Dwight, 5 N. Y. St. 889.

Pennsylvania.—Playford *v.* Hutchinson, 135 Pa. St. 426, 19 Atl. 1019.

Vermont.— Paddock *v.* Kittredge, 31 Vt. 378; Scott *v.* Hoxsie, 13 Vt. 50.

United States.— Orr *v.* Brown, 74 Fed. 1004, 41 U. S. App. 486, 21 C. C. A. 195.

61. See *supra*, III, C, 3, c.

62. *Illinois.*— Evans *v.* Mohr, 153 Ill. 561, 39 N. E. 1083.

Indiana.— Moore *v.* Orr, 10 Ind. App. 89, 37 N. E. 554; Brown *v.* Underhill, 4 Ind. App. 77, 30 N. E. 430.

Iowa.— Antrobus *v.* Sherman, 65 Iowa 230, 21 N. W. 579, 54 Am. Rep. 7.

Louisiana.— Voorhies *v.* Harrison, 22 La. Ann. 85; Jones *v.* Goza, 16 La. Ann. 428.

New York.— Cook *v.* Ritter, 4 E. D. Smith (N. Y.) 253; Macniffe *v.* Luddington, 13 Abb. N. Cas. (N. Y.) 407, 67 How. Pr. (N. Y.) 13; Matter of Bleakley, 5 Paige (N. Y.) 311. See also Harwood *v.* La Grange, 137 N. Y. 538, 32 N. E. 1000, 50 N. Y. St. 30.

Vermont.— Willard *v.* Danville, 45 Vt. 93; Paddock *v.* Colby, 18 Vt. 485.

63. Nave *v.* Tucker, 70 Ind. 15; Aldrich *v.* Brown, 103 Mass. 527; Sedgwick *v.* Bliss, 23 Nebr. 617, 37 N. W. 483; Briggs *v.* Georgia, 10 Vt. 68. See also Meany *v.* Rosenberg, 28 Misc. (N. Y.) 520, 59 N. Y. Suppl. 582, to the effect that this would be true even though the attorney was also liable.

64. King *v.* Pope, 28 Ala. 601; Hogate *v.* Edwards, 65 Ind. 372; Holmes *v.* Holland, 11 Ohio Dec. (Reprint) 768, 29 Cinc. L. Bul. 115; Smith *v.* Lipscomb, 13 Tex. 532.

The client's conduct did not amount to a ratification of the employment in Porter *v.* Elizalde, 125 Cal. 204, 57 Pac. 899; Price *v.* Hay, 29 Ill. App. 552, 31 Ill. App. 293 [*affirmed* in 132 Ill. 543, 24 N. E. 620]; Young *v.* Crawford, 23 Mo. App. 432. See also Reese *v.* Resburgh, 54 N. Y. App. Div. 378, 66 N. Y. Suppl. 633.

65. McCrary *v.* Ruddick, 33 Iowa 521; Brigham *v.* Foster, 7 Allen (Mass.) 419. But see Herndon *v.* Lammers, (Tex. Civ. App. 1900) 55 S. W. 414.

66. Thirlwell *v.* Campbell, 11 Bush (Ky.) 163; Cincinnati Sav. Bank *v.* Benton, 2

ratify the employment.[67] But where one jointly interested in a common fund maintains litigations in good faith to save it, he is, in equity, entitled to reimbursement from the fund.[68]

(c) *By Trustees, Personal Representatives, and Beneficiaries.* Although the attorney was employed to act for the protection of the estate, it was held that the liability for his compensation was a personal one in the case of a trustee,[69] of an administrator,[70] and of an executor.[71] So, when a beneficiary employs an attorney to protect his interest, the attorney must look to his employer for his pay, and cannot get an allowance out of the estate[72] even though the services rendered are beneficial to it.[73]

c. Recovery Back by Client. It sometimes happens that a client becomes entitled to recover back money paid his attorney as fees;[74] but the settlement of the case in a manner involving less work than was anticipated will not entitle the client to recover back,[75] nor can he recover back a contingent fee by alleging that the contract was champertous.[76]

2. Express Agreements — a. In General — (i) *Validity* — (a) *Generally.* The contract made with an attorney for his retainer in the first instance is not subject to the particular scrutiny of the court,[77] for the client is regarded as competent to judge for himself what is a proper sum to pay for services.[78] The validity of the contract does not depend on the value of the services rendered,[79]

Metc. (Ky.) 240; Roselius *v.* Delachaise, 5 La. Ann. 481, 52 Am. Dec. 597; Jones *v.* Woods, 76 Pa. St. 408.

Principal acting for self and sureties.— The employment of attorneys by the principal, alone, to defend an action brought against both principal and sureties, will not subject the sureties to any liability for attorney's fees. Simms *v.* Floyd, 65 Ga. 719; Daly *v.* Hines, 55 Ga. 470; Turner *v.* Myers, 23 Iowa 391; Smith *v.* Lyford, 24 Me. 147.

67. Rarrick *v.* Clay, 6 Ky. L. Rep. 360; Percy *v.* Clary, 32 Md. 245; Holmes *v.* Holland, 11 Ohio Dec. (Reprint) 768, 29 Cinc. L. Bul. 115; Davis *v.* Downer, 10 Vt. 529.

68. Adriatic F. Ins. Co. *v.* Treadwell, 108 U. S. 361, 2 S. Ct. 772, 27 L. ed. 754; Trustees Florida Internal Imp. Fund *v.* Greenough, 105 U. S. 527, 26 L. ed. 1157. See also Furst *v.* Muller, 11 Ohio Cir. Ct. 178.

69. Bowman *v.* Tallman, 2 Rob. (N. Y.) 385, 27 How. Pr. (N. Y.) 212 [*affirmed* in 41 N. Y. 619, 40 How. Pr. (N. Y.) 1]; Hallam *v.* Maxwell, 2 Cinc. Super. Ct. (Ohio) 384 [*reversing* 2 Cinc. Super. Ct. (Ohio) 136].

Trustees of state property have been held not personally liable for services of attorneys employed by them to prosecute claims regarding the trust property. Butler *v.* Mitchell, 15 Wis. 355. See also Fillmore *v.* Wells, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567; Long *v.* Rodman, 58 Ind. 58.

Where the trustee absconded, an attorney has been allowed compensation out of the estate. Manderson's Appeal, 113 Pa. St. 631, 6 Atl. 893.

70. Livermore *v.* Rand, 26 N. H. 85; McGloin *v.* Vanderlip, 27 Tex. 366.

71. Austin *v.* Monroe, 4 Lans. (N. Y.) 67. See also Malville *v.* Kappeler, (Cal. 1894) 37 Pac. 934.

Where a will was subsequently set aside an attorney has been allowed compensation for the estate. Nave *v.* Salmon, 51 Ind. 159.

72. Grimball *v.* Cruse, 70 Ala. 534; Gray's Estate, 7 Wkly. Notes Cas. (Pa.) 542.

73. Scott *v.* Dailey, 89 Ind. 477.

Prosecuting administrator for misconduct. — But, where five out of six heirs employed counsel to prosecute an administrator for misconduct, the court allowed the attorney reasonable compensation from the fund in the administrator's hands. Francis' Estate, 5 Kulp (Pa.) 17.

74. As where a judge served as attorney in violation of statute (Evans *v.* Funk, 151 Ill. 650, 38 N. E. 230); when the attorney, on account of neglect, did not comply with his duties (Benton *v.* Craig, 2 Mo. 198; Von Wallhoffen *v.* Newcombe, 10 Hun (N. Y.) 236); because the attorney died before the services were completed (Callahan *v.* Shotwell, 60 Mo. 398; McCammon *v.* Peck, 9 Ohio Cir. Ct. 589); or because the attorney wrongfully assigned the contract for services (Hilton *v.* Crooker, 30 Nebr. 707, 47 N. W. 3).

75. Mahoney *v.* Bergin, 41 Cal. 423.

76. Reese *v.* Resburgh, 54 N. Y. App. Div. 378, 66 N. Y. Suppl. 633.

77. Rust *v.* Larue, 4 Litt. (Ky.) 411, 14 Am. Dec. 172.

78. Schaffner *v.* Kober, 2 Ind. App. 409, 28 N. E. 871; Beals *v.* Wagener, 47 Minn. 489, 50 N. W. 535; Zabriskie *v.* Woodruff, 48 N. J. L. 610, 7 Atl. 336; Schomp *v.* Schenck, 40 N. J. L. 195, 29 Am. Rep. 219; Porter *v.* Parmly, 39 N. Y. Super. Ct. 219; Allison *v.* Scheeper, 9 Daly (N. Y.) 365; Jenkins *v.* Williams, 2 How. Pr. (N. Y.) 261.

Contract for salary in lieu of fees.— The agreement to pay a solicitor a fixed sum as a yearly salary, in lieu of paying items in detail, is neither illegal or unusual, whether it provides for the past or the future. Falkiner *v.* Grand Junction R. Co., 4 Ont. 350.

79. Topeka Water-Supply Co. *v.* Root, 56 Kan. 187, 42 Pac. 715.

Settlement of a case before trial would not

and it has been held that the objection of want of mutuality cannot be sustained in such contracts.[80]

(B) *Where Attorney a Salaried Officer.* It is proper for an attorney to contract with a corporation for a special fee in a special case, although he is employed by the same corporation for a fixed salary.[81]

(C) *Where Costs Are Allowed.* An agreement is unobjectionable which allows the attorney the costs recovered,[82] or costs plus a reasonable counsel fee.[83]

(D) *Unfair Agreement.* The power of the court to reform contracts between attorney and client is limited to the duty of protecting the latter against the undue influence of the former.[84] If any fraud or undue influence on the part of the attorney induces the contract, it will not be enforced;[85] and the same is true where the terms are so indefinite as to be susceptible of unconscionable advantage on the part of the attorney.[86] It has also been said that an attorney cannot stipulate for compensation incommensurate with the services to be performed.[87] It is usually true that any agreement for services, made by the client, cannot be objected to on the part of his creditors.[88]

(II) *Construction and Interpretation*—(A) *Generally.* Agreements between attorneys and clients regarding compensation will be construed most favorably to the interests of the client.[89] An agreement to defend a suit has been held to include the filing of a counter-claim;[90] but there is no rule that a general employment for an agreed sum continues till the final disposition of the case in the court of last resort,[91] and an agreement to attend to cases during the balance of the year does not oblige the attorney to attend to business uncompleted at the end of that time.[92]

(B) *Where Extra Work Is Done.* When the contract calls for a fixed amount to be paid to the attorney for his services, it sometimes becomes necessary for work not included in the terms of the agreement to be done. In such cases, if the

relieve the client from liability for the agreed compensation. Reynolds *v.* Clark County, 162 Mo. 680, 63 S. W. 382.

80. Franklin County *v.* Layman, 145 Ill. 138, 33 N. E. 1094.

Substituted contract.— It has been held also that a new contract, without undue advantage on the attorney's part, will supersede the old contract and can be enforced. Beatty *v.* Larzelere, 15 Montg. Co. Rep. (Pa.) 67. But see, *contra*, Jackson *v.* Stone, 64 N. Y. Suppl. 820; *In re* Maires, 7 Pa. Dist. 297, 4 Lack. Leg. N. (Pa.) 139.

81. Bartlett *v.* Odd Fellows' Sav. Bank, 79 Cal. 218, 21 Pac. 743, 12 Am. St. Rep. 139. See also Clarke *v.* Union F. Ins. Co., 10 Ont. Pr. 339.

82. Ely *v.* Cooke, 28 N. Y. 365, 2 Abb. Dec. (N. Y.) 14.

83. Zogbaum *v.* Parker, 55 N. Y. 120. See also Wallis *v.* Loubat, 2 Den. (N. Y.) 607.

84. Lewis *v.* Yale, 4 Fla. 418.

An attorney is bound even though he agrees to act for an inadequate amount (McElroy *v.* Russell, 15 Ky. L. Rep. 740, 24 S. W. 3) or for no fee at all (Mayer *v.* Townsend, 1 N. Y. City Ct. 358).

85. Judah *v.* Vincennes University, 23 Ind. 272; Brock *v.* Barnes, 40 Barb. (N. Y.) 521; White *v.* Whaley, 40 How. Pr. (N. Y.) 353; Allard *v.* Lamirande, 29 Wis. 502.

Where the parties deal with each other at arm's length there is no presumption of undue influence, and no burden on the attorney to prove good faith affirmatively. Dockery *v.* McLellan, 93 Wis. 381, 67 N. W. 733. See also Ryan *v.* Martin, 18 Wis. 672.

86. Planters' Bank *v.* Hornberger, 4 Coldw. (Tenn.) 531.

87. Newman *v.* Davenport, 9 Baxt. (Tenn.) 538. See also Hill *v.* Johnson, 15 Ky. L. Rep. 368.

88. Reed *v.* Mellor, 5 Mo. App. 567; Mumma's Appeal, 127 Pa. St. 474, 24 Wkly. Notes Cas. (Pa.) 297, 18 Atl. 6; Jenkins *v.* Einstein, 3 Biss. (U. S.) 128, 13 Fed. Cas. No. 7,265. But see Colgan *v.* Jones, 44 N. J. Eq. 274, 18 Atl. 55, where the surplus compensation over a reasonable amount was held void as to creditors.

89. Hitchings *v.* Van Brunt, 38 N. Y. 335, 5 Abb. Pr. N. S. (N. Y.) 272; Burling *v.* King, 46 How. Pr. (N. Y.) 452.

Contracts between attorney and client were construed in the following cases:

New York.— Hanover *v.* Reynolds, 4 Dem. Surr. (N. Y.) 385.

Vermont.— Davis *v.* Downer, 10 Vt. 529.

West Virginia.— Camden *v.* McCoy, 48 W. Va. 377, 37 S. E. 637.

Wisconsin.— Cotzhausen *v.* New York Cent. Trust Co., 79 Wis. 613, 49 N. W. 158.

United States.— Lazarus *v.* McDonald, 97 Fed. 121; Russell *v.* Young, 94 Fed. 45, 36 C. C. A. 71.

90. Lindsay *v.* Carpenter, 90 Iowa 529, 58 N. W. 900.

91. Bartholomew *v.* Langsdale, 35 Ind. 278. See also Hill *v.* Leland, 10 Ky. L. Rep. 280.

92. State Bank *v.* Martin, 4 Ala. 615.

extra work is done with the assent of the client extra compensation can be recovered.[93] But, consistently with the general rule of construction, the courts are unwilling to find that services were not included in the contract,[94] and in doubtful cases will usually decide unfavorably to the attorney.[95]

b. For Contingent Fees — (i) *Validity.* While the law will scrutinize such transactions closely, an agreement is not necessarily invalid[96] because the payment of the fee is made contingent upon the success of the suit[97] or upon the

93. *California.*— Mahoney *v.* Bergin, 41 Cal. 423.

Illinois.— Gorrell *v.* Payson, 170 Ill. 213, 48 N. E. 433; Sanders *v.* Seelye, 128 Ill. 631, 21 N. E. 601; Singer *v.* Steele, 125 Ill. 426, 17 N. E. 751.

Indiana.— Louisville, etc., R. Co. *v.* Reynolds, 118 Ind. 170, 20 N. E. 711; Judah *v.* Vincennes University, 16 Ind. 56; Ohio, etc., R. Co. *v.* Smith, 5 Ind. App. 36, 31 N. E. 371.

Maryland.— Calvert *v.* Coxe, 1 Gill (Md.) 95.

New York.— Allen *v.* Baker, 29 Misc. (N. Y.) 337, 60 N. Y. Suppl. 472; Matter of Bowles, 12 N. Y. Suppl. 468, 35 N. Y. St. 608.

Texas.— Headley *v.* Good, 24 Tex. 232.

Washington.— Isham *v.* Parker, 3 Wash. 755, 29 Pac. 835.

94. *Alabama.*— Lindsay *v.* Colbert County, 112 Ala. 409, 20 So. 637.

Kentucky.— McKay *v.* Lancaster, 15 Ky. L. Rep. 159; Simrall *v.* Morton, 6 Ky. L. Rep. 735.

New York.—*In re* Maxwell. 51 Hun (N. Y.) 640, 4 N. Y. Suppl. 576, 21 N. Y. St. 77.

Washington.— Niagara F. Ins. Co. *v.* Hart, 13 Wash. 651, 43 Pac. 937.

United States.— Hughes *v.* Dundee Mortg., etc., Invest. Co., 140 U. S. 98, 11 S. Ct. 727, 35 L. ed. 354; Tuttle *v.* Claflin, 88 Fed. 122, 31 C. C. A. 419.

95. *Georgia.*— Moses *v.* Bagley, 55 Ga. 283.

Illinois.— Dyer *v.* Sutherland, 75 Ill. 583.

Indiana.— Baldwin *v.* Logansport School City. 73 Ind. 346.

Maine.— Timberlake *v.* Crosby, 81 Me. 249, 16 Atl. 896.

Michigan.— McCutcheon *v.* Loud, 71 Mich. 433, 39 N. W. 569.

New York.— Welsh *v.* Old Dominion Min., etc., Co., 10 N. Y. Suppl. 174, 31 N. Y. St. 916.

96. Where the contract is unfair it sometimes happens that a court will refuse to enforce it. Newman *v.* Freitas, 129 Cal. 283, 61 Pac. 907, 50 L. R. A. 548; Potts *v.* Francis, 43 N. C. 300; Sloan's Estate, 14 Pa. Co. Ct. 359.

Fee to be divided between attorneys.—An agreement for a conditional fee, to be divided between the attorney obtaining the retainer and the one doing the work, is illegal under N. Y. Code Civ. Proc. § 74. Irwin *v.* Curie, 56 N. Y. App. Div. 514, 67 N. Y. Suppl. 380.

97. *California.*— Bergen *v.* Frisbie, 125 Cal. 168, 57 Pac. 784.

Iowa.— Jewel *v.* Neidy, 61 Iowa 299, 16 N. W. 141.

New York.— Hitchings *v.* Van Brunt, 38 N. Y. 335, 5 Abb. Pr. N. S. (N. Y.) 272; Whittaker *v.* New York, etc., R. Co., 54 N. Y. Super. Ct. 8.

Pennsylvania.— Chester County *v.* Barber, 97 Pa. St. 455.

Virginia.— Major *v.* Gibson, 1 Patt. & H. (Va.) 48.

Contra, Leblanc *v.* Beauparlant, 33 L. C. Jur. 243, 18 Rev. Lég. 21; Dorion *v.* Brown, 27 L. C. Jur. 47, 2 Leg. N. 214; Bernard *v.* Elliott, 12 Leg. N. 146; Cameron *v.* Heward, 11 Quebec Super. Ct. 392.

That the attorney was a necessary witness for his client seems not to affect the validity of the arrangement. Perry *v.* Dicken, 105 Pa. St. 83, 51 Am. Rep. 181.

Contracts held valid.— In each of the following cases there was a contract for a contingent fee, ranging in amount from one tenth to one half of the sum recovered; and the court, finding upon examination the contract fair and the fee not excessive, gave effect to it and allowed the attorney to recover:

California.— Ballard *v.* Carr, 48 Cal. 74.

Illinois.—Smith *v.* Young, 62 Ill. 210; Funk *v.* Mohr, 85 Ill. App. 97 [*affirmed* in 185 Ill. 395, 57 N. E. 2].

Kentucky.— Smith *v.* Thompson, 7 B. Mon. (Ky.) 305; Rust *v.* Larue, 4 Litt. (Ky.) 411, 14 Am. Dec. 172.

Maryland.— Cain *v.* Warford, 33 Md. 23.

New York.— Matter of Hynes, 105 N. Y. 560, 12 N. E. 60; Browne *v.* West, 9 N. Y. App. Div. 135, 41 N. Y. Suppl. 146, 75 N. Y. St. 604; Matter of Fernbacher, 18 Abb. N. Cas. (N. Y.) 1, 5 Dem. Surr. (N. Y.) 219.

Ohio.— Reece *v.* Kyle, 49 Ohio St. 475, 31 N. E. 747, 16 L. R. A. 723.

Pennsylvania.— Fellows *v.* Smith, 190 Pa. St. 301, 42 Atl. 678; Mumma's Appeal, 127 Pa. St. 474, 24 Wkly. Notes Cas. (Pa.) 297, 18 Atl. 6.

Utah.— Potter *v.* Ajax Min. Co., 22 Utah 273, 61 Pac. 999.

United States.—Taylor *v.* Bemiss, 110 U. S. 42, 3 S. Ct. 441, 28 L. ed. 64; Wright *v.* Tebbitts, 91 U. S. 252, 23 L. ed. 320; Maybin *v.* Raymond, 16 Fed. Cas. No. 9,338, 4 Am. L. T. N. S. 21, 15 Nat. Bankr. Reg. 353; *Ex p.* Plitt, 2 Wall. Jr. C. C. (U. S.) 453, 19 Fed. Cas. No. 11,228.

Binding effect on others.—A contract for contingent fee of fifty per cent, made by a mother and sole next of kin of a decedent, is not binding upon her descendants, nor upon an estate toward which she stood in no other relation than that of distributee. Sloan's Estate, 161 Pa. St. 237, 28 Atl. 1084.

happening of some other event,[98] and such an agreement is not objectionable for want of mutuality.[99] So, a contingent agreement to convey a portion of the land recovered by suit to the attorney for his fee will be specifically enforced,[1] even though the land has greatly increased in value.[2]

(II) *Effect of*—(A) *When Enforceable*—(1) As Assignment. Without an express stipulation to that effect, an agreement for contingent fees will not act as an assignment;[3] and, where a right of action is not assignable, it is not possible to assign to the attorney any right in a future judgment.[4] Where the claim is assignable, the wording of the agreement for a contingent fee must in every case be examined to determine whether the parties intended an equitable assignment in favor of the attorney.[5]

(2) On Client's Power to Compromise. Though there is a valid agreement for the payment to the attorney of a large proportion of the sum recovered in case of success, this does not give the attorney such an interest in the cause of action that it prevents plaintiff from compromising the suit.[6]

(B) *When Unenforceable*—(1) As Against Third Persons. The making of a champertous contract with his attorney in no way affects the rights of the client against third persons. So, it cannot be set up as a defense to a suit that plaintiff had a champertous agreement for the payment of his attorney.[7]

(2) As Between Attorney and Client. As between the attorney and client who are parties to the contract, the effect of the taint of champerty is that the agreement itself cannot be enforced;[8] but it does not prevent recovery on an implied agreement for reasonable compensation, and the champertous contract cannot be set up as a defense to such an action.[9]

98. Fitzpatrick *v.* Lincoln Sav., etc., Co., 194 Pa. St. 544, 45 Atl. 333.

99. Gorrell *v.* Payson, 170 Ill. 213, 48 N. E. 433.

1. Howard *v.* Throckmorton, 48 Cal. 482; Martin *v.* Platt, 5 N. Y. St. 284.

If the property has been converted into a fund, the attorney is entitled to his due share of the increased amount. Hand *v.* Savannah, etc., R. Co., 21 S. C. 162.

Where the client repudiates his contract, the attorney may compel him to deliver so much of the proceeds recovered as will compensate him, or may have a personal judgment for his damages sustained by reason of the client's failure to carry out his contract. Hazeltine *v.* Brockway, 26 Colo. 291, 57 Pac. 1077.

2. Chester *v.* Jumel, 125 N. Y. 237, 26 N. E. 297, 35 N. Y. St. 4 [*reversing* 2 Silv. Supreme (N. Y.) 159, 5 N. Y. Suppl. 809, 24 N. Y. St. 214].

3. Wood *v.* Dickinson, 7 Mackey (D. C.) 301; Nesbit *v.* Cantrell, 29 Ga. 255; Corbin *v.* Mulligan, 1 Bush (Ky.) 297. See Assignments, 4 Cyc. 48.

Nor does he get any vested right in the cause of action. Kusterer *v.* Beaver Dam, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725.

4. Pulver *v.* Harris, 62 Barb. (N. Y.) 500.

5. **The agreement was held to constitute an equitable assignment** in favor of the attorney in the following cases:

California.— Hoffman *v.* Vallejo, 45 Cal. 564.

Florida.— Sammis *v.* L'Engle, 19 Fla. 800.

New York.— Fairbanks *v.* Sargent, 104 N. Y. 108, 9 N. E. 870, 56 Am. Rep. 490.

Pennsylvania.— Hagemann's Estate, 5 Pa. Co. Ct. 576.

United States.— The Alice Strong, 57 Fed. 249 [*distinguishing* Kendall *v.* U. S., 7 Wall. (U. S.) 113, 19 L. ed. 85].

See also Shepherd *v.* Dickson, 38 La. Ann. 741; Martinez *v.* Vives, 32 La. Ann. 305; San Antonio, etc., R. Co. *v.* Belt, (Tex. Civ. App. 1900) 59 S. W. 607; and Assignments, 4 Cyc. 48.

6. Coughlin *v.* New York Cent., etc., R. Co., 71 N. Y. 443, 27 Am. Rep. 75 [*reversing* 8 Hun (N. Y.) 136]; Wright *v.* Wright, 70 N. Y. 96; Compton *v.* Whitehouse, 48 N. Y. Super. Ct. 208; Britton *v.* Bese, 23 Pittsb. Leg. J. (Pa.) 181. *Contra*, Toy *v.* Haskell, 128 Cal. 558, 61 Pac. 89, 79 Am. St. Rep. 70.

7. *Arkansas.*— Missouri Pac. R. Co. *v.* Smith, 60 Ark. 221, 29 S. W. 752.

Indiana.— Cleveland, etc., R. Co. *v.* Davis, 10 Ind. App. 342, 36 N. E. 778, 37 N. E. 1069.

Iowa.— Small *v.* Chicago, etc., R. Co., 55 Iowa 582, 8 N. W. 437; Allison *v.* Chicago, etc., R. Co., 42 Iowa 274.

New York.— Hall *v.* Gird, 7 Hill (N. Y.) 586.

Ohio.— Pennsylvania Co. *v.* Lombardo, 49 Ohio St. 1, 29 N. E. 573, 14 L. R. A. 785.

United States.— Burnes *v.* Scott, 117 U. S. 582, 6 S. Ct. 865, 29 L. ed. 991.

8. Holloway *v.* Lowe, 7 Port. (Ala.) 488; Allen *v.* Hawks, 13 Pick. (Mass.) 79; Byrne *v.* Kansas City, etc., R. Co., 55 Fed. 44; Courtright *v.* Burnes, 3 McCrary (U. S.) 60, 13 Fed. 317.

9. Davis *v.* Webber, 66 Ark. 190, 49 S. W. 822, 74 Am. St. Rep. 81, 45 L. R. A. 196; Caldwell *v.* Shepherd, 6 T. B. Mon. (Ky.)

(III) *Happening of Contingency*—(A) *In General.* Where there is an agreement for a contingent fee, the happening of the contingency is a condition precedent to the right of the attorney to recover for his services,[10] and the precise event which was contemplated must happen.[11] It is not, however, a valid objection to a claim for a contingent fee that the result was brought about in some unforeseen manner, even though the duties of the attorney are rendered much less burdensome thereby,[12] provided he has not previously abandoned the suit.[13]

(B) *Effect of Death of Parties.* The death of either attorney or client does not affect the requirement that the contingency must happen before the fees become payable.[14] But it has also been held that an agreement for a percentage of the sum recovered is such an interest as will prevent the death of the client from revoking the attorney's authority.[15]

(C) *Effect of Interference by Client.* Since, ordinarily, an agreement for a contingent fee does not give the attorney any interest in the subject-matter of the litigation,[16] any disposition the client choses to make of the case is binding on the attorney;[17] and if the party dismisses a suit without receiving any consideration, the attorney is entitled to nothing under the contract.[18] Where, however, the attorney agrees not to charge any fee unless successful, it has been held that he may recover a reasonable value for services rendered in cases where the client interferes to prevent success.[19] Where the agreement is for a percentage of the recovery and the client compromises for less than the face of the claim, the attor-

389; Rust *v.* Larue, 4 Litt. (Ky.) 411, 14 Am. Dec. 172; Stearns *v.* Felker, 28 Wis. 594. *Contra,* Gammons *v.* Johnson, 76 Minn. 76, 78 N. W. 1035. And see Mazureau *v.* Morgan, 25 La. Ann. 281.

10. *Georgia.*— Moses *v.* Bagley, 55 Ga. 283.
Illinois.— Fraatz *v.* Garrison, 83 Ill. 60.
Indiana.— Scobey *v.* Ross, 5 Ind. 445.
Kentucky.— Hargis *v.* Louisville Gas Co., 15 Ky. L. Rep. 369, 22 S. W. 85, 23 S. W. 790.
New York.— Bittiner *v.* Goldman, 20 Misc. (N. Y.) 330, 45 N. Y. Suppl. 953; Phelps *v.* Emery, 5 N. Y. St. 282, 24 N. Y. Wkly. Dig. 541.
Pennsylvania.— Dickerson *v.* Pyle, 4 Phila. (Pa.) 259, 18 Leg. Int. (Pa.) 37.
Texas.— McCampbell *v.* Durst, 73 Tex. 410, 11 S. W. 380.

When the attainment of the desired object becomes impossible through the happening of a collateral event, the client is not liable for fees. Fisk *v.* Snyder, 4 Ky. L. Rep. 716; Moyers *v.* Graham, 15 Lea (Tenn.) 57.

11. Thus, having bonds declared void did not satisfy a condition that the issue should be prevented (Richland County *v.* Millard, 9 Ill. App. 396), and taking the debtor's note is not a satisfactory "settlement" of a claim (Mills *v.* Fox, 4 E. D. Smith (N. Y.) 220. See also Leach *v.* Strange, 10 N. C. 601); but it is immaterial that the client is not benefited by the success of the suit (Hudson *v.* Sanders, 19 Ohio Cir. Ct. 615, 10 Ohio Cir. Dec. 342).

12. *Arkansas.*— Jacks *v.* Thweatt, 39 Ark. 340.
Iowa.— Larned *v.* Dubuque, 86 Iowa 166, 53 N. W. 105.
Kentucky.— McIntosh *v.* Bach, (Ky. 1901) 62 S. W. 515.
Missouri.— Moss *v.* Richie, 50 Mo. App. 75.
New York.— Dennison *v.* Lawrence, 44 N. Y. App. Div. 287, 60 N. Y. Suppl. 748.

13. Cheney *v.* Kelly, 95 Ala. 163, 10 So. 664; Scoville *v.* School Trustees, 65 Ill. 523; Simrall *v.* Morton, 12 Ky. L. Rep. 31, 12 S. W. 185; Frink *v.* McComb, 60 Fed. 486. See also Newlin *v.* Thompson, 15 Montg. Co. Rep. (Pa.) 76.

14. Triplett *v.* Mockbees, 5 J. J. Marsh. (Ky.) 219; Badger *v.* Celler, 41 N. Y. App. Div. 599, 58 N. Y. Suppl. 653.

15. Price *v.* Haeberle, 25 Mo. App. 201; Wylie *v.* Coxe, 15 How. (U. S.) 415, 14 L. ed. 753. But see Villhauer *v.* Toledo, 5 Ohio Dec. 8, 32 Cinc. L. Bul. 154.

16. See *supra,* V, B, 2, b, (II), (A), (1).

17. Alexander *v.* Grand Ave. R. Co., 54 Mo. App. 66.

18. Evans *v.* Bell, 6 Dana (Ky.) 479. But see Hill *v.* Cunningham, 25 Tex. 25.

19. *Indiana.*— French *v.* Cunningham, 149 Ind. 632, 49 N. E. 797.
Maryland.— Western Union Tel. Co. *v.* Semmes, 73 Md. 9, 20 Atl. 127.
Michigan.— Millard *v.* Jordan, 76 Mich. 131, 42 N. W. 1085.
Missouri.— Duke *v.* Harper, 8 Mo. App. 296.
Nevada.— Quint *v.* Ophir Silver Min. Co., 4 Nev. 304.
New York.— Badger *v.* Mayer, 8 Misc. (N. Y.) 533, 28 N. Y. Suppl. 765, 59 N. Y. St. 398.
West Virginia.— Polsley *v.* Anderson, 7 W. Va. 202, 23 Am. Rep. 613.
See also Majors *v.* Hickman, 2 Bibb (Ky.) 217.

Where the suit would have been unsuccessful, in case no compromise were made, the attorney can recover nothing. Merchants Nat. Bank *v.* Eustis, 8 Tex. Civ. App. 350, 28 S. W. 227. See also Lynch *v.* Munson, (Tex. Civ. App. 1901) 61 S. W. 140.

ney is at least entitled to his proportion of the sum compromised for,[20] and the client's act amounts to a waiver of any requirement that the full amount be collected.[21]

(IV) *Amount on Which Percentage Fee Is Reckoned.* The percentage coming to the attorney is usually reckoned on the amount actually recovered,[22] which has been held to include costs,[23] and from which fees of assistant counsel cannot be deducted as necessary expenses.[24]

e. With Partnership — (I) *In General.* Where the client contracts with a firm of attorneys, whatever is done by any one, in behalf of all and under their joint engagement, is, if properly done, a fulfilment, to that extent, of their contract,[25] and where he contracts with one partner there is no implied agreement to pay extra for services rendered by another partner.[26]

(II) *Effect of Changes in Firm* — (A) *Generally.* In the absence of a particular agreement on the part of the client, the formation of a partnership by his attorney does not alter previous terms of employment.[27] And, where a firm dissolves, there is still a joint employment, and all the attorneys constituting the firm are under the same obligation to the client as if the partnership continued.[28]

(B) *By Death.* When one member of a firm dies and the client exercises his privilege of changing, he is liable for the reasonable value of the services already rendered,[29] and for the full amount if he allows the remaining members of the firm to complete the business.[30]

(III) *Effect of Employing Additional Counsel.* When there is an express agreement between an attorney and his client that the pay for services shall be a certain fixed sum, the right of the attorney to the full amount agreed

20. Bogert *v.* Adams, 8 Colo. App. 185, 45 Pac. 235; Marsh *v.* Holbrook, 3 Abb. Dec. (N. Y.) 176. But see Bittiner *v.* Gomprecht, 28 Misc. (N. Y.) 218, 58 N. Y. Suppl. 1011.

21. Larned *v.* Dubuque, 86 Iowa 166, 53 N. W. 105.

If the attorney continues to prosecute the case after the compromise, he must prove the material allegations of the original declaration in order to entitle him to his contingent fee. Swift *v.* Register, 97 Ga. 446, 25 S. E. 315.

22. Pilkington *v.* Brooklyn Heights R. Co., 49 N. Y. App. Div. 22, 63 N. Y. Suppl. 211, 30 N. Y. Civ. Proc. 276; Nickels *v.* Kane, 82 Va. 309; Fisher *v.* Mylius, 42 W. Va. 638, 26 S. E. 309.

An attempted deduction was not allowed in Chadwick *v.* Walsh, 70 Mich. 627, 38 N. W. 602.

Commissions were allowed on disputed amounts only in McIlvoy *v.* Russell, 11 Ky. L. Rep. 888, 12 S. W. 1067.

Property increased in value.—If the article recovered increases in value the attorney is entitled to his proportion of the larger amount (Chester *v.* Jumel, 2 Silv. Supreme (N. Y.) 159, 5 N. Y. Suppl. 809, 24 N. Y. St. 214), but not to rents accruing before the successful result was obtained (Rector *v.* Rose, 62 Ark. 279, 36 S. W. 898).

Real estate not sold.— Real estate which the executors did not find it necessary to sell was not included in estimating the amount due to an attorney, where a legatee agreed to pay one half the beneficial interest recovered from the executors. Matter of Fernbacher, 18 Abb. N. Cas. (N. Y.) 1, 5 Dem. Surr. (N. Y.) 219.

Where an attorney obtained an amount in cash and notes, he could deduct his proportion only from the sum paid in cash. Matter of Tracy, 1 N. Y. App. Div. 113, 37 N. Y. Suppl. 65, 72 N. Y. St. 219 [*affirmed* in 149 N. Y. 608, 44 N. E. 1129].

23. Taylor *v.* Long Island R. Co., 25 Misc. (N. Y.) 11, 53 N. Y. Suppl. 830, 28 N. Y. Civ. Proc. 118.

24. Whitlow *v.* Whitlow, 22 Ky. L. Rep. 179, 60 S. W. 182.

25. Phillips *v.* Edsall, 127 Ill. 535, 20 N. E. 801; Phillips *v.* South Park Com'rs, 119 Ill. 626, 10 N. E. 230; Simon *v.* Brashear, 9 Rob. (La.) 59, 41 Am. Dec. 321; Page *v.* Wolcott, 15 Gray (Mass.) 536. But see Morgan *v.* Roberts, 38 Ill. 65.

26. Evans *v.* Mohr, 42 Ill. App. 225.

Payment to one is payment to the whole firm. Williams *v.* More, 63 Cal. 50.

27. King *v.* Barber, 61 Iowa 674, 17 N. W. 88; Davis *v.* Peck, 54 Barb. (N. Y.) 425.

Merely consulting with another partner will not warrant the inference that the client has retained the new firm in place of the individual attorney formerly employed. Carr *v.* Wilkins, 44 Tex. 424.

28. Walker *v.* Goodrich, 16 Ill. 341. See also Johnson *v.* Bright, 15 Ill. 464.

Where the remaining partner alone acts he may sue alone. Dougall *v.* Ockerman, 9 U. C. Q. B. 354.

29. McGill *v.* McGill, 2 Metc. (Ky.) 258; Landa *v.* Shook, 87 Tex. 608, 30 S. W. 536, 31 S. W. 57.

30. Smith *v.* Hill, 13 Ark. 173. See also Waples *v.* Layton, 24 La. Ann. 624; Tomlinson *v.* Polsley, 31 W. Va. 108, 5 S. E. 457.

upon is not affected by the client's act in employing additional counsel to assist in the work.[31] A suggestion by the attorney that aid be called in seems not to affect this rule,[32] but the attorney may not, of his own accord, employ assistant counsel and charge their services to his client.[33]

3. Implied Agreements — a. Arise When — (I) *In General.* In the absence of special agreement,[34] assuming that there is a valid retainer, there arises an implied agreement, on the part of the client, to pay for the services of his attorney.[35]

(II) *When There Has Been an Express Contract.* The existence of an express contract prevents one from arising by implication,[36] and in such case evidence of the value of the services is irrelevant.[37] The attorney alone has no right to rescind such a contract,[38] and cannot claim a larger sum than the amount agreed upon;[39] but where both parties assent to the abandonment of the express contract an implied contract arises.[40] In case the client sets aside the contract or procures it by misrepresentation, the attorney can resort to an implied contract on the part of the client to pay a fair amount as a fee.[41]

(III) *When Services Are Considered as Necessaries.* The services of an attorney will usually be considered as necessaries, and a promise to pay for them will be implied when rendered in a proceeding personal[42] to an infant[43] or

31. *California.*— Luco *v.* De Toro, 91 Cal. 405, 27 Pac. 1082.

Florida.— Randall *v.* Archer, 5 Fla. 438.

Minnesota.— Moyer *v.* Cantieny, 41 Minn. 242, 42 N. W. 1060.

New York.— Matter of Hynes, 105 N. Y. 560, 12 N. E. 60.

Tennessee.—Pate *v.* Maples, (Tenn. Ch. 1897) 43 S. W. 740.

Washington.— Isham *v.* Parker, 3 Wash. 755, 29 Pac. 835.

32. Townsend *v.* Rhea, 18 Ky. L. Rep. 901, 38 S. W. 865.

33. Hughes *v.* Zeigler, 69 Ill. 38.

34. An agreement that fees shall be fixed by the client, if carried out in good faith, limits the amount the attorney can recover. *In re* Maxwell, 4 N. Y. Suppl. 576, 21 N. Y. St. 77; Tennant *v.* Fawcett, (Tex. 1900) 58 S. W. 824 [*reversing* (Tex. Civ. App. 1900) 55 S. W. 611]; Howe *v.* Kenyon, 4 Wash. 677, 30 Pac. 1058. See also Roche *v.* Baldwin, (Cal. 1901) 65 Pac. 459; Eakin *v.* Peeples Hotel Co., (Tenn. Ch. 1899) 54 S. W. 87.

Where the special agreement was void, as where an attorney rendered services to a municipal corporation under a contract made while such attorney was the city attorney, the latter may recover, under an implied contract, upon a *quantum meruit* for the value of the services rendered by him after the expiration of his term of office as city attorney. Buck *v.* Eureka, 124 Cal. 61, 56 Pac. 612.

35. *Kentucky.*— Price *v.* Caperton, 1 Duv. (Ky.) 207.

Missouri.— Rose *v.* Spies, 44 Mo. 20; Webb *v.* Browning, 14 Mo. 354.

New Jersey.—Strong *v.* Mundy, 52 N. J. Eq. 833, 31 Atl. 611 [*reversing* 52 N. J. Eq. 744, 30 Atl. 322].

New York.— Van Every *v.* Adams, 42 N. Y. Super. Ct. 126; Easter *v.* Smith, 1 E. D. Smith (N. Y.) 318.

South Dakota.— Cranmer *v.* Dakota Bldg., etc., Assoc., 6 S. D. 341, 61 N. W. 35.

United States.— Blake *v.* Elizabeth, 3 Fed. Cas. No. 1,495, 2 N. J. L. J. 328; Newman *v.* Keffer, 18 Fed. Cas. No. 10,177, Brunn. Col. Cas. (U. S.) 502, 33 Pa. St. 442 note.

See 5 Cent. Dig. tit. "Attorney and Client," § 336.

36. Bull *v.* St. Johns, 39 Ga. 78.

37. Marston *v.* Baerenklan, 11 Misc. (N. Y.) 620, 32 N. Y. Suppl. 785, 66 N. Y. St. 169 [*affirmed* in 13 Misc. (N. Y.) 13, 33 N. Y. Suppl. 994, 67 N. Y. St. 844]; Wait's Appeal, 20 Wkly. Notes Cas. (Pa.) 19, 9 Atl. 943.

38. Johnson *v.* Clarke, 22 Ga. 541; White *v.* Wright, 16 Mo. App. 551. See also Sheehy *v.* Duffy, 89 Wis. 6, 61 N. W. 295.

39. Coopwood *v.* Wallace, 12 Ala. 790; Ennis *v.* Hultz, 46 Iowa 76; Ingersoll *v.* Morse, 33 Miss. 667.

40. Carter *v.* New Orleans Second Municipality, 5 Rob. (La.) 238; Holladay's Case, 27 Fed. 830.

41. *Kentucky.*—Evans *v.* Bell, 6 Dana (Ky.) 479.

Nebraska.— Cowles *v.* Thompson, 31 Nebr. 479, 48 N. W. 145.

New York.— Dailey *v.* Devlin, 21 N. Y. App. Div. 62, 47 N. Y. Suppl. 296.

Pennsylvania.— Campbell *v.* Goodman, 23 Pa. Co. Ct. 609.

Tennessee.— Planters' Bank *v.* Hornberger, 4 Coldw. (Tenn.) 531.

The attorney may take his choice between recovering damages for the client's breach of contract or reasonable compensation for the services actually rendered. Henry *v.* Vance, (Ky. 1901) 63 S. W. 273.

42. Acts done to protect the infant's property are not necessaries, and the attorney cannot recover for them, whether the infant had or had not a guardian. Phelps *v.* Worcester, 11 N. H. 51.

43. Munson *v.* Washhand, 31 Conn. 303, 83 Am. Dec. 151; Barker *v.* Hibbard, 54 N. H. 539, 20 Am. Rep. 160.

See, generally, Infants.

other person incapable of entering into a contract, such as an habitual drunkard or an insane man.[44] Attorney's services rendered to a married woman may also, in certain instances, be regarded as necessaries, and her husband held liable for them — as where a wife brought a complaint against her husband to secure her personal safety,[45] or resisted a groundless charge brought against her by her husband.[46] As a rule, however, services rendered in bringing or defending divorce libels have not been brought within the category of necessaries, and the husband cannot be charged with counsel fees in such cases.[47]

b. Services Covered. Provided his act is neither illegal nor criminal,[48] an attorney can generally recover for doing[49] any services he has been requested to perform.[50]

c. Amount of Compensation — (i) *In General* — (A) *Rule Stated.* Implied agreements between attorney and client stand upon the same footing as like agreements between other parties,[51] the attorney being entitled to reasonable value for his services, taking into consideration the nature of the controversy, the skill and labor required, the responsibility imposed, the standing and experience of the attorney, and the success achieved.[52]

44. Hallett *v.* Oakes, 1 Cush. (Mass.) 296; Darby *v.* Cabanné, 1 Mo. App. 126; McCrillis *v.* Bartlett, 8 N. H. 569.

45. Morris *v.* Palmer, 39 N. H. 123.

46. Smith *v.* Davis, 45 N. H. 566; Warner *v.* Heiden, 28 Wis. 517, 9 Am. Rep. 515.

47. *Iowa.*— Johnson *v.* Williams, 3 Greene (Iowa) 97, 54 Am. Dec. 491.

Massachusetts.— Coffin *v.* Dunham, 8 Cush. (Mass.) 404, 54 Am. Dec. 769.

New Hampshire.— Ray *v.* Adden, 50 N. H. 82, 9 Am. Rep. 175; Morrison *v.* Holt, 42 N. H. 478, 80 Am. Dec. 120.

Vermont.— Wing *v.* Hurlburt, 15 Vt. 607, 40 Am. Dec. 695.

England.— Grindell *v.* Godmond, 5 A. & E. 755, 2 Hurl. & W. 339, 6 L. J. K. B. 31, 1 N. & P. 168, 31 E. C. L. 812.

Canada.— See Magurn *v.* Magurn, 10 Ont. Pr. 570.

See, generally, DIVORCE.

48. Where the services were illegal there can be no recovery. Arrington *v.* Sneed, 18 Tex. 135.

49. The services must have been actually rendered. Smedley *v.* Grand Haven, 125 Mich. 424, 84 N. W. 626.

50. Ellwood *v.* Wilson, 21 Iowa 523; Hopkins *v.* Mallard, 1 Greene (Iowa) 117.

He may recover for advising with a sheriff about the levy of an execution (People's Nat. Bank *v.* Geisthardt, 55 Nebr. 232, 75 N. W. 582); for attendance at a hearing, though the hearing is defaulted (Otis *v.* Forman, 1 Barb. Ch. (N. Y.) 30); for attendance at the taking of depositions, although the depositions were unnecessary (Kentucky Seminary *v.* Wallace, 15 B. Mon. (Ky.) 35); for avoiding impending litigation (McLean's Estate, 5 Kulp (Pa.) 170); for conducting a negotiation (Breen *v.* Union R. Co., 9 N. Y. App. Div. 122, 41 N. Y. Suppl. 164, 75 N. Y. St. 615), or for time spent in court while waiting for trial (Crowell *v.* Truax, 94 Mich. 585, 54 N. W. 384). But, where an attorney was detained over Sunday, he could not charge for attendance, because testimony could not legally be taken on that day. Frost *v.* Frost, 1 Barb. Ch. (N. Y.) 492. See also Cooke *v.* Penfold, 7 Leg. N. 176; Ferguson *v.* Troop, 31 N. Brunsw. 241; *Ex p.* James, 8 N. Brunsw. 286.

He cannot recover for doing an act which he knows is useless (Stockholm *v.* Robbins, 24 Wend. (N. Y.) 109; Gay *v.* Capers, 3 Brev. (S. C.) 283, 1 Treadw. (S. C.) 198; Hill *v.* Featherstonhaugh, 7 Bing. 569, 5 M. & P. 541, 20 E. C. L. 255; Hill *v.* Allen, 5 Dowl. P. C. 471, 1 Jur. 44, M. & H. 37, 2 M. & W. 283); for interviews, when transacting business as a broker (Walker *v.* American Nat. Bank, 49 N. Y. 659), or where the attorney had an execution issue after plaintiff's death (Smith *v.* Alexander, 80 Ala. 251).

51. Stow *v.* Hamlin, 11 How. Pr. (N. Y.) 452.

An annual counsel fee cannot be charged under a general retainer. Yates *v.* Shepardson, 27 Wis. 238.

In the case of infants the measure of compensation for professional services should be determined by the same considerations which regulate similar services on behalf of an adult in like circumstances. Bowling *v.* Scales, 1 Tenn. Ch. 618. See also Reynolds *v.* McMillan, 63 Ill. 46.

Rules of the local bar regarding prices are not binding upon an employer who is ignorant of them. Boylan *v.* Holt, 45 Miss. 277.

52. *California.*— Bridges *v.* Paige, 13 Cal. 640.

Colorado.— Willard *v.* Williams, 10 Colo. App. 140, 50 Pac. 207.

Georgia.— Wells *v.* Haynes, 101 Ga. 841, 28 S. E. 968.

Illinois.— McMannomy *v.* Chicago, etc., R. Co., 167 Ill. 497, 47 N. E. 712.

Iowa.— Stevens *v.* Ellsworth, 95 Iowa 231, 63 N. W. 683.

Kentucky.—Downing *v.* Major, 2 Dana (Ky.) 228.

Louisiana. — Macarty's Succession, 3 La. Ann. 517; Hunt *v.* Orleans Cotton Press Co.,

(B) *Right to Interest.* An attorney suing to collect compensation for services cannot recover interest on unliquidated demands either for fees or

2 Rob. (La.) 404; Dorsey *v.* His Creditors, 5 Mart. N. S. (La.) 399.

Massachusetts.—Hyde *v.* Moxie Nerve Food Co., 160 Mass. 559, 36 N. E. 585. See also Frost *v.* Belmont, 6 Allen (Mass.) 152.

Michigan.— Eggleston *v.* Boardman, 37 Mich. 14.

Missouri.— Wright *v.* Baldwin, 51 Mo. 269.

New York.— Crotty *v.* McKenzie, 42 N. Y. Super. Ct. 192; Clark *v.* Brooklyn El. R. Co., 5 N. Y. St. 52; Cregier *v.* Cheesbrough, 25 How. Pr. (N. Y.) 200.

Rhode Island.—Gorman *v.* Banigan, 22 R. I. 22, 46 Atl. 38.

Vermont.— Vilas *v.* Downer, 21 Vt. 419.

United States.— Middleton *v.* Bankers', etc., Tel. Co., 32 Fed. 524.

Canada.— Paradis *v.* Bossé, 21 Can. Supreme Ct. 419; Fraser *v.* Halifax, etc., R. Co., 18 Nova Scotia 23, 6 Can. L. T. 138. There is a presumption, however, that the tariff shall govern (Christin *v.* Lacoste, 2 Quebec 142); and, where the tariff omits to provide, fees should be decided in accordance with analogous cases provided for by the tariff (Huissiers *v.* Caisse, 6 Montreal Super. Ct. 32).

No regular measure of value can be fixed. Tinney *v.* Pierrepont, 45 N. Y. Suppl. 977; People *v.* Bond St. Sav. Bank. 10 Abb. N. Cas. (N. Y.) 15. See also Edelin *v.* Richardson, 4 La. Ann. 502.

An order fixing the compensation of an attorney, if unenforced, will not limit the amount of the attorney's recovery in a subsequent action at law. Naumer *v.* Gray, 41 N. Y. App. Div. 361, 58 N. Y. Suppl. 476.

Services requiring journeys.— Where attorneys are employed to leave the state where they reside and render services in another state, their compensation will be governed by the value of the services in the state where they reside. Stanberry *v.* Dickerson, 35 Iowa 493. The attorney is entitled to what the trip was reasonably worth even though no charge was made at the time. Crowell *v.* Truax, 94 Mich. 585, 54 S. W. 384; Foster *v.* Newbrough, 66 Barb. (N. Y.) 645.

The amount charged was held not excessive or else sufficient in the following cases:

Colorado.— Hazeltine *v.* Brockway, 26 Colo. 291, 57 Pac. 1077 (three thousand five hundred dollars); Leitensdorfer *v.* King, 7 Colo. 436, 4 Pac. 37 (ten thousand dollars).

Illinois.— Elliott *v.* Rubel, 132 Ill. 9, 23 N. E. 400 [*reversing* 30 Ill. App. 62] (three thousand dollars); Sanders *v.* Seelye, 128 Ill. 631, 21 N. E. 601 (five thousand dollars); Beard *v.* Morgan, 71 Ill. App. 564 (two hundred and fifty-nine dollars); National Home Bldg., etc., Assoc. *v.* Fifer, 71 Ill. App. 295 (two thousand eight hundred dollars); Lamar Ins. Co. *v.* Pennell, 19 Ill. App. 212 (six thousand dollars).

Indiana.— Reisterer *v.* Carpenter, 124 Ind. 30, 24 N. E. 371, sixty dollars.

Iowa.— Farley *v.* Geisheker, 78 Iowa 453, 43 N. W. 279, 6 L. R. A. 533, twenty-five dollars.

Kentucky.— Warren Deposit Bank *v.* Barclay, 22 Ky. L. Rep. 1555, 60 S. W. 853 (five hundred dollars); Fryer *v.* Dicken, 20 Ky. L. Rep. 696, 47 S. W. 341 (four hundred and fifty dollars); Louisville Gas Co. *v.* Hargis, 17 Ky. L. Rep. 1190, 33 S. W. 946 [*modifying* 15 Ky. L. Rep. 369, 22 S. W. 85, 23 S. W. 790] (thirteen thousand dollars).

Louisiana.— Billington *v.* Poitevent, etc., Lumber Co., 52 La. Ann. 1397, 27 So. 725 (two hundred dollars); Auld's Succession, 45 La. Ann. 248, 11 So. 948 (seven hundred dollars); Leech's Interdiction, 45 La. Ann. 194, 12 So. 126 (four hundred dollars); Sterry's Succession, 38 La. Ann. 854 (five hundred dollars); Roth's Succession, 33 La. Ann. 540 (seven hundred dollars); Lartigue *v.* White, 25 La. Ann. 325 (one hundred and fifty dollars); Lartigue *v.* White, 25 La. Ann. 291 (one hundred dollars); Taylor *v.* Simpson, 12 La. Ann. 587 (ten dollars); Uzee *v.* Biron, 6 La. Ann. 565 (two hundred dollars).

Minnesota.— Wilson *v.* Minneapolis, etc., R. Co., 31 Minn. 481, 18 N. W. 291, four hundred and seventy-five dollars.

Nebraska.— Cressman *v.* Whitall, 16 Nebr. 592, 21 N. W. 458, forty per cent of recovery.

New Jersey.— Koenig *v.* Harned, (N. J. 1888) 13 Atl. 236, two hundred dollars plus fifty dollars retainer, plus fifty dollars allowed by the court.

New York.— Deering *v.* Schreyer, 58 N. Y. App. Div. 322, 68 N. Y. Suppl. 1015 (eleven thousand two hundred and fifty dollars); Atlantic Sav. Bank *v.* Hetterick, 5 Thomps. & C. (N. Y.) 239 (two thousand seven hundred dollars); Farmers' L. & T. Co. *v.* Mann, 4 Rob. (N. Y.) 356 (one thousand five hundred dollars and two hundred dollars previously paid); Kult *v.* Nelson, 25 Misc. (N. Y.) 238, 55 N. Y. Suppl. 56 (one hundred and fifty dollars); Thompson *v.* Knickerbocker Ice Co., 6 N. Y. Suppl. 7, 25 N. Y. St. 581 [*affirmed* in 127 N. Y. 671, 28 N. E. 255, 38 N. Y. St. 1016] (ten thousand dollars); People *v.* Bond St. Sav. Bank, 10 Abb. N. Cas. (N. Y.) 15 (twenty-one thousand six hundred and forty-six dollars).

Ohio.— *In re* Commercial Bank, 4 Ohio Dec. 440, 3 Ohio N. P. 193, one thousand two hundred and fifty dollars.

Pennsylvania.— Culp's Estate, 26 Wkly. Notes Cas. (Pa.) 78 (seven hundred dollars); Moller *v.* Ohse, 5 Wkly. Notes Cas. (Pa.) 510 (five per cent on recovery); Smythe *v.* O'Brien. 30 Pittsb. Leg. J. N. S. (Pa.) 383 (eight thousand dollars); First Nat. Bank *v.* Colvin, 11 York Leg. Rec. (Pa.) 27 (one hundred and twenty-two dollars and fifty cents).

Rhode Island.— Burns *v.* Allen, 15 R. I. 32, 23 Atl. 35, 2 Am. St. Rep. 844, twenty-two dollars and fifty cents.

South Carolina.—Aultman, etc., Co. *v.* Gibert, 28 S. C. 303, 5 S. E. 806, fifty dollars.

[V, B, 3, c, (I), (B)]

costs,[53] interest running in such cases only from the date when the attorney's claim for compensation has been reduced to judgment.[54] When, however, the amounts are liquidated, interest on the fee runs from the time of demand for payment, and on disbursements from the time when the money was paid out.[55]

(II) *Effect of Statutory Regulation.* Where the legislature, by a special act, adjusts the claims of attorneys employed in some particular proceeding, it withdraws from the court the question of reasonable value[56] and also supersedes an express contract to pay.[57] Such special acts are of rare occurrence, but in most jurisdictions there are general acts specifying certain amounts to be taxed against the losing party to a lawsuit, and one item of the costs thus taxed is an attorney's fee. These statutory regulations do not limit the amount of an attorney's recovery on a *quantum meruit*, and the attorney is entitled to a

Tennessee.— Wright *v.* Knoxville Livery, etc., Co., (Tenn. Ch. 1900) 59 S. W. 677 (one thousand dollars); Vinson *v.* Cantrell, (Tenn. Ch. 1900) 56 S. W. 1034 (five hundred dollars); Taylor *v.* Badoux, (Tenn. Ch. 1899) 58 S. W. 919 (two hundred dollars); Eakin *v.* Peeples Hotel Co., (Tenn. Ch. 1899) 54 S. W. 87 (eight hundred dollars); Butler *v.* King, (Tenn. Ch. 1898) 48 S. W. 697 (two thousand dollars).

Washington.— Proulx *v.* Stetson, etc., Mill Co., 6 Wash. 478, 33 Pac. 1067, fifty dollars.

Wisconsin.— Remington *v.* Minnesota Eastern R. Co., 109 Wis. 154, 84 N. W. 898, 85 N. W. 321 (two thousand two hundred and sixty-two dollars and fifty cents); Halaska *v.* Cotzhausen, 52 Wis. 624, 9 N. W. 401 (five hundred and thirty dollars); Hitchcock *v.* Merrick, 15 Wis. 522 (twenty-five dollars).

United States.— Tuttle *v.* Claflin, 86 Fed. 964 (thirteen thousand two hundred and eighty-five dollars); Frink *v.* McComb, 60 Fed. 486 (one third of amount recovered); St. Louis, etc., R. Co. *v.* Clark, 51 Fed. 483, 10 U. S. App. 66, 2 C. C. A. 331 (three thousand dollars to one attorney and two thousand dollars to others); Celluloid Mfg. Co. *v.* Chandler, 27 Fed. 9 (six thousand dollars); *In re* Treadwell, 23 Fed. 442 (five thousand dollars); *In re* Bignall, 3 McCrary (U. S.) 440, 9 Fed. 385 (twenty per cent on amount recovered); *Ex p.* Plitt, 2 Wall Jr. C. C. (U. S.) 453, 19 Fed. Cas. No. 11,228 (six thousand dollars).

The amount charged was held excessive or insufficient in the following cases:

Georgia.—McLaren *v.* Lochrane, 51 Ga. 237, twenty dollars.

Illinois.— Dorsey *v.* Corn, 2 Ill. App. 533, five hundred dollars.

Maryland.— Gordon *v.* Miller, 14 Md. 204, three hundred dollars.

New York.— Starin *v.* New York, 106 N. Y. 82, 12 N. E. 643 (three hundred and eighty-eight, one hundred and fifty-six, and forty-one dollars); Matter of Raby, 25 Misc. (N. Y.) 240, 55 N. Y. Suppl. 87 (four hundred and fifty dollars); Matter of Ludeke, 22 Misc. (N. Y.) 676, 50 N. Y. Suppl. 952 (eight hundred dollars); Batterson *v.* Osborne, 18 N. Y. Suppl. 431, 44 N. Y. St. 839 (fifteen hundred dollars).

Virginia.— Cullop *v.* Leonard, 97 Va. 256, 33 S. E. 611, nine hundred dollars.

53. Colorado Coal, etc., Co. *v.* John, 5 Colo. App. 213, 38 Pac. 399; Gallup *v.* Perue, 10 Hun (N. Y.) 525; Hadley *v.* Ayres, 12 Abb. Pr. N. S. (N. Y.) 240; Adams *v.* Ft. Plain Bank, 23 How. Pr. (N. Y.) 45.

Allowance discretionary.—Allowance of interest, when the attorney's lien was in the form of an open account, was held to be discretionary in the court in Gaylord *v.* Nelson, 7 Ky. L. Rep. 821.

54. Louisville Gas Co. *v.* Hargis, 17 Ky. L. Rep. 1190, 33 S. W. 946 [*modifying* 15 Ky. L. Rep. 369, 22 S. W. 85, 23 S. W. 790].

Allowed only on amount due.— In an action against an attorney to recover money collected, interest should only be allowed on the amount which was actually due to the client. Hover *v.* Heath, 3 Hun (N. Y.) 283, 5 Thomps. & C. (N. Y.) 488.

55. Mygatt *v.* Wilcox, 45 N. Y. 306, 6 Am. Rep. 90; Rexford *v.* Comstock, 3 N. Y. Suppl. 876.

Where an attorney's fee had been fixed by a referee, by agreement, it was not error to allow interest on this amount at the same rate that the client's judgment bore interest. Whitney *v.* New Orleans, 54 Fed. 614, 4 C. C. A. 521.

56. Julian *v.* State, 122 Ind. 68, 23 N. E. 690.

Amount payable to state officials.— Attorneys, though officers of the court, are not limited in their recovery to such amounts as the state pays its officials for like services. Hyde *v.* Moxie Nerve Food Co., 160 Mass. 559, 36 N. E. 585.

The amount allowed to a professional abstractor by statute does not fix the proper fee for an attorney who does such work. Wright *v.* Union Cent. L. Ins. Co., 8 Ohio N. P. 232, 11 Ohio S. & C. Pl. Dec. 131.

What statute governs.— Where services were contracted for and rendered in Ontario, a statute of Ontario controlled the charges, though the suit to recover fees was brought in Michigan. Dawson *v.* Peterson, 110 Mich. 431, 68 N. W. 246.

57. Mullan *v.* Clark, (Ida. 1894) 38 Pac. 247; Lynch *v.* Pollard, (Tex. Civ. App. 1901) 62 S. W. 945. See also *Re* Geddes, 2 Ch. Chamb. (U. C.) 447.

reasonable compensation for his services regardless of the amount fixed by statute.[58]

C. Actions to Recover Compensation — 1. Form of Action — a. In General. As an attorney's claim for fees arises *ex contractu*, the proper form of action by which to enforce payment is assumpsit[59] or book account.[60] This remedy being ordinarily adequate, some special circumstances must be present in a cause to give equity jurisdiction.[61]

b. Summary Proceeding. Where the amount of an attorney's fee is liquidated,[62] and where he has a lien on some article of value within the control of the court,[63] he may resort to a summary remedy. This remedy, however, is discretionary and is always a subsidiary proceeding in the principal cause, which must be instituted while that cause is still pending.[64]

2. Conditions Precedent — a. Accrual of Action — (i) *Generally.* When an attorney acts under a general retainer, the contract is generally considered an entire one, and the right of action for compensation does not arise till the proceedings have been brought to some conclusion.[65] It may be shown, however,

58. *Delaware.*— Stevens *v.* Monges, 1 Harr. (Del.) 127.

Maine.— Clay *v.* Moulton, 70 Me. 315.

New Hampshire.— Smith *v.* Davis, 45 N. H. 566; Wilcox *v.* Bowers, 36 N. H. 372.

New Jersey.— Strong *v.* Mundy, 52 N. J. Eq. 833, 31 Atl. 611 [*reversing* 52 N. J. Eq. 744, 30 Atl. 322].

New York.—Gallup *v.* Perue, 10 Hun (N. Y.) 525; Epstein *v.* Hodgetts, 4 Misc. (N. Y.) 272, 24 N. Y. Suppl. 137, 53 N. Y. St. 321 [*affirmed* in 6 Misc. (N. Y.) 635, 25 N. Y. Suppl. 1141, 56 N. Y. St. 896]; Adams *v.* Stevens, 26 Wend. (N. Y.) 451.

Pennsylvania.— Foster *v.* Jack, 4 Watts (Pa.) 334; Gray *v.* Brackenridge, 2 Penr. & W. (Pa.) 75 [*overruling* Mooney *v.* Lloyd, 5 Serg. & R. (Pa.) 412]; Delaware Ins. Co. *v.* Gilpin, 1 Binn. (Pa.) 501; Brackenridge *v.* McFarlane, Add. (Pa.) 49.

Virginia.— Yates *v.* Robertson, 80 Va. 475.

59. State Bank *v.* Martin, 4 Ala. 615; Bayard *v.* McLane, 3 Harr. (Del.) 139; Stevens *v.* Monges, 1 Harr. (Del.) 127; Calvert *v.* Coxe, 1 Gill (Md.) 95; Crosby *v.* Krøpf, 33 N. Y. App. Div. 446, 54 N. Y. Suppl. 76; Stevens *v.* Adams, 23 Wend. (N. Y.) 57 [*affirmed* in 26 Wend. (N. Y.) 451]. See also *Ex p.* Fort, 36 S. C. 19, 15 S. E. 332.

60. See Accounts and Accounting, 1 Cyc. 499, note 3.

61. Lynch *v.* Willard, 6 Johns. Ch. (N. Y.) 342; Warner *v.* Hoffman, 4 Edw. Ch. (N. Y.) 381.

A creditor's bill by an attorney has been allowed, enabling him to recover directly from an estate in equity, when both administrators were insolvent and one had also removed from the state. Coopwood *v.* Wallace, 12 Ala. 790.

Compelling payment by guardian.— An attorney failed, in a bill in equity, to compel a second guardian to pay for services rendered an estate while it was under the management of a former guardian. Pugh *v.* Dorsey, 8 Sm. & M. (Miss.) 379.

Specific performance.—An agreement to pay part of the verdict recovered to the attorney employed will not be specifically enforced (Miller *v.* Newell, 20 S. C. 123, 47 Am. Rep. 833); but, under a similar agreement, to convey a portion of the land recovered by suit, specific performance will be decreed, for the contract comes within the general scope of equity jurisdiction (Cockrill *v.* Sanders, (Ark. 1888) 8 S. W. 831; Howard *v.* Throckmorton, 48 Cal. 482; Chester *v.* Jumel, 125 N. Y. 237, 26 N. E. 297, 35 N. Y. St. 4 [*reversing* 2 Silv. Supreme (N. Y.) 159, 5 N. Y. Suppl. 809, 24 N. Y. St. 214]; Martin *v.* Platt, 5 N. Y. St. 284).

62. Goddard *v.* Stiles, 90 N. Y. 199; Matter of Halsey, 13 Abb. N. Cas. (N. Y.) 353; Dimick *v.* Cooley, 3 N. Y. Civ. Proc. 141; Hoes *v.* Halsey, 2 Dem. Surr. (N. Y.) 577; Croft *v.* Hicks, 26 Tex. 383.

In no case will the amount of compensation be determined in a summary proceeding — that question must be settled in a separate action at law. Foot *v.* Culbertson, 8 Ky. L. Rep. 62; Baldwin *v.* Foss, 16 Nebr. 80, 19 N. W. 496 [*affirmed* in 16 Nebr. 298, 20 N. W. 348]; Campbell *v.* Terney, 7 N. J. L. J. 189; Black *v.* Black, 32 N. J. Eq. 74; Schriever *v.* Brooklyn Heights R. Co., 49 N. Y. App. Div. 629, 63 N. Y. Suppl. 217 [*modifying* 30 Misc. (N. Y.) 145, 61 N. Y. Suppl. 644, 890]; Lorillard *v.* Robinson, 2 Paige (N. Y.) 276; *In re* Southwick, 1 Johns. Ch. (N. Y.) 22.

63. Brown *v.* New York, 9 Hun (N. Y.) 587.

64. Nolan *v.* Taylor, 12 La. Ann. 201.

65. *Arkansas.* — Phelps *v.* Patterson, 25 Ark. 185; Fenno *v.* English, 22 Ark. 170.

California.— Hancock *v.* Pico, 47 Cal. 161.

Colorado.— Wells *v.* Gilpin, 19 Colo. 305, 35 Pac. 545; Leitensdorfer *v.* King, 7 Colo. 436, 4 Pac. 37.

Illinois.— Meyer *v.* McCumber, 75 Ill. App. 119.

Massachusetts.— Eliot *v.* Lawton, 7 Allen (Mass.) 274, 83 Am. Dec. 683.

Michigan.—Walbridge *v.* Barrett, 118 Mich. 433, 76 N. W. 973.

Mississippi.— Holly Springs *v.* Manning, 55 Miss. 380; Johnson *v.* Pyles, 11 Sm. & M. (Miss.) 189.

New York.— Bathgate *v.* Haskin, 59 N. Y.

that separate steps of a single proceeding were taken under separate contracts, and, in such cases, the cause of action is complete as soon as each contract is performed.[66]

(11) *When Either Party Dies.* Where there is no special agreement which prevents the death of either party from terminating the relation, the right of action accrues at once upon the death of either attorney or client.[67]

b. Delivery of Bill to Client. In some jurisdictions an attorney must deliver to his client[68] an itemized[69] bill of costs, signed by himself,[70] at least one month[71] before he can bring an action for his fee,[72] but in others no account need be presented.[73]

3. Parties — a. Plaintiff. Under a general retainer it has been held that counsel employed to assist may be made a party plaintiff with the principal attorney,[74] and, where one member of a partnership renders services without an understanding as to whether he alone or the firm of which he is a member is retained, it seems that suit may be brought in the name of the individual partner[75] or in the

533 [*reversing* 5 Daly (N. Y.) 361]; Gustine *v.* Stoddard, 23 Hun (N. Y.) 99; Adams *v.* Ft. Plain Bank, 23 How. Pr. (N. Y.) 45. But see Sessions *v.* Palmeter, 75 Hun (N. Y.) 268, 26 N. Y. Suppl. 1076, 58 N. Y. St. 289.

Pennsylvania.— Mattern *v.* McDivitt, 113 Pa. St. 402, 6 Atl. 83; Foster *v.* Jack, 4 Watts (Pa.) 334; Tarr's Estate, 21 Pa. Co. Ct. 358. See also Mosgrove *v.* Golden, 101 Pa. St. 605.

Vermont.— Noble *v.* Bellows, 53 Vt. 527.

England.—Nicholls *v.* Wilson, 2 Dowl. N. S. 1031, 12 L. J. Exch. 266, 11 M. & W. 106.

Canada.— Atwell *v.* Browne, 9 L. C. Jur. 155; Moloney *v.* Fitzgerald, 3 Quebec 381; Loranger *v.* Filiatrault, 2 Quebec 356. See also Lizars *v.* Dawson, 32 U. C. Q. B. 237.

See 5 Cent. Dig. tit. "Attorney and Client," § 358.

An executor cannot be sued till twelve months after he qualifies. Fry *v.* Lofton, 45 Ga. 171.

Manner of conclusion.— The ordinary end to which they are brought is the entry of final judgment; but it is sufficient if the suit has been terminated by settlement out of court (O'Farrell *v.* Reciprocity Min. Co., 4 Quebec 198), and, as the client possesses the privilege of discharging his attorney at any time, it has also been stated, generally, that the attorney's right of action arises as soon as the relation ceases to exist (Mattern *v.* McDivitt, 113 Pa. St. 402, 6 Atl. 83). Where, however, it had been stipulated that the attorney should proceed to collect the judgment, the cause of action for his fees did not accrue till the collection was made (Morgan *v.* Brown, 12 La. Ann. 159); and, where the case was taken upon a contingent basis, the attorney's right of action did not accrue till success was achieved, although the relation terminated long before (Bartlett *v.* Odd Fellows' Sav. Bank, 79 Cal. 218, 21 Pac. 743, 12 Am. St. Rep. 139).

Premature commencement of suit will not bar a subsequent action. Porter *v.* Ruckman, 38 N. Y. 210.

66. Ennis *v.* Pullman Palace Car Co., 165 Ill. 161, 46 N. E. 439 [*affirming* 60 Ill. App. 398]; Adams *v.* Mott, 44 Vt. 259.

Under employment to attend to all business of an estate, the fee for each act of service would be due as soon as each task was completed. Jones *v.* Lewis, 11 Tex. 359.

67. Campbell *v.* Maple, 105 Pa. St. 304; Stark *v.* Hart, 22 Tex. Civ. App. 543, 55 S. W. 378. But see Labauve's Succession, 34 La. Ann. 1187.

68. **Where one attorney sues another,** it is not necessary to deliver a bill one month before action. But, by 3 Jac. I, a bill must be delivered at some time before action in a case where the business done is not agency business, but as for any other client. Draper *v.* Beasley, 8 U. C. Q. B. 260.

69. Stanton *v.* McLean, 9 Can. L. J. 301; *Ex p.* Philips, 26 N. Brunsw. 178.

It is not necessary to deliver a taxed bill before bringing an action. Jack *v.* Clewes, 5 N. Brunsw. 637.

70. **The attorneys who commence the action must sign** the bill delivered. Where, therefore, three attorneys, composing a firm, commenced the action, and only one of them signed the bill, it was insufficient. Sullivan *v.* Bridges, 5 U. C. Q. B. 322.

A defendant, by indorsing an admission of service on the bill produced, admits that the copy received was signed by the attorney. Berry *v.* Andruss, 3 U. C. Q. B. O. S. 645.

71. Berry *v.* Andruss, 3 U. C. Q. B. O. S. 645, holding that a lunar, and not a calendar, month is necessary.

In New Brunswick, 3 Jac. I, c. 7, requiring the delivery of an attorney's bill of costs before action brought, is in force (Kerr *v.* Burns, 9 N. Brunsw. 604; James *v.* McLean, 8 N. Brunsw. 164); but 2 Geo. II, c. 23, requiring the delivery a month before action, is not (James *v.* McLean, 8 N. Brunsw. 164).

72. **The delivery is necessary even though** the client admits the amount to be due (Dempsey *v.* Winstanley, 5 U. C. Q. B. 317), or suffers judgment by default (Ridout *v.* Brown, 4 U. C. Q. B. O. S. 74).

73. Foster *v.* Newbrough, 66 Barb. (N. Y.) 645; Bruyn *v.* Comstock, 56 Barb. (N. Y.) 9; Gleason *v.* Clark, 9 Cow. (N. Y.) 57.

74. Starrett *v.* Gault, 62 Ill. App. 209.

75. **One partner alone** was allowed to maintain a suit in Webb *v.* Trescony, 76 Cal. 621, 18 Pac. 796; Moshier *v.* Frost, 110 Ill. 206;

names of all the partners composing the firm of which the individual attorney so retained was a member.[76]

b. Defendant. Ordinarily, the employer, or employers if there be more than one, should be made parties defendant to the suit. Where several guardians assumed the position successively, however, it was held that only the last need be made a party, though, when the services were rendered, the earlier ones had charge of the estate.[77]

4. PLEADINGS — a. Complaint, Declaration, or Petition.[78] The attorney should allege that the services were rendered at defendant's request,[79] or that defendant ratified his acts, or that the services rendered without the latter's knowledge were necessary, stating facts showing such necessity.[80] He should also aver the performance of any conditions precedent.[81] With respect to the statement of charges,[82] it is sufficient to show the dates of the different services,[83] and their total value,[84] even though it does not allege when the amount claimed fell due;[85] and an allegation of demand for payment is not necessary.[86] Failure to allege that plaintiff was licensed to practise is not fatal, but is cured by verdict.[87]

b. Answer or Plea — (I) *GENERAL DENIAL.* Under a general denial it has been held that defendant may show that there was no retainer,[88] that the contract sued on was illegal,[89] and that the services were rendered by another attorney.[90]

James T. Hair Co. *v.* Thorne, 27 Ill. App. 502; McCabe *v.* Goodfellow, 133 N. Y. 89, 30 N. E. 728, 44 N. Y. St. 253, 17 L. R. A. 204 [*reversing* 61 Hun (N. Y.) 619, 15 N. Y. Suppl. 377, 39 N. Y. St. 941, 21 N. Y. Civ. Proc. 65]; Platt *v.* Halen, 23 Wend. (N. Y.) 456. See also Anderson *v.* Tarpley, 6 Sm. & M. (Miss.) 507.

76. All the partners were allowed to join in French *v.* Cunningham, 149 Ind. 632, 49 N. E. 797; Warner *v.* Griswold, 8 Wend. (N. Y.) 665; Maynard *v.* Briggs, 26 Vt. 94.

77. Fillmore *v.* Wells, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567.

78. For forms of complaints or petitions in whole, in part, or in substance, see the following cases:

California.— Foltz *v.* Cogswell, 86 Cal. 542, 25 Pac. 60.

Georgia.— Davis *v.* Jackson, 86 Ga. 138, 12 S. E. 299.

Indiana.— Hornaday *v.* Campbell, 21 Ind. 76; Ohio, etc., R. Co. *v.* Smith, 5 Ind. App. 36, 31 N. E. 371.

Montana.— Sanford *v.* Newell, 18 Mont. 126, 44 Pac. 522.

New York.— Dickinson *v.* Devlin, 46 N. Y. Super. Ct. 232.

Texas.— Fowler *v.* Morrill, 8 Tex. 153.

79. Services rendered for a third person at the request of defendant may be recovered for under the common count in the same form as if the services had been rendered for defendant herself. Wilson *v.* Burr, 25 Wend. (N. Y.) 386.

80. Cleveland, etc., R. Co. *v.* Shrum, 24 Ind. App. 96, 55 N. E. 515.

81. Thus, upon a covenant to pay a reasonable fee for defending defendant on a criminal charge, nothing more can be recovered than nominal damages, unless it be averred that the attorney did defend, or special damage be alleged and admitted or proved. Wilson *v.* Barnes, 13 B. Mon. (Ky.) 330.

Sufficient averment of performance.—Where the attorney declared on a covenant that the client would pay a sum in case the attorney gained the suit, an averment that the attorney did gain the suit for his client was held to be sufficient averment of the condition precedent to the payment. Roysdon *v.* Sumner, 2 Ark. 465.

82. An allegation that defendant promised plaintiff a good fee is not an allegation of an express contract, and evidence is admissible to show the value of the services performed. Fairbanks *v.* Weeber, (Colo. 1900) 62 Pac. 368. See also Warder *v.* Seitz, 157 Mo. 140, 57 S. W. 537.

83. MacMahon *v.* Duffy, 36 Oreg. 150, 59 Pac. 184.

84. Powers *v.* Manning, 154 Mass. 370, 28 N. E. 290, 13 L. R. A. 258; Derringer *v.* Pugh, 7 Ohio Cir. Ct. 158; MacMahon *v.* Duffy, 36 Oreg. 150, 59 Pac. 184; Carothers *v.* Walton, (Tex. 1886) 1 S. W. 79.

Bill of particulars.—A claim for professional services need not be specifically set forth in a bill of particulars. Phillips *v.* Stanton, 9 N. Y. St. 503; Newlin *v.* Armstrong, 8 Wkly. Notes Cas. (Pa.) 255. But see Williams *v.* Huidekoper, 1 Wkly. Notes Cas. (Pa.) 376; Cummings *v.* Thomas, 1 Wkly. Notes Cas. (Pa.) 311.

85. MacMahon *v.* Duffy, 36 Oreg. 150, 59 Pac. 184.

86. Gibbs *v.* Davis, 11 Oreg. 288, 3 Pac. 677.

87. Kersey *v.* Garton, 77 Mo. 645, 5 Ky. L. Rep. 2, 16 Centr. L. J. 472.

88. Aldis *v.* Gardner, 1 C. & K. 564, 47 E. C. L. 564.

An admission that the services were rendered, accompanied by a denial of their value, does not entitle plaintiff to judgment for the amount claimed by him. Templin *v.* Henkle, 50 Iowa 95.

89. Cary *v.* Western Union Tel. Co., 47 Hun (N. Y.) 610.

90. Cooper *v.* Stinson, 5 Minn. 201.

It has also been held that he may show any degree of negligence on the part of the attorney.[91]

(II) *Non-Delivery of Bill of Costs.* The defense of non-delivery of the bill must be specially pleaded, and the non-delivery is no ground for staying the proceedings or discharging the client after an arrest.[92]

(III) *Payment.* Payment cannot be shown under a general denial.[93]

5. Trial — a. In General. After the issues between the attorney and his client have been properly framed, the selection of the tribunal depends largely upon the nature of the case and the wishes of the parties concerned, and their determination may be left to a jury[94] or to the court,[95] or the matter may be referred to an auditor to decide.[96]

b. Evidence — (I) *Burden of Proof.* The attorney must prove that he possessed the qualifications required by statute to practise,[97] what services he rendered,[98] the value thereof,[99] and that such services were rendered at defendant's request;[1] but, where defendant sets up any new matter to defeat the attorney's recovery, the burden of proving it is on the former.[2]

91. Bridges *v.* Paige, 13 Cal. 640; Blizzard *v.* Applegate, 61 Ind. 368; Lindsay *v.* Carpenter, 90 Iowa 529, 58 N. W. 900; Buttrick *v.* Gilman, 22 Wis. 356. *Compare* Chain *v.* Hart, 140 Pa. St. 374, 21 Atl. 442.

Formerly the negligence of the attorney in the course of his employment was the subject of a cross-action merely, unless such negligence entirely frustrated the object for which he was employed, in which latter case only could it be shown under a plea of general denial. Templer *v.* McLachlan, 2 B. & P. N. R. 136; Edwards *v.* Cooper, 3 C. & P. 277, 14 E. C. L. 566. This rule has been recognized by the New York courts, with the modification that, if notice was properly given, negligence could also be shown in reduction of the amount claimed. Gleason *v.* Clark, 9 Cow. (N. Y.) 57. See also Runyan *v.* Nichols, 11 Johns. (N. Y.) 547.

Negligence cannot be set off, in an action for compensation, because the amount is not liquidated. Abbott *v.* Smith, 4 Ind. 452.

Opportunity to explain a delay would be given to either attorney or client. Union Mut. L. Ins. Co. *v.* Buchanan, 100 Ind. 63; Tate *v.* Field, 60 N. J. Eq. 42, 46 Atl. 952.

92. Boomer *v.* Anderson, 16 U. C. C. P. 163 [*citing* 2 Patterson Pr. 1253]. See also McMartin *v.* Spafford, 4 U. C. Q. B. O. S. 332.

This is not a plea to the merits, is no bar to a second action (Dempsey *v.* Winstanley, 6 U. C. Q. B. 409), and is not issuable (Eccles *v.* Johnson, 1 C. L. Chamb. (U. C.) 93).

93. St. Louis, etc., R. Co. *v.* Grove, 39 Kan. 731, 18 Pac. 958; Dickinson *v.* Devlin, 46 N. Y. Super. Ct. 232.

An answer setting up payment and waiver of lien was held not to be redundant, and, although setting up matters accruing after suit was brought, was allowed to stand. Lansing *v.* Ensign, 62 How. Pr. (N. Y.) 363.

Payment and general denial are not inconsistent pleas. Steenerson *v.* Waterbury, 52 Minn. 211, 53 N. W. 1146.

94. Smith *v.* Goode, 29 Ga. 185.

95. Rabasse's Succession, 51 La. Ann. 590, 25 So. 326; Serat *v.* Smith, 61 Hun (N. Y.) 36, 15 N. Y. Suppl. 330, 40 N. Y. St. 45; Porter *v.* Parmly, 39 N. Y. Super. Ct. 219.

96. Graves *v.* Lockwood, 30 Conn. 276; Carr *v.* Berdell, 22 Hun (N. Y.) 130; McKelvy's Appeal, 108 Pa. St. 615; Porter *v.* Parmly, 39 N. Y. Super. Ct. 219.

97. Perkins *v.* McDuffee, 63 Me. 181.

98. Garr *v.* Mairet, 1 Hilt. (N. Y.) 498; Williams *v.* Dodge, 8 Misc. (N. Y.) 317, 28 N. Y. Suppl. 729, 59 N. Y. St. 288; Stow *v.* Hamlin, 11 How. Pr. (N. Y.) 452; Allen *v.* Gregg, 22 Wkly. Notes Cas. (Pa.) 520, 16 Atl. 46; Smith *v.* Lipscomb, 13 Tex. 532; Windett *v.* Maine Union Mut. L. Ins. Co., 144 U. S. 581, 12 S. Ct. 751, 36 L. ed. 551 [*affirming* 36 Fed. 838].

Each step taken in the suit does not require proof, however. Garfield *v.* Kirk, 65 Barb. (N. Y.) 464.

Where no specific items could be proved by attorney, he was allowed to recover only a reasonable annual retainer. Hughes *v.* Dundee Mortg., etc., Invest. Co., 21 Fed. 169.

99. Fry *v.* Lofton, 45 Ga. 171.

Proof of the reasonableness of a solicitor's fee, stipulated for in foreclosure, is not necessary in the absence of any offer to show the contrary. Dorn *v.* Ross, 177 Ill. 225, 52 N. E. 321 [*affirming* 77 Ill. App. 223].

Special contract.— In New Jersey a contract fixing the amount of the counsel fee must also be shown. Hopper *v.* Ludlum, 41 N. J. L. 182.

1. Wright *v.* Fairbrother, 81 Me. 38, 16 Atl. 330. See also Saxton *v.* Harrington, 52 Nebr. 300, 72 N. W. 272, holding that, where employment is dependent on whether one who authorized proceedings did so with authority, the burden is on the attorney to establish such authority.

Where the action is on a special contract the burden is on the attorney to show that it was free from fraud, and that the client had a full knowledge of the facts when he entered into the contract. Matter of Mayer, 84 Hun (N. Y.) 539, 32 N. Y. Suppl. 850, 66 N. Y. St. 324; Haight *v.* Moore, 37 N. Y. Super. Ct. 161; McMahan *v.* Smith, 6 Heisk. (Tenn.) 167. See also White *v.* Whaley, 40 How. Pr. (N. Y.) 353.

2. Misconduct or negligence of attorney.— Moshier *v.* Kitchell, 87 Ill. 18; Cullison *v.*

(II) *Admissibility, Weight, and Sufficiency* — (A) *As to Retainer.* On the question of whether or not the services were rendered at defendant's request circumstantial evidence is admissible,[3] and proof that the client recognized the attorney as acting for him, if unexplained, tends to show an original employment.[4]

(B) *As to Nature and Extent of Services.* The nature and extent of the services of counsel can be proved by parol,[5] and it is usually enough to show that the attorney's task was practically accomplished, though the exact means contemplated were not used.[6]

(C) *As to Value of Services* — (1) In General. To determine the value of

Lindsay, 108 Iowa 124, 78 N. W. 847; Seymour *v.* Cagger, 13 Hun (N. Y.) 29.

Settlement.— Hitchcock *v.* Davis, 87 Mich. 629, 49 N. W. 912. See also Hooper *v.* Brundage, 22 Me. 460.

That services were rendered gratuitously.— Woodbury *v.* Conger, 61 Hun (N. Y.) 624, 15 N. Y. Suppl. 926, 40 N. Y. St. 665; Brady *v.* New York, 1 Sandf. (N. Y.) 569; Kelly *v.* Houghton, 59 Wis. 400, 18 N. W. 326.

3. Evidence on the question of employment was held proper for that purpose in Snow *v.* Gould, 74 Me. 540, 43 Am. Rep. 604; Kellogg *v.* Rowland, 40 N. Y. App. Div. 416, 57 N. Y. Suppl. 1064; Foster *v.* Burton, 62 Vt. 239, 20 Atl. 326; Briggs *v.* Georgia, 15 Vt. 61.

The evidence offered was either excluded or found insufficient in Manning *v.* Borland, 83 Me. 125, 21 Atl. 837; Prentiss *v.* Kelley, 41 Me. 436; Wright *v.* Gillespie, 43 Mo. App. 244; Hale *v.* Ard, 48 Pa. St. 22; Murphey *v.* Gates, 81 Wis. 370, 51 N. W. 573. See also De Long *v.* Muskegon Booming Co., 88 Mich. 282, 50 N. W. 297.

4. Jackson *v.* Clopton, 66 Ala. 29; Hotchkiss *v.* Le Roy, 9 Johns. (N. Y.) 142.

A written request to an attorney for his opinion has been held sufficient evidence to show employment. Jameson *v.* Butler, 1 Nebr. 115.

Consultations just before the bringing of the suit for defendant tend to show employment. Taft *v.* Shaw, 159 Mass. 592, 35 N. E. 88.

Previous employment helps to establish the same point. Mabury *v.* Cheadle, (Iowa 1899) 80 N. W. 312.

The records of the case in which the services were rendered are usually admitted as *prima facie* **evidence of a retainer.** Stringer *v.* Breen, 7 Ind. App. 557, 34 N. E. 1015; Beneville *v.* Whalen, 14 Daly (N. Y.) 508, 2 N. Y. Suppl. 20, 16 N. Y. St. 672; Harper *v.* Williamson, 1 McCord (S. C.) 156. But see Roraback *v.* Pennsylvania Co., 58 Conn. 292, 20 Atl. 465.

5. Brewer *v.* Cook, 11 La. Ann. 637.

Evidence of services rendered in another matter would be excluded. Callender *v.* Turpin, (Tenn. Ch. 1901) 61 S. W. 1057.

6. Performance was sufficiently shown in the following cases:

Alabama.— Walker *v.* Cuthbert, 10 Ala. 213.

Arkansas.— Cockrill *v.* Sanders, (Ark. 1888) 8 S. W. 831.

California.— Craddock *v.* O'Brien, 104 Cal. 217, 37 Pac. 896; Stewart *v.* Robinson, 76 Cal. 164, 18 Pac. 157.

Illinois.— Moore *v.* Robinson, 92 Ill. 491; Franklin County *v.* Layman, 43 Ill. App. 163; Millard *v.* Richland County, 13 Ill. App. 527.

Indiana.— Pennington *v.* Nave, 15 Ind. 323.

Kentucky.— Williams *v.* Thruston, 3 B. Mon. (Ky.) 164; Hargis *v.* Louisville Gas Co., 15 Ky. L. Rep. 369, 22 S. W. 85, 23 S. W. 790.

Massachusetts.— Tapley *v.* Coffin, 12 Gray (Mass.) 420.

Nevada.— Cole *v.* Richmond Min. Co., 18 Nev. 120, 1 Pac. 663.

New York.— Chester *v.* Jumel, 125 N. Y. 237, 26 N. E. 297, 35 N. Y. St. 4 [*reversing* 2 Silv. Supreme (N. Y.) 159, 5 N. Y. Suppl. 809, 24 N. Y. St. 214]; Grapel *v.* Hodges, 112 N. Y. 419, 20 N. E. 542, 21 N. Y. St. 845 [*affirming* 49 Hun (N. Y.) 107, 1 N. Y. Suppl. 823, 17 N. Y. St. 83]; Matter of Hynes, 105 N. Y. 560, 12 N. E. 60; Deering *v.* McCahill, 51 N. Y. Super. Ct. 263 [*affirmed* in 106 N. Y. 660, 13 N. E. 934].

Tennessee.— McClain *v.* Williams, 8 Yerg. (Tenn.) 230.

Texas.— Ker *v.* Paschal, 1 Tex. Unrep. Cas. 692.

United States.— Mellen *v.* U. S., 13 Ct. Cl. 71.

Canada.— Clarke *v.* Union F. Ins. Co., 10 Ont. Pr. 339.

Performance was not sufficiently shown in the following cases:

California.— Houghton *v.* Clarke, 80 Cal. 417, 22 Pac. 288.

Connecticut.— Richardson *v.* Rowland, 40 Conn. 565.

Delaware.— Bayard *v.* McLane, 3 Harr. (Del.) 139.

Illinois.— Badger *v.* Gallaher, 113 Ill. 662; Bunn *v.* Prather, 21 Ill. 217.

Kentucky.— Lockwood *v.* Brush, 6 Dana (Ky.) 433; Percifull *v.* Wilson, 3 Ky. L. Rep. 759.

New York.— Thorn *v.* Beard, 135 N. Y. 643, 32 N. E. 140, 48 N. Y. St. 530; Barnard *v.* Brower, 110 N. Y. 77, 17 N. E. 376, 16 N. Y. St. 734; Hitchings *v.* Van Brunt, 38 N. Y. 335, 5 Abb. Pr. N. S. (N. Y.) 272; Richards *v.* Washburn, 28 N. Y. App. Div. 109, 50 N. Y. Suppl. 885; Cole *v.* Roby, 61 Hun (N. Y.) 624, 16 N. Y. Suppl. 20, 40 N. Y. St. 899; Carey *v.* Gnant, 59 Barb. (N. Y.) 574; Dennison *v.* Lawrence, 27 Misc. (N. Y.) 99, 58 N. Y. Suppl. 142, 29 N. Y. Civ. Proc. 176.

the services rendered,[7] evidence is admissible[8] as to prices usually charged for services of similar nature,[9] and as to the character and standing of defendant's

Tennessee.— Bruce *v.* Baxter, 7 Lea (Tenn.) 477.

7. The jury should be governed by the evidence and not by any preconceived notions of the value of such services. Atkinson *v.* Dailey, 107 Ind. 117, 7 N. E. 902.

Where the services were rendered under the eye of the court, it has been decided that the court may fix the value without hearing evidence. Baldwin *v.* Carleton, 15 La. 394; Dorsey *v.* His Creditors, 5 Mart. N. S. (La.) 399. See also Gaylord *v.* Nelson, 7 Ky. L. Rep. 821.

Minutely itemizing services will not give a just estimate of their value. Randall *v.* Kingsland, 53 How. Pr. (N. Y.) 512.

8. Evidence was held admissible in the following cases:

Alabama.— Humes *v.* Decatur Land Imp., etc., Co., 98 Ala. 461, 13 So. 368.

California.— Hinckley *v.* Krug, (Cal. 1893) 34 Pac. 118.

Illinois.— Bruce *v.* Dickey, 116 Ill. 527, 6 N. E. 435; Levinson *v.* Sands, 74 Ill. App. 273.

Indiana.— Blizzard *v.* Applegate, 77 Ind. 516; McFadden *v.* Ferris, 6 Ind. App. 454, 32 N. E. 107.

Iowa.— Cullison *v.* Lindsay, 108 Iowa 124, 78 N. W. 847; Clark *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023; Bolton *v.* Daily, 48 Iowa 348; Berry *v.* Davis, 34 Iowa 594.

Kentucky.— Hallam *v.* Bardsley, 7 Ky. L. Rep. 516.

Massachusetts.— Aldrich *v.* Brown, 103 Mass. 527.

Michigan.—Crowell *v.* Truax, 94 Mich. 585, 54 N. W. 384; Babbitt *v.* Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585; Romeyn *v.* Campau, 17 Mich. 327.

Minnesota.— White *v.* Esch, 78 Minn. 264, 80 N. W. 976; Olson *v.* Gjertsen, 42 Minn. 407, 44 N. W. 306.

Missouri.— Stark *v.* Hill, 31 Mo. App. 101.

Nebraska.— Saxton *v.* Harrington, 52 Nebr. 300, 72 N. W. 272.

New York.— Shiel *v.* Muir, 51 Hun (N. Y.) 644, 4 N. Y. Suppl. 272, 22 N. Y. St. 829; Allison *v.* Scheeper, 9 Daly (N. Y.) 365.

Pennsylvania.— Powers *v.* Rich, 184 Pa. St. 325, 41 Wkly. Notes Cas. (Pa.) 407, 39 Atl. 62.

Wisconsin.— White *v.* Lueps, 55 Wis. 222, 12 N. W. 376; Yates *v.* Shepardson, 27 Wis. 238; Cunning *v.* Kemp, 22 Wis. 509.

The evidence offered was ruled out in the following cases:

Alabama.— Holloway *v.* Lowe, 1 Ala. 246.

California.— Ellis *v.* Woodburn, 89 Cal. 129, 26 Pac. 963 [*affirming* (Cal. 1890) 24 Pac. 893].

Colorado.— Bachman *v.* O'Reilly, 14 Colo. 433, 24 Pac. 546; Wells *v.* Adams, 7 Colo. 26, 1 Pac. 698.

Connecticut.— Phelps *v.* Hunt, 43 Conn. 194.

District of Columbia.— Gilbert *v.* Fay, 4 App. Cas. (D. C.) 38.

Illinois.— Tewkesbury *v.* Beckwith, 46 Ill. App. 323; Hutchinson *v.* Dunham, 41 Ill. App. 107.

Maine.— Manning *v.* Borland, 83 Me. 125, 21 Atl. 837.

Michigan.— Walbridge *v.* Barrett, 118 Mich. 433, 76 N. W. 973; Howell *v.* Smith, 108 Mich. 350, 66 N. W. 218; Crowell *v.* Truax, 94 Mich. 585, 54 N. W. 384; Babbitt *v.* Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585; Wildey *v.* Crane, 69 Mich. 17, 36 N. W. 734.

Minnesota.— Steenerson *v.* Waterbury, 52 Minn. 211, 53 N. W. 1146; Lamprey *v.* Langevin, 25 Minn. 122.

Missouri.— Goldsmith *v.* St. Louis Candy Co., 85 Mo. App. 595; Wright *v.* Gillespie, 43 Mo. App. 244.

New York.— Case *v.* Hotchkiss, 1 Abb. Dec. (N. Y.) 324, 3 Keyes (N. Y.) 334, 1 Transcr. App. (N. Y.) 285, 3 Abb. Pr. N. S. (N. Y.) 381, 37 How. Pr. (N. Y.) 283; Easton *v.* Smith, 1 E. D. Smith (N. Y.) 318; Crawford *v.* Tyng, 2 Misc. (N. Y.) 469, 21 N. Y. Suppl. 1041, 51 N. Y. St. 153; Matter of Simpson, 5 N. Y. Suppl. 363, 24 N. Y. St. 685.

Pennsylvania.— Fitzpatrick *v.* Lincoln Sav., etc., Co., 194 Pa. St. 544, 45 Atl. 333.

Texas.— Boyd *v.* Boyce, (Tex. Civ. App. 1899) 53 S. W. 720; Fulton *v.* Western Stove Mfg. Co., (Tex. Civ. App. 1898) 45 S. W. 1035.

Vermont.— Goodrich *v.* Mott, 9 Vt. 395.

Wisconsin.— Kelly *v.* Houghton, 59 Wis. 400, 18 N. W. 326.

9. Knight *v.* Russ, 77 Cal. 410, 19 Pac. 698; Nathan *v.* Brand, 167 Ill. 607, 47 N. E. 771 [*affirming* 67 Ill. App. 540]; Vilas *v.* Downer, 21 Vt. 419; Stanton *v.* Embry, 93 U. S. 548, 23 L. ed. 983.

A client's offers of pay during the proceedings are evidence of his own estimate of the value of such services. Randall *v.* Packard, 1 Misc. (N. Y.) 344, 20 N. Y. Suppl. 716, 48 N. Y. St. 778 [*affirmed* in 142 N. Y. 47, 36 N. E. 823, 58 N. Y. St. 415].

The testimony of the attorney suing is competent to show what the services are worth. Young *v.* Whitney, 18 Fla. 54; Ellis *v.* Warfield, 82 Iowa 659, 48 N. W. 1058; Schlicht *v.* Stivers, 61 Iowa 746, 16 N. W. 74; Chamberlain *v.* Rodgers, 79 Mich. 219, 41 N. W. 598; Cranmer *v.* Dakota Bldg., etc., Assoc., 6 S. D. 341, 61 N. W. 35.

Such testimony was successfully contradicted in Parker *v.* Esch, 5 Wash. 296, 31 Pac. 754. See also Bettens *v.* Fowler, 51 N. Y. Super. Ct. 166.

The amount received by one attorney acting in a cause is no criterion of the sum due his associate (Ottawa University *v.* Welsh, 14 Kan. 164; Ottawa University *v.* Parkinson, 14 Kan. 159; Calvert *v.* Coxe, 1 Gill (Md.) 95; Playford *v.* Hutchinson, 135 Pa. St. 426, 19 Atl. 1019), nor of the proper pay for the opponent's attorney (Babbitt *v.* Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585. But see Compton *v.* Barnes, 4 Gill (Md.) 55, 45 Am. Dec. 115).

attorney.[10] The pleadings in the action wherein the alleged services were rendered are also admissible to show their nature and value;[11] but proof of the value of plaintiff's services rendered in another suit is not good evidence,[12] and opinions as to the future benefits of a compromise cannot be considered.[13] An attorney's bill taxed *ex parte* is not conclusive proof of the services or disbursements charged,[14] but when the amount seems reasonable the court will not set it aside on appeal.[15]

(2) Expert Testimony. Evidence by attorneys in good standing and in active practice is admissible to prove the value of the services,[16] and, upon suitable occasion, an attorney has been allowed to testify as an expert regarding the necessity of services which were rendered,[17] or as to the absence of risk when the case was taken upon a contingent fee.[18] The witness must, however, qualify as an expert by showing that he is an attorney;[19] and the opinion must be as to the value of the particular services rendered, and not as to the general value of such services.[20] Such evidence is not necessarily controlling upon the court[21] or upon the jury,[22] though due weight should be given thereto.[23]

10. Phelps *v.* Hunt, 40 Conn. 97; Clark *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023. But evidence of the attorney's ability was ruled out in Lungerhausen *v.* Crittenden, 103 Mich. 173, 61 N. W. 270; and evidence of the amount of business the attorney had on hand was held irrelevant in Gaither *v.* Dougherty, 18 Ky. L. Rep. 709, 38 S. W. 2.

11. Stringer *v.* Breen, 7 Ind. App. 557, 34 N. E. 1015; McFadden *v.* Ferris, 6 Ind. App. 454, 32 N. E. 107; Cooke *v.* Plaisted, 176 Mass. 374, 57 N. E. 687.

12. Hart *v.* Vidal, 6 Cal. 56; Robbins *v.* Harvey, 5 Conn. 335.

13. Haish *v.* Payson, 107 Ill. 365, 5 Ky. L. Rep. 1, 15 Chic. Leg. N. 307.

14. Cook *v.* Stilson, 3 Barb. (N. Y.) 337.

15. Churchill *v.* Bee, 66 Ga. 621; Nathan *v.* Brand, 167 Ill. 607, 47 N. E. 771 [*affirming* 67 Ill. App. 540]; Day's Succession, 22 La. Ann. 366; Pendleton *v.* Johnston, (N. Y. 1892) 31 N. E. 626, 45 N. Y. St. 931.

16. *Colorado.*— Bachman *v.* O'Reilly, 14 Colo. 433, 24 Pac. 546.

Illinois.— Louisville, etc., R. Co. *v.* Wallace, 136 Ill. 87, 26 N. E. 493, 11 L. R. A. 787; Haish *v.* Payson, 107 Ill. 365, 5 Ky. L. Rep. 1, 15 Chic. Leg. N. 307.

Louisiana.— Jackson's Succession, 30 La. Ann. 463.

Maine.— Bodfish *v.* Fox, 23 Me. 90, 39 Am. Dec. 611.

Michigan.— Kelley *v.* Richardson, 69 Mich. 430, 37 N. W. 514.

Minnesota.— Allis *v.* Day, 14 Minn. 516.

New York.— Garfield *v.* Kirk, 65 Barb. (N. Y.) 464.

Ohio.— Williams *v.* Brown, 28 Ohio St. 547.

Pennsylvania.— Thompson *v.* Boyle, 85 Pa. St. 477.

That pure business matters are mixed with the legal services does not prevent the admission of expert opinion. Kelley *v.* Richardson, 69 Mich. 430, 37 N. W. 514.

17. Artz *v.* Robertson, 50 Ill. App. 27.

18. Greeff *v.* Miller, 87 Fed. 33.

19. Howell *v.* Smith, 108 Mich. 350, 66 N. W. 218; Fry *v.* Estes, 52 Mo. App. 1.

A more liberal rule has been suggested, not requiring that the expert be an attorney, but merely that he be familiar with an attorney's charges. McNiel *v.* Davidson, 37 Ind. 336.

The court itself is an expert on the question of the value of an attorney's services. Randolph *v.* Carroll, 27 La. Ann. 467; Cullom *v.* Mock, 21 La. Ann. 687; Baldwin *v.* Carleton, 15 La. 394.

20. Southgate *v.* Atlantic, etc., R. Co., 61 Mo. 89; Barker *v.* Cairo, etc., R. Co., 3 Thomps. & C. (N. Y.) 328.

21. Matter of Dorland, 63 Cal. 281; Dorsey *v.* Corn, 2 Ill. App. 533; Lee's Succession, 4 La. Ann. 578; Macarty's Succession, 3 La. Ann. 517; Dorsey *v.* His Creditors, 5 Mart. N. S. (La.) 399; Chatfield *v.* Hewlett, 2 Dem. Surr. (N. Y.) 191.

22. *Colorado.*—Bourke *v.* Whiting, 19 Colo. 1, 34 Pac. 172; Willard *v.* Williams, 10 Colo. App. 140, 50 Pac. 207.

Iowa.— Arndt *v.* Hosford, 82 Iowa 499, 48 N. W. 981.

Kentucky.— Jordan *v.* Swift Iron, etc., Works, 13 Ky. L. Rep. 970.

Missouri.— Cosgrove *v.* Leonard, 134 Mo. 419, 33 S. W. 777, 35 S. W. 1137; Rose *v.* Spies, 44 Mo. 20.

New York.—Reves *v.* Hyde, 14 Daly (N. Y.) 431, 13 N. Y. Civ. Proc. 323; Holm *v.* Parmele-Eccleston Co., 13 Misc. (N. Y.) 317, 34 N. Y. Suppl. 458, 68 N. Y. St. 362; Randall *v.* Packard, 1 Misc. (N. Y.) 344, 20 N. Y. Suppl. 716, 48 N. Y. St. 778 [*affirmed* in 142 N. Y. 47, 36 N. E. 823, 58 N. Y. St. 415].

Ohio.— Holmes *v.* Holland, 11 Ohio Dec. (Reprint) 768, 29 Cinc. L. Bul. 115; Kittredge *v.* Armstrong, 11 Ohio Dec. (Reprint) 661, 28 Cinc. L. Bul. 249.

United States.— Sanders *v.* Graves, 105 Fed. 849; Head *v.* Hargrave, 105 U. S. 45, 26 L. ed. 1028.

Compare International, etc., R. Co. *v.* Clark, 81 Tex. 48, 16 S. W. 631, holding that an instruction that the jury are not bound by the opinions of experts, unless they think the opinions are correct, was properly refused, it being an improper comment on evidence.

23. Williams *v.* Boyd, 75 Ind. 286; Blizzard *v.* Applegate, 61 Ind. 368. See also Bell

(3) Wealth of Client and Amount Involved in Suit. There is some diversity of opinion as to whether the wealth of the client may be considered by the jury in estimating the size of the attorney's fee, but as a rule it is not allowed.[24] The importance of the proceeding, however, has a direct bearing on the responsibility which the attorney assumes, and may always be considered in deciding what is reasonable compensation for his services.[25]

c. Questions For Jury. Whether or not the attorney was employed by defendant,[26] and, if so, whether the latter agreed to pay,[27] and what were the terms of the contract,[28] whether the services were rendered[29] and their value,[30] and whether an attorney was justified in withdrawing from a case,[31] are all questions of fact for the jury.

d. Instructions. Instructions should protect attorneys who act to the best of their knowledge and skill, even though they are mistaken,[32] and they should not

v. Welch, 38 Ark. 139; Turnbull *v.* Richardson, 69 Mich. 400, 37 N. W. 499.

24. Robbins *v.* Harvey, 5 Conn. 335; Stevens *v.* Ellsworth, 95 Iowa 231, 63 N. W. 683; International, etc., R. Co. *v.* Clark, 81 Tex. 48, 16 S. W. 631; Hamman *v.* Willis, 62 Tex. 507.

Compare Daly *v.* Hines, 55 Ga. 470 (to the effect that the pecuniary condition of the client at the time of engaging counsel would be material in graduating fees, but that his wealth several years later was not relevant); Clark *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023 (holding that in a divorce proceeding, the wealth of the parties is material as bearing on the amount involved in the controversy); Ward *v.* Kohn, 58 Fed. 462, 19 U. S. App. 280, 7 C. C. A. 314 (wherein the jury were allowed to consider the financial ability of defendant to determine whether he was able to pay a fair and just compensation).

The debtor's ability to pay may be considered. Breaux *v.* Francke, 30 La. Ann. 336.

25. *Illinois.*— Campbell *v.* Goddard, 17 Ill. App. 385.

Iowa.— Smith *v.* Chicago, etc., R. Co., 60 Iowa 515, 15 N. W. 291.

Minnesota.— Selover *v.* Bryant, 54 Minn. 434, 56 N. W. 58, 40 Am. St. Rep. 349, 21 L. R. A. 418.

Mississippi.— Holly Springs *v.* Manning, 55 Miss. 380.

New York.—Harland *v.* Lilienthal, 53 N. Y. 438; Garfield *v.* Kirk, 65 Barb. (N. Y.) 464; People *v.* Bond St. Sav. Bank, 10 Abb. N. Cas. (N. Y.) 15.

Ohio.— Holmes *v.* Holland, 11 Ohio Dec. (Reprint) 768, 29 Cinc. L. Bul. 115; Kittredge *v.* Armstrong, 11 Ohio Dec. (Reprint) 661, 28 Cinc. L. Bul. 249.

Pennsylvania.— Kentucky Bank *v.* Combs, 7 Pa. St. 543.

United States.— Lombard *v.* Bayard, 1 Wall. Jr. C. C. (U. S.) 196, 15 Fed. Cas. No. 8,469.

Evidence of what was recovered is material (Berry *v.* Davis, 34 Iowa 594), and the court will consider the benefit inuring to the client (Rutland *v.* Cobb, 32 La. Ann. 857); but an attorney cannot claim half the amount merely because the debt was desperate (Christy *v.* Douglas, Wright (Ohio) 485).

26. Cullison *v.* Lindsay, 108 Iowa 124, 78 N. W. 847; Briggs *v.* Georgia, 10 Vt. 68; Northern Pac. R. Co. *v.* Clarke, 106 Fed. 794.

27. Cullison *v.* Lindsay, 108 Iowa 124, 78 N. W. 847; Briggs *v.* Georgia, 10 Vt. 68.

28. *Florida.*— Broward *v.* Doggett, 2 Fla. 49.

Minnesota.— Wilkinson *v.* Crookston, 75 Minn. 184, 77 N. W. 797.

New Hampshire.— Dodge *v.* Janvrin, 59 N. H. 16.

Pennsylvania.—Playford *v.* Hutchinson, 135 Pa. St. 426, 19 Atl. 1019; Porter Tp. Road, 1 Walk. (Pa.) 10.

Vermont.— Strong *v.* McConnel, 5 Vt. 338.

Canada.— Butterfield *v.* Wells, 4 Ont. 168.

29. Graydon *v.* Stokes, 24 S. C. 483.

30. Graydon *v.* Stokes, 24 S. C. 483. But, where the only testimony was that a certain amount was a reasonable attorney's fee, it was error to submit to the jury what a reasonable fee would be. Herndon *v.* Lammers, (Tex. Civ. App. 1900) 55 S. W. 414.

31. Pickard *v.* Pickard, 83 Hun (N. Y.) 338, 31 N. Y. Suppl. 987, 64 N. Y. St. 847.

32. Lindsay *v.* Carpenter, 90 Iowa 529, 58 N. W. 900.

Instructions were sustained by the higher court in the following cases:

Alabama.— Humes *v.* Decatur Land Imp., etc., Co., 98 Ala. 461, 13 So. 368; Moore *v.* Watts, 81 Ala. 261, 2 So. 278.

Colorado.— Leitensdorfer *v.* King, 7 Colo. 436, 4 Pac. 37.

Connecticut.— Thompson *v.* Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554.

Illinois.— Bruce *v.* Dickey, 116 Ill. 527, 6 N. E. 435; Bennett *v.* Connelly, 103 Ill. 50.

Indiana.— McFadden *v.* Ferris, 6 Ind. App. 454, 32 N. E. 107.

Iowa.— Hudspeth *v.* Yetzer, 78 Iowa 11, 42 N. W. 529; Gaston *v.* Austin, 52 Iowa 35, 2 N. W. 609.

Kansas.— Perry *v.* Bailey, 12 Kan. 539.

Massachusetts.— Cooke *v.* Plaisted, 176 Mass. 374, 57 N. E. 687; Hubbard *v.* Woodbury, 7 Allen (Mass.) 422.

Michigan.— Chamberlain *v.* Rodgers, 79 Mich. 219, 44 N. W. 598.

Minnesota.— Calhoun *v.* Akeley, 82 Minn. 354, 85 N. W. 170.

Missouri.—Thrasher *v.* Greene County, 105 Mo. 244, 16 S. W. 955; Musser *v.* Adler, 86 Mo. 445; Rose *v.* Spies, 44 Mo. 20.

ignore certain grounds of defense,[33] or exclude from the consideration of the jury the necessity of the services.[34]

VI. LIEN OF ATTORNEY.

A. Classification. The lien of an attorney is of two kinds — possessory and charging.[35]

B. Definitions — 1. CHARGING LIEN. An attorney's charging lien may be defined as the right of the attorney, in the nature of an encumbrance, to charge upon property not in his possession, but connected with his employment, his claims arising out of his employment.[36]

2. POSSESSORY LIEN. An attorney's possessory lien may be defined as the attorney's right to retain possession of property, belonging to his client, which comes into his hands within the scope of his employment, until his charges are paid.[37]

C. Nature of Lien — 1. IN GENERAL. The charging lien of an attorney is an equitable right to be paid for his services out of the proceeds of the judgment obtained by his labor and skill. To the extent of such services he is regarded as an equitable assignee of the judgment.[38]

2. ASSIGNABILITY. The attorney's possessory lien is not assignable and is lost by an attempt at assignment.[39] The rule is otherwise, however, as to assignment of a claim for services or of the lien for such services on the sum collected.[40]

New York.— Randall *v.* Packard, 1 Misc. (N. Y.) 344, 20 N. Y. Suppl. 716, 48 N. Y. St. 778 [*affirmed* in 142 N. Y. 47, 36 N. E. 823, 58 N. Y. St. 415].

Pennsylvania.— Taggart *v.* Hower, (Pa. 1889) 17 Atl. 13.

Texas.— Britt *v.* Burghart, 16 Tex. Civ. App. 78, 41 S. W. 389.

Wisconsin.— Cunning *v.* Kemp, 22 Wis. 509.

Instructions were held erroneous, upon appeal, in the following cases:

Alabama.— Humes *v.* Decatur Land Imp., etc., Co., 98 Ala. 461, 13 So. 368; Long *v.* Davis. 18 Ala. 801.

California.—Ellis *v.* Woodburn, (Cal. 1890) 24 Pac. 893.

Illinois.— Goodman *v.* Lee, 40 Ill. App. 229.

Iowa.— Rickel *v.* Chicago, etc., R. Co., 112 Iowa 148, 83 N. W. 957.

Kentucky.— Lockwood *v.* Brush, 6 Dana (Ky.) 433.

Missouri.— Warder *v.* Seitz, 157 Mo. 140, 57 S. W. 537; Stewart *v.* Emerson, 70 Mo. App. 482; Dearing *v.* Fletcher, 37 Mo. App. 122.

Nevada.— Quint *v.* Ophir Silver Min. Co., 4 Nev. 304.

Texas.— Boyd *v.* Boyce, (Tex. Civ. App. 1899) 53 S. W. 720.

Wisconsin.— Gough *v.* Root, 73 Wis. 32, 40 N. W. 647, 41 N. W. 622.

33. Gorrell *v.* Payson, 170 Ill. 213, 48 N. E. 433 [*reversing* 68 Ill. App. 641].

34. Artz *v.* Robertson, 50 Ill. App. 27.

35. Mosely *v.* Norman, 74 Ala. 422; Weed Sewing Mach. Co. *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821; *In re* Wilson, 12 Fed. 235; Bozon *v.* Bolland, 4 Myl. & C. 354, 3 Jur. 884, 4 Jur. 763, 9 L. J. Ch. 123. 18 Eng. Ch. 354.

36. See Fillmore *v.* Wells, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567; Weed Sewing Mach. Co. *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

37. See Weed Sewing Mach. Co. *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

38. *Alabama.*— Mosely *v.* Norman, 74 Ala. 422; *Ex p.* Lehman, 59 Ala. 631.

Maine.— Hobson *v.* Watson, 34 Me. 20, 56 Am. Dec. 632.

New Jersey.—Terney *v.* Wilson, 45 N. J. L. 282.

New York.— Gates *v.* De la Mare, 142 N. Y. 307, 37 N. E. 121, 59 N. Y. St. 1; Wright *v.* Wright, 70 N. Y. 98; Rooney *v.* Second Ave. R. Co., 18 N. Y. 368; Deering *v.* Schreyer, 58 N. Y. App. Div. 322, 68 N. Y. Suppl. 1015; Matter of King, 34 Misc. (N. Y.) 10, 69 N. Y. Suppl. 399; Ackerman *v.* Ackerman, 14 Abb. Pr. (N. Y.) 229; Bradt *v.* Koon, 4 Cow. (N. Y.) 416.

Oregon.— Stoddard *v.* Lord, 36 Oreg. 412, 59 Pac. 710.

The attorney is entitled to protection as an officer of the court or as one holding an equity superior to the claims of general creditors. Koons *v.* Beach, 147 Ind. 137, 45 N. E. 601, 46 N. E. 587; Justice *v.* Justice, 115 Ind. 201, 16 N. E. 615; Kilbourne *v.* Wiley, 124 Mich. 370, 83 N. W. 99; Rooney *v.* Second Ave. R. Co., 18 N. Y. 368; Zimmer *v.* Metropolitan St. R. Co., 32 Misc. (N. Y.) 262, 65 N. Y. Suppl. 977; Ackerman *v.* Ackerman, 14 Abb. Pr. (N. Y.) 229.

39. **Possessory lien.**— Lovett *v.* Brown, 40 N. H. 511; Sullivan *v.* New York, 68 Hun (N. Y.) 544, 22 N. Y. Suppl. 1041, 52 N. Y. St. 557; *In re* Wilson, 12 Fed. 235; Meany *v.* Head, 1 Mason (U. S.) 319, 16 Fed. Cas. No. 9,379.

40. **Charging lien.**— Taylor *v.* Black Diamond Coal Min. Co., 86 Cal. 589, 25 Pac. 51; Day *v.* Bowman, 109 Ind. 383, 10 N. E. 126; Sibley *v.* Pine County, 31 Minn. 201, 17 N. W. 337; Muller *v.* New York, 29 N. Y. Suppl. 1096, 23 N. Y. Civ. Proc. 261. *Compare* Chappell *v.* Dann, 21 Barb. (N. Y.) 17; Beech *v.* Canaan, 14 Vt. 485.

D. Creation and Existence of Lien — 1. In General. The common law did not recognize an attorney's charging lien on the judgment recovered.[41] Such lien now exists, however. in most jurisdictions either by statute or by virtue of judicial legislation.[42]

2. Agreement For Lien. An agreement between attorney and client that the attorney should have a lien on the judgment is decisive as to the existence of the lien and its amount;[43] but an agreement to pay the attorney out of the sum recovered in a proceeding will not, of itself, create a lien.[44] The latter agree-

Assignment against part of clients.—Where an attorney was employed to defend four defendants, his assignment of his claim against two is invalid. Mulford *v.* Hodges, 10 Hun (N. Y.) 79.

Assignment to partner.—A suit to enforce a lien for attorney's fees, declared in favor of a firm, can be maintained by one of the firm who has become the owner of the fees by virtue of an arrangement with his partner. Vinson *v.* Cantrell, (Tenn. 1900) 56 S. W. 1034.

41. *Arkansas.*— Compton *v.* State, 38 Ark. 601.

California.— Hogan *v.* Black, 66 Cal. 41, 4 Pac. 943; Mansfield *v.* Dorland, 2 Cal. 507; *Ex p.* Kyle, 1 Cal. 331.

Indiana.— Hill *v.* Brinkley, 10 Ind. 102.

Iowa.— Barbee *v.* Aultman, 102 Iowa 278, 71 N. W. 235; Ward *v.* Sherbondy, 96 Iowa 477, 65 N. W. 413.

Maine.— Potter *v.* Mayo, 3 Me. 34, 14 Am. Dec. 211.

Massachusetts.— Baker *v.* Cook, 11 Mass. 236.

Minnesota.— Forbush *v.* Leonard, 8 Minn. 303.

New York.— Phillips *v.* Stagg, 2 Edw. (N. Y.) 108.

South Carolina.— Scharlock *v.* Oland, 1 Rich. (S. C.) 207.

Texas.— Casey *v.* March, 30 Tex. 180; Dutton *v.* Mason, 21 Tex. Civ. App. 389, 52 S. W. 651; Texas Mexico R. Co. *v.* Showalter, 3 Tex. App. Civ. Cas. § 69.

United States.— Sherry *v.* Oceanic Steam Nav. Co., 72 Fed. 565; Patrick *v.* Leach, 2 McCrary (U. S.) 635, 12 Fed. 661; *In re* Wilson, 12 Fed. 235.

England.— Wilkins *v.* Carmichael, 1 Dougl. 101.

42. *Alabama.*— Mosely *v.* Norman, 74 Ala. 422; Warfield *v.* Campbell, 38 Ala. 527, 82 Am. Dec. 724.

Arkansas.— Compton *v.* State, 38 Ark. 601; Sexton *v.* Pike, 13 Ark. 193.

Colorado.— Johnson *v.* McMillan, 13 Colo 423, 22 Pac. 769.

Connecticut.— Andrews *v.* Morse, 12 Conn. 444, 31 Am. Dec. 752.

Florida.— Carter *v.* Davis, 8 Fla. 183.

Georgia.— Jones *v.* Groover, 46 Ga. 568; McDonald *v.* Napier, 14 Ga. 89.

Iowa.— Barbee *v.* Aultman, 102 Iowa 278, 71 N. W. 235.

Maine.— Gammon *v.* Chandler, 30 Me. 152; Stone *v.* Hyde, 22 Me. 318; Potter *v.* Mayo, 3 Me. 34, 14 Am. Dec. 211.

Massachusetts.— Thayer *v.* Daniels, 113 Mass. 129; Baker *v.* Cook, 11 Mass. 236.

Michigan.— Kinney *v.* Tabor, 62 Mich. 517, 29 N. W. 86, 512.

Minnesota.— Crowley *v.* Le Duc, 21 Minn. 412; Forbush *v.* Leonard, 8 Minn. 303.

Mississippi.— Stewart *v.* Flowers, 44 Miss. 513, 7 Am. Rep. 707.

New York.— Rooney *v.* Second Ave. R. Co., 18 N. Y. 368; Wilkins *v.* Batterman, 4 Barb. (N. Y.) 47; Crotty *v.* McKenzie, 42 N. Y. Super. Ct. 192, 52 How. Pr. (N. Y.) 54; Ward *v.* Wordsworth, 1 E. D. Smith (N. Y.) 598, 9 How. Pr. (N. Y.) 16.

Vermont.— Weed Sewing Mach. Co. *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821; Hurlbert *v.* Brigham, 56 Vt. 368.

Wisconsin.— Rice *v.* Garnhart, 35 Wis. 282.

England.— Welsh *v.* Hole, 1 Dougl. 238; Read *v.* Dupper, 6 T. R. 361, 3 Rev. Rep. 200.

Canada.— Linton *v.* Wilson, 3 N. Brunsw. 300.

See 5 Cent. Dig. tit. "Attorney and Client," § 378.

43. Agreement for lien.—*Indiana.*—Harshman *v.* Armstrong, 119 Ind. 224, 21 N. E. 662.

Iowa.— Wallace *v.* Chicago, etc., R. Co., 112 Iowa 565, 84 N. W. 662; Winslow *v.* Central Iowa R. Co., 71 Iowa 197, 32 N. W. 330.

Kentucky.— Louisville, etc., R. Co. *v.* Proctor, 21 Ky. L. Rep. 447, 51 S. W. 591; Louisville, etc., R. Co. *v.* Givens, 13 Ky. L. Rep. 491.

Minnesota.— Forbush *v.* Leonard, 8 Minn. 303.

New York.— Matter of Dept. Public Works, 167 N. Y. 501, 60 N. E. 781; Rooney *v.* Second Ave. R. Co., 18 N. Y. 368; Crotty *v.* McKenzie, 42 N. Y. Super. Ct. 192, 52 How. Pr. (N. Y.) 54; Wright *v.* Rensens, 21 N. Y. Suppl. 485, 50 N. Y. St. 869; Richardson *v.* Brooklyn City, etc., R. Co., 15 Abb. Pr. (N. Y.) 342 note.

Contra, Forsythe *v.* Beveridge, 52 Ill. 268, 4 Am. Rep. 612.

Mere silence when proposition respecting a lien is made will not create an agreement to it. Wright *v.* Rensens, 21 N. Y. Suppl. 485, 50 N. Y. St. 869.

44. Agreement to pay out of sum recovered. — *Connecticut.*— *Compare* Cooke *v.* Thresher, 51 Conn. 105.

District of Columbia.— Woods *v.* Dickinson, 7 Mackey (D. C.) 301. *Compare* Hutchinson *v.* Worthington, 7 App. Cas. (D. C.) 548.

Illinois.— La Framboise *v.* Grow, 56 Ill. 197.

Massachusetts.— Newell *v.* West, 149 Mass. 520, 21 N. E. 954.

New York.— McBratney *v.* Rome, etc., R. Co., 17 Hun (N. Y.) 385; Walsh *v.* Flatbush,

ment, however, has been held to be an assignment, which attaches as soon as the fund is recovered.[45]

3. Services or Fees Covered — a. In General. Though in some states the charging lien has been confined to taxable costs and disbursements,[46] the tendency of the later cases is to allow the lien to cover fees, as well.[47]

b. Services in Other Proceedings. The charging lien will support only claims arising from the same proceeding as that in which the judgment was recovered.[48]

etc., R. Co., 11 Hun (N. Y.) 190; Fermenich *v.* Bovee, 1 Hun (N. Y.) 532, 4 Thomps. & C. (N. Y.) 98; Quincey *v.* Francis, 5 Abb. N. Cas. (N. Y.) 286.

Tennessee.— Gribble *v.* Ford, (Tenn. 1898) 52 S. W. 1007.

United States.— Burke *v.* Child, 21 Wall. (U. S.) 441, 22 L. ed. 623. See also Porter *v.* White, 127 U. S. 235, 8 S. Ct. 1217, 32 L. ed. 112.

See 5 Cent. Dig. tit. "Attorney and Client," § 381.

Fund created by agreement.— The attorney has no lien on a fund put in the hands of a trustee under an agreement by the parties in the suit to pay attorneys' fees out of it. Brown's Estate, 131 Pa. St. 352, 18 Atl. 901.

45. Agreement operating as assignment.— Harwood *v.* La Grange, 137 N. Y. 538, 32 N. E. 1000, 50 N. Y. St. 30 [*affirming* 16 N. Y. Suppl. 689, 42 N. Y. St. 905]; Williams *v.* Ingersoll, 23 Hun (N. Y.) 284; Bent *v.* Lipscomb, 45 W. Va. 183, 31 S. E. 907, 72 Am. St. Rep. 815. *Contra*, Bromwell *v.* Turner, 37 Ill. App. 561.

46. Costs and disbursements.— *California.* — *Ex p.* Kyle, 1 Cal. 331.

Illinois.— Forsythe *v.* Beveridge, 52 Ill. 268, 4 Am. Rep. 612.

Kentucky.— Louisville, etc., R. Co. *v.* Proctor, 21 Ky. L. Rep. 447, 51 S. W. 591.

Maine.— Cooly *v.* Patterson, 52 Me. 472; Newbert *v.* Cunningham, 50 Me. 231, 79 Am. Dec. 612; Gammon *v.* Chandler, 30 Me. 152; Hooper *v.* Brundage, 22 Me. 460.

Massachusetts.— Ocean Ins. Co. *v.* Rider, 22 Pick. (Mass.) 210.

Michigan.— Kinney *v.* Tabor, 62 Mich. 517, 29 N. W. 86, 512.

New Hampshire.— Whitcomb *v.* Straw, 62 N. H. 650; Rowe *v.* Langley, 49 N. H. 395; Wells *v.* Hatch, 43 N. H. 246; Currier *v.* Boston, etc., R. Co., 37 N. H. 223; Wright *v.* Cobleigh, 21 N. H. 339.

New Jersey.— Holmes *v.* Sinnickson, 15 N. J. L. 313.

Texas.— Texas Mexico R. Co. *v.* Showalter, 3 Tex. App. Civ. Cas. § 69.

Vermont.— Walker *v.* Sargeant, 14 Vt. 247; Heartt *v.* Chipman, 2 Aik. (Vt.) 162.

Wisconsin.— Rice *v.* Garnhart, 35 Wis. 282.

United States.—Massachusetts, etc., Constr. Co. *v.* Gill's Creek Tp., 48 Fed. 145.

See 5 Cent. Dig. tit. "Attorney and Client," § 395.

47. Fees, costs, and disbursements.—*Alabama.*— Mosely *v.* Norman, 74 Ala. 422; Warfield *v.* Campbell, 38 Ala. 527, 82 Am. Dec. 724.

Arkansas.— Compton *v.* State, 38 Ark. 601; Waters *v.* Grace, 23 Ark. 118; Sexton *v.* Pike, 13 Ark. 193.

Colorado.— Johnson *v.* McMillan, 13 Colo. 423, 22 Pac. 769.

Florida.— Carter *v.* Davis, 8 Fla. 183.

Maine.— Stratton *v.* Hussey, 62 Me. 286.

Minnesota.— Crowley *v.* Le Duc, 21 Minn. 412.

New York.— Brown *v.* New York, 11 Hun (N. Y.) 21; Whittaker *v.* New York, etc., R. Co., 54 N. Y. Super. Ct. 8, 11 N. Y. Civ. Proc. 189, 18 Abb. N. Cas. (N. Y.) 11; Albert Palmer Co. *v.* Van Orden, 49 N. Y. Super. Ct. 89, 4 N. Y. Civ. Proc. 44, 64 How. Pr. (N. Y.) 79; Crotty *v.* McKenzie, 42 N. Y. Super. Ct. 192, 52 How. Pr. (N. Y.) 54; Ackerman *v.* Ackerman, 11 Abb. Pr. (N. Y.) 256; Haight *v.* Holcomb, 7 Abb. Pr. (N. Y.) 210, 16 How. Pr. (N. Y.) 160.

Pennsylvania.— Springer's Estate, 33 Pittsb. Leg. J. (Pa.) 363.

Vermont.— Weed Sewing Mach. Co. *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

West Virginia.— Renick *v.* Ludington, 16 W. Va. 378.

United States.— Texas *v.* White, 10 Wall. (U. S.) 483, 19 L. ed. 992; McDougall *v.* Hazelton Tripod-Boiler Co., 88 Fed. 217, 60 U. S. App. 209, 31 C. C. A. 487; Tuttle *v.* Claflin, 86 Fed. 964; *In re* Wilson, 12 Fed. 235.

See 5 Cent. Dig. tit. "Attorney and Client," § 394.

Costs of enforcement.— The lien covers the cost of enforcing it. Newbert *v.* Cunningham, 50 Me. 231, 79 Am. Dec. 612; Com. *v.* Terry, 11 Pa. Super. Ct. 547. *Contra*, Rodgers *v.* Hamilton, 49 Ga. 604.

Prospective fee.— The lien only extends to claims for services which have been performed. Walker *v.* Floyd, 30 Ga. 237; Massachusetts, etc., Constr. Co. *v.* Gill's Creek Tp., 48 Fed. 145.

48. Charging lien.— *Alabama.*— Mosely *v.* Norman, 74 Ala. 422; Jackson *v.* Clopton, 66 Ala. 29.

Arkansas.—Davis *v.* Webber, 66 Ark. 190, 49 S. W. 822, 74 Am. St. Rep. 81, 45 L. R. A. 81; Porter *v.* Hanson, 36 Ark. 591; Waters *v.* Grace, 23 Ark. 118.

Georgia.— McDonald *v.* Napier, 14 Ga. 89.

Minnesota.— Forbush *v.* Leonard, 8 Minn. 303.

Mississippi.— Cage *v.* Wilkinson, 3 Sm. & M. (Miss.) 223; Pope *v.* Armstrong, 3 Sm. & M. (Miss.) 214.

Nebraska.— Oliver *v.* Sheeley, 11 Nebr. 521, 9 N. W. 689.

New York.— Williams *v.* Ingersoll, 89 N. Y. 508; Brown *v.* New York, 11 Hun

But an attorney has a general possessory lien for costs, disbursements, and fees, whether they grow out of the same transaction as that in which the possession in question was obtained, or not.[49]

4. Notice of Lien — a. Necessity. In some jurisdictions, notice that a lien is claimed must be given,[50] unless the person against whom it is asserted has knowledge of the claim, or is charged with facts which put him on inquiry.[51] In others the pendency of the suit is sufficient notice — at least, as against the judgment debtor.[52]

(N. Y.) 21; Adams *v.* Fox, 40 Barb. (N. Y.) 442; Anderson *v.* De Breckeleer, 25 Misc. (N. Y.) 343, 55 N. Y. Suppl. 721, 28 N. Y. Civ. Proc. 306; Phillips *v.* Stagg, 2 Edw. (N. Y.) 108.

West Virginia.— Fowler *v.* Lewis, 36 W. Va. 112, 14 S. E. 447.

United States.— Foster *v.* Danforth, 59 Fed. 750; Massachusetts, etc., Constr. Co. *v.* Gill's Creek Tp., 48 Fed. 145; *In re* Wilson, 12 Fed. 235.

Canada.— Canadian Commerce Bank *v.* Crouch, 8 Ont. Pr. 437.

See 5 Cent. Dig. tit. "Attorney and Client," § 397.

Services connected with main cause.— The lien applies to other suits necessarily connected with the main cause (Warren Deposit Bank *v.* Barclay, 22 Ky. L. Rep. 1555, 60 S. W. 853; Butchers' Union Slaughterhouse, etc., Co. *v.* Crescent City Live Stock Landing, etc., Co., 41 La. Ann. 355, 6 So. 508; Newbert *v.* Cunningham, 50 Me. 231, 79 Am. Dec. 612; Stoddard *v.* Lord, 36 Oreg. 412, 59 Pac. 710; Blair *v.* Harrison, 57 Fed. 257, 6 C. C. A. 326. *Compare* Adams *v.* Kehlor Milling Co., 38 Fed. 281) as test cases (Greeff *v.* Miller, 87 Fed. 33).

Services in lower court.— The lien applies to services in the same suit in a lower court. Weaver *v.* Cooper, 73 Ala. 318.

49. Possessory lien.—*Alabama.*— Mosely *v.* Norman, 74 Ala. 422.

Connecticut.— See Cooke *v.* Thresher, 51 Conn. 105.

Georgia.— *Compare* McDonald *v.* Napier, 14 Ga. 89.

New York.— Matter of H——, 87 N. Y. 521; Krone *v.* Klotz, 3 N. Y. App. Div. 587, 38 N. Y. Suppl. 225, 73 N. Y. St. 719, 25 N. Y. Civ. Proc. 320, 3 N. Y. Annot. Cas. 36; Schwartz *v.* Jenney, 21 Hun (N. Y.) 33.

Tennessee.— McDonald *v.* Charleston, etc., R. Co., 93 Tenn. 281, 24 S. W. 252.

Vermont.— Weed Sewing Mach. Co. *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821; Hurlbert *v.* Brigham, 56 Vt. 368; Hooper *v.* Welch, 43 Vt. 169, 5 Am. Rep. 267.

United States.—McPherson *v.* Cox, 96 U. S. 404, 24 L. ed. 746; Texas *v.* White, 10 Wall. (U. S.) 483, 19 L. ed. 992; Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 52 Fed. 526; *In re* Wilson, 12 Fed. 235.

Breach of agreement.— The lien does not cover damages for breach of a client's agreement concerning a professional matter. Lorillard *v.* Barnard, 42 Hun (N. Y.) 545.

50. Actual notice.—*Arkansas.*—See Porter *v.* Hanson, 36 Ark. 591.

Colorado.— Johnson *v.* McMillan, 13 Colo. 423, 22 Pac. 769; Fillmore *v.* Wells, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567; Boston, etc., Smelting Co. *v.* Pless, 9 Colo. 112, 10 Pac. 652.

Iowa.— Jennings *v.* Bacon, 84 Iowa 403, 51 N. W. 15; Phillips *v.* Germon, 43 Iowa 101; Hurst *v.* Sheets, 21 Iowa 501; Casar *v.* Sargent, 7 Iowa 317.

Minnesota.—Dodd *v.* Brott, 1 Minn. 270, 66 Am. Dec. 541.

Nebraska.— Cobbey *v.* Dorland, 50 Nebr. 373, 69 N. W. 951.

New Hampshire.— Grant *v.* Hazeltine, 2 N. H. 541.

New Jersey.— Braden *v.* Ward, 42 N. J. L. 518. See also Black *v.* Black, 32 N. J. Eq. 74.

Oregon.— Day *v.* Larsen, 30 Oreg. 247, 47 Pac. 101.

West Virginia.— Renick *v.* Ludington, 16 W. Va. 378.

Wisconsin.— Voell *v.* Kelly, 64 Wis. 504, 25 N. W. 536; Courtney *v.* McGavock, 23 Wis. 619.

United States.— Patrick *v.* Leach, 3 McCrary (U. S.) 555, 17 Fed. 476.

See 5 Cent. Dig. tit. "Attorney and Client," § 390.

51. Facts charging notice.—Davidson *v.* La Plata County, 26 Colo. 549, 59 Pac. 46; Cones *v.* Brooks, 60 Nebr. 698, 84 N. W. 85; Lake *v.* Ingham, 3 Vt. 158.

Lien declared in decree.— Notice is not necessary where the lien is declared in the decree. Whittle *v.* Tarver, 75 Ga. 818.

A statement in a deed of land is sufficient notice to the purchaser as to a lien. Fry *v.* Calder, 74 Ga. 7.

Mere knowledge of the former employment of an attorney is not notice of a lien. Manning *v.* Leighton, 65 Vt. 84, 26 Atl. 258, 24 L. R. A. 684. But see Gammon *v.* Chandler, 30 Me. 152.

52. Pendency of suit as notice.—*Georgia.*— Under Ga. Code, § 1989, the only notice necessary to a defendant in a pending action of the lien of plaintiff's attorney on the suit and its proceeds is knowledge of the fact that the suit is pending. Little *v.* Sexton, 89 Ga. 411, 15 S. E. 490.

Kentucky.— Stephens *v.* Farrar, 4 Bush (Ky.) 13.

Maine.— Newbert *v.* Cunningham, 50 Me. 231, 79 Am. Dec. 612; Hobson *v.* Watson, 34 Me. 20, 56 Am. Dec. 632; Stone *v.* Hyde, 22 Me. 318.

New York.— Under N. Y. Code Civ. Proc. § 66, providing a lien on a cause of action, notice of the lien is unnecessary. Keeler *v.* Keeler, 51 Hun (N. Y.) 505, 4 N. Y. Suppl. 580, 21 N. Y. St. 666; Jenkins *v.* Adams, 22

b. Persons Entitled to Notice. If notice is required it must be given to the adverse party in order to protect the attorney's lien,[53] but need not be given to the client, to any purchaser of the judgment,[54] or to one who attaches the judgment under garnishment process.[55]

c. Requisites and Sufficiency — (I) *In General.* The notice need not state the sum claimed,[56] unless the amount of compensation has been specially agreed upon,[57] but it must be a notice of a lien,[58] and must be explicit to pay to the attorney.[59]

(II) *Statutory Provisions.* Provision is sometimes made by statute for giving notice of a lien, as by entering it on the docket[60] or filing it with the clerk.[61]

Hun (N. Y.) 600; Albert Palmer Co. *v.* Van Orden, 49 N. Y. Super. Ct. 89, 4 N. Y. Civ. Proc. 44, 64 How. Pr. (N. Y.) 79; Fenwick *v.* Mitchell, 34 Misc. (N. Y.) 617, 70 N. Y. Suppl. 667; Vrooman *v.* Pickering, 25 Misc. (N. Y.) 277, 54 N. Y. Suppl. 389, 28 N. Y. Civ. Proc. 302; Kipp *v.* Rapp, 7 N. Y. Civ. Proc. 316; *In re* Bailey, 4 N. Y. Civ. Proc. 140; Moloughney *v.* Kavanagh, 3 N. Y. Civ. Proc. 253. This provision, however, protects only taxable costs. Bailey *v.* Murphy, 4 N. Y. Suppl. 579, 22 N. Y. St. 102; Stahl *v.* Wadsworth, 10 N. Y. St. 228, 13 N. Y. Civ. Proc. 32. *Compare* Peri *v.* New York Cent., etc., R. Co., 152 N. Y. 521, 46 N. E. 849. Prior to the adoption of this provision notice was a prerequisite. Wright *v.* Wright, 70 N. Y. 98; Pulver *v.* Harris, 52 N. Y. 73; Walsh *v.* Flatbush, etc., R. Co., 11 Hun (N. Y.) 190; Crotty *v.* McKenzie, 42 N. Y. Super. Ct. 192, 52 How. Pr. (N. Y.) 54; Stahl *v.* Wadsworth, 10 N. Y. St. 228, 13 N. Y. Civ. Proc. 32; Lablache *v.* Kirkpatrick, 8 N. Y. Civ. Proc. 256; *In re* Bailey, 4 N. Y. Civ. Proc. 140; Ackerman *v.* Ackerman, 14 Abb. Pr. (N. Y.) 229; McKenzie *v.* McKenzie, 21 How. Pr. (N. Y.) 467; People *v.* Hardenbergh, 8 Johns. (N. Y.) 335; Pinder *v.* Morris, 3 Cai. (N. Y.) 165, Col. & C. Cas. (N. Y.) 489.

Tennessee.— Covington *v.* Bass, 88 Tenn. 496, 12 S. W. 1033; Pierce *v.* Lawrence, 16 Lea (Tenn.) 572, 1 S. W. 204; Vaughn *v.* Vaughn, 12 Heisk. (Tenn.) 472; Hunt *v.* McClanahan, 1 Heisk. (Tenn.) 503.

Vermont.— See Weed Sewing Mach. Co. *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

United States.— Mahone *v.* Southern Tel. Co., 33 Fed. 702.

53. Notice to adverse party.— Renick *v.* Ludington, 16 W. Va. 378.

Notice to agent.— Service on a depot-master is not service on the corporation for which he is working. Kansas Pac. R. Co. *v.* Thacher, 17 Kan. 92. So, of the local agent of a foreign insurance corporation or the insurance commissioner. Weed Sewing Mach. Co. *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

Notice to defendant's attorney is insufficient; it must be delivered to defendant personally. Wright *v.* Wright, 7 Daly (N. Y.) 62.

Notice to member of firm.—Where an attorney, who was a member of a firm composed of three persons, received from a railway company a draft to deliver to a third person in the settlement of a suit, and in such suit none of the members of the firm represented the railway company, a notice of a lien served upon a member of the firm other than the one who actually received the draft will not be notice upon the attorney receiving the draft. St. Louis, etc., R. Co. *v.* Bennett, 35 Kan. 395, 11 Pac. 155.

In Iowa notice may be served on any one upon whom original notice of the suit could be served. Smith *v.* Chicago, etc., R. Co., 56 Iowa 720, 10 N. W. 244.

54. Notice to purchaser of judgment.—McCain *v.* Portis, 42 Ark. 402; Sayre *v.* Thompson, 18 Nebr. 33, 24 N. W. 383; Renick *v.* Ludington, 16 W. Va. 378.

Fund in court.— The court will not, without notice to the client, enforce the lien by granting the attorney's application for payment out of funds in the hands of the court. Black *v.* Black, 32 N. J. Eq. 74; Atty.-Gen. *v.* North America L. Ins. Co., 93 N. Y. 387.

55. Notice under garnishment process.— Weed Sewing Mach. Co. *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

56. Crowley *v.* Le Duc, 21 Minn. 412, holding that a notice is sufficient if it fairly inform the party that a lien is claimed, its nature and character, for what it is claimed, and upon what it is intended to be enforced.

An indorsement on the summons in an action has been held insufficient (Cobbey *v.* Dorland, 50 Nebr. 373, 69 N. W. 951); but a proper notice may be included in a summons in an action (Smith *v.* Chicago, etc., R. Co., 56 Iowa 720, 10 N. W. 244).

The notice covers only what is stated in it (Griggs *v.* White, 5 Nebr. 467); but a single notice that a lien is claimed is sufficient to cover all services rendered in the action, whether before or after the service of the notice (Smith *v.* Chicago, etc., R. Co., 56 Iowa 720, 10 N. W. 244).

57. Forbush *v.* Leonard, 8 Minn. 303.

58. Elliott *v.* Atkins, 26 Nebr. 403, 42 N. W. 403, holding that notice of a contract between the attorney and client is insufficient. But see Fry *v.* Calder, 74 Ga. 7.

59. Connell *v.* Brumback, 18 Ohio Cir. Ct. 502, holding that mere notice that the attorney claims an interest in the settlement is insufficient.

60. Entry on docket.—Day *v.* Bowman, 109 Ind. 383, 10 N. E. 126; Hroch *v.* Aultman, 3 S. D. 477, 54 N. W. 269.

61. Filing with clerk.— Elliott *v.* Atkins, 26 Nebr. 403, 42 N. W. 403; Griggs *v.* White, 5 Nebr. 467; Wooding *v.* Crain, 11 Wash. 207, 39 Pac. 442. But where there is no statute

With such statutory provisions it has been held that there must be a strict compliance.[62]

5. Time of Attachment — a. In General. Unless otherwise regulated by statute,[63] a charging lien does not usually attach until the recovery of judgment.[64] A contingent judgment will not be subject to the lien until the contingency is satisfied.[65]

b. Appeal From Judgment. An appeal from a judgment suspends the lien,[66] unless the appeal does not operate to vacate the judgment.[67]

6. What Law Governs. The lien of an attorney will be enforced and adjudicated according to the law of the state where the lien attached.[68]

providing for notice by filing with the clerk, such filing is ineffectual (Durango State Bank *v.* Davidson, 7 Colo. App. 91, 42 Pac. 687), unless the party affected has actual notice of it (Davidson *v.* La Plata County, 26 Colo. 549, 59 Pac. 46).

62. Compliance with statute.—Alderman *v.* Nelson, 111 Ind. 255, 12 N. E. 394; Day *v.* Bowman, 109 Ind. 383, 10 N. E. 126; Lavender *v.* Atkins, 20 Nebr. 206, 29 N. W. 467; Kreuzen *v.* Forty-Second St., etc., R. Co., 13 N. Y. Suppl. 588, 38 N. Y. St. 461; Wooding *v.* Crain, 11 Wash. 207, 39 Pac. 442. But see Porter *v.* Hanson, 36 Ark. 591, holding that a statute requiring the filing of a statement of the lien in writing, and having the same noted, extends only to protect those who in good faith, and without notice, make payment on the judgment.

Notice in writing.—Where the statute requires it, the notice should be in writing. Kansas Pac. R. Co. *v.* Thacher, 17 Kan. 92; Patrick *v.* Leach, 3 McCrary (U. S.) 555, 17 Fed. 476.

Where notice is to be placed in the docket on entry of judgment, notice on the day following the entry is sufficient. Blair *v.* Lanning, 61 Ind. 499.

63. In some states the lien exists on the cause of action from the institution of the suit. Lovett *v.* Moore, 98 Ga. 158, 26 S. E. 498; Winchester *v.* Heiskell, 16 Lea (Tenn.) 556. See also Ward *v.* Sherbondy, 96 Iowa 477, 65 N. W. 413; Patrick *v.* Leach, 2 McCrary (U. S.) 635, 12 Fed. 661, which cases hold that the lien arises on notice to the opposite party, whether before or after judgment.

In New York, by Code Civ. Proc. § 66, the lien attaches to a report but not to a report on a reference which is in the nature of a motion. Jones *v.* Easton, 11 Abb. N. Cas. (N. Y.) 114.

64. Recovery of judgment.— *Alabama.*— Mosely *v.* Norman, 74 Ala. 422.

Connecticut.— Andrews *v.* Morse, 12 Conn. 444, 31 Am. Dec. 752.

Illinois.— Henchey *v.* Chicago, 41 Ill. 136.

Indiana.— Hanna *v.* Island Coal Co., 5 Ind. App. 163, 31 N. E. 846, 51 Am. St. Rep. 246.

Kentucky.— Bell *v.* Wood, 7 Ky. L. Rep. 516; Stewart *v.* Louisville, etc., R. Co., 4 Ky. L. Rep. 718.

Maine.— Averill *v.* Longfellow, 66 Me. 237; Newbert *v.* Cunningham, 50 Me. 231, 79 Am. Dec. 612; Hobson *v.* Watson, 34 Me. 20, 56 Am. Dec. 632; Potter *v.* Mayo, 3 Me. 34, 14 Am. Dec. 211.

Massachusetts.— Simmons *v.* Almy, 103 Mass. 33; Getchell *v.* Clark, 5 Mass. 309.

Michigan.— Voigt Brewery Co. *v.* Donovan, 103 Mich. 190, 61 N. W. 343.

Nebraska.— Abbott *v.* Abbott, 18 Nebr. 503, 26 N. W. 361.

New Hampshire.—Wells *v.* Hatch, 43 N. H. 246.

New York.— Pulver *v.* Harris, 52 N. Y. 73; Brown *v.* New York, 11 Hun (N. Y.) 21; Brown *v.* Comstock, 10 Barb. (N. Y.) 67; McDowell *v.* Second Ave. R. Co., 4 Bosw. (N. Y.) 670; Sweet *v.* Bartlett, 4 Sandf. (N. Y.) 661; Oliwell *v.* Verdenhalven, 7 N. Y. Suppl. 99, 26 N. Y. St. 115, 17 N. Y. Civ. Proc. 362; Wade *v.* Orton, 12 Abb. Pr. N. S. (N. Y.) 444; Lansing *v.* Ensign, 62 How. Pr. (N. Y.) 363; Sullivan *v.* O'Keefe, 53 How. Pr. (N. Y.) 426; Sherwood *v.* Buffalo, etc., R. Co., 12 How. Pr. (N. Y.) 136; Benedict *v.* Harlow, 5 How. Pr. (N. Y.) 347; Talcott *v.* Bronson, 4 Paige (N. Y.) 501.

Utah.— Sandberg *v.* Victor Gold, etc., Min. Co., 18 Utah 66, 55 Pac. 74.

Vermont.— Weed Sewing Mach. Co. *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821; Hutchinson *v.* Pettes, 18 Vt. 614; Foot *v.* Tewksbury, 2 Vt. 97.

Wisconsin.— Courtney *v.* McGavock, 23 Wis. 619.

United States.— Swanston *v.* Morning Star Min. Co., 4 McCrary (U. S.) 241, 13 Fed. 215; Peterson *v.* Watson, Blatchf. & H. Adm. 487, 19 Fed. Cas. No. 11,037.

See 5 Cent. Dig. tit. "Attorney and Client," § 385.

A certificate from the law court making a final disposition of a cause on its merits is a final judgment, on which lien arises. Cooly *v.* Patterson, 52 Me. 472.

65. Contingent judgment.— Usry *v.* Usry, 64 Ga. 579.

66. Bell *v.* Wood, 7 Ky. L. Rep. 516; Pulver *v.* Harris, 52 N. Y. 73; Sweet *v.* Bartlett, 4 Sandf. (N. Y.) 661.

Appeal from taxation of costs.— The judgment lien attaches to the judgment, although an appeal from the taxation of costs is still pending. Cooly *v.* Patterson, 52 Me. 472.

67. Covington *v.* Bass, 88 Tenn. 496, 12 S. W. 1033.

68. Citizens Nat. Bank *v.* Culver, 54 N. H. 327, 20 Am. Rep. 134. See also Matter of King, 34 Misc. (N. Y.) 10, 69 N. Y. Suppl.

E. Continuance or Termination of Lien — 1. In General. The lien, being a contractual right, survives the death of the client.[69] The lien likewise survives where the judgment becomes dormant and is subsequently revived by other attorneys.[70] It has also been held that the bankruptcy of a client does not affect the lien on papers for services performed prior to the filing of the petition in bankruptcy.[71] A reversal of the judgment, however, annuls the lien.[72]

2. Discharge of Attorney. The client cannot by discharging the attorney deprive him of his lien, unless the discharge was with good cause.[73]

3. Withdrawal by Attorney. An attorney who withdraws from a suit without cause loses his inchoate right to a lien on the ultimate recovery.[74]

4. Waiver of Lien — a. In General. If an attorney agrees to a waiver, either expressly or by some act inconsistent with the existence of the lien,[75]

399, holding that the lien should be declared, if possible, in the state where it arose.

69. Death of client.— Peetsch *v.* Quinn, 6 Misc. (N. Y.) 52, 26 N. Y. Suppl. 729, 56 N. Y. St. 607; Aycinena *v.* Peries, 6 Watts & S. (Pa.) 243; Hurlbert *v.* Brigham, 56 Vt. 368.

As to abatement of action or proceeding by death of party, generally, see Abatement and Revival, 1 Cyc. 47.

70. Revival of judgment.— Jenkins *v.* Stephens, 60 Ga. 216.

71. Bankruptcy of client.—*In re* Brown, 4 Fed. Cas. No. 1,984, 5 Law Rep. 324, 1 N. Y. Leg. Obs. 69; Lambert *v.* Buckmaster, 2 B. & C. 616, 4 D. & R. 125, 2 L. J. K. B. O. S. 93, 9 E. C. L. 270; *Ex p.* Lee, 2 Ves. Jr. 285.

The appointment of a receiver of a mortgagee pending foreclosure proceedings does not affect the attorney's lien for services in the foreclosure process. Bowling Green Sav. Bank *v.* Todd, 64 Barb. (N. Y.) 146.

72. Dunlap *v.* Burnham, 38 Me. 112.

73. Hudson Trust, etc., Inst. *v.* Carr-Curran Paper Mills, (N. J. 1899) 44 Atl. 638; Grant *v.* Langley, 68 N. Y. Suppl. 820; Cowdrey *v.* Galveston, etc., R. Co., 93 U. S. 352, 23 L. ed. 950; Griffiths *v.* Griffiths, 2 Hare 587, 7 Jur. 573, 12 L. J. Ch. 397, 24 Eng. Ch. 587; Bozon *v.* Balland, 3 Jur. 884, 4 Jur. 763, 9 L. J. Ch. 123, 4 Myl. & C. 354, 18 Eng. Ch. 354; Newton *v.* Harland, 4 Scott N. R. 769.

A lien on a fund in court survives a discharge. Phillips *v.* Sherburne, 30 Ill. App. 327.

On substitution of attorneys an order is proper, protecting the lien of the first attorney. Jeffards *v.* Brooklyn Heights R. Co., 49 N. Y. App. Div. 45, 63 N. Y. Suppl. 530. The lien should be restricted to the papers in his hands, and should not include the charging lien in any form. Hinman *v.* Devlin, 40 N. Y. App. Div. 234, 57 N. Y. Suppl. 1037.

74. White *v.* Harlow, 5 Gray (Mass.) 463; Halbert *v.* Gibbs, 16 N. Y. App. Div. 126, 45 N. Y. Suppl. 113, 4 N. Y. Annot. Cas. 232; Tuck *v.* Manning, 53 Hun (N. Y.) 455, 6 N. Y. Suppl. 140, 25 N. Y. St. 130, 17 N. Y. Civ. Proc. 175; Hektograph Co. *v.* Fourl, 11 Fed. 844. See also Morgan *v.* Roverts, 38 Ill. 65.

A refusal to proceed unless his claim for past services is paid is not adequate cause for withdrawal. Tuck *v.* Manning, 53 Hun (N. Y.) 455, 6 N. Y. Suppl. 140, 25 N. Y. St. 130, 17 N. Y. Civ. Proc. 175.

An existing lien on papers is preserved on withdrawal. Hektograph Co. *v.* Fourl, 11 Fed. 844. See also Heslop *v.* Metcalf, 1 Jur. 816, 7 L. J. Ch. 49, 3 Myl. & C. 183, 14 Eng. Ch. 183; Cresswell *v.* Byron, 14 Ves. Jr. 271, 9 Rev. Rep. 275.

75. Express or implied waiver.—*Arkansas.* — Trapnall *v.* Byrd, 22 Ark. 10.

Georgia.— Speer *v.* Matthews, 78 Ga. 757, 3 S. E. 644.

Iowa.— Cowen *v.* Boone, 48 Iowa 350.

New York.— West *v.* Bacon, 164 N. Y. 425, 58 N. E. 522; Goodrich *v.* McDonald, 112 N. Y. 157, 19 N. E. 649, 20 N. Y. St. 509; Matter of King, 61 N. Y. App. Div. 152, 70 N. Y. Suppl. 356; Matter of Evans, 34 Misc. (N. Y.) 37, 69 N. Y. Suppl. 487.

Tennessee.—Cantrell *v.* Ford, (Tenn. 1898) 46 S. W. 581.

West Virginia.— Renick *v.* Ludington, 16 W. Va. 378.

Illustrations.—A denial of the client's title is a waiver (Boardman *v.* Sill, 1 Campb. 410 note), or a claim apart from lien on the property (Dirks *v.* Richards, C. & M. 626, 6 Jur. 562, 4 M. & G. 574, 5 Scott N. R. 534, 41 E. C. L. 340), or giving credit for a particular time (Stoddard Woolen Manufactory *v.* Huntley, 8 N. H. 441, 31 Am. Dec. 198), or allowing the client to stipulate that the judgment shall be subject to a lien in favor of a third party (McClare *v.* Lockard, 121 N. Y. 308, 24 N. E. 453, 31 N. Y. St. 69). So, collecting a draft waives the lien on it (Lawrence *v.* Townsend, 88 N. Y. 24); but the lien is not waived by a refusal to deliver property held under it (Owen *v.* Knight, 4 Bing. N. Cas. 54, 6 Dowl. P. C. 245, 7 L. J. C. P. 27, 5 Scott 307, 33 E. C. L. 593), or by a claim of more than is due (Scarfe *v.* Morgan, 1 H. & H. 292, 2 Jur. 569, 7 L. J. Exch. 324, 4 M. & W. 270), by acquiescence in an assignment of the judgment (Hutchinson *v.* Worthington, 7 App. Cas. (D. C.) 548; Kinsey *v.* Stewart, 14 Tex. 457; Niagara F. Ins. Co. *v.* Hart, 13 Wash. 651, 43 Pac. 937), or by permitting others to enforce liens on the property in question (Coleman *v.* Austin, 99 Ga. 629, 27 S. E. 763).

or if he accepts security for it,[76] or is guilty of laches in enforcing it,[77] he loses his lien.

b. Recovery of Judgment. An attorney waives his lien by suing his client on his claim for services, and recovering judgment.[78]

c. Relinquishment of Possession. As a possessory lien depends upon possession, it will be lost if possession is voluntarily relinquished,[79] unless such relinquishment was effected by the fraud or coercion of the client.[80]

F. Subject-Matter of Lien — 1. Charging Lien — a. In General. A statute giving the attorney a lien on a judgment he has recovered confers a lien on the money or property so recovered.[81] The lien also applies to any process incident

76. Acceptance of security.—Fulton *v.* Harrington, 7 Houst. (Del.) 182, 30 Atl. 856; *In re* Taylor, [1891] 1 Ch. 590; Cowell *v.* Simpson, 16 Ves. Jr. 275, 10 Rev. Rep. 181; Balch *v.* Symes, Turn. & R. 87, 23 Rev. Rep. 195, 12 Eng. Ch. 87.

The acceptance of an assignment of the judgment is a waiver of the lien. Whitehead *v.* Jessup, 7 Colo. App. 460, 43 Pac. 1042; Dodd *v.* Brott, 1 Minn. 270, 66 Am. Dec. 541; Bishop *v.* Garcia, 14 Abb. Pr. N. S. (N. Y.) 69. But if the assignment is set aside the lien revives. Swift *v.* Hart, 35 Hun (N. Y.) 128.

Accepting client's note or bond is not a taking of security which waives the lien (Davis *v.* Jackson, 86 Ga. 138, 12 S. E. 299; Pope *v.* Armstrong, 3 Sm. & M. (Miss.) 214; Johnson *v.* Johnson R. Signal Co., 57 N. J. Eq. 79, 40 Atl. 193; Renick *v.* Ludington, 16 W. Va. 378), unless the note or bond is taken as payment (Dennett *v.* Cutts, 11 N. H. 163).

77. Laches.—Winans *v.* Mason, 33 Barb. (N. Y.) 522, 21 How. Pr. (N. Y.) 153. See also Guild *v.* Borner, 7 Baxt. (Tenn.) 266, holding that failure to have the lien declared on property covered by it at the termination of the suit will prevent the attorney from enforcing it in any way, even in chancery. But see Stone *v.* Hyde, 22 Me. 318, holding that delay without negligence will not discharge the lien.

Claim barred by limitations.— The lien on the judgment is destroyed when the attorney's claim for services is barred by the statute of limitations. Reavey *v.* Clark, 9 N. Y. Suppl. 216, 30 N. Y. St. 535, 18 N. Y. Civ. Proc. 272. The rule is otherwise as to an attorney's rights under a possessory lien. Higgins *v.* Scott, 2 B. & Ad. 413, 9 L. J. K. B. O. S. 262, 22 E. C. L. 176; *In re* Broomhead, 5 Dowl. & L. 52, 16 L. J. Q. B. 355. The statute does not run against an attorney's bill for fees until the dissolution of the relation between him and his client. Lichty *v.* Hugus, 55 Pa. St. 434.

78. Jones *v.* Muskegon County Cir. Judge, 95 Mich. 289, 54 N. W. 876; Commercial Telegram Co. *v.* Smith, 57 Hun (N. Y.) 176, 10 N. Y. Suppl. 433, 32 N. Y. St. 445, 19 N. Y. Civ. Proc. 32; Beech *v.* Canaan, 14 Vt. 485; *Ex p.* Solomon, 1 Glyn & J. 25.

Suit on other claims.— But the lien is not lost by suing the client on other claims. Commercial Telegram Co. *v.* Smith, 57 Hun (N. Y.) 176, 10 N. Y. Suppl. 433, 32 N. Y. St. 445, 19 N. Y. Civ. Proc. 32.

79. Nichols *v.* Pool, 89 Ill. 491. See, generally, Liens.

Delivery for temporary purpose.— The lien will be preserved though changed in kind, by a delivery of the property for a temporary purpose to the client, without prejudice to the attorney's lien. Blunden *v.* Desart, 2 Con. & Law. 111, 2 Drury & Warr. 405, 5 Ir. Eq. 221. See also Aycinena *v.* Peries, 6 Watts & S. (Pa.) 243; *In re* Wilson, 12 Fed. 235.

Delivery under order of court.— Delivery to a receiver of the client under order of court, with notice of the lien, does not dissolve the lien. Cory *v.* Harte, 13 Daly (N. Y.) 147.

80. Dicas *v.* Stockley, 7 C. & P. 587, 32 E. C. L. 773.

81. Durango State Bank *v.* Davidson, 7 Colo. App. 91, 42 Pac. 687; Johnson *v.* Breckinridge, 4 Ky. L. Rep. 994; *In re* Wilson, 12 Fed. 235.

The word "recovered" in a statute or agreement includes any property obtained as a result of a suit, whether or not directly involved in it. Willoughby *v.* Mackall, 5 App. Cas. (D. C.) 162 [*affirmed* in 167 U. S. 681, 17 S. Ct. 954, 42 L. ed. 323]; McLean *v.* Lerch, 105 Tenn. 693, 58 S. W. 640.

Action ex delicto.— The lien may exist although the cause of action is for tort and the damages are unliquidated. Smith *v.* Chicago, etc., R. Co., 56 Iowa 720, 10 N. W. 244; Kansas Pac. R. Co. *v.* Thacher, 17 Kan. 92; Astrand *v.* Brooklyn Heights R. Co., 24 Misc. (N. Y.) 92, 53 N. Y. Suppl. 294, 28 N. Y. Civ. Proc. 113.

Alimony.— There can be no lien on alimony awarded (Branth *v.* Branth, 10 N. Y. Suppl. 638, 32 N. Y. St. 979, 19 N. Y. Civ. Proc. 28; Weill *v.* Weill, 10 N. Y. Suppl. 627, 18 N. Y. Civ. Proc. 241), unless the client consented to it (Putnam *v.* Tennyson, 50 Ind. 456).

Award of arbitrators.— The lien applies to an award of arbitrators to whom a pending suit is referred. Hutchinson *v.* Howard, 15 Vt. 544.

Award of damages.—A lien may be charged against an award of damages. Matter of Lexington Ave. No. 1, 30 N. Y. App. Div. 602, 52 N. Y. Suppl. 203; Grigg *v.* McNulty, 5 Misc. (N. Y.) 334, 25 N. Y. Suppl. 504, 55 N. Y. St. 210; Hutchinson *v.* Howard, 15 Vt. 544.

Judgment for costs.— The lien covers a judgment for costs (Matter of Lazelle, 16 Misc. (N. Y.) 515, 40 N. Y. Suppl. 343; Lesher *v.* Roessner, 3 Hun (N. Y.) 217, 5 Thomps. & C. (N. Y.) 674); but damages for delay are not costs (Sanborn *v.* Plowman, 20 Tex. Civ. App. 484, 49 S. W. 639).

to the enforcement of the judgment,[82] or to anything on which the judgment itself is a lien.[83] If nothing is recovered, or if there is no cause of action, there is nothing to which the lien can attach.[84]

b. Counter-Claim. A lien may exist on a counter-claim resulting in an affirmative judgment for defendant.[85]

c. Fund in Custody or Control of Court. While there is, strictly speaking, no lien on any fund which is within the custody or control of the court,[86] the court may award attorney's fees out of the fund.[87] Thus, counsel for a representative may receive remuneration out of the estate,[88] especially if he procures property for the estate;[89] but counsel for a beneficiary cannot claim payment out of the

82. Newbert *v.* Cunningham, 50 Me. 231, 79 Am. Dec. 612; Bickford *v.* Ellis, 50 Me. 121; Hobson *v.* Watson, 34 Me. 20, 56 Am. Dec. 632; Woolf *v.* Jacobs, 45 N. Y. Super. Ct. 583; Crouch *v.* Hoyt, 30 N. Y. Suppl. 406, 62 N. Y. St. 126, 24 N. Y. Civ. Proc. 60, 1 N. Y. Annot. Cas. 76 note; Kipp *v.* Rapp, 7 N. Y. Civ. Proc. 316, 2 How. Pr. N. S. (N. Y.) 169; Shackelton *v.* Hart, 12 Abb. Pr. (N. Y.) 325 note, 20 How. Pr. (N. Y.) 39; Leighton *v.* Serveson, 8 S. D. 350, 66 N. W. 938; Clark *v.* Sullivan, 3 N. D. 280, 55 N. W. 733. *Compare* Cornell *v.* Donovan, 14 Daly (N. Y.) 292.

Subjecting land to payment of judgment.— The lien does not apply to an equitable proceeding to enforce a judgment by subjecting land to its payment. Gribble *v.* Ford, (Tenn. Ch. 1898) 52 S. W. 1007; McCoy *v.* McCoy, 36 W. Va. 772, 15 S. E. 973.

83. Atlantic Sav. Bank *v.* Hetterick, 5 Thomps. & C. (N. Y.) 239.

84. Wilson *v.* House, 10 Bush (Ky.) 406; Kipp *v.* Rapp, 7 N. Y. Civ. Proc. 385, 2 How. Pr. N. S. (N. Y.) 169.

Claims against government.—There can be no lien, properly speaking, on money in the hands of the government. State *v.* Moore, 40 Nebr. 854, 59 N. W. 755, 25 L. R. A. 774; Manning *v.* Leighton, 65 Vt. 84, 26 Atl. 258, 24 L. R. A. 684; Burke *v.* Child, 21 Wall. (U. S.) 441, 22 L. ed. 623.

Setting apart homestead.— No lien arises on an application for the setting apart of a homestead. Haygood *v.* Dannenberg Co., 102 Ga. 24, 29 S. E. 293.

85. Merchants Nat. Bank *v.* Armstrong, 107 Ga. 479, 33 S. E. 473; Matter of Rowland, 55 N. Y. App. Div. 66, 66 N. Y. Suppl. 1121; White *v.* Sumner, 16 N. Y. App. Div. 70, 44 N. Y. Suppl. 692; Longyear *v.* Carter, 88 Hun (N. Y.) 513, 34 N. Y. Suppl. 785, 68 N. Y. St. 583, 2 N. Y. Annot. Cas. 192; Levis *v.* Burke, 51 Hun (N. Y.) 71, 3 N. Y. Suppl. 386, 20 N. Y. St. 789; Pierson *v.* Safford, 30 Hun (N. Y.) 521.

86. *New York.*— Atlantic Sav. Bank *v.* Hiler, 3 Hun (N. Y.) 209; Matter of Lamberson, 63 Barb. (N. Y.) 297; Hoyt's Estate, 12 N. Y. Civ. Proc. 208, 5 Dem. Surr. (N. Y.) 432.

North Carolina.—Mordecai *v.* Devereux, 74 N. C. 673.

Pennsylvania.— Dubois' Appeal, 38 Pa. St. 231, 80 Am. Dec. 478; Irwin *v.* Workman, 3 Watts (Pa.) 357.

West Virginia.—Fowler *v.* Lewis, 36 W. Va. 112, 14 S. E. 447.

United States.— U. S. *v.* Boyd, 79 Fed. 858; Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 46 Fed. 426.

87. Awarding fees out of fund.—McKelvy's Appeal, 108 Pa. St. 615; Weigand *v.* Alliance Supply Co., 44 W. Va. 133, 28 S. E. 803; Tuttle *v.* Claflin, 86 Fed. 964; Wardell *v.* Trenouth, 8 Ont. Pr. 142.

Nature of power.—The power to award fees is impersonal, acting on the *res* alone (Rumsey *v.* Peoples R. Co., 84 Mo. App. 508), so, where the *res* is beyond the control of the court, the attorney must seek some other remedy (Rawlings *v.* New Memphis Gaslight Co., (Tenn. 1900) 60 S. W. 206.

88. Counsel for representative.—*Alabama.* — Lehman *v.* Tallassee Mfg. Co., 64 Ala. 567.

Florida.— State *v.* Florida Cent. R. Co., 16 Fla. 703.

Illinois.— Abend *v.* McKendree College Endowment Fund Com'rs, 174 Ill. 96, 50 N. E. 1052 [*affirming* 74 Ill. App. 654].

Kentucky.— Stone *v.* Wilson, 22 Ky. L. Rep. 190, 56 S. W. 817.

Louisiana.— Wells' Succession, 24 La. Ann. 162.

New York.— Matter of Bailey, 31 Hun (N. Y.) 608.

Pennsylvania.— Newbaker *v.* Alricks, 5 Watts (Pa.) 183.

South Carolina.— Brooks *v.* Brooks, 16 S. C. 621; Nimmons *v.* Stewart, 13 S. C. 445.

Tennessee.— State *v.* Edgefield, etc., R. Co., 4 Baxt. (Tenn.) 92; Blount County Bank *v.* Smith, (Tenn. Ch. 1898) 48 S. W. 296. *Compare* Manson *v.* Stacker, (Tenn. Ch. 1896) 36 S. W. 188.

United States.— Needles *v.* Smith, 87 Fed. 316, 58 U. S. App. 276, 32 C. C. A. 226.

Counsel opposed to representative of estate. — The counsel for those who oppose the representative cannot be paid out of the estate.

Georgia.— Ball *v.* Vason, 56 Ga. 264.

Maryland.— Baltimore, etc., R. Co. *v.* Brown, 79 Md. 442, 29 Atl. 524.

Massachusetts.— Com. *v.* Mechanics Mut. F. Ins. Co., 122 Mass. 421.

Minnesota.— Dwinnell *v.* Badger, 74 Minn. 405, 77 N. W. 219; Merrick *v.* Bonness, 66 Minn. 135, 68 N. W. 850.

Pennsylvania.— Com. *v.* Order of Solon, 192 Pa. St. 487, 43 Atl. 1084; Newbaker *v.* Alricks, 5 Watts (Pa.) 183.

United States.—Hobbs *v.* McLean, 117 U. S. 567, 6 S. Ct. 870, 29 L. ed. 940.

89. Recovery for estate.—Spencer's Appeal, (Pa. 1887) 9 Atl. 523; Harrison *v.* Perea, 168 U. S. 311, 18 S. Ct. 129, 42 L. ed. 478.

estate,[90] though he may be paid out of his client's share,[91] or from the portions of those beneficiaries who have joined in the proceedings, or have acquiesced in the attorney's exertions.[92] The lien may also apply to a fund realized from a successful attempt to set aside a fraudulent conveyance.[93] But counsel has no lien on funds in the hands of a trustee as security for a client,[94] nor on a fund on which he levies when it was entirely covered by prior executions.[95]

d. Judgments of Courts Not of Record. A charging lien arises only in courts of record. Accordingly, a lien will not attach to a judgment of a probate,[96] municipal,[97] or justice's court,[98] unless such court is a court of record.[99]

e. Land. Whether the charging lien applies to land or other property which is the subject of the judgment and recovered for the client is a matter of dispute,[1]

Counsel for creditors of estate.— Where attorneys for certain creditors of an estate establish a fund for the estate, they may be paid out of such fund. Bristol-Goodson Electric Light, etc., Co. *v.* Bristol Gas, etc., Co., 99 Tenn. 371, 42 S. W. 19. *Compare* Rives *v.* Patty, 74 Miss. 381, 20 So. 862, 60 Am. St. Rep. 510.

90. Counsel for beneficiary.— Lawrence *v.* Townsend, 88 N. Y. 24.

91. Payment out of client's share.—Justice *v.* Justice, 115 Ind. 201, 16 N. E. 615; Kirk *v.* Breed, 4 Ohio Dec. 403, 3 Ohio N. P. 122; Coe *v.* Alabama East, etc., R. Co., 65 Fed. 16; *Ex p.* Plitt, 2 Wall. Jr. C. C. (U. S.) 453, 19 Fed. Cas. No. 11,228.

92. Abert *v.* Taylor, 18 Ky. L. Rep. 615, 37 S. W. 676; McGraw *v.* Canton, 74 Md. 554, 22 Atl. 132 [*distinguishing* Davis *v.* Gemmell, 73 Md. 530, 21 Atl. 712]; Howard *v.* Charleston First Nat. Bank, (Va. 1897) 27 S. E. 492; Georgia Cent. R., etc., Co. *v.* Pettus, 113 U. S. 116, 5 S. Ct. 387, 28 L. ed. 915; Mahone *v.* Southern Tel. Co., 33 Fed. 702.

93. Setting aside fraudulent conveyance.— Grant *v.* Lookout Mountain Co., 93 Tenn. 691, 28 S. W. 90, 27 L. R. A. 98; Boring *v.* Jobe, (Tenn. Ch. 1899) 53 S. W. 763; Adams *v.* Kehlor Milling Co., 38 Fed. 281.

94. Funds in hands of trustee.— Mooney *v.* Mooney, 29 Misc. (N. Y.) 707, 62 N. Y. Suppl. 769.

95. Prior levy of execution.— Mitchell *v.* Atkins, 71 Ga. 680.

96. Probate court.— McCaa *v.* Grant, 43 Ala. 262; Devin *v.* Patchin, 26 N. Y. 441; Adee *v.* Adee, 55 N. Y. App. Div. 63, 66 N. Y. Suppl. 1101; Flint *v.* Van Dusen, 26 Hun (N. Y.) 606; Smith *v.* Central Trust Co., 4 Dem. Surr. (N. Y.) 75.

97. Municipal court.— Drago *v.* Smith, 92 Hun (N. Y.) 536, 36 N. Y. Suppl. 975, 72 N. Y. St. 418; People *v.* Fitzpatrick, 35 Misc. (N. Y.) 456, 71 N. Y. Suppl. 191.

98. Justice's court.—Read *v.* Joselyn, Sheld. (N. Y.) 60.

99. Matter of Rowland, 55 N. Y. App. Div. 66, 66 N. Y. Suppl. 1121; Matter of Regan, 29 Misc. (N. Y.) 527, 61 N. Y. Suppl. 1074, 7 N. Y. Annot. Cas. 165.

Appellate court.— The granting of a lien is an exercise or original jurisdiction, and hence not within the power of a court having only appellate jurisdiction. Preston *v.* Daniels, 2 Greene (Iowa) 536.

1. *Alabama.*— *Contra,* McWilliams *v.* Jenkins, 72 Ala. 480; McCullough *v.* Flournoy, 69 Ala. 189; Lee *v.* Winston, 68 Ala. 402. *Compare* Higley *v.* White, 102 Ala. 604, 15 So. 141.

Arkansas.— McCain *v.* Portis, 42 Ark. 402; Lane *v.* Hallum, 38 Ark. 385. *Compare* Hanger *v.* Fowler, 20 Ark. 667.

Colorado.— Fillmore *v.* Wells, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567.

Georgia.— Wooten *v.* Denmark, 85 Ga. 578, 11 S. E. 861.

Illinois.— *Contra,* Humphrey *v.* Browning, 46 Ill. 476, 95 Am. Dec. 446.

Kentucky.— Eginton *v.* Rusk, 3 Ky. L. Rep. 689; Reid *v.* Punch, 2 Ky. L. Rep. 62.

Michigan.— See Kilbourne *v.* Wiley, 124 Mich. 370, 83 N. W. 99.

Mississippi.— *Contra,* Martin *v.* Harrington, 57 Miss. 208.

New York.— Adee *v.* Adee, 55 N. Y. App. Div. 63, 66 N. Y. Suppl. 1101; West *v.* Bacon, 13 N. Y. App. Div. 371, 43 N. Y. Suppl. 206.

Rhode Island.— *Contra,* Cozzens *v.* Whitney, 3 R. I. 79.

Tennessee.— Perkins *v.* Perkins, 9 Heisk. (Tenn.) 95; Hunt *v.* McClanahan, 1 Heisk. (Tenn.) 503; Brown *v.* Bigley, 3 Tenn. Ch. 618.

Vermont.—*Contra,* Smalley *v.* Clark, 22 Vt. 598.

West Virginia.— *Contra,* McCoy *v.* McCoy, 36 W. Va. 772, 15 S. E. 973; Hogg *v.* Dower, 36 W. Va. 200, 14 S. E. 995; Fowler *v.* Lewis, 36 W. Va. 112, 14 S. E. 447.

See 5 Cent. Dig. tit. "Attorney and Client," § 404.

Defeating the attempted probate of a will has been held to be a recovery of land for the heirs. Johnson *v.* Breckinridge, 4 Ky. L. Rep. 994. But the attorney for a legatee who obtains the probate of a will has no lien on the legacy. Fuller *v.* Cason, 26 Fla. 476, 7 So. 870; Gentile *v.* Plasencia, 10 La. Ann. 203.

Partition.— An allotment of land in partition will not give rise to a lien. Gladney *v.* Rush, 68 Ark. 80, 56 S. W. 448; Gibson *v.* Buckner, 65 Ark. 84, 44 S. W. 1034; Martin *v.* Kennedy, 83 Ky. 335; Cozzens *v.* Whitney, 3 R. I. 79. *Compare* Cooper *v.* Cooper, 27 Misc. (N. Y.) 595, 59 N. Y. Suppl. 86; New-

but it is distinctly established that it does not apply to property defended for the client.[2]

f. Proceeds of Judgment. The general equitable principle of following the *res* into whatever form it may be converted usually applies to the proceeds of a judgment.[3]

g. Property Exempt From Execution. The fact that property is exempt from execution does not relieve it from the lien.[4]

2. Possessory Lien — a. In General. If the relationship of attorney and client exists, the possessory lien will cover, in general, any property of any sort belonging to the client, and held by the attorney.[5] It includes ordinary legal documents of the client in the possession of the attorney,[6] or money collected by the attor-

baker *v.* Alricks, 5 Watts (Pa.) 183; Keith *v.* Fitzhugh, 15 Lea (Tenn.) 49.

2. This distinction is based on the words of the statute, which provide liens only on "recovery."

Alabama.— Lee *v.* Winston, 68 Ala. 402; Hinson *v.* Gamble, 65 Ala. 605.

Arkansas.—Greer *v.* Ferguson, 56 Ark. 324, 19 S. W. 966; Hershy *v.* Du Val, 47 Ark. 86, 14 S. W. 469.

Georgia.— Hodnett *v.* Bonner, 107 Ga. 452, 33 S. E. 416. But see Fry *v.* Calder, 74 Ga. 7, where it is said that defeating ninety per cent of the liens claimed on land is a "recovery" of the land within the statute.

Kentucky.— Greenhill *v.* Bowling, 13 Ky. L. Rep. 495; Eginton *v.* Rusk, 3 Ky. L. Rep. 689.

Louisiana.— Weil *v.* Levi, 40 La. Ann. 135, 3 So. 559.

Ohio.— Goslin *v.* Campbell, 7 Ohio Dec. (Reprint) 456, 3 Cinc. L. Bul. 369.

Tennessee.— Garner *v.* Garner, 1 Lea (Tenn.) 29.

3. *Alabama.*— Higley *v.* White, 102 Ala. 604, 15 So. 141.

Arkansas.— Porter *v.* Hanson, 36 Ark. 591.

California.— Hoffman *v.* Vallejo, 45 Cal. 564.

Florida.— Randall *v.* Archer, 5 Fla. 438.

Georgia.— May *v.* Sibley, 69 Ga. 133; Yarborough *v.* Lumpkin, 52 Ga. 280; Morrison *v.* Ponder, 45 Ga. 167.

Kentucky.— Isom *v.* Bell, 7 Ky. L. Rep. 589. *Compare* Morton *v.* Hallam, 89 Ky. 165, 11 Ky. L. Rep. 447, 12 S. W. 187.

New York.—Matter of Gates, 51 N. Y. App. Div. 350, 64 N. Y. Suppl. 1050. *Compare* Goodrich *v.* McDonald, 112 N. Y. 157, 19 N. E. 649, 20 N. Y. St. 509; Reavey *v.* Clark, 9 N. Y. Suppl. 216, 30 N. Y. St. 535, 18 N. Y. Civ. Proc. 272.

Tennessee.— Wright *v.* Dufield, 2 Baxt. (Tenn.) 218.

Virginia.— Fitzgerald *v.* Irby, 99 Va. 81, 37 S. E. 777.

Contra, Luneau *v.* Edwards, 39 La. Ann. 876, 6 So. 24; Stewart *v.* Flowers, 44 Miss. 513, 7 Am. Rep. 707.

4. Strohecker *v.* Irvine, 76 Ga. 639, 2 Am. St. Rep. 62.

5. *Kentucky.*— McIntosh *v.* Bach, (Ky. 1901) 62 S. W. 515.

Louisiana.— Hodges *v.* Ory, 48 La. Ann. 54, 18 So. 899.

Mississippi.— Stewart *v.* Flowers, 44 Miss. 513, 7 Am. Rep. 707.

New York.—Cory *v.* Harte, 13 Daly (N. Y.) 147.

Vermont.— Weed Sewing Mach. Co. *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

United States.— Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 46 Fed. 426; *In re* Wilson, 12 Fed. 235.

England.— Bozon *v.* Bolland, 3 Jur. 884, 4 Jur. 763, 9 L. J. Ch. 123, 4 Myl. & C. 354, 18 Eng. Ch. 354; Friswell *v.* King, 15 Sim. 191, 38 Eng. Ch. 191; *Ex p.* Pemberton, 18 Ves. Jr. 282; *Ex p.* Sterling, 16 Ves. Jr. 258, 10 Rev. Rep. 177.

6. *Alabama.*— Mosely *v.* Norman, 74 Ala. 422.

Arkansas.—Compton *v.* State, 38 Ark. 601; Gist *v.* Hanly, 33 Ark. 233.

Illinois.— Sanders *v.* Seelye, 128 Ill. 631, 21 N. E. 601 [*affirming* 27 Ill. App. 288].

Kentucky.— McIntosh *v.* Bach, (Ky. 1901) 62 S. W. 515.

Mississippi.— Stewart *v.* Flowers, 44 Miss. 513, 7 Am. Rep. 707.

New Hampshire.— Dennett *v.* Cutts, 11 N. H. 163.

New York.— Fairbanks *v.* Sargent, 39 Hun (N. Y.) 588 [*affirmed* in 104 N. Y. 108, 9 N. E. 870, 56 Am. Rep. 490]; Schwartz *v.* Jenney, 21 Hun (N. Y.) 33; Matter of Russell, 1 How. Pr. (N. Y.) 149; St. John *v.* Diefendorf, 12 Wend. (N. Y.) 261.

Oregon.— State *v.* Lucas, 24 Oreg. 168, 33 Pac. 538.

Pennsylvania.— Dubois' Appeal, 38 Pa. St. 231, 80 Am. Dec. 478 [*overruling* Walton *v.* Dickerson, 7 Pa. St. 376].

Tennessee.— McDonald *v.* Charleston, etc., R. Co., 93 Tenn. 281, 24 S. W. 252.

Vermont.— Weed Sewing Mach. Co. *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

Wisconsin.— Howard *v.* Osceola, 22 Wis. 453.

United States.—McPherson *v.* Cox, 96 U. S. 404, 24 L. ed. 746; Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 52 Fed. 526; *In re* Wilson, 12 Fed. 235; Leszynsky *v.* Merritt, 9 Fed. 688; *In re* Brown, 4 Fed. Cas. No. 1,984, 5 Law Rep. 324, 1 N. Y. Leg. Obs. 69.

See 5 Cent. Dig. tit. "Attorney and Client," § 403.

Relinquishment or inspection of papers.— Under certain circumstances, especially where the papers are needed for use in a suit pend-

ney.[7] A lien cannot be claimed, however, on a will[8] or on public records of any kind.[9]

b. Property Delivered For Special Purpose. An attorney has no lien on property placed in his hands for a special purpose under such circumstances that a trust arises which is inconsistent with, or adverse to, the claim of a lien.[10]

c. Property Delivered in Representative Capacity. An attorney may claim a lien on property belonging to an estate, placed in his hands by the representative of that estate in his representative capacity, for services rendered him in such capacity.[11]

ing (Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 48 Fed. 45), the court may, in its discretion, order the attorney to relinquish these papers (Cunningham *v.* Widing, 5 Abb. Pr. (N. Y.) 413; Trust *v.* Repoor, 15 How. Pr. (N. Y.) 570; Leszynsky *v.* Merritt, 9 Fed. 688; *Ex p.* Horsfall, 7 B. & C. 528, 6 L. J. K. B. O. S. 48, 1 M. & R. 306, 31 Rev. Rep. 266, 14 E. C. L. 239. But see Davis *v.* Davis, 90 Fed. 791), or to allow an inspection and copy of them (Pennsylvania Finance Co. *v.* Charleston, etc.. R. Co., 48 Fed. 45).

7. Money collected.— *Georgia.*— McDonald *v.* Napier, 14 Ga. 89.

Indiana.— Union Mut. L. Ins. Co. *v.* Buchanan, 100 Ind. 63.

Louisiana.— Butchers' Union Slaughterhouse, etc., Co. *v.* Crescent City Live Stock Landing, etc., Co., 41 La. Ann. 355, 6 So. 508.

Michigan.— Dowling *v.* Eggeman, 47 Mich. 171, 10 N. W. 187.

Mississippi.— Stewart *v.* Flowers, 44 Miss. 513, 7 Am. Rep. 707.

Nebraska.— Van Etten *v.* State, 24 Nebr. 734, 40 N. W. 289, 1 L. R. A. 669.

New Hampshire.—Wells *v.* Hatch, 43 N. H. 246.

New Jersey.— Sparks *v.* McDonald, (N. J. 1898) 41 Atl. 369.

New York.— Matter of Knapp, 85 N. Y. 284; Bowling Green Sav. Bank *v.* Todd, 52 N. Y. 489; Krone *v.* Klotz, 3 N. Y. App. Div. 587, 38 N. Y. Suppl. 225, 73 N. Y. St. 719, 25 N. Y. Civ. Proc. 320, 3 N. Y. Annot. Cas. 36; Lorillard *v.* Barnard, 42 Hun (N. Y.) 545.

North Carolina.— Wiley *v.* Logan, 95 N. C. 358.

Ohio.— Christy *v.* Douglas, Wright (Ohio) 485; Fargo Gas Light, etc., Co. *v.* Greer, 18 Ohio Cir. Ct. 589.

Pennsylvania.— Dubois' Appeal, 38 Pa. St. 231, 80 Am. Dec. 478; Balsbaugh *v.* Frazer, 19 Pa. St. 95; Com. *v.* Herr, 1 Pearson (Pa.) 328.

Tennessee.— Foster *v.* Jackson, 8 Baxt. (Tenn.) 433; Read *v.* Bostick, 6 Humphr. (Tenn.) 321.

Texas.— Randolph *v.* Randolph, 34 Tex. 181.

Vermont.— Scott *v.* Darling, 66 Vt. 510, 29 Atl. 993.

See 5 Cent. Dig. tit. "Attorney and Client," § 400.

Only enough money can be held under the lien to satisfy the claim of the attorney. The surplus must be paid to the client. Charboneau *v.* Orton, 43 Wis. 96; Jeffries *v.* Laurie, 23 Fed. 786. The court may even order the attorney to deposit the money claimed in the hands of a trustee to await the adjudication of his claim. Matter of Rowland, 55 N. Y. App. Div. 66, 66 N. Y. Suppl. 1121.

8. Will.— Balch *v.* Symes, Turn. & R. 87, 23 Rev. Rep. 195, 12 Eng. Ch. 87; Georges *v.* Georges, 18 Ves. Jr. 294.

9. Public records.— Wright *v.* Cobleigh, 21 N. H. 331; Dodson *v.* Riddle, 1 Ohio Dec. (Reprint) 54, 1 West. L. J. 393; Clifford *v.* Turrill, 2 De G. & Sm. 1, 12 Jur. 428.

10. *Massachusetts.*— Newell *v.* West, 149 Mass. 520, 21 N. E. 954.

New Jersey.— Bracher *v.* Olds, 60 N. J. Eq. 449, 46 Atl. 770.

New York.— West *v.* Bacon, 164 N. Y. 425, 58 N. E. 522; Henry *v.* Fowler, 3 Daly (N. Y.) 199.

Oregon.— State *v.* Lucas, 24 Oreg. 168, 33 Pac. 538.

Rhode Island.— Anderson *v.* Bosworth, 15 R. I. 443, 8 Atl. 339, 2 Am. St. Rep. 910.

Texas.— Maxey *v.* Besser, 44 Tex. 506.

Vermont.— Goodrich *v.* Mott, 9 Vt. 395.

United States.— *In re* Brown, 4 Fed. Cas. No. 1,984, 5 Law Rep. 324, 1 N. Y. Leg. Obs. 69.

England.— Pelly *v.* Wathen, 7 Hare 351, 14 Jur. 9, 18 L. J. Ch. 381, 27 Eng. Ch. 351; Lawson *v.* Dickinson, 8 Mod. 306; Balch *v.* Symes, Turn. & R. 87, 23 Rev. Rep. 195, 12 Eng. Ch. 87.

Retention after accomplishment of special purpose.— Where property given to an attorney for a special purpose is left in his hands after the termination of the particular transaction, the character of the attorney's possession will be presumed to have changed, and a lien will arise on such property of his client as remains in his hands. *Ex p.* Pemberton, 18 Ves. Jr. 282; *Ex p.* Sterling, 16 Ves. Jr. 258, 10 Rev. Rep. 177.

11. Executor.— Matter of Knapp, 85 N. Y. 284; Arkenburgh *v.* Little, 64 N. Y. Suppl. 742; De Lamater *v.* McCaskie, 4 Dem. Surr. (N. Y.) 549.

Guardian.— Monget *v.* Tessier, 5 La. Ann. 165; Matter of Holland Trust Co., 76 Hun (N. Y.) 323, 27 N. Y. Suppl. 687, 59 N. Y. St. 85.

Trustee.— Matter of King, 61 N. Y. App. Div. 152, 70 N. Y. Suppl. 356.

The charging lien may arise although the client is a representative and the estate is charged. Lee *v.* Van Voorhis, 78 Hun (N. Y.) 575, 29 N. Y. Suppl. 571, 61 N. Y. St. 220 [*affirmed* in 145 N. Y. 603, 40 N. E. 164].

G. Attorneys Entitled to Lien — 1. In General. Only attorneys employed under a valid contract can claim a lien on the judgment recovered.[12]

2. Associate Counsel. An assistant counsel may claim a lien when his employment was authorized by the client,[13] unless the statute confines the lien to the attorney of record.[14]

H. Priority of Lien — 1. In General. An attorney's lien covers only the interest of the client in the property charged, and is subject to any rights in the property which are valid against the client at the time the lien attaches.[15] The lien when perfected, however, is held to be superior to claims subsequently attaching, by garnishment or otherwise, of the creditors of the client.[16] The lien

12. Compton *v.* State, 38 Ark. 601 (holding that no lien arises where a public officer retaining counsel has no authority to do so); Davis *v.* Sharron, 15 B. Mon. (Ky.) 64 (holding that no lien arises where the contract of employment is champertous).

Attorney of other state.—A lien may be allowed although the attorney is not licensed in the state where he assisted in the cause. Taylor *v.* Badoux, (Tenn. Ch. 1899) 58 S. W. 919.

An attorney for the real party in interest has a lien on the judgment although he was not employed by the nominal party. McGregor *v.* Comstock, 28 N. Y. 237.

A lien cannot be claimed against an administrator for services rendered the intestate. Foss *v.* Cobler, 105 Iowa 728, 75 N. W. 516; January *v.* Mansell, 4 Bibb (Ky.) 566.

One partner in a firm of attorneys cannot claim a lien for his individual fee on other matters, on property or funds intrusted to the partnership. Bowling Green Sav. Bank *v.* Todd, 64 Barb. (N. Y.) 146.

13. **Associate counsel.**—Jackson *v.* Clopton, 66 Ala. 29; People *v.* Pack, 115 Mich. 669, 74 N. W. 185; Heavenrich *v.* Kelley, 111 Mich. 163, 69 N. W. 226; Balsbaugh *v.* Frazer, 19 Pa. St. 95; Massachusetts, etc., Constr. Co. *v.* Gill's Creek Tp., 48 Fed. 145. See also Harwood *v.* La Grange, 137 N. Y. 538, 32 N. E. 1000, 50 N. Y. St. 30.

Where the client made no contract with the assistant counsel the latter can claim no lien. Larned *v.* Dubuque, 86 Iowa 166, 53 N. W. 105.

The lien may be enforced by motion against money collected by a co-attorney. Smith *v.* Goode, 29 Ga. 185. But see Taylor *v.* Long Island R. Co., 38 N. Y. App. Div. 595, 56 N. Y. Suppl. 665, holding that the court cannot order assistant counsel to pay to the counsel of record, as the relationship between them is simply that of debtor and creditor.

14. **Attorney of record.**— Brown *v.* New York, 9 Hun (N. Y.) 587; Kennedy *v.* Carrick, 18 Misc. (N. Y.) 38, 40 N. Y. Suppl. 1127; Foster *v.* Danforth, 59 Fed. 750.

15. **Claims previously attaching.**—*Alabama.* — *Ex p.* Lehman, 59 Ala. 631.

Connecticut.— Gager *v.* Watson, 11 Conn. 168; Rumrill *v.* Huntington, 5 Day (Conn.) 163.

District of Columbia.— Van Riswick *v.* Lamon, 2 MacArthur (D. C.) 172.

Georgia.— Waters *v.* Greenway, 17 Ga. 592.

Illinois.— Hawk *v.* Ament, 28 Ill. App. 390.

Iowa.— Ward *v.* Sherbondy, 96 Iowa 477, 65 N. W. 413; Des Moines Gas Co. *v.* West, 50 Iowa 16.

Kentucky.— Montgomery *v.* Garr, 18 Ky. L. Rep. 607, 37 S. W. 580; McAfee *v.* Rurrack, 1 Ky. L. Rep. 347.

Tennessee.— Blackburn *v.* Clarke, 85 Tenn. 506, 3 S. W. 505; Hays *v.* Dalton, 5 Lea (Tenn.) 555. See also Neil *v.* Staten, 7 Heisk. (Tenn.) 290.

Texas.— Meyers *v.* Bloon, 20 Tex. Civ. App. 554, 50 S. W. 217.

Vermont.— Weed Sewing Mach. Co. *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821; Walker *v.* Sargeant, 14 Vt. 247.

West Virginia.— Bent *v.* Lipscomb, 45 W. Va. 183, 31 S. E. 907, 72 Am. St. Rep. 815; Renick *v.* Ludington, 16 W. Va. 378.

United States.— Gregory *v.* Pike, 67 Fed. 837, 21 U. S. App. 658, 15 C. C. A. 33; Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 52 Fed. 678. See also De Chambrun *v.* Cox, 60 Fed. 471, 20 U. S. App. 347, 9 C. C. A. 86.

England.— Wakefield *v.* Newbon, 6 Q. B. 276, 8 Jur. 735, 13 L. J. Q. B. 258, 51 E. C. L. 276; Pratt *v.* Vizard, 5 B. & Ad. 808, 2 L. J. K. B. 7, 2 N. & M. 455, 27 E. C. L. 340; Hollis *v.* Claridge, 4 Taunt. 807.

Assignment of claim pending suit will defeat the lien if made before judgment is entered (Potter *v.* Mayo, 3 Me. 34, 14 Am. Dec. 211. *Contra,* Mosely *v.* Norman, 74 Ala. 422; New York Cent. Trust Co. *v.* Richmond, etc., R. Co., 105 Fed. 803, 45 C. C. A. 60; Frink *v.* McComb, 60 Fed. 486. See also Key *v.* U. S. Bank, 1 Hayw. & H. (U. S.) 74, 14 Fed. Cas. No. 7,746), or before notice is given where notice is necessary (Jennings *v.* Bacon, 84 Iowa 403, 51 N. W. 15).

The purchaser of property pending a suit in regard to it takes subject to an attorney's lien. McCain *v.* Portis, 42 Ark. 402; Porter *v.* Hanson, 36 Ark. 591; Suwannee Turpentine Co. *v.* Baxter, 109 Ga. 597, 35 S. E. 142; O'Brien *v.* Whitehead, 75 Ga. 751. *Contra,* La Framboise *v.* Grow, 56 Ill. 197. See also Lovett *v.* Moore, 98 Ga. 158, 26 S. E. 498; Mays *v.* Sanders, 90 Tex. 132, 37 S. W. 595.

16. **Claims subsequently attaching.** — *Georgia.*— Hargett *v.* McCadden, 107 Ga. 773, 33 S. E. 666; Morrison *v.* Ponder, 45 Ga. 167. See also Coleman *v.* Austin, 99 Ga. 629, 27 S. E. 763.

Indiana.— Justice *v.* Justice, 115 Ind. 201, 16 N. E. 615.

Iowa.— Myers *v.* McHugh, 16 Iowa 335.

in such case has also been held to be superior to the claims of an assignee of the judgment.[17]

2. OVER RIGHT OF SET-OFF. In some states it is held that the attorney's charging lien is superior to the rights of the adverse party under the statute of set-off.[18] In other states the lien is held to be subject to the right of the opposing party to a set-off,[19] though it is also held that it will not be suspended for the purpose of

Massachusetts.— Thayer *v.* Daniels, 113 Mass. 129.

Minnesota.— Henry *v.* Traynor, 42 Minn. 234, 44 N. W. 11.

New York.— Palmer *v.* Palmer, 24 Misc. (N. Y.) 217, 53 N. Y. Suppl. 538; Dienst *v.* McCaffrey, 32 N. Y. Suppl. 818, 66 N. Y. St. 200, 24 N. Y. Civ. Proc. 238.

Tennessee.— Winchester *v.* Heiskell, 16 Lea (Tenn.) 556; Damron *v.* Robertson, 12 Lea (Tenn.) 372; Brown *v.* Bigley, 3 Tenn. Ch. 618.

Vermont.— Weed Sewing Mach. Co. *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

United States.— Lawrence *v.* U. S., 71 Fed. 228.

An attorney's fee for the settlement of an estate takes precedence over the claims of the creditors of the deceased. Wells' Succession, 24 La. Ann. 162.

Garnishment of sum collected.—An attorney, having claims in his hands for collection, is entitled to an allowance for his fees when they are garnished in his hands. Daigle *v.* Bird, 22 La. Ann. 138.

17. Claims of assignee of judgment.—*Alabama.*— Mosely *v.* Norman, 74 Ala. 422.

Arkansas.— McCain *v.* Portis, 42 Ark. 402; Sexton *v.* Pike, 13 Ark. 193.

Colorado.— Davidson *v.* La Plata County, 26 Colo. 549, 59 Pac. 46.

Indiana.— Peterson *v.* Struby, 25 Ind. App. 19, 56 N. E. 733, 57 N. E. 599.

Minnesota.— Gill *v.* Truelsen, 39 Minn. 373, 40 N. W. 254.

Nebraska.— Yates *v.* Kinney, 33 Nebr. 853, 51 N. W. 230.

New York.— Matter of Gates, 51 N. Y. App. Div. 350, 64 N. Y. Suppl. 1050; Sweet *v.* Bartlett, 4 Sandf. (N. Y.) 661; Guliano *v.* Whitenack, 9 Misc. (N. Y.) 562, 30 N. Y. Suppl. 415, 62 N. Y. St. 84, 24 N. Y. Civ. Proc. 55, 1 N. Y. Annot. Cas. 75; Ward *v.* Lee, 13 Wend. (N. Y.) 41.

Tennessee.— Cunningham *v.* McGrady, 2 Baxt. (Tenn.) 141; Taylor *v.* Badoux, (Tenn. Ch. 1899) 58 S. W. 919.

Vermont.— Parker *v.* Parker, 71 Vt. 387, 45 Atl. 756; Heartt *v.* Chipman, 2 Aik. (Vt.) 162.

West Virginia.— Renick *v.* Ludington, 16 W. Va. 378.

18. Superiority of lien to set-off.—*Florida.*— Carter *v.* Davis, 8 Fla. 183; Carter *v.* Bennett, 6 Fla. 214.

Illinois.— Brent *v.* Brent, 24 Ill. App. 448.

Indiana.— Puett *v.* Beard, 86 Ind. 172, 44 Am. Rep. 280; Adams *v.* Lee, 82 Ind. 587.

Kansas.— Leavenson *v.* Lafontane, 3 Kan. 523.

Maine.— Peirce *v.* Bent, 69 Me. 381; Stratton *v.* Hussey, 62 Me. 286; Hooper *v.* Brundage, 22 Me. 460.

Massachusetts.— See Little *v.* Rogers, 2 Metc. (Mass.) 478.

Michigan.— Kinney *v.* Tabor, 62 Mich. 517, 29 N. W. 86, 512.

Minnesota.— See Lindholm *v.* Itasca Lumber Co., 64 Minn. 46, 65 N. W. 931.

New Hampshire.— Rowe *v.* Langley, 49 N. H. 395; Currier *v.* Boston, etc., R. Co., 37 N. H. 223; Shapley *v.* Bellows, 4 N. H. 347.

New Jersey.—Phillips *v.* Mackay, 54 N. J. L. 319, 23 Atl. 941; Terney *v.* Wilson, 45 N. J. L. 282; Brown *v.* Hendrickson, 39 N. J. L. 239.

New York.—Perry *v.* Chester, 53 N. Y. 240; Bevins *v.* Albro, 86 Hun (N. Y.) 590, 33 N. Y. Suppl. 1079, 67 N. Y. St. 783; Delaney *v.* Miller, 84 Hun (N. Y.) 244, 32 N. Y. Suppl. 505, 65 N. Y. St. 834, 1 N. Y. Annot. Cas. 266; Ainslie *v.* Boynton, 2 Barb. (N. Y.) 258; Naylor *v.* Lane, 50 N. Y. Super. Ct. 97; Bamberger *v.* Oshinsky, 21 Misc. (N. Y.) 716, 48 N. Y. Suppl. 139; Kaufman *v.* Keenan, 13 N. Y. Civ. Proc. 225; Smith *v.* Chenoweth, 11 N. Y. Civ. Proc. 138; Ennis *v.* Curry, 61 How. Pr. (N. Y.) 1; Devoy *v.* Boyer, 3 Johns. (N. Y.) 247; Cole *v.* Grant, 2 Cai. (N. Y.) 105; Gridley *v.* Garrison, 4 Paige (N. Y.) 647.

Ohio.— Diehl *v.* Friester, 37 Ohio St. 473.

Tennessee.— Roberts *v.* Mitchell, 94 Tenn. 277, 29 S. W. 5, 29 L. R. A. 705.

See 5 Cent. Dig. tit. "Attorney and Client," § 418.

Set-off acquired after lien attaches.— The attorney's lien will prevail over a set-off acquired by the adverse party after the lien attached. Warfield *v.* Campbell, 38 Ala. 527, 82 Am. Dec. 724; Caudle *v.* Rice, 78 Ga. 81, 3 S. E. 7; Bradt *v.* Koon, 4 Cow. (N. Y.) 416; Hroch *v.* Aultman, 3 S. D. 477, 54 N. W. 269.

19. Inferiority of lien to set-off.—*Alabama.*— Mosely *v.* Norman, 74 Ala. 422; Jackson *v.* Clopton, 66 Ala. 29; *Ex p.* Lehman, 59 Ala. 631.

Arkansas.— See Popplewell *v.* Hill, 55 Ark. 622, 18 S. W. 1054.

California.— See Hathaway *v.* Patterson, 45 Cal. 294.

Connecticut.— Benjamin *v.* Benjamin, 17 Conn. 110.

Iowa.— Watson *v.* Smith, 63 Iowa 228, 18 N. W. 916; Tiffany *v.* Stewart, 60 Iowa 207, 14 N. W. 241; Hurst *v.* Sheets, 21 Iowa 501.

Kentucky.— Robertson *v.* Shutt, 9 Bush (Ky.) 659; Bradford *v.* Ware, 12 Ky. L. Rep. 986.

Maryland.—Levy *v.* Steinbach, 43 Md. 212; Marshall *v.* Cooper, 43 Md. 46.

allowing the adverse party to put his unliquidated demand in shape for a set-off.[20]

3. Over Settlement Between Parties — a. Before Judgment. In the absence of a statute protecting the lien,[21] the parties may compromise or settle a cause of action before judgment, regardless of the rights of the attorneys,[22] unless the com-

Nebraska.— Field *v.* Maxwell, 44 Nebr. 900, 63 N. W. 62.

North Dakota.— Clark *v.* Sullivan, 3 N. D. 280, 55 N. W. 733.

South Dakota.— Lindsay *v.* Pettigrew, 8 S. D. 244, 66 N. W. 321.

Vermont.— Fairbanks *v.* Devereaux, 58 Vt. 359, 3 Atl. 500; McDonald *v.* Smith, 57 Vt. 502; Walker *v.* Sargeant, 14 Vt. 247.

Wisconsin.— Bosworth *v.* Tallman, 66 Wis. 533, 29 N. W. 542. *Compare* Stanley *v.* Bouck, 107 Wis. 225, 83 N. W. 298.

United States.— Winterset Nat. Bank *v.* Eyre, 3 McCrary (U. S.) 175, 8 Fed. 733.

20. Carter *v.* Bennett, 6 Fla. 214; McDonald *v.* Napier, 14 Ga. 89; Nicoll *v.* Nicoll, 16 Wend. (N. Y.) 446 [*reversing* 2 Edw. (N. Y.) 574]; Dunkin *v.* Vandenbergh, 1 Paige (N. Y.) 622; Mohawk Bank *v.* Burrows, 6 Johns. Ch. (N. Y.) 317.

An assignment of a judgment by a client to his attorney made prior to an attempt at set-off made by the adverse party will defeat such set-off.

Connecticut.— Ripley *v.* Bull, 19 Conn. 53; Benjamin *v.* Benjamin, 17 Conn. 110.

Michigan.— Wells *v.* Elsam, 40 Mich. 218.

New York.— Firmenich *v.* Bovee, 1 Hun (N. Y.) 532, 4 Thomps. & C. (N. Y.) 98.

Oregon.— Ladd *v.* Ferguson, 9 Oreg. 180.

Wisconsin.—Rice *v.* Garnhart, 35 Wis. 282.

Contra, Turner *v.* Crawford, 14 Kan. 499; Marshall *v.* Cooper, 43 Md. 46; People *v.* New York C. Pl., 13 Wend. (N. Y.) 649, 28 Am. Dec. 495; Fitzhugh *v.* McKinney, 43 Fed. 461.

21. Statutory protection of lien.—*California.*— Stockton Sav., etc., Soc. *v.* Donnelly, 60 Cal. 481.

Georgia.— Florida Cent., etc., R. Co. *v.* Ragan, 104 Ga. 353, 30 S. E. 745; Johnson *v.* McCurry, 102 Ga. 471, 31 S. E. 88; Twiggs *v.* Chambers, 56 Ga. 279. *Compare* Brown *v.* Georgia, etc., R. Co., 101 Ga. 80, 28 S. E. 634.

Kentucky.— Skaggs *v.* Hill, 12 Ky. L. Rep. 382, 14 S. W. 363.

New York.— Hart *v.* New York, 69 Hun (N. Y.) 237, 23 N. Y. Suppl. 555, 53 N. Y. St. 353 [*affirmed* in 139 N. Y. 610, 35 N. E. 204, 54 N. Y. St. 929]; Fenwick *v.* Mitchell, 34 Misc. (N. Y.) 617, 70 N. Y. Suppl. 667; Canary *v.* Russell, 10 Misc. (N. Y.) 597, 31 N. Y. Suppl. 291, 63 N. Y. St. 740, 24 N. Y. Civ. Proc. 109; Crouch *v.* Hoyt, 30 N. Y. Suppl. 406, 62 N. Y. St. 126, 24 N. Y. Civ. Proc. 60, 1 N. Y. Annot. Cas. 76 note; Minto *v.* Baur, 6 N. Y. Suppl. 444, 25 N. Y. St. 559, 17 N. Y. Civ. Proc. 314; Eberhardt *v.* Schuster, 10 Abb. N. Cas. (N. Y.) 374; Haight *v.* Holcomb, 7 Abb. Pr. (N. Y.) 210, 16 How. Pr. (N. Y.) 160.

Tennessee.— Illinois Cent. R. Co. *v.* Wells, 104 Tenn. 706, 59 S. W. 1041.

Wisconsin.— Smelker *v.* Chicago, etc., R. Co., 106 Wis. 135, 81 N. W. 994.

As to remedy of attorney on settlement see *infra,* VI, I, 1, c, (II).

22. Settlement between parties.—*Alabama.* — Connor *v.* Boyd, 73 Ala. 385; Tillman *v.* Reynolds, 48 Ala. 365.

Arkansas.— De Graffenreid *v.* St. Louis Southwestern R. Co., 66 Ark. 260, 50 S. W. 272.

Georgia.— Green *v.* Southern Express Co., 39 Ga. 20; Hawkins *v.* Loyless, 39 Ga. 5; Gray *v.* Lawson, 36 Ga. 629; McDonald *v.* Napier, 14 Ga. 89.

Indiana.— Koons *v.* Beach, 147 Ind. 137, 45 N. E. 601, 46 N. E. 587.

Iowa.— Ellwood *v.* Wilson, 21 Iowa 523.

Kentucky.— Rowe *v.* Fogle, 88 Ky. 105, 10 Ky. L. Rep. 689, 10 S. W. 426, 2 L. R. A. 708; Wood *v.* Anders, 5 Bush (Ky.) 601; Stewart *v.* Louisville, etc., R. Co., 4 Ky. L. Rep. 718.

Maine.— Averill *v.* Longfellow, 66 Me. 237; Potter *v.* Mayo, 3 Me. 34, 14 Am. Dec. 211.

Michigan.— Wright *v.* Hake, 38 Mich. 525; Parker *v.* Blighton, 32 Mich. 266. *Compare* Weeks *v.* Wayne Cir. Judges, 73 Mich. 256, 41 N. W. 269.

Mississippi.— Mosely *v.* Jamison, 71 Miss. 456, 14 So. 529.

Nebraska.— Sheedy *v.* McMurtry, 44 Nebr. 499, 63 N. W. 21. *Compare* Hand *v.* Phillips, 18 Nebr. 593, 26 N. W. 388, 53 Am. Rep. 824.

New Jersey.—Heister *v.* Mount, 17 N. J. L. 438; Gregory *v.* Gregory, 32 N. J. Eq. 424.

New York.— Coughlin *v.* New York Cent., etc., R. Co., 71 N. Y. 443, 27 Am. Rep. 75; Marsh *v.* Holbrook, 3 Abb. Dec. (N. Y.) 176; Roberts *v.* Doty, 31 Hun (N. Y.) 128; Brown *v.* Comstock, 10 Barb. (N. Y.) 67; Wright *v.* Wright, 7 Daly (N. Y.) 62; Anonymous, 2 Daly (N. Y.) 533; Publishers' Printing Co. *v.* Gillin Printing Co., 16 Misc. (N. Y.) 558, 38 N. Y. Suppl. 784, 74 N. Y. St. 132; Howard *v.* Riker, 11 Abb. N. Cas. (N. Y.) 113; Sullivan *v.* O'Keefe, 53 How. Pr. (N. Y.) 426; McDowell *v.* Appleby, 1 How. Pr. (N. Y.) 229; St. John *v.* Diefendorf, 12 Wend. (N. Y.) 261.

South Carolina.— Miller *v.* Newell, 20 S. C. 123, 47 Am. Rep. 833.

Tennessee.— Stephens *v.* Nashville, etc., R. Co., 10 Lea (Tenn.) 448; Johnson *v.* Story, 1 Lea (Tenn.) 114.

Texas.— Whittaker *v.* Clarke, 33 Tex. 647.

Vermont.— Hooper *v.* Welch, 43 Vt. 169, 5 Am. Rep. 267; Foot *v.* Tewksbury, 2 Vt. 97.

Wisconsin.— Kusterer *v.* Beaver Dam, 56 Wis. 471, 14 N. W. 617, 43 Am. Rep. 725; Courtney *v.* McGavock, 23 Wis. 619.

United States.— The Bella, 91 Fed. 540; Swanson *v.* Chicago, etc., R. Co., 35 Fed. 638; Swanston *v.* Morning Star Min. Co., 4 McCrary (U. S.) 241, 13 Fed. 215; London

promise or settlement was for the purpose of depriving the attorneys of their fees.[23]

b. After Judgment. After judgment, and after the lien has been properly perfected by notice or otherwise, a compromise cannot prejudice the attorney's right to enforce the judgment to the extent of the lien.[24]

I. Enforcement of Lien — 1. Charging Lien — a. Jurisdiction. The lien may be enforced in a court other than that in which the judgment was obtained.[25]

b. Who May Enforce. Only the attorney[26] or his assignee[27] may enforce the lien.

c. Manner of Enforcement — (1) *In General.* If an attorney has a lien on

Emma Silver Min. Co. *v.* New York Emma Silver Min. Co., 12 Fed. 815; Purcell *v.* Lincoln, 1 Sprague (U. S.) 230, 20 Fed. Cas. No. 11,471, 17 Law Rep. 217; Peterson *v.* Watson, Blatchf. & H. Adm. 487, 19 Fed. Cas. No. 11,037.

Canada.— Bellamy *v.* Connolly, 15 Ont. Pr. 87.

See 5 Cent. Dig. tit. "Attorney and Client," § 407.

If the settlement provides for the lien it will be upheld. Lee *v.* Vacuum Oil Co., 126 N. Y. 579, 27 N. E. 1018, 38 N. Y. St. 662.

Where the fund is in court a client cannot dismiss a case and take the fund without satisfying the attorney. Pleasants *v.* Kortrecht, 5 Heisk. (Tenn.) 694.

23. Collusive settlement.— *Georgia.*— McDonald *v.* Napier, 14 Ga. 89.

Illinois.— North Chicago St. R. Co. *v.* Ackley, 58 Ill. App. 572.

Kentucky.— Hubble *v.* Dunlap, 19 Ky. L. Rep. 656, 41 S. W. 432.

New Hampshire.— Young *v.* Dearborn, 27 N. H. 324.

New York.— McBratney *v.* Rome, etc., R. Co., 87 N. Y. 467; Crotty *v.* McKenzie, 42 N. Y. Super. Ct. 192, 52 How. Pr. (N. Y.) 54; Dietz *v.* McCallum, 44 How. Pr. (N. Y.) 493; Marquat *v.* Mulvy, 9 How. Pr. (N. Y.) 460; Payn *v.* Parks, 1 How. Pr. (N. Y.) 94.

Wisconsin.— Courtney *v.* McGavock, 23 Wis. 619.

United States.— Johnson *v.* A Raft of Spars, 13 Fed. Cas. No. 7,370*a*; Peterson *v.* Watson, Blatchf. & H. Adm. 487, 19 Fed. Cas. No. 11,037.

Canada.— Langle *v.* Fetterley, 5 U. C. Q. B. 628; Bellamy *v.* Connolly, 15 Ont. Pr. 87.

Contra, Whittaker *v.* Clarke, 33 Tex. 647.

24. *Connecticut.*— Andrews *v.* Morse, 12 Conn. 444, 31 Am. Dec. 752.

Georgia.— McDonald *v.* Napier, 14 Ga. 89.

Iowa.— Wallace *v.* Chicago, etc., R. Co., 112 Iowa 565, 84 N. W. 662; Parsons *v.* Hawley, 92 Iowa 175, 60 N. W. 520; Larned *v.* Dubuque, 86 Iowa 166, 53 N. W. 105; Winslow *v.* Central Iowa R. Co., 71 Iowa 197, 32 N. W. 330; Ross *v.* Chicago, etc., R. Co., 55 Iowa 691, 8 N. W. 644; Brainard *v.* Elwood, 53 Iowa 30, 3 N. W. 799; Fisher *v.* Oskaloosa, 28 Iowa 381.

Kentucky.— Stephens *v.* Farrar, 4 Bush (Ky.) 13; Louisville, etc., R. Co. *v.* Proctor, 21 Ky. L. Rep. 447, 51 S. W. 591.

Maine.— Stratton *v.* Hussey, 62 Me. 286; McKenzie *v.* Wardwell, 61 Me. 136; Cooley *v.* Patterson, 52 Me. 472; Gammon *v.* Chandler, 30 Me. 152.

Minnesota.— See Lindholm *v.* Itasca Lumber Co., 64 Minn. 46, 65 N. W. 931.

Missouri.— *Compare* Frissell *v.* Haile, 18 Mo. 18.

Nebraska.— See Aspinwall *v.* Sabin, 22 Nebr. 73, 34 N. W. 72, 3 Am. St. Rep. 258.

New Jersey.— Barnes *v.* Taylor, 30 N. J. Eq. 467.

New York.— Bailey *v.* Murphy, 136 N. Y. 50, 32 N. E. 627, 49 N. Y. St. 82 [*affirming* 4 N. Y. Suppl. 579, 22 N. Y. St. 102]; Rooney *v.* Second Ave. R. Co., 18 N. Y. 368; Commercial Telegram Co. *v.* Smith, 57 Hun (N. Y.) 176, 10 N. Y. Suppl. 433, 32 N. Y. St. 445, 19 N. Y. Civ. Proc. 32; Woolf *v.* Jacobs, 45 N. Y. Super. Ct. 583; Bollar *v.* Schoenwirt, 30 Misc. (N. Y.) 224, 63 N. Y. Suppl. 311; Branth *v.* Branth, 10 N. Y. Suppl. 638, 32 N. Y. St. 979, 19 N. Y. Civ. Proc. 28; Hall *v.* Ayer, 9 Abb. Pr. (N. Y.) 220, 19 How. Pr. (N. Y.) 91; Fox *v.* Fox, 24 How. Pr. (N. Y.) 409; Pilger *v.* Gou, 21 How. Pr. (N. Y.) 155; Haight *v.* Holcomb, 16 How. Pr. (N. Y.) 173; Ten Broeck *v.* De Witt, 10 Wend. (N. Y.) 617; Power *v.* Kent, 1 Cow. (N. Y.) 172; Martin *v.* Hawks, 15 Johns. (N. Y.) 405; Pinder *v.* Morris, 3 Cai. (N. Y.) 165, Col. & C. Cas. (N. Y.) 489; Talcott *v.* Bronson, 4 Paige (N. Y.) 501.

South Carolina.— Scharlock *v.* Oland, 1 Rich. (S. C.) 207.

Tennessee.— Covington *v.* Bass, 88 Tenn. 496, 12 S. W. 1033.

Washington.— Wooding *v.* Crain, 11 Wash. 207, 39 Pac. 442.

United States.— Foster *v.* Danforth, 59 Fed. 750.

25. Close *v.* Shute, 4 Dem. Surr. (N. Y.) 546.

Probate court.— The attorney cannot enforce his lien in the probate court, as that court has no jurisdiction over the attorney's lien. McCaa *v.* Grant, 43 Ala. 262.

26. Wehle *v.* Conner, 83 N. Y. 231; Murray *v.* Jibson, 22 Hun (N. Y.) 386; Avery *v.* Avery, 5 Misc. (N. Y.) 75, 24 N. Y. Suppl. 737; Oliwill *v.* Verdenhalven, 7 N. Y. Suppl. 99, 26 N. Y. St. 115, 17 N. Y. Civ. Proc. 362.

27. Vinson *v.* Cantrell, (Tenn. Ch. 1900) 56 S. W. 1034.

As to assignability of lien see *supra,* VI, C, 2.

a judgment he may enforce it in any way in which an ordinary judgment creditor may enforce a judgment.[28] He may proceed summarily against a sheriff who has collected money on the execution.[29] He may bring an independent suit for the enforcement of his lien against his client or the adverse party, or both.[30] If there be a specific fund he may, by motion and order, get that set apart to pay his claim for lien.[31] He cannot, however, prosecute an appeal for the purpose of reversing a verdict or judgment and so obtaining a lien.[32]

28. Tarver *v.* Tarver, 53 Ga. 43; Steward *v.* Biddlecum, 2 N. Y. 103; Commercial Telegram Co. *v.* Smith, 57 Hun (N. Y.) 176, 10 N. Y. Suppl. 433, 32 N. Y. St. 445, 19 N. Y. Civ. Proc. 32.

Arrest.— The attorney may enforce his lien by an arrest. Hobson *v.* Watson, 34 Me. 20, 56 Am. Dec. 632; Parker *v.* Speer, 49 N. Y. Super. Ct. 1.

Collection of judgment.— The attorney may collect the judgment and retain from the proceeds an amount sufficient to satisfy his lien. Sherwood *v.* Buffalo, etc., R. Co., 12 How. Pr. (N. Y.) 136.

Suit on bond.— The attorney may enforce, for his lien, his client's rights in a bond given by the adverse party. Johnson *v.* McMillan, 13 Colo. 423, 22 Pac. 769; Newbert *v.* Cunningham, 50 Me. 231, 79 Am. Dec. 612; Heavenrich *v.* Kelley, 111 Mich. 163, 69 N. W. 226; Shackleton *v.* Hart, 12 Abb. Pr. (N. Y.) 325 note, 20 How. Pr. (N. Y.) 39; Newberg *v.* Schwab, 49 N. Y. Super. Ct. 232. *Contra,* as to bond given by creditor on arresting debtor. Cornell *v.* Donovan, 109 N. Y. 664, 17 N. E. 869, 16 N. Y. St. 994 [*affirming* 14 Daly (N. Y.) 292].

Suit on judgment.— The attorney may sue on the judgment in the name of the client. Stone *v.* Hyde, 22 Me. 318; Woods *v.* Verry, 4 Gray (Mass.) 357; Kipp *v.* Rapp, 7 N. Y. Civ. Proc. 316. *Compare* Horton *v.* Champlin, 12 R. I. 550, 34 Am. Rep. 722, holding that the client's consent is necessary.

29. Harney *v.* Demoss, 3 How. (Miss.) 174. But his fees should be previously determined. Pugh *v.* Boyd, 38 Miss. 326.

A settlement between the parties is a good defense to the sheriff (Haynes *v.* Perry, 76 Ga. 33), unless the attorney sets up notice (Gray *v.* Maxwell, 50 Ga. 108).

Suit against sheriff.—The attorney may sue a sheriff for taking an insufficient bond. Newbert *v.* Cunningham, 50 Me. 231, 79 Am. Dec. 612.

30. *California.*— Elliott *v.* Leopard Min. Co., 52 Cal. 355.

Colorado.— Davidson *v.* La Plata County, 26 Colo. 549, 59 Pac. 46; Fillmore *v.* Wells, 10 Colo. 228, 15 Pac. 343, 3 Am. St. Rep. 567.

Indiana.— Wood *v.* Hughes, 138 Ind. 179, 37 N. E. 588.

Iowa.— Parsons *v.* Hawley, 92 Iowa 175, 60 N. W. 520.

Minnesota.— Wetherby *v.* Weaver, 51 Minn. 73, 52 N. W. 970.

Nebraska.— Reynolds *v.* Reynolds, 10 Nebr. 574, 7 N. W. 322.

New Hampshire.— Christie *v.* Sawyer, 44 N. H. 298.

New York.— *Compare* Adams *v.* Fox, 40 Barb. (N. Y.) 442, holding that, in the absence of collusion, the judgment debtor should not be made a co-defendant in an action to recover the amount of a lien upon a judgment obtained for the client.

Tennessee.— Covington *v.* Bass, 88 Tenn. 496, 12 S. W. 1033.

Vermont.— Heartt *v.* Chipman, 2 Aik. (Vt.) 162.

The attorneys may intervene and become parties to the suit when necessary to prosecute it successfully. Reynolds *v.* Reynolds, 10 Nebr. 574, 7 N. W. 322; Fitzgerald *v.* Irby, 99 Va. 81, 37 S. E. 777; Patrick *v.* Leach, 3 McCrary (U. S.) 555, 17 Fed. 476.

31. *Indiana.*— Blankenbaker *v.* Bank of Commerce, 85 Ind. 459.

Michigan.— Dennis *v.* Kent Cir. Judge, 42 Mich. 249, 3 N. W. 950.

Minnesota.— Davis *v.* Swedish American Nat. Bank, 78 Minn. 408, 80 N. W. 953, 81 N. W. 210, 79 Am. St. Rep. 400.

Nebraska.— Aspinwall *v.* Sabin, 22 Nebr. 73, 34 N. W. 72, 3 Am. St. Rep. 258.

New Jersey.— Hudson Trust, etc., Inst. *v.* Carr-Curran Paper Mills, (N. J. 1899) 44 Atl. 638.

New York.— Matter of Gates, 51 N. Y. App. Div. 350, 64 N. Y. Suppl. 1050; Canary *v.* Russell, 10 Misc. (N. Y.) 597, 31 N. Y. Suppl. 291, 63 N. Y. St. 740, 24 N. Y. Civ. Proc. 109.

Ohio.— Olds *v.* Tucker, 35 Ohio St. 581; Byrnes *v.* Cincinnati, 7 Ohio Dec. 430.

Reference.— The attorney's rights may be settled by a motion, and a reference to an auditor to take evidence. Brown *v.* New York, 11 Hun (N. Y.) 21.

Restitution.— Where the court erroneously allows the attorney too much, restitution may be ordered. Pinkard *v.* Allen, 75 Ala. 73; Cooper *v.* Cooper, 51 N. Y. App. Div. 595, 64 N. Y. Suppl. 901.

The attorney may hold a fund if he can take it *in transitu* by order of court (Adams *v.* Fox, 40 Barb. (N. Y.) 442; Campbell *v.* Terney, 7 N. J. L. J. 189; Welsh *v.* Hole, 1 Dougl. 238), and may impound funds sufficient to recover his lien (Merchants Nat. Bank *v.* Armstrong, 107 Ga. 479, 33 S. E. 473).

32. Morrison *v.* Green, 96 Ga. 754, 23 S. E. 845; Cock *v.* Palmer, 1 Rob. (N. Y.) 658, 19 Abb. Pr. (N. Y.) 372; McDowell *v.* Appleby, 1 How. Pr. (N. Y.) 229. His proper remedy is with the court below. Atlantic, etc., Canal, etc., Co. *v.* Kinsman, 29 Fla. 332, 10 So. 555; Brown *v.* Comstock, 10 Barb. (N. Y.) 67. But see Roe *v.* Doe, 50 Ga. 486, where it is held that, after notice of his lien, the attorney may proceed with a writ of error. See also Davis *v.* Swedish

(II) *Settlement Between Parties.* On the settlement of a cause some decisions hold that plaintiff's attorney, on obtaining leave of court,[33] may prosecute the suit in his client's name to judgment for his lien.[34] Other cases deny the right, and require an independent suit,[35] or limit it to the case of a collusive settlement for the purpose of depriving the attorney of his claim.[36] If satisfaction of the judgment has been entered, the attorney may have the satisfaction set aside to the amount of his lien.[37]

d. Pleading. In a proceeding to enforce a lien, the amount due must be alleged either by stating a contract fixing the amount, or averring the value of the services charged for.[38]

American Nat. Bank, 78 Minn. 408, 80 N. W. 953, 81 N. W. 210, 79 Am. St. Rep. 400.

Dismissal of appeal.— An attorney may object to the dismissal of an appeal, brought before the settlement was made. Stilwell *v.* Armstrong, 28 Misc. (N. Y.) 546, 59 N. Y. Suppl. 671.

33. Necessity of leave of court.— Goddard *v.* Trenbath, 24 Hun (N. Y.) 182; Washburn *v.* Mott, 12 N. Y. Suppl. 111, 34 N. Y. St. 145, 19 N. Y. Civ. Proc. 439; Oliwill *v.* Verdenhalven, 7 N. Y. Suppl. 99, 26 N. Y. St. 115, 17 N. Y. Civ. Proc. 362; Stahl *v.* Wadsworth, 13 N. Y. Civ. Proc. 32; Dimick *v.* Cooley, 3 N. Y. Civ. Proc. 141. *Contra*, Forstman *v.* Schulting, 35 Hun (N. Y.) 504; Kehoe *v.* Miller, 10 Abb. N. Cas. (N. Y.) 393 note.

34. *Georgia.*—Johnson *v.* McCurry, 102 Ga. 471, 31 S. E. 88; Manning *v.* Manning, 61 Ga. 137; Coleman *v.* Ryan, 58 Ga. 132; Twiggs *v.* Chambers, 56 Ga. 279.

Michigan.— Carpenter *v.* Myers, 90 Mich. 209, 51 N. W. 206.

New York.— Pickard *v.* Yencer, 21 Hun (N. Y.) 403, 10 N. Y. Wkly. Dig. 271; Albert Palmer Co. *v.* Van Orden, 49 N. Y. Super. Ct. 89, 7 N. Y. Civ. Proc. 44, 64 How. Pr. (N. Y.) 79; Tullis *v.* Bushnell, 12 Daly (N. Y.) 217; Anonymous, 2 Daly (N. Y.) 533; Gallison, etc., Co. *v.* Rawak, 3 N. Y. Suppl. 802, 24 N. Y. St. 318; Deutsch *v.* Webb, 10 Abb. N. Cas. (N. Y.) 393 note; Shackelton *v.* Hart, 12 Abb. Pr. (N. Y.) 325 note, 20 How. Pr. (N. Y.) 39; Wood *v.* Trustees Northwest Presb. Church, 7 Abb. Pr. (N. Y.) 210 note; McCabe *v.* Fogg, 60 How. Pr. (N. Y.) 488; Owen *v.* Mason, 18 How. Pr. (N. Y.) 156.

Tennessee.— Illinois Cent. R. Co. *v.* Wells, 104 Tenn. 706, 59 S. W. 1041.

Utah.— Potter *v.* Ajax Min. Co., 22 Utah 273, 61 Pac. 999.

Wisconsin.— Howard *v.* Osceola, 22 Wis. 453.

United States.— Stewart *v.* Hilton, 19 Blatchf. (U. S.) 290, 7 Fed. 562; Gaines *v.* Travis, Abb. Adm. 297, 9 Fed. Cas. No. 5,179; McDonald *v.* The Cabot, Newb. Adm. 348, 16 Fed. Cas. No. 8,759; Eldridge *v.* The Ashley, 8 Fed. Cas. No. 4,333, 2 N. Y. Leg. Obs. 68; The Planet, 1 Sprague (U. S.) 11, 19 Fed. Cas. No. 11,204, 4 Law Rep. 353; The Victory, Blatchf. & H. Adm. 443, 28 Fed. Cas. No. 16,937.

Compare Fitzgerald *v.* Irby, 99 Va. 81, 37 S. E. 777.

The attorney for a pauper cannot attempt to collect his costs by proceeding with the suit. Quinnan *v.* Clapp, 10 Abb. N. Cas. (N. Y.) 394.

If the action abates, plaintiff's counsel cannot prosecute the suit for his fees. Harris *v.* Tison, 63 Ga. 629, 36 Am. Rep. 126.

35. *District of Columbia.*— Lamont *v.* Washington, etc., R. Co., 2 Mackey (D. C.) 502, 47 Am. Rep. 268.

Kansas.— Farry *v.* Davidson, 44 Kan. 377, 24 Pac. 419.

Louisiana.— Rind *v.* Hunsicker, 24 La. Ann. 571.

New York.— Pulver *v.* Harris, 62 Barb. (N. Y.) 500.

United States.— Platt *v.* Jerome, 19 How. (U. S.) 384, 15 L. ed. 623.

36. Collusive settlement.— Jones *v.* Morgan, 39 Ga. 310, 99 Am. Dec. 458; McDonald *v.* Napier, 14 Ga. 89; Pilkington *v.* Brooklyn Heights R. Co., 49 N. Y. App. Div. 22, 63 N. Y. Suppl. 211, 30 N. Y. Civ. Proc. 276; Wilber *v.* Baker, 24 Hun (N. Y.) 24; Pickard *v.* Yencer, 21 Hun (N. Y.) 403; McDowell *v.* Second Ave. R. Co., 4 Bosw. (N. Y.) 670; Dolliver *v.* American Swan Boat Co., 32 Misc. (N. Y.) 264, 65 N. Y. Suppl. 978; Rasquin *v.* Knickerbocker Stage Co., 12 Abb. Pr. (N. Y.) 324, 21 How. Pr. (N. Y.) 293; Talcott *v.* Bronson, 4 Paige (N. Y.) 501.

37. Setting aside satisfaction of judgment. — Bailey *v.* Murphy, 136 N. Y. 50, 32 N. E. 627, 49 N. Y. St. 82; Roberts *v.* Union El. R. Co., 84 Hun (N. Y.) 437, 32 N. Y. Suppl. 387, 65 N. Y. St. 592; Commercial Telegram Co. *v.* Smith, 57 Hun (N. Y.) 176, 10 N. Y. Suppl. 433, 32 N. Y. St. 445, 19 N. Y. Civ. Proc. 32; Whittaker *v.* New York, etc., R. Co., 54 N. Y. Super. Ct. 8, 11 N. Y. Civ. Proc. 189, 18 Abb. N. Cas. (N. Y.) 11; Crotty *v.* McKenzie, 42 N. Y. Super. Ct. 192, 52 How. Pr. (N. Y.) 54; Ward *v.* Wordsworth, 1 E. D. Smith (N. Y.) 598, 9 How. Pr. (N. Y.) 16; Mitchell *v.* Piqua Club Assoc., 15 Misc. (N. Y.) 366, 37 N. Y. Suppl. 406, 72 N. Y. St. 470, 25 N. Y. Civ. Proc. 139; Guliano *v.* Whitenack, 9 Misc. (N. Y.) 562, 30 N. Y. Suppl. 415, 62 N. Y. St. 84, 24 N. Y. Civ. Proc. 55, 1 N. Y. Annot. Cas. 75; Spors *v.* Schultheis, 8 N. Y. Suppl. 175, 28 N. Y. St. Schultheis, 8 N. Y. Suppl. 175, 28 N. Y. St. 50; Wade *v.* Orton, 12 Abb. Pr. N. S. (N. Y.) 444.

Laches will bar the attorney's right. Neill *v.* Van Wagenen, 54 N. Y. Super. Ct. 477.

38. Wood *v.* Hughes, 138 Ind. 179, 37 N. E. 588; Day *v.* Bowman, 109 Ind. 383, 10 N. E. 126; Adams *v.* Lee, 82 Ind. 587; Dunning *v.* Galloway, 47 Ind. 182.

2. Possessory Lien. The possessory lien is a right merely to retain, and cannot be actively enforced.[39] If, however, the attorney fails to prosecute his claim diligently, the court may order the property held under the claim to be given up.[40]

Bill of particulars.— A rule to show cause why a fund should not be applied in payment of fees need not have a bill of particulars attached. Walker *v.* Floyd, 30 Ga. 237.

39. Compton *v.* State, 38 Ark. 601; McKelvy's Appeal, 108 Pa. St. 615; Eddinger *v.* Adams, 4 Kulp (Pa.) 401; *In re* Wilson, 12 Fed. 235; Bozon *v.* Bollard, 3 Jur. 884, 4 Jur. 763, 9 L. J. Ch. 123, 4 Myl. & C. 354, 18 Eng. Ch. 354.

40. Leszynsky *v.* Merritt, 9 Fed. 688. But see Esdale *v.* Oxenham, 3 B. & C. 225, 5 D. & R. 49, 27 Rev. Rep. 331, 10 E. C. L. 110, holding that, where the client's right is disputed by a third party, the court will make no summary order.

A bill in equity is a proper remedy by the client to compel the attorney to relinquish the property held under the lien. Soper *v.* Manning, 147 Mass. 126, 16 N. E. 752.

ATTORNEY-GENERAL

EDITED BY ROBERT F. WALKER*

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CROSS-REFERENCES

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  - To Recover Assets or Sequester Property of Corporation, see CORPORATIONS.
  - To Restrain Abuse or Usurpation of Corporate Franchise, see CORPORATIONS; STREET RAILROADS.

I. DEFINITION.

Attorney-general is a title conferred in England,[1] under the government of the United States, and in many states of the Union,[2] on the chief law officer of the government.[3] The Prince of Wales also has an attorney-general, and the queen consort when there is one.[4]

II. APPOINTMENT, QUALIFICATION, AND TENURE.

In England the attorney-general is selected from the king's counsel[5] and is appointed, by letters patent from the crown,[6] on the advice of the government for the time being. There is, therefore, a change of attorney-general on every change of government.[7] Under the government of the United States the attorney-general is appointed by the president, with the advice and consent of the senate.[8] In the various states of the Union the selection,[9] qualifications,[10] and

1. **The title is first mentioned** in England in the eleventh year of Edward IV. Burrill L. Dict. [*citing* 4 Reeves Hist. Eng. L. 132].

2. **In some states the name "solicitor-general"** is bestowed on an officer of substantially the same power. Abbott L. Dict.

3. Abbott L. Dict.

The word is also defined as "a general attorney; one who was authorized to appear in all suits and causes, and in all courts; or in all suits at a particular circuit, or for a specified period of time." Burrill L. Dict.

4. Sweet L. Dict.

5. Burrill L. Dict.

6. Abbott L. Dict.

But the Prince of Wales appoints his own attorney-general. Wharton L. Lex.

7. Sweet L. Dict.

8. Abbott L. Dict.

Powers and duties of the attorney-general of the United States defined.—U. S. Rev. Stat. (1872), §§ 346–387.

9. **The legislature alone** can fill the office for the first term specified, where a law is enacted providing that the legislature enacting it shall elect an attorney-general to serve for two years, and that thereafter the office shall be filled by the qualified voters. Collins *v.* State, 8 Ind. 344.

Presumption as to regularity of appointment.—Where, on an informal contest as to the right to appear in a case as attorney-general, one party claims under an appointment by the present governor and the other under an appointment previously made for a term not yet expired, according to a commission exhibited in court, the court will presume, from the presence of the latter claimant, that he is not dead, and from his acts and declarations that he has not resigned, and will, accordingly, treat him as *de facto* attorney-general, the question as to who is so *de jure* being reserved for determination until such time as a proper case shall have been formally submitted and heard. *In re* Atty.-Gen., 3 N. M. 304, 9 Pac. 249.

10. **Incumbent of another office ineligible.**—A person holding the office of United States district attorney, on the day of election, is incapable of being chosen to the office of attorney-general of the state. State *v.* Clarke, 3 Nev. 566.

tenure of office[11] are fixed by the constitution or legislative enactment of each individual state.

III. DEPUTIES, ASSISTANTS, AND SUBSTITUTES.

A. District and County Attorneys. The attorney-general of the United States has a deputy in each judicial district who is known as the United States district attorney; the attorney-general of the state a deputy in each county, usually known as the district or county attorney.[12]

B. Special Assistants — 1. In General. The attorney-general may authorize another attorney to assist in a criminal prosecution or to conduct the prosecution alone;[13] has power, in the name of the state, to employ counsel to assist him in any suit when the state is a party;[14] and, in instituting legal proceedings on behalf of the crown, may be represented by attorney just as a private suitor may, the employment of an attorney to act for him not being a delegation of the powers conferred upon him by law to take such proceedings.[15] He has no authority,

11. Baker *v.* Payne, 22 Oreg. 335, 29 Pac. 787, holding that, under Oreg. Laws (1891), p. 188, by which the office was created, and which provided for a quadrennial election in one section, and by a subsequent section provided that, on the approval of the act, and at any time when a vacancy may occur in the office, the governor shall appoint a person to be attorney-general, who shall hold the office "until the next general election, when his successor shall be elected and shall qualify as provided for in this act"— the person appointed by the governor to fill the vacancy will hold only until some one is elected at the "next general election" to hold for the fractional part of the term.

12. Anderson L. Dict. See U. S. Rev. Stat. (1872), §§ 346–387; and, generally, PROSECUTING ATTORNEYS.

In Missouri (Mo. Laws (1901), p. 47) and other states, the office of assistant attorney-general is created by statute. This officer assists the attorney-general in the discharge of his duties in the appellate courts, while the district, county, and prosecuting attorneys represent the state in the trial courts.

Evidence of authority to act.—A certified copy of an order of the attorney-general, directing the United States attorney for the district of California to proceed in a certain suit in equity, is an abundant proof that the bill was filed by authority of the attorney-general. Mullan *v.* U. S., 118 U. S. 271, 6 S. Ct. 1041, 30 L. ed. 170 [*affirming* 10 Fed. 785].

13. State *v.* Anderson, 29 La. Ann. 774; State *v.* Russell, 26 La. Ann. 68. See also Com. *v.* Knapp, 10 Pick. (Mass.) 477, 20 Am. Dec. 534, holding that Mass. Stat. (1807), c. 18, providing that the attorney-general or the solicitor-general shall have control of prosecutions and shall receive no fee from the prosecutor, does not prevent the attorney-general, with the concurrence of the solicitor-general, from securing additional counsel, without pay, in the trial of a murder case, provided that the number addressing the jury for the state be limited to two.

When authorized by the state legislature, the attorney-general may appoint an attorney for the purpose of enforcing a given law, with authority to take all steps necessary to its enforcement that the attorney-general could take. State *v.* Becker, 3 S. D. 29, 51 N. W. 1018.

14. State *v.* Mayes, 28 Miss. 706.

15. Casgrain *v.* Cie de Carosserié de Montréal, 9 Quebec Super. Ct. 383. *Compare* Abrahams *v.* Reg., 6 Can. Supreme Ct. 10; Reg. *v.* Granger, 7 Leg. N. 247, which hold that, under 32 & 33 Vict. c. 29, the attorney-general could not delegate to the judgment and discretion of another the power which the legislature had authorized him personally to exercise.

Presumption as to authority of assistant. — An attorney who institutes proceedings for the attorney-general is presumed to be duly authorized, and all proceedings signed by him under such presumed authority are to be considered as the act of the attorney-general. Casgrain *v.* Cie de Carosserié de Montréal, 9 Quebec Super. Ct. 383. See also Crawford *v.* State, 155 Ind. 692, 57 N. E. 931, holding that a justice of the peace accused of failure to turn over fines received by him on demand of a deputy attorney-general, as is required by law, cannot set up the defense that the attorney-general is only entitled to one deputy, and that the person who made the demand, being appointed after another had been, is not a deputy authorized to make the demand, the statute providing that the attorney-general shall have such deputies as the governor, secretary, and auditor of state may deem necessary, and the salary act providing for the payment of two deputies.

Evidence as to appointment.— In a prosecution of a justice of the peace for embezzlement in failing to account for fines received by him after demand by one alleged to be a deputy of the attorney-general, on an issue as to whether or not a certain person was a deputy attorney-general, testimony that he is a deputy of the attorney-general, and that, at the time of the transactions under investigation, he was acting as such, is competent, and sufficient to prove that he was a deputy attorney-general. Crawford *v.* State, 155 Ind. 692, 57 N. E. 931.

however, to procure the opinion of counsel at the expense of the state,[16] to employ the assistance of counsel to resist the enactment of a law,[17] or to employ a district attorney to perform services in his own district, on behalf of the government but not pertaining to his office;[18] and statutes authorizing the employment of assistants are strictly construed.[19] It has been held that the duties of an assistant attorney-general are confined to the county in which he is appointed, and that he has no authority to bring an action by the state on his relation.[20]

2. STENOGRAPHERS. The attorney-general may employ a stenographer,[21] and the attorney-general of the United States has power to authorize the employment by the district attorney of a stenographer to assist in preparing indictments.[22]

C. Substitutes. When so provided by law, a substitute may be appointed to act in the absence or disqualification of the attorney-general.[23]

IV. COMPENSATION.

A. Of Attorney-General — 1. IN GENERAL. The compensation of an attorney-general may, according to the constitutional or legislative enactment of the particular jurisdiction, consist of a salary,[24] which may, in the absence of statutory or constitutional limitation, be made smaller during his term;[25] of a percentage[26] of moneys collected by him and his assistants;[27] or of specified fees,[28]

16. People *v.* Talmage, 6 Cal. 256.

17. Julian *v.* State, 140 Ind. 581, 39 N. E. 923.

18. Smith *v.* U. S., 26 Ct. Cl. 568.

19. Thus, under a statute, in one section authorizing the attorney-general to employ assistants to recover moneys due the state, paying such assistants a percentage of the sums collected, and in another providing that he shall have certain deputies provided not more than a certain sum per annum is expended, it has been held that the attorney-general was not authorized to employ attorneys for the prosecution of suits in relation to real estate owned by the state, by which such attorneys are entitled to a fee from the state equal to ten per cent of the value of the land (Julian *v.* State, 122 Ind. 68, 23 N. E. 690); and, under a statute providing that the attorney-general is authorized to employ additional counsel in suits in the name of the people "at any general or special term, or at chambers of the supreme court," etc., it has been held that he cannot appear by special counsel on the trial of such an action in a circuit court (People *v.* Metropolitan Telephone, etc., Co., 11 Abb. N. Cas. (N. Y.) 304, 64 How. Pr. (N. Y.) 66).

20. State *v.* Shearman, 51 Kan. 686, 35 Pac. 455.

21. *In re* Appropriations For Deputies, etc., 25 Nebr. 662, 667, 41 N. W. 643, holding that a stenographer is not a clerk within the meaning of Nebr. Const. art. 5, § 24, which provides that "there shall be no allowance for clerk-hire in the offices of the . . attorney-general."

22. U. S. *v.* Denison, 80 Fed. 370, 49 U. S. App. 352, 25 C. C. A. 496.

23. State *v.* Harris, (Tenn. 1898) 45 S. W. 438, holding that the court may appoint such a substitute under Shannon's Code Tenn. § 5769, and that an indictment for murder, drawn and preferred by an attorney-general so appointed, was valid. But see State *v.* Morris, Houst. Crim. Cas. (Del.) 124, holding that the legislature has no power, under the constitution, to authorize two particular members of the bar to prepare indictments, for certain misdemeanors, in behalf of the state, sign them as attorneys for the state, submit them to the grand jury, and then proceed to try them, exercising all the powers of the attorney-general, in case the attorney-general should not act within a certain time.

24. Act increasing salary not retrospective. — The Missouri act of Feb. 15, 1865, which increased the annual salary of the attorney-general, and was in terms made to take effect from its passage, was not retrospective so as to make the increased salary commence from the first day of the preceding January. State *v.* Thompson, 36 Mo. 65.

25. Field *v.* Auditor, 83 Va. 882, 3 S. E. 707.

Withholding in case of indebtedness to state unconstitutional.— The office of attorney-general being a constitutional office, although the salary is fixed by the legislature, Va. Acts (Ex. Sess. 1884), p. 90, authorizing the withholding of the salary in the case of an indebtedness to the state, is unconstitutional, and mandamus will issue to compel payment notwithstanding. Blair *v.* Marye, 80 Va. 485.

26. Two per cent of the judgment in favor of the state should, under Ky. Gen. Stat. c. 5, art. 5, § 4, be taxed as costs for the attorney-general's fee. Newport, etc., Bridge Co. *v.* Douglass, 12 Bush (Ky.) 673.

27. State *v.* Denny, 67 Ind. 148, which holds that he is not entitled to commissions on amounts paid to the state before his term of office began.

28. An attachment for a contempt, against a juror for non-attendance, is not an action for which the attorney-general can receive a fee for appearing on behalf of the state. Martin *v.* State, 1 Harr. & J. (Md.) 721.

For each misdemeanant whose conviction

to which last it has been held that he may be entitled although he is given a specific salary.[29]

2. EXTRA SERVICES. Where, at the bidding of the legislature, the attorney-general performs services not incumbent on him by virtue of his office,[30] the legislature may compensate him therefor.[31]

B. Of Assistants. Special assistants employed by the attorney-general are entitled to compensation only under the conditions prescribed by law,[32] and are entitled to no compensation where their employment was unauthorized.[33]

V. DUTIES AND POWERS.

A. In General. The attorney-general has the powers belonging to that officer at common law in addition to those conferred by statute.[34] In both England[35] and the United States[36] he is the principal law officer of the government. His

is affirmed, though jointly convicted, the attorney-general is entitled to receive ten dollars, under Tex. Code Crim. Proc. (1895), art. 1119. Hogg *v.* State, 40 Tex. Crim. 109, 48 S. W. 580.

In suits where the crown is a party and entitled to costs, a retaining fee of twenty-five shillings is allowed to the attorney-general; and for all papers properly termed pleadings a higher rate per folio is allowed for drafting and copying than in suits between subjects. Atty.-Gen. *v.* Twenty Casks Spirits, 8 N. Brunsw. 404.

29. Com. *v.* Field, 84 Va. 26, 3 S. E. 882 (holding that, although he be allowed fees taxed in criminal actions when collected from the defendants, he cannot collect those fees from the state under the Virginia act of April 4, 1877, as amended by the act of March 12, 1878, providing a salary of a given amount for the attorney-general, and that he "shall not be entitled to any further compensation"); Thon *v.* Com., 77 Va. 289.

30. **Where the statute provides, among other duties,** that the attorney-general "shall discharge such other duties as may be imposed by the general assembly," but shall receive no other compensation than his salary, and he appears for the state in certain cases under an act of the legislature, his services in such cases are covered by his salary. Field *v.* Auditor, 83 Va. 882, 3 S. E. 707.

31. Love *v.* Baehr, 47 Cal. 364.

32. Thus, under Ky. Stat. § 114, their fees must be fixed by the governor and auditor, and no fees can be paid except out of the amount recovered and paid into the treasury. Hendrick *v.* Posey, 104 Ky. 8, 20 Ky. L. Rep. 359, 45 S. W. 525, 46 S. W. 702. And, under Ky. Stat. §§ 4241, 4258, 4262, 4263, 4266, and c. 8, art. 2, §§ 113, 114, 127, it is held that an attorney employed by the attorney-general to institute a suit to compel a taxpayer to list his property is not entitled to be paid by the state. Coulter *v.* Denny, (Ky. 1902) 67 S. W. 65.

Allowance from funds in hands of receiver. — An allowance to special counsel employed by the attorney-general to wind up the affairs of an insolvent life insurance company should not be granted out of the funds in the hands of the receiver. Atty.-Gen. *v.* Continental L. Ins. Co., 88 N. Y. 571.

33. Smith *v.* U. S., 26 Ct. Cl. 568.

34. Hunt *v.* Chicago Horse, etc., R. Co., 121 Ill. 638, 13 N. E. 176 [*affirming* 20 Ill. App. 282]; People *v.* Miner, 2 Lans. (N. Y.) 396.

Power of legislature to increase duties. — It has been held that the legislature has no power to compel the attorney-general to act as a member of the board of examiners (Love *v.* Baehr, 47 Cal. 364); but where, though the constitution classed the attorney-general as belonging to the executive department, and district attorneys as belonging to the judicial, a clause in the constitution required the former to perform "such other duties as may be required by law," it was held that he might be required by act of legislature to advise the district attorneys and to act for the state in counties where there are no district attorneys; but that the legislature could not give the attorney-general control of cases in which the constitution provided that the district attorneys should represent the state, nor empower him to deprive those officers of their fees in such cases (State *v.* Moore, 57 Tex. 307).

35. Rex *v.* Austen, 8 Price 142; Atty.-Gen. *v.* Brown, 1 Swanst. 265, 1 Wils. C. P. 323; Abbott L. Dict.

During the vacancy of the office the whole business and authority of the attorney-general devolve upon the solicitor-general. Rex *v.* Wilkes, 4 Burr. 2527.

Right to appear for crown not questionable by private person. — The right of the attorney-general for the Province of Quebec to appear for the crown cannot be questioned by a private person. Monk *v.* Ouimet, 19 L. C. Jur. 71.

36. Fletcher's Succession, 12 La. Ann. 498; State *v.* Fremont, etc., R. Co., 22 Nebr. 313, 35 N. W. 118; Abbott L. Dict.

The attorney-general of the United States directs the management and operation of the department of justice. Abbott L. Dict. See also a discussion of the duties of the attorney-general of the United States by William Wirt in 5 Law Rep. 373, and by Caleb Cushing in 6 Op. Atty.-Gen. (U. S.) 326, 5 Am. Law Reg. 65. By U. S. Rev. Stat. (1872), § 368, he has vested in him a general supervisory power over the accounts of the United States marshals, and his decision of any point

functions are, however, political as well as legal, for in England he is almost invariably a member of the house of commons, where he answers questions on legal matters of public interest and has charge of government measures relating to legal subjects;[37] and the attorney-general of the United States is a member of the president's cabinet and, under the act of congress of Jan. 19, 1886, is the fourth in succession after the vice-president to the office of president, in case of a vacancy.[38]

B. Furnishing Opinions to Other Officers. The attorney-general of the United States is required to advise the president and heads of departments upon questions of law arising in the performance of their duties,[39] but he is not authorized to give legal opinions at the call of congress.[40] His opinions are preserved in a series of reports known as the "Opinions of the Attorneys-General," which include decisions rendered from 1791 to date.[41] In many of the states it is the duty of the attorney-general to advise, on request, the governor[42] or other state officers.[43]

C. Instituting Disbarment Proceedings. The attorney-general has power to institute disbarment proceedings.[44]

D. In Civil Actions — 1. May Act in What Cases — a. In General. The authority of the attorney-general to prosecute or defend any suit in which the state is concerned is necessarily implied from the nature of his office,[45] and he may bring an action where the wrong or injury complained of affects the public generally,[46] whenever there is proper cause, even though he is not required to do

connected with the subject is conclusive, and not subject to collateral attack by the courts. Schloss *v.* Hewlett, 81 Ala. 266, 1 So. 263. He is not, however, authorized thereby to reduce fees of district attorneys which have been fixed by the court within the prescribed limit by virtue of U. S. Rev. Stat. (1872), § 824, providing that, for a conviction upon an indictment, "the district attorney may be allowed, in addition to the attorney's fees herein provided, a counsel fee in proportion to the importance and difficulty of the cause, not exceeding thirty dollars." U. S. *v.* Waters, 133 U. S. 208, 10 S. Ct. 249, 33 L. ed. 594 [*affirming* 21 Ct. Cl. 30].

37. Sweet L. Dict.

38. Bouvier L. Dict.

39. Abbott L. Dict.

40. 15 Op. Atty.-Gen. (U. S.) 475.

41. Anderson L. Dict.

42. Abbott L. Dict.

43. Dodd *v.* State, 18 Ind. 56, holding that it is the duty of the attorney-general to furnish a state officer on request an opinion touching his duties, but that a mistaken opinion will not protect an officer who acts in accordance therewith.

44. Wilson *v.* Popham, 91 Ky. 327, 12 Ky. L. Rep. 904, 15 S. W. 859; State *v.* Harber, 129 Mo. 271, 31 S. W. 889; State *v.* Mullins, 129 Mo. 231, 31 S. W. 744.

Disbarment, generally, see Attorney and Client.

45. State *v.* State Bank, 5 Mart. N. S. (La.) 327. See also Orton *v.* State, 12 Wis. 509, holding that it is the duty of the attorney-general to appear for the state in all suits in which it is interested, and the school-land commissioners are not authorized to employ counsel at the expense of the state in an action brought against them.

Duty to appear in inferior courts. — Since Colo. Gen. Laws, § 1103, limits the duties of the attorney-general to state cases instituted or pending in the supreme court of the state, his duty to appear in such cases in inferior courts would be obligatory only when required to do so by the governor or general assembly. Atchison, etc., R. Co. *v.* People, 5 Colo. 60.

When parties claim under two different grants from the crown, each reserving a rent, but of different amounts — inasmuch as the rights of the crown are concerned, the attorney-general ought to be before the court. Hovenden *v.* Annesley, 2 Sch. & Lef. 617.

Where the state is only a nominal party, as in an action brought on the relation of a private individual against certain public officers to test the validity of an act of the legislature, the attorney-general may appear. Parker *v.* State, 132 Ind. 419, 31 N. E. 1114.

46. *California.* — People *v.* Oakland Water Front Co., 118 Cal. 234, 50 Pac. 305.

Kansas. — Wyandotte, etc., Bridge Co. *v.* Wyandotte County, 10 Kan. 326.

Massachusetts. — Goddard *v.* Smithett, 3 Gray (Mass.) 116.

Missouri. — The attorney-general is authorized, in an appropriate proceeding, to institute an inquiry into the legality of the acts of a county institute board, organized under the law to determine as to the qualifications of school-teachers. State *v.* Harrison, 141 Mo. 12, 41 S. W. 971, 43 S. W. 867.

New York. — People *v.* Vanderbilt, 26 N. Y. 287 [*affirming* 38 Barb. (N. Y.) 282, 24 How. Pr. (N. Y.) 301]; People *v.* Macy, 62 How. Pr. (N. Y.) 65.

South Carolina. — State *v.* Corbin, 16 S. C. 533, holding that, since S. C. Gen. Stat. p. 110, § 5, authorizes the attorney-general to "prosecute information or other process against persons who intrude upon lands, rights, or property of the State," and section 35 requires him to "defend the rights of

so except where other officers, whose duty it is to sue, have delayed for twelve

the State in all cases where its rights are involved," he had authority to sue a law firm to recover money collected by them in a suit against persons intruding on the state's property, especially as the action of the attorney-general in suing the firm was reported to the legislature, and no objection was made, from which a ratification of his action might be inferred.

England.— Atty.-Gen. *v.* Shrewsbury Bridge Co., 21 Ch. D. 752, 51 L. J. Ch. 746, 46 L. T. Rep. N. S. 687, 30 Wkly. Rep. 916; Ware *v.* Regents' Canal Co., 3 De G. & J. 212, 5 Jur. N. S. 25, 28 L. J. Ch. 153, 7 Wkly. Rep. 67, 60 Eng. Ch. 165. See also Reg. *v.* Cruise, 2 Ir. Ch. 65.

Canada.— Atty.-Gen. *v.* Bergen, 29 Nova Scotia 135.

Actions against public officers.— The attorney-general is the proper party to bring action against public officers to compel them to properly dispose of moneys in their keeping (State *v.* McClelland, 138 Ind. 395, 37 N. E. 799; Moore *v.* State, 55 Ind. 360), to restrain public boards from exercising inhibited powers (McMullen *v.* Person, 102 Mich. 608, 61 N. W. 260; Taggart *v.* Wayne County, 73 Mich. 53, 40 N. W. 852), or to recover on a state treasurer's bond (Miller *v.* State, 69 Miss. 112, 12 So. 265). It has been held, however, that an action cannot be maintained by the attorney-general to restrain a county treasurer from collecting taxes for the payment of bonds issued by a school district (State *v.* McLaughlin, 15 Kan. 228, 22 Am. Rep. 264), and that neither N. Y. Code Civ. Proc. § 430 (permitting the attorney-general, on leave of court, to bring suit to annul the charter of a corporation other than municipal, when such corporation exercises a franchise not conferred by law), nor section 432 (allowing him to maintain an action whenever any person shall unlawfully exercise any public office or franchise), authorizes such officer to prosecute a suit in the name of the people against commissioners appointed by act of legislature, to enjoin them from issuing town bonds authorized by said act, on the ground that they had failed to take the requisite preliminary steps, nor has he power at common law to maintain such proceeding (People *v.* Miner, 2 Lans. (N. Y.) 396).

Certiorari to remove orders of sessions relating to the expenditure of the district rates and assessments lies at the instance of the attorney-general, without notice. Rex *v.* Newcastle Justices, Draper (U. C.) 114.

Collection of taxes.— Under a statute authorizing the attorney-general to commence an action in the name of the state whenever, in his opinion, it is necessary to do so in order to protect or secure the public interests, he may bring suit for the collection of taxes due the state (State *v.* Central Pac. R. Co., 10 Nev. 47); but only upon express authority from the state can he settle a tax execution for less than its full amount (State *v.* Southwestern R. Co., 66 Ga. 403). Moneys received by him in actions for delinquent taxes become part of the public revenue of the state, and must be paid by him into the state treasury, notwithstanding such sums are not the full sum sued for, but constitute merely a payment of part which is admitted to be due, without prejudice to the rights of either party as to the balance. San Mateo County *v.* Oullahan, 69 Cal. 647, 11 Pac. 386.

Enforcing provisions in deed by commonwealth.— The attorney-general may bring suit to enforce a provision in a deed by the commonwealth prohibiting the placing of a building upon the front of a lot conveyed (Atty.-Gen. *v.* Gardiner, 117 Mass. 492), and where a bond for a deed given by the commonwealth contains a stipulation that "a passageway sixteen feet wide is to be laid out in the rear of said premises, the same to be filled in by the Commonwealth, and to be kept open and maintained by the abutters in common," may maintain an action to restrain defendant from building or maintaining bay windows which project over the passageway (Atty.-Gen. *v.* Williams, 140 Mass. 329, 2 N. E. 80, 3 N. E. 214, 54 Am. Rep. 468).

Enjoining conspiracy to do prohibited acts.— The attorney-general may institute proceedings to obtain an injunction restraining persons who have conspired together for the purpose of doing what is prohibited by law. State *v.* Fagan, 22 La. Ann. 545.

Enjoining erection of buildings adjoining public square.— Mass. Stat. (1898), c. 452, prohibiting the erection of buildings over ninety feet high on the streets adjoining Copley square, in Boston, which is a public park, intended for the use of the public, gives the public rights in the nature of an easement over lands facing the square, which are annexed to it for the benefit of the public, and hence the attorney-general is the proper person to sue to enforce it. Atty.-Gen. *v.* Williams, 174 Mass. 476, 55 N. E. 77, 47 L. R. A. 314, holding further that Mass. Stat. (1894), c. 257, giving the city of Boston the right to enforce its building laws, applied to statutes then in force, and did not contemplate the passage of the later statute, and hence did not affect the attorney-general's right to enforce it. *Compare* State *v.* Schweickardt, 109 Mo. 496, 19 S. W. 47, holding that the attorney-general has no authority to enjoin a party from carrying out a contract made with a city under an ordinance in regard to a privilege granted such party in a park.

Enjoining trespass on crown lands.— The court has jurisdiction to grant an injunction, at the instance of the attorney-general for the Dominion, in respect of trespass upon crown lands. Atty.-Gen. *v.* Ryan, 5 Manitoba 81.

Intervention in suit between states.—The attorney-general may intervene on behalf of the United States in a suit between states in which the general government is interested, and may introduce evidence and take part in the argument without making the United States a party for or against whom judgment

months after cause of action accrued.[47] He cannot, however, maintain an action to prevent or redress a private wrong,[48] or on behalf of a municipality[49] or county.[50]

b. Concerning Charities. The attorney-general is a proper party in any action involving the proper administration of a trust in which the public is interested,[51] and may bring suit to enforce a trust for a public charity.[52]

c. Concerning Patents. In England and her colonies the attorney-general acts as representative of the crown in matters connected with patents.[53]

can be rendered. Florida *v.* Georgia, 17 How. (U. S.) 478, 15 L. ed. 181.

Where a public right is invaded, and the authorities whose duty it is to bring an action fraudulently refuse to do so, or no other remedy exists at common law, the attorney-general may sue in his representative capacity, whether the injury affect the whole people or a limited organization of them, and whether it be a public nuisance or corrupt perversion of public money or public credit. People *v.* Tweed, 13 Abb. Pr. N. S. (N. Y.) 25.

47. Carr *v.* State, 81 Ind. 342.

After a twelve months' delay on the part of a prosecuting attorney, an action may be prosecuted by the attorney-general on a forfeited recognizance, and the authority of the attorney-general in a suit so brought is superior to that of the prosecuting attorney. State *v.* Schloss, 92 Ind. 293.

48. Atty.-Gen. *v.* Salem, 103 Mass. 138.

Qui tam actions.— It is not the attorney-general's duty to attend to the prosecution of *qui tam* or popular actions. Matter of Atty.-Gen., Mart. & Y. (Tenn.) 285.

49. State *v.* Desforges, 5 Rob. (La.) 253 (suit on a forfeited bail bond when the penalty belongs to a city); People *v.* Equity Gas Light Co., 141 N. Y. 232, 36 N. E. 194, 56 N. Y. St. 825 (to restrain unauthorized tearing up of street pavements); People *v.* Booth, 32 N. Y. 397 (to restrain a person from taking possession of municipal property).

50. Atty.-Gen. *v.* Moliter, 26 Mich. 444; People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178 [*affirming* 67 Barb. (N. Y.) 472].

51. Atty.-Gen. *v.* Newberry Library, 150 Ill. 229, 37 N. E. 236 [*affirming* 51 Ill. App. 166]; Lackland *v.* Walker, 151 Mo. 210, 52 S. W. 414 (holding that where the public is the beneficiary of a charitable trust the attorney-general is the only necessary party to a proceeding involving the administration of the trust estate or the powers and duties of the trustees). See also *Ex p.* Skinner, 2 Meriv. 453, 1 Wils. C. P. 14 (holding that a petition under 52 Geo. III, c. 101, must have the signature of the attorney-general, or of the solicitor-general in case only of there being no attorney-general at the time, such signature not to be affixed without the same deliberation as in the case of an information regularly filed); Matter of Warwick Charities, 1 Phil. 559, 19 Eng. Ch. 559 (holding that petitions for filling vacancies in the number of charity trustees require the fiat of the attorney-general, but need not be served upon him); Atty.-Gen. *v.* Hewitt, 9 Ves. Jr. 232 (holding that the court will not act under an award in a charity cause without consent of the attorney-general, or without inquiring whether it is for the benefit of charity).

He is a necessary party to a suit to obtain the direction of a court of equity as to the administration of a public charity which is not in the hands of trustees charged by the donor with its management, but is not a proper party when the only relief sought is the division of the property left by the donor between the charity and other devisees. Newberry *v.* Blatchford, 106 Ill. 584. He must also be made a party to a suit in equity by an executor to test the validity of a bequest for charitable purposes. Jackson *v.* Phillips, 14 Allen (Mass.) 539.

52. *Massachusetts.*—Parker *v.* May, 5 Cush. (Mass.) 336.

Michigan.— Atty.-Gen. *v.* Soule, 28 Mich. 153, holding, however, that a bequest of a certain sum for the establishment of a school in a specified locality "for the education of children, to be expended according to the direction of my said executors," was not a bequest for a public charity so enforceable.

New Hampshire.— Orford Union Cong. Soc. *v.* Orford West Cong. Soc., 55 N. H. 463.

New York.— Relief Respectable Aged Indigent Females Assoc. *v.* Beekman, 21 Barb. (N. Y.) 565.

England.— Sweet L. Dict.

Canada.— Atty.-Gen. *v.* Axford, 13 Can. Supreme Ct. 294.

This is a common-law power, incident to the office, and does not depend for its exercise upon the requirement of the governor, or either branch of the legislature, as provided in Mass. Rev. Stat. c. 13, § 30. Parker *v.* May, 5 Cush. (Mass.) 336.

53. Sweet L. Dict.

A scire facias to repeal letters patent, at the instance of a private prosecutor, can only issue on the fiat of the attorney-general, who may withhold his assent if no sufficient ground is shown. A draft of the writ and a statement of the facts on which it is founded should be laid before the attorney-general, and, if he is disqualified from acting, the solicitor-general or a crown lawyer should decide on the application. Legall *v.* Duffy, 8 N. Brunsw. 57.

On an application to question a patent under the Patent Act of 1872, it seems that the intervention of the attorney-general is not essential. Matter of Bell Telephone Co., 9 Ont. 339.

d. For Recovery of Common-School Fund. A suit by the state to recover a part of its common-school fund is properly brought on the relation of the attorney-general.[54]

2. Conduct and Management of Cause — a. In General. In England[55] and Canada[56] the attorney-general possesses entire dominion over every suit instituted by him in his official capacity, whether there be a relator or not. In some of the United States, however, it has been held that when the state has no direct interest in the event of the suit, the attorney-general, as such, has no power to control the conduct thereof[57] or to withdraw his consent, to the parties interested, to use the name of the state and his name in bringing an action when such withdrawal would prejudice the parties interested.[58]

b. On Appeal. The attorney-general is the only person who is authorized by law to appear for the people in the supreme court,[59] and no other attorney, appearing without his consent, will be recognized.[60] The attorney-general may

54. Tippecanoe County *v.* State, 92 Ind. 353.

55. Atty.-Gen. *v.* Haberdasher's Co., 15 Beav. 397, 16 Jur. 717. See also Atty.-Gen. *v.* Ironmongers Co., 1 Cr. & Ph. 208, 5 Jur. 356, 10 L. J. Ch. 201, 18 Eng. Ch. 208, holding that, in an information, the attorney-general, and not the relator, is the party prosecuting the cause, and that, therefore, the court will not allow counsel for the relator to be heard in any other character than as counsel for the attorney-general.

56. Casgrain *v.* Atlantic, etc., R. Co., [1895] App. Cas. 282 [*confirming* (Q. B. Dec. 23, 1892) Consol. Dig. Quebec 179 (*reversing* 21 Rev. Leg. 71)].

57. People *v.* Jacob, (Cal. 1886) 12 Pac. 222 (holding that, when a suit is instituted in the name of the state, by permission of the attorney-general, upon the relation of the real party in interest, seeking the cancellation of a patent for state swamp-lands, and the state has no direct interest in the event of the suit, the attorney-general is not authorized to move to dismiss); People *v.* North San Francisco Homestead, etc., Assoc., 38 Cal. 564; Atty.-Gen. *v.* Wallace, 7 B. Mon. (Ky.) 611 (holding that the attorney-general has no authority to dismiss an information filed with his consent on relation of another to enforce a charitable bequest, since the control of the cause and liability for costs rest on the relator); Mechanics' F. Ins. Co.'s Case, 5 Abh. Pr. (N. Y.) 444 (holding that an action begun by the attorney-general at the instance of the state comptroller to dissolve an insurance company cannot be discontinued at the option of the attorney-general). See also Atty.-Gen. *v.* Barstow, 4 Wis. 567, holding that, where the attorney-general has filed an information in the nature of quo warranto upon the relation of a person claiming an office, he may dismiss the action as far as the public is concerned, but the relator will be allowed to prosecute his claim in the suit so instituted. *Compare* State *v.* Fremont, etc., R. Co., 22 Nebr. 313, 35 N. W. 118 (holding that where the attorney-general is intrusted by law with the management of all cases in which the state is a party or interested, his action in a suit by the state against a railroad company to compel the company to reduce its freight charges cannot be controlled by a majority of the state board of transportation); People *v.* New York Cent. Crosstown R. Co., 21 Hun (N. Y.) 476 (holding that an action brought by the people with the consent of the attorney-general to restrain a street-railway company from laying its tracks along a certain street may be abandoned if he so elects); People *v.* Tobacco Mfg. Co., 42 How. Pr. (N. Y.) 162 (holding that the attorney-general may discontinue an action brought by him in the name of the people against a corporation to enforce a forfeiture of its charter).

Change of venue.— The attorney-general, and not the governor, has authority to consent to the transfer of a case against the state from a term in the city of New Orleans to a term in Monroe. State *v.* Dubuclet, 27 La. Ann. 29.

58. People *v.* Clark, 72 Cal. 289, 13 Pac. 858; People *v.* Jacob, (Cal. 1886) 12 Pac. 222; People *v.* North San Francisco Homestead, etc., Assoc., 38 Cal. 564.

59. People *v.* Pacheco, 29 Cal. 210; People *v.* Navarre, 22 Mich. 1 (holding that, except by him, the state cannot, under Mich. Comp. Laws, § 180, be made a plaintiff in error in that court).

60. Frey *v.* Michie, 68 Mich. 323, 36 N. W. 184; Babcock *v.* Hanselman, 56 Mich. 27, 22 N. W. 99.

It will be presumed that other counsel appearing for the state are acting by his authority. State *v.* California Min. Co., 13 Nev. 203.

An appeal from the board of general appraisers by the United States can only be allowed on the application and in the name of the attorney-general, when the record does not show that the court is of opinion that the question involved is of such importance as to require an appeal; but where such an appeal is irregularly taken, in the name of the collector of the port by the district attorney, and the parties admit, in the circuit court of appeals, that it was, in fact, taken by direction of the attorney-general, and consent that the petition for appeal may be amended by substituting his name for that of the collector, the circuit court of appeals has jurisdiction to allow such amendment. U. S. *v.*

appeal[61] from a judgment taken by consent of the district attorney[62] or when the latter declines to present an appeal,[63] and, it seems, has power to waive his right to an appeal.[64]

c. Appearance. In England the attorney-general, as such, is always supposed to be in court, and if he will not appear it must be considered as a *nil dicit*.[65] In the United States supreme court it is the uniform practice of the clerk to enter, at the first term to which any writ of error or appeal is returnable, in cases in which the United States is a party, the appearance of the attorney-general of the United States. This practice is not conclusive against the attorney-general if, at the first term, he withdraws his appearance or moves to strike it off; but, if he lets it pass for one term, it is conclusive upon him as to an appearance.[66]

d. Pleading.[67] Where an action is brought by the attorney-general on the relation of another, the latter need not be joined as plaintiff unless the action is substantially for his benefit,[68] and it has been held that the proceedings in an *ex-officio* information[69] may be either at the suit of the queen or of the attorney-general.[70] There is no precedent, however, for dispensing with the signature of the attorney-general to an information,[71] though where, by direction of the court, an information had been amended by merely adding a party, a motion to take the amended information off the files because not signed by the attorney-general was refused.[72] At common law the crown is not precluded from pleading double, or pleading and demurring, and the right of the crown to plead double is unaffected by any of the statutes or rules of court relating to pleading and procedure.[73] Where a question of great difficulty and delicacy arises between a subject plaintiff and the crown defendant, the court will not allow it to be decided upon demurrer, but an answer must be filed, and the benefit of the demurrer will be reserved to defendant.[74]

Hopewell, 51 Fed. 798, 5 U. S. App. 137, 2 C. C. A. 510.

61. Where he is not a party or the representative of a party under Ind. Rev. Stat. (1881), § 662, as in an action by the state on his relation to test the constitutionality of a law affecting the membership of the legislature, he may not appeal, since the action is not brought by the state, or against it, nor is it one in which any criminal or state prosecution is pending in the supreme court. Parker *v.* State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567.

62. Sacramento County *v.* Central Pac. R. Co., 61 Cal. 250.

63. State *v.* Reid, 45 La. Ann. 162, 12 So. 189.

64. People *v.* Stephens, 52 N. Y. 306. *Compare* State *v.* Echeveria, 33 La. Ann. 709, holding that, in proceedings under the Intrusion Into Office Act, although the attorney-general will not be compelled by mandamus to appeal in behalf of the state from an adverse decision, he cannot bind the state by acquiescence in an adverse judgment.

65. Barclay *v.* Russell, Dick. 729, wherein the court, in consequence, refused to order the attorney-general to appear to a bill. See also Shea *v.* Fellowes, 1 Ch. Chamb. (U. C.) 30, holding that where the attorney-general is a defendant and does not answer, the proper course is to obtain an order that he answer in a week, or that the bill be taken *pro confesso*.

66. Farrar *v.* U. S., 3 Pet. (U. S.) 459, 7 L. ed. 741.

67. Time to plead in abatement.— In an action against the commonwealth the attorney-general cannot plead in abatement after a general imparlance. Martin *v.* Com., 1 Mass. 347.

68. People *v.* Metropolitan Bank, 7 How. Pr. (N. Y.) 144; State *v.* Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561. See also Matter of Bedford Charity, 2 Swanst. 470, 19 Rev. Rep. 107.

69. In an action by the attorney-general at the relation of a plaintiff, the title "information" should no longer be used. Atty.-Gen. *v.* Shrewsbury Bridge Co., 21 Ch. D. 752, 51 L. J. Ch. 746, 42 L. T. Rep. N. S. 79, 30 Wkly. Rep. 916.

70. Reg. *v.* Burnham, 1 U. C. Q. B. 413.

71. *Ex p.* Skinner, 2 Meriv. 453, 1 Wils. C. P. 14; Atty.-Gen. *v.* Toronto St. R. Co., 13 Grant Ch. (U. C.) 441, 2 Ch. Chamb. (U. C.) 165, the latter case holding that where, in his absence from the province, an information was filed without his signature, but having indorsed thereon a fiat signed by the solicitor-general, it should be taken off the files.

72. Atty.-Gen. *v.* Toronto St. R. Co., 2 Ch. Chamb. (U. C.) 321.

73. Tobin *v.* Reg., 14 C. B. N. S. 505, 9 Jur. N. S. 1130, 32 L. J. C. P. 216, 8 L. T. Rep. N. S. 392, 11 Wkly. Rep. 701, 108 E. C. L. 505; Reg. *v.* Diplock, 19 L. T. Rep. N. S. 380. See also Atty.-Gen. *v.* Donaldson, 9 Dowl. P. C. 319, 5 Jur. 56, 7 M. & W. 422; Rex *v.* Caldwell, Forrest 57.

74. Lautour *v.* Atty.-Gen., 11 Jur. N. S. 7, 11 L. T. Rep. N. S. 613, 13 Wkly. Rep. 305.

e. Power to Bind State. Ordinarily, the attorney-general cannot bind the state by appearing for it in an action,[75] and, where he is specially authorized to bring certain actions, he can bind the state only in cases similar to those so authorized.[76]

E. In Criminal Causes — 1. In General. Both in England and the United States the attorney-general represents the government in criminal prosecutions.[77]

2. Conduct of Prosecution — a. In General — (I) *In Trial Court.* Although it may not be the duty of the attorney-general to conduct criminal trials in the court below, generally,[78] he may be required to do so in certain cases,[79] and may assist the circuit attorney, at the latter's request and by consent of court, in a prosecution for murder, without stating whether he appears in his official capacity or as hired counsel.[80]

(II) *On Appeal.* A criminal cause on appeal is under the exclusive control of the attorney-general,[81] notwithstanding a statute making it the duty of a prosecuting attorney to conduct such cause with the advice and assistance of the attorney-general.[82]

b. Entering Nolle Prosequi. The attorney-general has power to enter a *nolle prosequi*[83] to the whole or any distinct part of an indictment,[84] without defendant's consent,[85] either before the jury is impaneled[86] or after verdict,[87] but not during the trial.[88]

F. When Term of Office Has Expired. The authority of the attorney-general terminates with his term of office,[89] and any duty pertaining to the office and

75. *Ex p.* Dunn, 8 S. C. 207; Public Account Com'rs *v.* Rose, 1 Desauss. (S. C.) 461. See also New Orleans, etc., R. Co. *v.* New Orleans, 34 La. Ann. 429 (holding that the intervention of the attorney-general in a case, in the name of the state, unauthorized by any legislative action, does not bind the state to any of the judicial averments or pleading of such intervention); State *v.* Lancaster County Bank, 8 Nebr. 218 (holding that, where the petition fails to set forth a cause of action against the state, the assent of the attorney-general to a judgment thereon will not aid the judgment). *Compare* Fonseca *v.* Atty.-Gen., 17 Can. Supreme Ct. 612, where Gwynne, J., said that there is no sound reason why the government of the Dominion should not be bound by the judgment of a court of justice in a suit in which the attorney-general, as representing the government, was a party defendant, equally as any individual would be, if the relief prayed by the information is sought in the same interest and upon the same grounds as were adjudicated upon by the judgment in the former suit.

76. *Ex p.* Dunn, 8 S. C. 207.

77. Abbott L. Dict.; Sweet L. Dict.

78. Sharp *v.* Kirkendall, 2 J. J. Marsh. (Ky.) 150.

Signing record of acquittal. — In Nova Scotia it is not the practice to require the record of acquittal, in proceedings relating to indictable offenses, to be signed by the attorney-general. Seary *v.* Saxton, 28 Nova Scotia 278.

79. Com. *v.* Tuck, 20 Pick. (Mass.) 356 (holding that it is his exclusive duty, when present, to conduct a criminal prosecution, and that, although he can seek assistance, a private prosecutor cannot employ counsel to aid him); People *v.* Kramer, 33 Misc. (N. Y.) 209, 68 N. Y. Suppl. 383, 15 N. Y. Crim. 257 (in prosecution of crimes against the elective franchise).

80. State *v.* Hays, 23 Mo. 287.

In Wisconsin the attorney-general may, when requested by the governor, assist in the prosecution of a criminal case in a trial court. Emery *v.* State, 101 Wis. 627, 78 N. W. 145.

81. Stewart *v.* State, 24 Ind. 142; State *v.* Fleming, 13 Iowa 443; People *v.* Swift, 59 Mich. 529, 26 N. W. 694; People *v.* Burt, 51 Mich. 199, 16 N. W. 378.

82. People *v.* Bussey, 80 Mich. 501, 45 N. W. 594.

Right to intervene on appeal see Reg. *v.* Starkey, 7 Manitoba 489.

83. Rogers *v.* Hill, 22 R. I. 496, 48 Atl. 670.

At common law the power to enter a *nolle prosequi* exists only in the attorney-general. People *v.* McLeod, 1 Hill (N. Y.) 377, 37 Am. Dec. 328. See, generally, Criminal Law.

84. Com. *v.* Tuck, 20 Pick. (Mass.) 356.

85. Com. *v.* Tuck, 20 Pick. (Mass.) 356; Reg. *v.* Allen, 1 B. & S. 850, 9 Cox C. C. 120, 8 Jur. N. S. 230, 31 L. J. M. C. 129, 5 L. T. Rep. N. S. 636, 101 E. C. L. 850.

86. Com. *v.* Tuck, 20 Pick. (Mass.) 356.

87. Com. *v.* Tuck, 20 Pick. (Mass.) 356; Reg. *v.* Leatham, 7 Jur. N. S. 674, 30 L. J. Q. B. 205.

88. Com. *v.* Tuck, 20 Pick. (Mass.) 356.

89. Hendrick *v.* Posey, 104 Ky. 8, 20 Ky. L. Rep. 358, 45 S. W. 525, 46 S. W. 702.

Cannot preclude successor from appealing. — The attorney-general cannot, under the laws of Louisiana, make an agreement to preclude his successor from taking an appeal in the course of his duty. State *v.* Graham, 25 La. Ann. 433. *Compare* Casgrain *v.* Atlantic, etc., R. Co., [1895] App. Cas. 282 [*confirming* (Q. B. Dec. 23, 1892) Consol. Dig. Quebec

not to the person who claims to be the incumbent devolves upon his successor,[90] who may act without causing himself to be substituted on the record.[91]

VI. LIABILITY FOR COSTS AND OFFICER'S FEES.

As a general rule the attorney-general is not liable for costs in a suit brought in his official capacity,[92] even upon interlocutory applications.[93] He is liable in his personal capacity, however, to a sheriff for such of the sheriff's fees of office on the execution of crown processes as are included in the attorney-general's taxed bill of costs, and received by him from defendants in the several crown suits, after demand made, where no ground is shown for retaining them.[94]

VII. PRIVILEGES.

A. In General. While the attorney-general has been held to be privileged in certain respects,[95] he will not be permitted to prosecute any proceeding which is merely vexatious or has no legal object,[96] is bound by the same rules as private suitors with respect to parties,[97] and, it seems, has no greater right to be let in to appeal.[98]

B. Choice of Forum. The attorney-general may, under some circumstances, choose his own forum,[99] but it is incumbent on him to make out clearly the prerogative.[1]

C. Practising Privately. In the absence of constitutional or statutory inhibition the attorney-general may engage in private practice during his term of office,[2] and it has been held that he may appear as counsel for defendant to an information filed by relators in his name.[3]

179 (*reversing* 21 Rev. Lég. 71)], holding that a succeeding attorney-general cannot retract a discontinuance entered by his predecessor.

90. Nance *v.* People, 25 Colo. 252, 54 Pac. 631.

91. People *v.* Carson, 78 Hun (N. Y.) 544, 29 N. Y. Suppl. 619, 61 N. Y. St. 161.

92. Atty.-Gen. *v.* Illinois Agricultural College, 85 Ill. 516; Atty.-Gen. *v.* Richard, 4 Manitoba 336; Reg. *v.* Mainwaring, 5 U. C. Q. B. O. S. 67).

In Indiana a personal judgment for costs may be rendered against the attorney-general when, at his relation, a suit is unsuccessfully prosecuted in behalf of the state for the recovery of public moneys from a county. State *v.* Marion County, 85 Ind. 489. Under Ind. Rev. Stat. (1881), § 593, providing that the relator, in a suit brought by the state, shall be liable for the costs, the costs should be taxed against the attorney-general in a suit brought on his relation, but under section 5585, providing that costs taxed against the relator in a suit brought on relation of the governor for breach of the condition of an official bond shall be paid by the state, costs taxed against the attorney-general should be paid by the state. Henderson *v.* State, 96 Ind. 437.

93. Gibson *v.* Clench, 1 Ch. Chamb. (U. C.) 69.

94. White *v.* Peters, 4 N. Brunsw. 329.

95. Delay or laches may not be imputed to the attorney-general suing on the behalf of the public where it might be against an individual in a similar case. Atty.-Gen. *v.* Bradford Canal Co., 15 L. T. Rep. N. S. 9.

His proper place in court upon any special matters of a criminal nature wherein his attendance is required is under the judges, on the left hand of the clerk of the crown; but this is only upon solemn and extraordinary occasions, for usually he does not sit there, but within the bar, in the face of the court. Jacob L. Dict. In peerage cases, which he attends as assistant to the lords' committees for privileges, it is said that he is entitled to sit (on a chair) inside the bar. Barony Saye and Sele, 1 H. L. Cas. 507, 511 note.

96. Reg. *v.* Prosser, 11 Beav. 306, 13 Jur. 71, 18 L. J. Ch. 35.

97. Atty.-Gen. *v.* Hughes, 11 L. J. Ch. 329.

98. Laing *v.* Ingham, 3 Moore P. C. 26, 13 Eng. Reprint 11.

99. Dixon *v.* Farrer, 18 Q. B. D. 43, 6 Aspin. 52, 56 L. J. Q. B. 53, 55 L. T. Rep. N. S. 578, 35 Wkly. Rep. 95; Atty.-Gen. *v.* Crossman, L. R. 1 Exch. 381, 4 H. & C. 568, 12 Jur. N. S. 712, 35 L. J. Exch. 215, 14 L. T. Rep. N. S. 856, 14 Wkly. Rep. 996; Atty.-Gen. *v.* Macdonald, 6 Manitoba 372 (holding that the crown may, when proceeding in relation to property to which the sovereign is entitled in right of the crown choose its own forum; but otherwise where the crown claims no beneficial interest).

1. Atty.-Gen. *v.* Crossman, L. R. 1 Exch. 381, 4 H. & C. 568, 12 Jur. N. S. 712, 35 L. J. Exch. 215, 14 L. T. Rep. N. S. 856, 14 Wkly. Rep. 996.

2. Masten *v.* Indiana Car, etc., Co., 25 Ind. App. 175, 57 N. E. 148.

3. Shore *v.* Atty.-Gen., 9 Cl. & F. 355, 8 Eng. Reprint 450. But see Atty.-Gen. *v.* Governors Sherborne Grammar School, 18

D. Precedence. In the United States it has been held that a cause in which the attorney-general is concerned has no preference at the sittings or circuits,[4] but in England[5] the attorney-general is entitled to precedence in certain cases.[6]

ATTORNEY IN FACT. A private attorney authorized by another to act in his place and stead, either for some particular act, or for the transaction of business in general, not of a legal character.[1] (See, generally, PRINCIPAL AND AGENT.)

ATTORNMENT. The acknowledgment by a tenant of a new landlord, on the alienation of land, and an agreement to become tenant to the purchaser;[2] the act of recognition of a new landlord, implying an engagement to pay rent and perform covenants to him;[3] the consent of a tenant to the grant of his landlord.[4] (See, generally, LANDLORD AND TENANT.)

AU BESOIN. Literally, "in case of need." Words used in the direction of bills of exchange, pointing out certain persons who, in case of a refusal or failure of the drawee, are to be applied to, that they may honor and pay the bill.[5]

Beav. 256, 18 Jur. 636, 24 L. J. Ch. 74; Atty.-Gen. *v.* Ironmongers Co., 1 Cr. & Ph. 208, 5 Jur. 356, 10 L. J. Ch. 201, 18 Eng. Ch. 208 [*affirming* 2 Beav. 313, 17 Eng. Ch. 313].

4. Anonymous, 2 Cai. (N. Y.) 246, Col. & C. Cas. (N. Y.) 399.

Preferences on appeal see APPEAL AND ERROR, 3 Cyc. 205, 206.

5. In Quebec the attorney-general for the province claimed precedence for the hearing of his case as a privilege. The court, without adjudicating on the right, allowed the special case to take precedence, as it was a matter of general public interest. Atty.-Gen. *v.* Queen's Ins. Co., (Q. B. June 11, 1877) Consol. Dig. Quebec 179.

6. Order Precedency Atty.-Gen., 6 Taunt. 424, 2 Ves. & B. 422, 1 E. C. L. 684 (whereby, after Dec. 14, 1814, the attorney-general and solicitor-general took precedence before all the queen's sergeants; whereas, before, they were accustomed to have place and audience in the courts next after the two most ancient of the queen's sergeants, but before the others); Atty.-Gen.'s Case, 2 Cl. & F. 482, 6 Eng. Reprint 1236 (holding that the attorney-general, by an order of the house of lords, has preëminence over the lord advocate, and the solicitor-general over the Scotch solicitor-general); Reg. *v.* Exeter, 9 Dowl. P. C. 276, 5 Jur. 102, 10 L. J. Exch. 92, 7 M. & W. 189 (holding that the attorney-general, in the crown's business, has pre-audience in the exchequer over the postman and tubman); Paddock *v.* Forrester, 8 Dowl. P. C. 834, 1 M. & G. 583, 1 Scott N. R. 391, 39 E. C. L. 919 (holding that, although not a sergeant, he had a right of audience in the common pleas, in a cause in which the crown was interested, before the privileges of sergeants were abolished by 9 & 10 Vict. c. 54).

The crown has no precedence in a criminal court. The court of exchequer is the only court in which the crown has right of precedence in revenue cases. Reg. *v.* Landon, 1 F. & F. 381.

1. Burrill L. Dict.

2. Lindley *v.* Dakin, 13 Ind. 388 [*citing* Bouvier L. Dict.; Wharton L. Dict.]. See also Foster *v.* Morris, 3 A. K. Marsh. (Ky.) 609, 611, 13 Am. Dec. 205.

3. Abbott L. Dict. [*quoted* in Willis *v.* Moore, 59 Tex. 628, 636, 46 Am. Rep. 284].

4. Souders *v.* Vansickle, 8 N. J. L. 313, 317.

5. Randolph Com. Paper, § 4.

AUCTIONS AND AUCTIONEERS

By Archibald C. Boyd

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I. TERMINOLOGY.

A. Auction. An auction is a public sale of property to the highest bidder.[1]

1. Russell *v.* Miner, 61 Barb. (N. Y.) 534, 5 Lans. (N. Y.) 537; Reg. *v.* Rawson, 22 Ont. 467.

Other definitions.— An auction sale is a sale by consecutive bidding, intended to reach the highest price of the article by competition for it. Hibler *v.* Hoag, 1 Watts & S. (Pa.) 552.

An auction is a public competitive sale. Crandall *v.* State, 28 Ohio St. 479.

A sale by auction is a sale by public outcry to the highest bidder on the spot. Cal. Civ. Code, § 1792.

A sale by auction is that which takes place when the thing is offered publicly to be sold to whoever will give the highest price. La. Rev. Civ. Code (1900), art. 2601.

Origin.— A sale at auction is said to have originated with the Romans, who gave it the descriptive name of *auctio* — an increase —

B. Auctioneer. An auctioneer is one who sells goods at public auction for another on commission, or for a recompense.[2]

C. Bid. A bid is an offer, by an intending purchaser, to pay a designated price for property which is to be sold at auction.[3]

II. LICENSES, TAXES, AND REGULATIONS.

A. Power to License or Regulate — 1. In General. The licensing of auctioneers and the regulation of their conduct as such is within the power of the legislature.[4]

2. Power of Municipal Corporation. As the power to license auctioneers and to regulate their conduct is not one of the incidents to a municipal corporation, such power cannot be exercised by a municipal corporation unless conferred on it by the legislature.[5] And, under a power given a municipal corporation to tax, license, and regulate the business of auctioneers, it cannot directly prohibit the business,[6] or adopt such regulations as will produce such a result, or even be oppressive or highly injurious to the business.[7]

because the offered property was sold to him who would offer the most for it. Crandall *v.* State, 28 Ohio St. 479.

A **Dutch auction** consists in the public offer of the property at a price beyond its value, and then gradually lowering the price until some one becomes the purchaser. Crandall *v.* State, 28 Ohio St. 479.

As to necessity for license for sale at Dutch auction see *infra*, II, C.

2. Thomas *v.* Kerr, 3 Bush (Ky.) 619, 96 Am. Dec. 262; Story Agency, § 27.

As to who are auctioneers within statute requiring auctioneers to have licenses see *infra*, II, C.

Other definitions.— An auctioneer is a person authorized or licensed by law to sell lands or goods of other persons at public auction. Black L. Dict.

An auctioneer is a person who conducts an auction. Reg. *v.* Rawson, 22 Ont. 467.

Distinguished from "broker."—Auctioneers differ from brokers in that the latter may both buy and sell, whereas auctioneers can only sell. Black L. Dict.

Distinguished from "pawnbroker."— The business of an auctioneer and the business of a pawnbroker differ essentially. That of an auctioneer is to sell by public outcry the property of others upon an agreement, express or implied, that he shall receive for his labor and skill a compensation. The business of a pawnbroker consists in the loaning of money on interest. Hunt *v.* Philadelphia, 35 Pa. St. 277.

3. Black L. Dict.; Eppes *v.* Mississippi, etc., R. Co., 35 Ala. 33.

As to manner of making bid see *infra*, IV, C, 1.

A **bidder** is one who makes an offer for property on sale at auction. Abbott L. Dict.

4. People *v.* Grant, 126 N. Y. 473, 27 N. E. 964, 38 N. Y. St. 499; Buffalo *v.* Marion, 13 Misc. (N. Y.) 639, 34 N. Y. Suppl. 945, 69 N. Y. St. 170.

As to powers of legislature, generally, see CONSTITUTIONAL LAW.

Authority to exact license-fees exists both under the police power and under the taxing power. State *v.* Atlantic City, (N. J. 1901) 50 Atl. 367.

Discrimination.— A statute dividing cities and towns into classes according to population, and imposing license-taxes on auctioneers engaged therein, the amount being different for each class, is not unconstitutional as discriminating between persons engaged in the same occupation. O'Hara *v.* State, 121 Ala. 28, 25 So. 622.

5. **Necessity that power be conferred.**— *Ex p.* Martin, 27 Ark. 467; Fowle *v.* Alexandria, 3 Pet. (U. S.) 398, 7 L. ed. 719; Merritt *v.* Toronto, 25 Ont. 256.

As to power of municipal corporation to pass ordinances, generally, see MUNICIPAL CORPORATIONS.

6. **Prohibition of business.**—Wiggins *v.* Chicago, 68 Ill. 372; Merritt *v.* Toronto, 25 Ont. 256.

7. **Oppressive regulations.**—Wiggins *v.* Chicago, 68 Ill. 372.

Amount of fee.—Where a municipal corporation has the power to regulate and license auction sales, and to pass all ordinances necessary to exercise that power, an ordinance authorizing the mayor to fix the amount of the license within a specified sum is valid. Decorah *v.* Dunstan, 38 Iowa 96. The amount of the license must not be unreasonable. Mankato *v.* Fowler, 32 Minn. 364, 20 N. W. 361. See also State *v.* Atlantic City, (N. J. 1901) 50 Atl. 367, holding that the imposition of a license-fee of twenty-five hundred dollars on an auctioneer is unreasonable.

Discrimination.— A municipal ordinance prohibiting persons temporarily residing in a city from selling goods at auction, without a license, thereby discriminating between temporary and permanent residents, is invalid. Carrollton *v.* Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522.

Regulation of place of sale.— Under a statute giving city councils control of streets, sidewalks, and public grounds, to keep the same open and free from nuisances, for the comfort and convenience of the inhabitants, an ordinance prohibiting auction sales to be

B. Right to License. Under the provisions of a municipal charter requiring auctioneers to give bond and obtain a license, and empowering the mayor to grant such licenses and to revoke them for misconduct of the licensees, it is within the discretion of the mayor to refuse a license even though a proper bond is tendered.[8]

C. Necessity of License. A person who sells his own goods at public auction is an auctioneer within the meaning of a statute requiring an auctioneer to procure a license.[10] So, one sale by auction,[11] or a sale without compensation,[12] is a violation of an ordinance prohibiting a sale at auction without a license.

D. Revocation of License. A municipal corporation vested by its charter with power to regulate and license auctioneers may, by ordinance, empower the mayor to revoke a license for cause.[13]

E. Taxes. A statute providing that property sold at public auction shall be subject to an auction tax every time it is struck off imposes the tax only on consummated sales and not on ineffectual efforts to sell.[14]

III. AGENCY OF AUCTIONEER.

A. In General. An auctioneer, in making a sale, whether of personalty or

held in such places is not an unreasonable restraint of trade, and the necessity thereof is solely within the determination of the city council. White *v.* Kent, 11 Ohio St. 550.

Regulation of time of sale.—An ordinance prohibiting the sale of watches at auction after six o'clock in the evening is authorized by a provision of a charter giving the common council power to enact ordinances to license and regulate auctioneers. Buffalo *v.* Marion, 13 Misc. (N. Y.) 639, 34 N. Y. Suppl. 945, 69 N. Y. St. 170. But see Rochester *v.* Close, 35 Hun (N. Y.) 208, holding that a city, under a power to regulate the "ringing of bells and the crying of goods for sale at auction or otherwise, and to prevent disturbing noises in the streets," cannot prohibit the auction sale of jewelers' goods after sunset.

8. People *v.* Grant, 126 N. Y. 473, 27 N. E. 964, 38 N. Y. St. 499, holding that mandamus will not lie in such case to compel the mayor to grant a license.

Corporation as auctioneer.—Under the provisions of a municipal charter declaring that "the city clerk shall have authority to grant licenses to any person engaged in and carrying on the business and occupation of auctioneer," the city clerk has power to license a corporation as an auctioneer. People *v.* Scully, 23 Misc. (N. Y.) 732, 53 N. Y. Suppl. 125.

Remedy on refusal of license.— Though the officers of a city refuse to license an auctioneer, the latter cannot, by bill in equity, restrain the former from interfering with him in conducting his business without a license, as he has an adequate remedy at law. Klinesmith *v.* Harrison, 18 Ill. App. 467.

9. As to validity of sale by unlicensed auctioneer see *infra*, IV, G.

10. **Sale of one's own goods.**— Goshen *v.* Kern, 63 Ind. 468, 30 Am. Rep. 234. But see Crandall *v.* State, 28 Ohio St. 479, holding that a person who, being in the business of selling merchandise at regular retail prices, sells a portion of them at his store-room by public outcry, making known to the persons present that he will sell the property offered for sale at his regular retail prices, and no other, is not exercising the trade or occupation of auctioneer, within the meaning of a statute requiring persons exercising the trade or occupation of auctioneer to take out a license.

Dutch auction.— Putting up property for sale at a high price, and then lowering the price till some one accepts it as a bidder, is a sale at auction within an ordinance requiring auctioneers to obtain a license. Deposit *v.* Pitts, 18 Hun (N. Y.) 475.

Sale at fixed price.—An offer of property to any one who will take it at a given price is not an offer to sell the property at auction within the meaning of a statute imposing a penalty on peddlers for selling goods at public auction. Hibler *v.* Hoag, 1 Watts & S. (Pa.) 552.

Territorial limits of license.—A license to sell goods at auction is of no force beyond the limits of the municipal corporation granting it. Waterhouse *v.* Dorr, 4 Me. 333.

11. **Single sale.**— Reg. *v.* Rawson, 22 Ont. 467. See also Rex *v.* Taylor, M'Clel. 362, 13 Price 636, wherein it appeared that, at a sale of premises, the vendor invited each bidder to put down two sums on a slip of paper, and, upon collating such biddings, he whose paper contained the highest bidding was to be declared the purchaser at the lowest of the two sums if that exceeded the highest of any other bidder. It was held that this was a sale by auction, and that the vendor incurred the penalty as an auctioneer without being licensed, although the purchase was never completed.

12. **Sale without compensation.**— State *v.* Rucker, 24 Mo. 557.

13. Wiggins *v.* Chicago, 68 Ill. 372.

Delegation of power to revoke.— Under a charter granting the common council of a city power to revoke a license, the common council cannot delegate to the mayor the power of revocation. State *v.* St. Paul, 34 Minn. 250, 25 N. W. 449.

14. State *v.* Hoboken Second Nat. Bank, 84 Md. 325, 35 Atl. 889.

realty, is, primarily, the agent of the seller.[15] When, however, the property is struck off he becomes also the agent of the purchaser to the extent of binding both parties by his memorandum of sale.[16]

B. Authority in Writing. The authority of an auctioneer to sell land at auction need not be in writing.[17]

C. Authority to Warrant. An auctioneer has no authority to bind the seller by a warranty of the goods sold, unless specially instructed so to do.[18]

15. He is the agent of the seller by virtue of his employment to make the sale.

Georgia.— McMillan *v.* Harris, 110 Ga. 72, 35 S. E. 334, 78 Am. St. Rep. 93, 48 L. R. A. 345.

Kentucky.— Thomas *v.* Kerr, 3 Bush (Ky.) 619, 96 Am. Dec. 262; Norton *v.* Laughlin, 15 Ky. L. Rep. 783.

Massachusetts.— Curtis *v.* Aspinwall, 114 Mass. 187, 19 Am. Rep. 332; Bent *v.* Cobb, 9 Gray (Mass.) 397, 69 Am. Dec. 295.

Rhode Island.— Randall *v.* Lautenberger, 16 R. I. 158, 13 Atl. 100.

United States.— Veazie *v.* Williams, 8 How. (U. S.) 134, 12 L. ed. 1018.

England.— Warlow *v.* Harrison, 1 E. & E. 295, 6 Jur. N. S. 66, 29 L. J. Q. B. 14, 8 Wkly. Rep. 95, 102 E. C. L. 295.

Canada.— Cull *v.* Wakefield, 6 U. C. Q. B. O. S. 178.

See 5 Cent. Dig. tit. "Auctions and Auctioneers," § 16.

As to authority of auctioneer to vary conditions of sale see *infra*, IV, B, 2.

As to liability of auctioneer on sale for undisclosed principal see *infra*, VI, D, 2, b.

Private sale.— On the employment of an auctioneer to sell by auction there is no employment to sell by private contract if the public sale proves abortive, and evidence of a custom to that effect among auctioneers is inadmissible. Marsh *v.* Jelf, 3 F. & F. 234. See also Muffatt *v.* Gott, 74 Mich. 672, 42 N. W. 149, holding that auctioneers employed to sell land upon specific terms fixed by the owner have no right, after a sale pursuant to such terms, to make a contract with a different person than the purchaser, and upon different terms.

16. He is made the agent of the purchaser by the act of the latter in giving him his bid and receiving from him, without objection, the announcement that the property is knocked off to him as purchaser.

Alabama.— Adams *v.* McMillan, 7 Port. (Ala.) 73.

California.— Craig *v.* Godfroy, 1 Cal. 415, 54 Am. Dec. 299.

Connecticut.— O'Sullivan *v.* Overton, 56 Conn. 102, 14 Atl. 300.

Georgia.— Ansley *v.* Green, 82 Ga. 181, 7 S. E. 921; Jackens *v.* Nicolson, 70 Ga. 198.

Illinois.— Doty *v.* Wilder, 15 Ill. 407, 60 Am. Dec. 756.

Indiana.— Hunt *v.* Gregg, 8 Blackf. (Ind.) 105.

Kentucky.— Gill *v.* Hewett, 7 Bush (Ky.) 10; Thomas *v.* Kerr, 3 Bush (Ky.) 619, 96 Am. Dec. 262; Norton *v.* Laughlin, 15 Ky. L. Rep. 783.

Maine.— O'Donnell *v.* Leeman, 43 Me. 158, 69 Am. Dec. 54; Pike *v.* Balch, 38 Me. 302, 61 Am. Dec. 248; Alna *v.* Plummer, 4 Me. 258; Cleaves *v.* Foss, 4 Me. 1.

Maryland.— Ijams *v.* Hoffman, 1 Md. 423; Singstack *v.* Harding, 4 Harr. & J. (Md.) 186, 7 Am. Dec. 669.

Massachusetts.— Curtis *v.* Aspinwall, 114 Mass. 187, 19 Am. Rep. 332; Bent *v.* Cobb, 9 Gray (Mass.) 397, 69 Am. Dec. 295.

New Jersey.— Johnson *v.* Buck, 35 N. J. L. 338, 10 Am. Rep. 243.

New York.— Bleeker *v.* Graham, 2 Edw. (N. Y.) 647.

Rhode Island.— Randall *v.* Lautenberger, 16 R. I. 158, 13 Atl. 100.

South Carolina.— Meadows *v.* Meadows, 3 McCord (S. C.) 458, 15 Am. Dec. 645; Davis *v.* Robertson, 1 Mill (S. C.) 71, 12 Am. Dec. 611; Trustees Macon Episcopal Church *v.* Wiley, 2 Hill Eq. (S. C.) 584, 30 Am. Dec. 386.

Texas.— Smith *v.* Nelson, 34 Tex. 516; Dawson *v.* Miller, 20 Tex. 172, 70 Am. Dec. 380.

Virginia.— Walker *v.* Herring, 21 Gratt. (Va.) 678, 8 Am. Rep. 616; Smith *v.* Jones, 7 Leigh (Va.) 165, 30 Am. Dec. 498.

Wisconsin.— Bamber *v.* Savage, 52 Wis. 110, 8 N. W. 609, 38 Am. Rep. 723.

United States.— Veazie *v.* Williams, 8 How. (U. S.) 134, 12 L. ed. 1018.

England.— Simon *v.* Motivos, 3 Burr. 1921; Hinde *v.* Whitehouse, 7 East 558, 3 Smith K. B. 528, 8 Rev. Rep. 676; Rucker *v.* Cammeyer, 1 Esp. 105; White *v.* Proctor, 4 Taunt. 209, 13 Rev. Rep. 580; Emmerson *v.* Heelis, 2 Taunt. 38, 11 Rev. Rep. 520.

Canada.— Reg. *v.* Rawson, 22 Ont. 467.

See 5 Cent. Dig. tit. "Auctions and Auctioneers," § 17.

As to agency of auctioneer in making memorandum to satisfy statute of frauds, generally, see FRAUDS, STATUTE OF.

17. Yourt *v.* Hopkins, 24 Ill. 326; Lake *v.* Campbell, 18 Ill. 106; Doty *v.* Wilder, 15 Ill. 407, 60 Am. Dec. 756.

18. *Indiana.*— Court *v.* Snyder, 2 Ind. App. 440, 28 N. E. 718, 50 Am. St. Rep. 247.

Louisiana.— See Poree *v.* Bonneval, 6 La. Ann. 386.

Massachusetts.— Upton *v.* Suffolk County Mills, 11 Cush. (Mass.) 586, 59 Am. Dec. 163. See also Blood *v.* French, 9 Gray (Mass.) 197, holding that an auctioneer has no authority to bind an administrator personally by a warranty of the condition of goods of the intestate.

United States.— The Monte Allegre, 9 Wheat. (U. S.) 616, 6 L. ed. 174.

England.— Payne *v.* Leconfield, 51 L. J. Q. B. 642, 30 Wkly. Rep. 814.

D. Delegation of Authority. An auctioneer cannot delegate his power to sell by auction. He may, however, employ another person to use the hammer and make the outcry under his immediate direction and supervision.[19]

E. Revocation of Authority. An authority given to an auctioneer to sell may be revoked by the vendor at any time before the sale.[20]

IV. CONDUCT AND VALIDITY OF SALE.

A. In General. In a sale by auction there are three parties — the owner of the property to be sold, the auctioneer, and the portion of the public who attend to bid.[21]

B. Conditions of Sale — 1. RIGHT TO PRESCRIBE. The owner of property offered for sale at auction has the right to prescribe the manner, conditions, and terms of sale.[22]

2. EFFECT OF PRESCRIBING PRINTED CONDITIONS. Printed conditions under which a sale proceeds are binding on both buyer[23] and seller,[24] and cannot be varied,[25]

As to liability of auctioneer on his personal warranty see *infra*, VI, D, 2.

19. Poree *v.* Bonneval, 6 La. Ann. 386; Com. *v.* Harnden, 19 Pick. (Mass.) 482; Stone *v.* State, 12 Mo. 400.

20. Warlow *v.* Harrison, 1 E. & E. 295, 6 Jur. N. S. 66, 29 L. J. Q. B. 14, 8 Wkly. Rep. 95, 102 E. C. L. 295; Manser *v.* Back, 6 Hare 443, 31 Eng. Ch. 443. But see Gunn *v.* Gillespie, 2 U. C. Q. B. 151, holding that, if goods are sent to an auctioneer to sell and the principal afterward directs the auctioneer not to sell them, but the goods still remain in his possession and are purchased *bona fide* by a third party who has no notice of the revocation of the auctioneer's authority, such sale is good. To the same effect is Morgan *v.* Darragh, 39 Tex. 171.

As to right of owner to withdraw property from sale see *infra*, IV, C, 4.

Reception of purchase-money.—Where it is provided by the terms of sale that a portion of the purchase-money shall be paid within a given time, and the auctioneer is authorized to receive it, his authority is not revoked, immediately on the expiration of the time limited, without further orders from his principal prohibiting the subsequent reception of such money. Pinckney *v.* Hagadorn, 1 Duer (N. Y.) 89.

21. Warlow *v.* Harrison, 1 E. & E. 295, 8 Jur. N. S. 66, 29 L. J. Q. B. 14, 8 Wkly. Rep. 95, 102 E. C. L. 295.

To complete an auction sale there must be a bidder, the property must be struck off or knocked down, and the person to whom it is struck off must complete his purchase by complying with the terms of the sale. Sherwood *v.* Reade, 7 Hill (N. Y.) 431.

An agreement, in advance of a sale of stock, to present a cow to the best bidder does not constitute the transaction a lottery, and so against public policy. Lucas *v.* Wallace, 42 Ill. App. 172.

Right to sell in street.— It is not lawful for an auctioneer to place goods intended for sale in public streets. Com. *v.* Passmore, 1 Serg. & R. (Pa.) 217.

22. Farr *v.* John, 23 Iowa 286, 92 Am. Dec. 426.

Right of auctioneer to prescribe conditions. — An auctioneer, being the agent of the seller, has the right to settle, not merely the terms of the sale, but to regulate the bidding. Holder *v.* Jackson, 11 U. C. C. P. 543.

23. Buyer bound by conditions.— Farr *v.* John, 23 Iowa 286, 92 Am. Dec. 426; Poree *v.* Bonneval, 6 La. Ann. 386; Layton *v.* Hennen, 3 La. Ann. 1; Macarty *v.* New Orleans Canal, etc., Co., 8 Rob. (La.) 102. See also Mead *v.* Hendry, 1 U. C. Q. B. 238, holding that the purchaser cannot, by any agreement made before the sale, be discharged from his obligation to perform the conditions imposed at the time of the sale. But see Mitchell *v.* Zimmerman, 109 Pa. St. 183, 58 Am. Rep. 715, holding that, as between the seller and the purchaser of goods sold at auction, evidence is admissible to show that the bid was made and the property struck down to the purchaser in pursuance of a prior private agreement which he had made with the seller, although such agreement is inconsistent with the conditions of the sale as stated by the auctioneer.

24. Seller bound by conditions.— Poree *v.* Bonneval, 6 La. Ann. 386; Layton *v.* Hennen, 3 La. Ann. 1; Macarty *v.* New Orleans Canal, etc., Co., 8 Rob. (La.) 102.

Advertisements of the sale are no part of the conditions of the sale, unless expressly made so. Aschom *v.* Smith, 2 Penr. & W. (Pa.) 211, 21 Am. Dec. 437.

25. Authority of auctioneer to vary conditions.— Marston *v.* Waldrhyn, Ky. Dec. 112; Poree *v.* Bonneval, 6 La. Ann. 386; Layton *v.* Hennen, 3 La. Ann. 1; Macarty *v.* New Orleans Canal, etc., Co., 8 Rob. (La.) 102; Chouteau *v.* Goddin, 39 Mo. 229, 90 Am. Dec. 462; Shelton *v.* Livius, 2 C. & J. 411, 1 L. J. Exch. 139, 2 Tyrw. 420; Gunnis *v.* Erhart, 1 H. Bl. 289, 2 Rev. Rep. 769; Ogilvie *v.* Foljambe, 3 Meriv. 53. But see Satterfield *v.* Smith, 33 N. C. 60, wherein it appeared that, at a hiring of slaves, the auctioneer read a written statement of the terms of hiring, and also declared in a loud voice other terms which amounted to an alteration of the written terms. It was held that he was at liberty, as agent of the hirer, to make such alteration.

though they may be explained,[26] by verbal statements of the auctioneer made at the time of the sale.

3. Notice of Conditions. If it is the custom to paste up the conditions in the auctioneer's room, and the auctioneer announces that the conditions are as usual, a purchaser is bound by the conditions, whether he sees them or not.[27]

C. The Bidding — 1. Manner of Making Bid. A bid may be made in words, uttered aloud in the hearing of the bystanders or spoken privately to the auctioneer,[28] or by writing in words or figures, or it may be made by a wink or nod,[29] or in any mode by which the bidder signifies his willingness and intention to give a particular sum or price for the property offered for sale.[30]

2. Manner of Accepting Bid. Property is struck off or knocked down when the auctioneer, by the fall of his hammer or by any other audible or visible announcement, signifies to the bidder that he is entitled to the property on paying the amount of his bid according to the terms of the sale.[31]

3. Right to Reject Bid. An auctioneer is not bound to accept all bids as a matter of course from persons present at his auction.[32] If the terms of sale are

26. Authority of auctioneer to explain conditions.— Chouteau *v.* Goddin, 39 Mo. 229, 90 Am. Dec. 462; Rankin *v.* Matthews, 29 N. C. 286. See also Cannon *v.* Mitchell, 2 Desauss. (S. C.) 320, holding that a purchaser of land at auction is bound by verbal declarations made by the vendor, publicly, at the sale, if such declarations are not variant from the terms advertised, but are additional thereto and explanatory thereof.

27. Mesnard *v.* Aldridge, 3 Esp. 271.

Failure to hear conditions.— Proof that a party did not hear the terms of the sale, which were publicly announced, will not discharge him from a compliance with such terms and conditions. Vanleer *v.* Fain, 6 Humphr. (Tenn.) 104.

Sufficiency of notice.—Where the advertisements of a sale of land stated that the terms of sale would be given at the time of the sale, a public verbal declaration at such time that the quantity was liable to be reduced by an adverse claim, in which event a reduction would be made from the price, is sufficient notice of such claim to the purchaser. Wainwright *v.* Read, 1 Desauss. (S. C.) 573.

28. Millingar *v.* Daly, 56 Pa. St. 245. But see Conover *v.* Walling, 15 N. J. Eq. 173, holding that a private signal, denoting a bid, at a sale by public auction is improper.

29. Warehime *v.* Graf, 83 Md. 98, 34 Atl. 364; Millingar *v.* Daly, 56 Pa. St. 245.

30. Millingar *v.* Daly, 56 Pa. St. 245.

Bid by letter.— It is not necessary that a person, in order to become a purchaser, should be actually present at an auction — he may make his bid by letter. Tyree *v.* Williams, 3 Bibb (Ky.) 365, 6 Am. Dec. 663.

31. *Florida.*— Coker *v.* Dawkins, 20 Fla. 141.

Hawaii.— McDonald *v.* Green, 5 Hawaii 325.

Illinois.— Chamberlain *v.* Bain, 27 Ill. App. 634; Coombs *v.* Steere, 8 Ill. App. 147.

Kentucky.— Grotenkemper *v.* Achtermeyer, 11 Bush (Ky.) 222.

Maryland.— State *v.* Hoboken Second Nat. Bank, 84 Md. 325, 35 Atl. 889.

Michigan.— Ives *v.* Tregent, 29 Mich. 390.

New York.— Sherwood *v.* Reade, 7 Hill (N. Y.) 431.

As to when title passes see *infra*, V, A.

32. Holder *v.* Jackson, 11 U. C. C. P. 543, holding that an action will not lie against an auctioneer for refusing to accept a bid, unless by reason of some special condition or terms of the sale. See also Marcus *v.* Boston, 136 Mass. 350, holding that a bill in equity, by a person claiming to be the highest bidder at an auction sale of land, against the auctioneer and the person to whom the land was struck off and the memorandum of sale executed, to compel the auctioneer to sign a memorandum of sale declaring plaintiff to be the purchaser, cannot be maintained. Plaintiff's remedy, if he has any, is in damages. But see Johnston *v.* Boyes, [1899] 2 Ch. 73, 68 L. J. Ch. 425, 80 L. T. Rep. N. S. 488, 47 Wkly. Rep. 517, holding that a vendor who offers land for sale under conditions providing that the highest bidder shall be the purchaser, and that he shall immediately pay a deposit and sign a contract of purchase, is liable in damages to one, to whom the property has been knocked down as the highest bidder, if he refuses to allow such bidder to sign the contract. And see Ricks *v.* Battle, 29 N. C. 269, holding that, if the seller employ an auctioneer to cry property at auction, without directing him not to cry the bid of a particular person, and such person is the last and highest bidder, and the property is knocked off to him, the contract is complete.

Bid of infant or insolvent.— An auctioneer is not bound to receive the bid of an infant (Kinney *v.* Showdy, 1 Hill (N. Y.) 544) or of an insolvent (Taylor *v.* Harnett, 26 Misc. (N. Y.) 362, 55 N. Y. Suppl. 988).

Trifling advances.—An auctioneer may refuse to accept trifling advances offered by bidders in the course of the sale, where that kind of bidding is initiated at the outset and the sum so offered is utterly incommensurate with the actual known value of the property. Taylor *v.* Harnett, 26 Misc. (N. Y.) 362, 55 N. Y. Suppl. 988. See also Holder *v.* Jackson, 11 U. C. C. P. 543, holding that an auctioneer may prescribe, as a condition, that he will

specific, he need not notice a bid that is coupled with different terms or conditions.[33]

4. Right to Withdraw Property or Bid. Until the hammer falls a *locus penitentiæ* remains, and the seller may withdraw his property from sale[34] or the bidder may withdraw his bid.[35]

5. Dispute as to Bid. If a bid is claimed by two or more persons, it is the usual practice to put the property up again at the price and at the bid of such one of the competitors as the auctioneer may declare, in his judgment, entitled to it.[36]

6. Chilling the Bidding. Generally, it may be said that any act of the auctioneer, or of the party selling, or of third parties as purchasers, which prevents a fair, free, and open sale, or which diminishes competition and stifles or chills the sale, is contrary to public policy and vitiates the sale.[37] A combination of

not receive any bid which does not advance a given sum upon the last preceding bid.

33. Moore *v.* Owsley, 37 Tex. 603.

34. Withdrawal of property.— Girardey *v.* Stone, 24 La. Ann. 286; Baham *v.* Bach, 13 La. 287, 33 Am. Dec. 561; Corryolles *v.* Mossy, 2 La. 504; Hartwell *v.* Gurney, 16 R. I. 78, 13 Atl. 113; Warlow *v.* Harrison, 1 E. & E. 295, 8 Jur. N. S. 66, 29 L. J. Q. B. 14, 8 Wkly. Rep. 95, 102 E. C. L. 295; Cull *v.* Wakefield, 6 U. C. Q. B. O. S. 178.

Auctioneer passing to other articles.— If the auctioneer adjourns the sale of the particular article and passes to something else without the express assent of the bidder, it is tantamount to a rejection of the preceding bid, which is thereby annulled. Donaldson *v.* Kerr, 6 Pa. St. 486.

35. Withdrawal of bid.— *California.*— Hibernia Sav., etc., Soc. *v.* Behnke, 121 Cal. 339, 53 Pac. 812.

Hawaii.— McDonald *v.* Green, 5 Hawaii 325.

Kentucky.— Grotenkemper *v.* Achtermeyer, 11 Bush (Ky.) 222.

Louisiana.— Corryolles *v.* Mossy, 2 La. 504.

Missouri.— See Dunham *v.* Hartman, 153 Mo. 625, 55 S. W. 233, 77 Am. St. Rep. 741, holding that, between the fall of the hammer and the writing of his name in the memorandum book, the bidder may withdraw his bid.

Pennsylvania.— Fisher *v.* Seltzer, 23 Pa. St. 308, 62 Am. Dec. 335; Donaldson *v.* Kerr, 6 Pa. St. 486.

Rhode Island.— Hartwell *v.* Gurney, 16 R. I. 78, 13 Atl. 113.

United States.— Blossom *v.* Milwaukee, etc., R. Co., 3 Wall. (U. S.) 196, 18 L. ed. 43.

England.— Warlow *v.* Harrison, 1 E. & E. 295, 8 Jur. N. S. 66, 29 L. J. Q. B. 14, 8 Wkly. Rep. 95, 102 E. C. L. 295; Jones *v.* Nanney, 13 Price 76; Payne *v.* Cave, 3 T. R. 148, 1 Rev. Rep. 679.

Canada.— Cull *v.* Wakefield, 6 U. C. Q. B. O. S. 178.

36. Conover *v.* Walling, 15 N. J. Eq. 173.

Dispute as to price bid.— On an issue as to the price bid at a sale, evidence of one bidder as to his understanding of the price bid by the person to whom the property was knocked down is competent. Ives *v.* Tregent, 29 Mich. 390.

Effect of bidding at second exposure.— In consequence of a dispute as to the person to whom property was struck off, the auctioneer offered it again for sale. The person to whom the first adjudication was made protested, but bid at the second sale. It was held that by so doing he deprived himself of the right to question a purchase made by a *bona fide* bidder to whom the property was adjudicated on the second exposure. McMasters *v.* Atchafalaya R., etc., Co., 1 La. Ann. 11. See also Warehime *v.* Graf, 83 Md. 98, 34 Atl. 364, wherein it appeared that at an auction sale the property was knocked down to A at a certain price, whereupon another person claimed that the bid was his. The seller then directed the property to be put up again, and it was again knocked down to A at a higher price. It was held that, since A's first bid was not accepted, there had been no complete sale, and that he was bound to take the property at his last bid.

37. A sale at auction is a sale to the best bidder, its object a fair price, its means competition. Any agreement, therefore, to stifle competition is a fraud upon the principle on which the sale is founded.

Alabama.— Carrington *v.* Caller, 2 Stew. (Ala.) 175. *Compare* Haynes *v.* Crutchfield, 7 Ala. 189, holding that the mere attempt of a purchaser to prevent another person from bidding for it will not render the purchase invalid. To have this effect the attempt must have been successful.

California.— Jenkins *v.* Frink, 30 Cal. 586, 89 Am. Dec. 134.

Illinois.— Loyd *v.* Malone, 23 Ill. 43, 74 Am. Dec. 179, agreement not to bid.

Indiana.— Hunt *v.* Elliott, 80 Ind. 245, 41 Am. Rep. 794.

Maine.— Weld *v.* Lancaster, 56 Me. 453; Pike *v.* Balch, 38 Me. 302, 61 Am. Dec. 248; Gardiner *v.* Morse, 25 Me. 140.

Maryland.— Smith *v.* Ullman, 58 Md. 183, 42 Am. Rep. 329.

Massachusetts.— Phippen *v.* Stickney, 3 Metc. (Mass.) 384.

Mississippi.— Newman *v.* Meek, Freem. (Miss.) 441.

Missouri.— Durfee *v.* Moran, 57 Mo. 374; Hook *v.* Turner, 22 Mo. 333; Wooton *v.* Hinkle, 20 Mo. 290. *Compare* Buckley *v.* Briggs, 30 Mo. 452, holding that an agree-

interests, however, is not necessarily corrupt. It is the end to be accomplished which determines whether the combination is lawful or otherwise. If it be to depress the price of the property by artifice, the purchase, under the rule just stated, will be void.[38] If it be to raise money for payment or to divide the property for the accommodation of the purchasers, it will be valid.[39]

7. PUFFING, OR BY-BIDDING. Though there is some diversity in the decisions as to the circumstances under which puffing[40] will invalidate a sale at auc-

ment, among incorporators in a corporation selling their lands, that they might bid and afterward take the lots or not, at their option, will not invalidate the sale where the agreement was not carried into effect.

New Hampshire.— Bellows *v.* Russell, 20 N. H. 427, 51 Am. Dec. 238.

New Jersey.— National Bank *v.* Sprague, 20 N. J. Eq. 159.

New York.— Hopkins *v.* Ensign, 122 N. Y. 144, 25 N. E. 306, 33 N. Y. St. 299, 9 L. R. A. 731; People *v.* Stephens, 71 N. Y. 527; Wheeler *v.* Wheeler, 5 Lans. (N. Y.) 355; Jackson *v.* Crafts, 18 Johns. (N. Y.) 110; Thompson *v.* Davies, 13 Johns. (N. Y.) 112 (agreement not to bid); Wilbur *v.* How, 8 Johns. (N. Y.) 444; Doolin *v.* Ward, 6 Johns. (N. Y.) 194; Jones *v.* Caswell, 3 Johns. Cas. (N. Y.) 29, 2 Am. Dec. 134.

North Carolina.— Whitaker *v.* Bond, 63 N. C. 290 (agreement not to bid); Goode *v.* Hawkins, 17 N. C. 393; Smith *v.* Greenlee, 13 N. C. 126, 18 Am. Dec. 564. See also Blythe *v.* Lovinggood, 24 N. C. 20, 37 Am. Dec. 402.

Ohio.— Breslin *v.* Brown, 24 Ohio St. 565, 15 Am. Rep. 627.

Pennsylvania.— Brotherline *v.* Swires, 48 Pa. St. 68 (discouragement of bidding by auctioneer); Slingluff *v.* Eckel, 24 Pa. St. 472 (agreement not to bid); Smull *v.* Jones, 1 Watts & S. (Pa.) 128.

Rhode Island.— Fenner *v.* Tucker, 6 R. I. 551.

South Carolina.— Dudley *v.* Odom, 5 S. C. 131, 22 Am. Rep. 6; Hamilton *v.* Hamilton, 2 Rich. Eq. (S. C.) 355, 46 Am. Dec. 58; Farr *v.* Sims, Rich. Eq. Cas. (S. C.) 122, 24 Am. Dec. 396.

Texas.— Allen *v.* Stephanes, 18 Tex. 658 (agreement not to bid); James *v.* Fulcrod, 5 Tex. 512, 55 Am. Dec. 743.

Vermont.— Strong *v.* Ellsworth, 26 Vt. 366, agreement not to bid.

United States.— Piatt *v.* Oliver, 1 McLean (U. S.) 295, 19 Fed. Cas. No. 11,114.

England.— Fuller *v.* Abrahams, 3 Brod. & B. 116, 6 Moore C. P. 316, 23 Rev. Rep. 626.

Canada.— *Compare* Waddel *v.* McCabe, 4 U. C. Q. B. O. S. 191, holding that an agreement to pay money on a party's not bidding at a sale is not void, as being contrary to public policy, where the party making the agreement thereby insured the withdrawal of a claim from the land to be sold.

See 5 Cent. Dig. tit. "Auctions and Auctioneers," § 23.

As to contract between bidders to prevent competition see CONTRACTS.

38. See cases cited *supra*, note 37.

39. *California.*— Jenkins *v.* Frink, 30 Cal. 586, 89 Am. Dec. 134.

Illinois.— Switzer *v.* Skiles, 8 Ill. 529, 44 Am. Dec. 723.

Indiana.— Hunt *v.* Elliott, 80 Ind. 245, 41 Am. Rep. 794.

Maryland.— Smith *v.* Ullman, 58 Md. 183, 42 Am. Rep. 329.

Massachusetts.— Phippen *v.* Stickney, 3 Metc. (Mass.) 384.

New Hampshire.— Bellows *v.* Russell, 20 N. H. 427, 51 Am. Dec. 238.

New Jersey.— National Bank *v.* Sprague, 20 N. J. Eq. 159.

New York.— Hopkins *v.* Ensign, 122 N. Y. 144, 25 N. E. 306, 33 N. Y. St. 299, 9 L. R. A. 731; People *v.* Stephens, 71 N. Y. 527.

North Carolina.— Bailey *v.* Morgan, 44 N. C. 352; Goode *v.* Hawkins, 17 N. C. 393; Smith *v.* Greenlee, 13 N. C. 126, 18 Am. Dec. 564.

Pennsylvania.— Smull *v.* Jones, 1 Watts & S. (Pa.) 128.

South Carolina.— Holmes *v.* Holmes, 3 Rich. Eq. (S. C.) 61 (holding that persons may lawfully unite for the purpose of making a bid among themselves, when neither is able to purchase, or desires to own, the whole property); Hamilton *v.* Hamilton, 2 Rich. Eq. (S. C.) 355, 46 Am. Dec. 58.

Texas.— James *v.* Fulcrod, 5 Tex. 512, 55 Am. Dec. 743.

United States.— Kearney *v.* Taylor, 15 How. (U. S.) 494, 14 L. ed. 787; Piatt *v.* Oliver, 1 McLean (U. S.) 295, 19 Fed. Cas. No. 11,114.

Question for jury.— The question of fraudulent or illegal intent, in a combination to bid at a sale, is one for the jury. Hunt *v.* Elliott, 80 Ind. 245, 41 Am. Rep. 794.

40. "A puffer is a person who without having any intention to purchase is employed by the vendor at an auction to raise the price by fictitious bids, thereby increasing the competition among the bidders, while he himself is secured from risk by a secret understanding with the vendor, that he shall not be bound by his bids." Per Green, J., in Peck *v.* List, 23 W. Va. 338, 375, 48 Am. Rep. 398. But one who bids at an auction sale, not because of any desire to purchase, but merely for the purpose, either in his own interest or that of another, to run up the price, is not a puffer, if, in case his bid is the last and highest, he can be compelled by the person conducting the sale to take and pay for the property. McMillan *v.* Harris, 110 Ga. 72, 35 S. E. 334, 78 Am. St. Rep. 93, 48 L. R. A. 345.

Rights and liabilities of puffer.—Where a

tion,[41] it is clear, both upon principle and the weight of the authorities that, when a sale is advertised or stated to be without reserve, the secret employment, by the seller, of puffers renders the sale voidable, at the option of the purchaser,[42] provided such purchaser returns, or offers to return, the property pur-

puffer, under an agreement with the owner, runs up the price of property, and it is knocked down to the puffer, the owner is bound by the sale. Troughton *v.* Johnston, 3 N. C. 498, 2 Am. Dec. 626. A puffer cannot recover compensation for his services. Walker *v.* Nightingale, 4 Bro. P. C. 193.

41. **In Tennessee** it has been held that, in order to avoid a sale on the ground of puffing, it must be shown that puffers were employed to enhance the price and deceive other bidders, and that they were, in fact, misled thereby. Davis *v.* Petway, 3 Head (Tenn.) 667, 75 Am. Dec. 789.

In Texas it has been held that the vendor may, with the *bona fide* intention of preventing a sacrifice of his property, where the purchaser is not indnced thereby to bid more than it is worth, employ a puffer without the sale being thereby avoided. The question as to whether such employment is *bona fide* or not is one of fact for the jnry. Reynolds *v.* Dechaums, 24 Tex. 174, 76 Am. Dec. 101.

In England the soundness of the doctrine against puffing laid down at law by Lord Mansfield in Bexwell *v.* Christie, Cowp. 395, was early called in question in equity by Lord Loughborough, who, in Conolly *v.* Parsons, 3 Ves. Jr. 625 note, attempted to sanction the practice of secret bidding or puffing. This decision was followed in Bramley *v.* Alt, 3 Ves. Jr. 620, and Smith *v.* Clarke, 12 Ves. Jr. 477, 8 Rev. Rep. 359. The conflict was finally settled by an act of parliament (30 & 31 Vict. c. 48) which provided that "whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law." McMillan *v.* Harris, 110 Ga. 72, 79, 35 S. E. 334, 78 Am. St. Rep. 93, 48 L. R. A. 345.

42. **The offer of property at auction, without reserve,** is an implied guaranty that it is to be sold to the highest bidder, and each bidder has the right to assume that all previons bids are genuine. The seller in substance so assures him, and the secret employment, by the seller, of an agent to make fictitious bids is equivalent to a false representation by him as to a matter in which he is bound to speak the truth and act in good faith.

Delaware.— Miller *v.* Baynard, 2 Houst. (Del.) 569, 83 Am. Dec. 168.

Georgia.— McMillan *v.* Harris, 110 Ga. 72, 35 S. E. 334, 78 Am. St. Rep. 93, 48 L. R. A. 345.

Indiana.— Bunts *v.* Cole, 7 Blackf. (Ind.) 265, 41 Am. Dec. 226.

Louisiana.— Baham *v.* Bach, 13 La. 287, 33 Am. Dec. 561.

Maryland.— Moncrieff *v.* Goldsborough, 4 Harr. & M. (Md.) 28, 1 Am. Dec. 407; Williams' Case, 3 Bland (Md.) 186.

Massachusetts.— Curtis *v.* Aspinwall, 114 Mass. 187, 19 Am. Rep. 332.

Missouri.— Springer *v.* Kleinsorge, 83 Mo. 152; Wooton *v.* Hinkle, 20 Mo. 290.

New Hampshire.— Towle *v.* Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Bellows *v.* Russell, 20 N. H. 427, 51 Am. Dec. 238.

New Jersey.— National Bank *v.* Sprague, 20 N. J. Eq. 159.

New York.— Minturn *v.* Main, 7 N. Y. 220; Bowman *v.* McClenahan, 20 N. Y. App. Div. 346, 46 N. Y. Suppl. 945; Fisher *v.* Hersey, 17 Hun (N. Y.) 370; Trust *v.* Delaplaine, 3 E. D. Smith (N. Y.) 219; Jones *v.* Caswell, 3 Johns. Cas. (N. Y.) 29, 2 Am. Dec. 134; National F. Ins. Co. *v.* Loomis, 11 Paige (N. Y.) 431.

North Carolina.— McDowell *v.* Simms, 45 N. C. 130, 57 Am. Dec. 595; Bailey *v.* Morgan, 44 N. C. 352; Woods *v.* Hall, 16 N. C. 415; Morehead *v.* Hunt, 16 N. C. 35; Smith *v.* Greenlee, 13 N. C. 126, 18 Am. Dec. 564; Troughton *v.* Johnston, 3 N. C. 498, 2 Am. Dec. 626.

Ohio.— Walsh *v.* Barton, 24 Ohio St. 28.

Pennsylvania.— Flannery *v.* Jones, 180 Pa. St. 338, 36 Atl. 856, 57 Am. St. Rep. 648; Yerkes *v.* Wilson, 81* Pa. St. 9; Staines *v.* Shore, 16 Pa. St. 200, 55 Am. Dec. 492; Pennock's Appeal, 14 Pa. St. 446, 53 Am. Dec. 561 [*overruling* Steele *v.* Ellmaker, 11 Serg. & R. (Pa.) 86]; Donaldson *v.* McRoy, 1 Browne (Pa.) 346; Rafferty *v.* Norris, 12 Pa. Super. Ct. 450.

Rhode Island.— Hartwell *v.* Gurney, 16 R. I. 78, 13 Atl. 113.

Tennessee.— Davis *v.* Petway, 3 Head (Tenn.) 667, 75 Am. Dec. 789.

Virginia.—Hinde *v.* Pendleton, Wythe (Va.) 354.

West Virginia.— Peck *v.* List, 23 W. Va. 338, 48 Am. Rep. 398.

United States.—Veazie *v.* Williams, 8 How. (U. S.) 134, 12 L. ed. 1018; Piatt *v.* Oliver, 1 McLean (U. S.) 295, 19 Fed. Cas. No. 11,114.

England.— Crowder *v.* Austin, 3 Bing. 368, 11 E. C. L. 184, 2 C. & P. 208, 12 E. C. L. 531, 11 Moore C. P. 283, 28 Rev. Rep. 646; Walker *v.* Nightingale, 4 Bro. P. C. 193; Green *v.* Baverstock, 14 C. B. N. S. 204, 10 Jur. N. S. 47, 32 L. J. C. P. 181, 8 L. T. Rep. N. S. 360, 11 Wkly. Rep. 128, 108 E. C. L. 204; Bexwell *v.* Christie, Cowp. 395; Robinson *v.* Wall, 11 Jur. 577, 16 L. J. Ch. 401, 2 Phil. 373; Thornett *v.* Haines, 15 L. J. Exch. 230, 15 M. & W. 367; Meadows *v.* Tanner, 5 Madd. 34; Wheeler *v.* Collier, M. & M. 123, 22 E. C. L. 487; Howard *v.* Castle, 6 T. R. 642, 3 Rev. Rep. 296; Walker *v.* Gascoigne, 13 Vin. 543; Rex *v.* Marsh, 3 Y. & J. 331.

Canada.— Jennings *v.* Hart, 10 Nova Scotia 15.

See 5 Cent. Dig. tit. "Auctions and Auctioneers," § 22.

Presumption as to effect of puffing.— In cases where puffing is practised at an auction,

chased,[43] and is not guilty of laches in exercising his option.[44] It is competent, however, for a seller to fix a minimum price, or reserve to himself the right to bid, or employ another to bid for him, if he gives fair notice of such fact.[45]

D. Disturbance of Sale. Though a person attending a sale cannot be expelled therefrom without proper motives,[46] an action lies against a bidder at a sale for a disturbance of the sale.[47]

E. Inclusion of Property of Third Person. Where property has been advertised as belonging to a certain person and the property of another is sold along with it, this fact should be announced.[48]

F. Purchase by Auctioneer. An auctioneer cannot be the purchaser of, or be interested in the purchase of, the property which he is selling.[49] It has been held, however, that an agency simply to bid a particular sum for a purchaser is not, necessarily, inconsistent with any duty of the auctioneer, and does not enable any one to avoid the sale.[50]

the presumption that real bidders upon the same property are influenced and misled by it is very strong, if not conclusive. The buyer, therefore, may avoid the sale, without further proof that he is influenced and injured, if there is no evidence tending to control or rebut such presumption. Curtis *v.* Aspinwall, 114 Mass. 187, 19 Am. Rep. 332.

43. **Return of property.**— Minturn *v.* Main, 7 N. Y. 220. See also Staines *v.* Shore, 16 Pa. St. 200, 55 Am. Dec. 492, holding that, when the employment of a puffer has been discovered by the purchaser after the sale, it is his duty to offer to return the property purchased; but, if not discovered until too late to do so, the purchaser's defense is good without it. And see McDowell *v.* Simms, 41 N. C. 278, holding that the purchaser must aver in his bill and show that he abandoned the contract as soon as he discovered the fraud.

44. **Laches.**— Latham *v.* Morrow, 6 B. Mon. (Ky.) 630 (delay of five years held fatal); McDowell *v.* Simms, 45 N. C. 130, 57 Am. Dec. 595 (delay of a year held fatal). See also Tomlinson *v.* Savage, 41 N. C. 430.

45. *Delaware.*—Miller *v.* Baynard, 2 Houst. (Del.) 559, 83 Am. Dec. 168.

New Hampshire.— Towle *v.* Leavitt, 23 N. H. 360, 55 Am. Dec. 195.

New York.— Hazul *v.* Dunham, 1 Hall (N. Y.) 655; Wolfe *v.* Luyster, 1 Hall (N. Y.) 146.

Pennsylvania.— Yerkes *v.* Wilson, 81* Pa. St. 9.

United States.— Veazie *v.* Williams, 8 How. (U. S.) 134, 12 L. ed. 1018.

England.— Crowder *v.* Austin, 3 Bing. 368, 11 E. C. L. 184, 2 C. & P. 208, 12 E. C. L. 531, 11 Moore C. P. 283, 28 Rev. Rep. 646; Thornett *v.* Haines, 15 L. J. Exch. 230, 15 M. & W. 367; Wheeler *v.* Collier, M. & M. 123, 22 E. C. L. 487; Howard *v.* Castle, 6 T. R. 642, 2 Rev. Rep. 296; Rex *v.* Marsh, 3 Y. & J. 331.

46. Martineau *v.* Marleau, 9 Rev. Lég. 530.

47. Furness *v.* Anderson, 1 Pa. L. J. Rep. 324.

48. **It may amount to a fraud** to sell goods as belonging to one person when they really belong to another. Bexwell *v.* Christie, Cowp. 395; Coppin *v.* Craig, 2 Marsh. 501, 7 Taunt. 243, 17 Rev. Rep. 508, 2 E. C. L. 345; Hill *v.* Gray, 1 Stark. 434, 18 Rev. Rep. 802, 2 E. C. L. 167. See also Thomas *v.* Kerr, 3 Bush (Ky.) 619, 96 Am. Dec. 262, holding that if, while an auctioneer is selling goods of one man, another procures him to sell his goods, without information as to whose they are, it is such a fraud both on the auctioneer and on the bidder as will entitle the bidder to repudiate the sale.

49. *Illinois.*— Mapps *v.* Sharpe, 32 Ill. 13.

Massachusetts.— Arnold *v.* Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296.

New York.— Gallatian *v.* Cunningham, 8 Cow. (N. Y.) 361.

Rhode Island.— Randall *v.* Lautenberger, 16 R. I. 158, 13 Atl. 100.

Virginia.— Brock *v.* Rice, 27 Gratt. (Va.) 812.

United States.— Veazie *v.* Williams, 8 How. (U. S.) 134, 12 L. ed. 1018; Michoud *v.* Girod, 4 How. (U. S.) 503, 11 L. ed. 1076; Dupuy *v.* Delaware Ins. Co., 63 Fed. 680.

England.— Oliver *v.* Court, Dan. Exch. 301, 8 Price 127, 22 Rev. Rep. 720; 2 Sugden Vendors (14th Am. ed.), 687; *Ex p.* Hughes, 6 Ves. Jr. 617.

Who may question.— A purchase by the auctioneer for himself at a sale made by him on behalf of his principal is not void, but voidable by the principal. Third persons cannot question the sale. Veazie *v.* Williams, 3 Story (U. S.) 611, 28 Fed. Cas. No. 16,907, 13 Hunt Mer. Mag. 356.

50. Richards *v.* Holmes, 18 How. (U. S.) 143, 15 L. ed. 304, holding that such an agency amounts to no more than receiving from the purchaser before the auction a bid which is to be treated as if made there by the purchaser himself. See also Flannery *v.* Jones, 180 Pa. St. 338, 36 Atl. 856, 57 Am. St. Rep. 648, holding that an auctioneer may bid for a third person who employs him, but not for the owner. But see Randall *v.* Lautenberger, 16 R. I. 158, 13 Atl. 100, holding that if, without the seller's assent, the auctioneer makes a bid for a purchaser, his conduct is fraudulent, and the sale is not enforceable by the purchaser. And see Campbell *v.* Swan, 48 Barb. (N. Y.) 109, holding that an auc-

G. Sale by Unlicensed Auctioneer. A sale at auction made by a person not licensed is good, even though the act of selling subjects the auctioneer to a penalty.[51]

H. Sale of Several Lots. If several lots are put up separately, and are separately struck off to the same purchaser, and on each occasion the auctioneer writes down the name of the purchaser, there is, in point of law, a distinct and independent contract as to each lot, although the purchaser afterward signs one memorandum that he has bought the several lots.[52]

V. RIGHTS AND LIABILITIES OF BUYER AND SELLER.

A. When Title Passes. Under a sale without conditions, the rule is that the title passes to the bidder when the property is knocked down to him.[53] A different rule prevails, however, where the sale is imposed with terms or conditions. In such case the title does not pass until there has been a compliance with the terms or conditions.[54]

B. Lien of Seller. A seller has a lien on the property sold for the amount of the bid.[55] Consequently, the purchaser is not entitled to possession until the amount of his bid is paid or tendered.[56]

C. Purchase by Agent For Undisclosed Principal. Where one bids for another, but does not disclose the name of his principal either to the owner or the auctioneer, he is personally liable as purchaser.[57]

tioneer at a sale of mortgaged property cannot bid in the property for the mortgagee who is not present at the time of the sale.

51. Learned *v.* Geer, 139 Mass. 31, 29 N. E. 215; Williston *v.* Morse, 10 Metc. (Mass.) 17; Bogart *v.* O'Regan, 1 E. D. Smith (N. Y.) 590. See also Gunnaldson *v.* Nyhus, 27 Minn. 440, 8 N. W. 147, holding that a note given for property purchased at an auction sale is not void because the auctioneer had not taken out a license as required by the statute.

As to license of auctioneers see *supra*, II.

Sale by interested auctioneer.— The fact that the auctioneer who sells land of a corporation is a stockholder of such corporation does not affect the validity of the sale. Dupuy *v.* Delaware Ins. Co., 63 Fed. 680.

52. *Massachusetts.*— Wells *v.* Day, 124 Mass. 38.

Missouri.— McManus *v.* Gregory, 94 Mo. 370, 7 S. W. 423 [*affirming* 16 Mo. App. 375].

New Hampshire.— Messer *v.* Woodman, 22 N. H. 172, 53 Am. Dec. 241.

New York.— *Contra*, Mills *v.* Hunt, 20 Wend. (N. Y.) 431 [*affirming* 17 Wend. (N. Y.) 333], holding that the contract is entire.

Pennsylvania.— *Contra*, Tompkins *v.* Haas, 2 Pa. St. 74; Coffman *v.* Hampton, 2 Watts & S. (Pa.) 377, 37 Am. Dec. 511, holding that the contract is entire.

England.— Roots *v.* Dormer, 4 B. & Ad. 77, 1 N. & M. 667, 24 E. C. L. 43; Johnson *v.* Johnson, 3 B. & P. 162, 6 Rev. Rep. 736; James *v.* Shore, 1 Stark. 426, 18 Rev. Rep. 798, 2 E. C. L. 165; Emmerson *v.* Heelis, 2 Taunt. 38, 11 Rev. Rep. 520.

53. Sale without conditions.— Lucas *v.* Wallace, 42 Ill. App. 172; Jenness *v.* Wendell, 51 N. H. 63, 12 Am. Rep. 48. See also Municipality No. 1 *v.* Cordeviolle, 19 La. 235; Canal Bank *v.* Copeland, 6 La. 543; Noah *v.* Pierce, 85 Mich. 70, 48 N. W. 277.

As to when title passes at sale, generally, see SALES.

Under a sale for cash down the title passes on the fall of the hammer. Clark *v.* Greeley, 62 N. H. 394.

54. Sale imposed with conditions.— *Delaware.*—Williams *v.* Connoway, 3 Houst. (Del.) 63.

Indiana.— Morgan *v.* East, 126 Ind. 42, 25 N. E. 867, 9 L. R. A. 558.

Louisiana.— See Mazoue *v.* Caze, 18 La. Ann. 31.

Missouri.— Matthews *v.* McElroy, 79 Mo. 202.

New Hampshire.— Clark *v.* Greeley, 62 N. H. 394.

See 5 Cent. Dig. tit. "Auctions and Auctioneers," § 30.

Waiver of conditions.—Where the seller delivers an article to the purchaser, or suffers him to take possession of it voluntarily and without requiring a compliance with the published terms of the sale, such delivery is a waiver of the conditions and passes a good title. Burt *v.* Kennedy, 3 Pennyp. (Pa.) 238.

55. Lien of seller.— Lucas *v.* Wallace, 42 Ill. App. 172.

56. Right to possession.—Jennings *v.* West, 40 Kan. 372, 19 Pac. 863; Mazoue *v.* Caze, 18 La. Ann. 31; Wakefield *v.* Gorrie, 5 U. C. Q. B. 159. See also Wainscott *v.* Smith, 68 Ind. 312, holding that, where a chattel is offered for sale on a credit of six months, the purchaser being required to execute his note, with interest, and such chattel is bid for at a certain price, the purchaser is not entitled to the possession thereof until he tenders to the owner such a note as the terms of the sale require, or a sum of money equal to the principal and interest which would be due upon the note at maturity.

57. McComb *v.* Wright, 4 Johns. Ch. (N. Y.) 659.

D. Rescission of Contract — 1. By Buyer. False representations of a material fact,[58] or the failure of the seller to give good title,[59] will relieve the buyer of his purchase.

2. By Seller. On the failure of the purchaser to comply with the conditions of the sale, the seller may treat the contract as abandoned.[60]

E. Rights as to Deposit. Where it is stipulated that the deposit shall be forfeited if the purchaser does not comply with his contract, the deposit cannot be recovered back either at law or in equity.[61] But, if the contract of sale falls

Duty to disclose principal.—A person bidding at an auction as the agent of another need not disclose to other bidders the name of the person for whom he is bidding, unless the person for whom he acts is the vendor. National F. Ins. Co. *v.* Loomis, 11 Paige (N. Y.) 431.

58. False representations.— *Connecticut.*— Stevens *v.* Giddings, 45 Conn. 507, false representations as to quantity of land.

Kentucky.—See Norton *v.* Laughlin, 15 Ky. L. Rep. 783, holding that the fact that a lot sold at auction is not on the same side of the street as was advertised is not ground for refusing to perform the bid where it appears that the bidder was present at the sale and was acquainted with the neighborhood.

Massachusetts.— Roberts *v.* French, 153 Mass. 60, 26 N. E. 416, 25 Am. St. Rep. 611, 10 L. R. A. 656, false representations as to quantity of land.

New York.— King *v.* Knapp, 59 N. Y. 462.

North Carolina.— Woods *v.* Hall, 16 N. C. 415, false representation that the land had a never-failing spring.

Ohio.— Pugh *v.* Chesseldine, 11 Ohio 109, 37 Am. Dec. 414.

Pennsylvania.— McCall *v.* Davis, 56 Pa. St. 431, 94 Am. Dec. 92. *Compare* Wallace *v.* Hussey, 63 Pa. St. 24.

See 5 Cent. Dig. tit. "Auctions and Auctioneers," § 32.

As to rescission because of the employment of puffers see *supra*, IV, C, 7.

As to right to recover back deposit on rescission see *infra*, V, E.

Mistake as to property purchased.—A bidder at a sale of land who, because of misleading statements of the auctioneer, bids for one lot, believing in good faith that he is bidding for a different one, is not bound by the purchase. Clay *v.* Kagelmacher, 98 Ga. 149, 26 S. E. 493. See also Sheldon *v.* Capron, 3 R. I. 171.

59. Failure of title.— Bodin *v.* McCloskey, 11 La. Ann. 46; Freret *v.* Meux, 9 Rob. (La.) 414; Mayer *v.* Adrian, 77 N. C. 83. See also Averett *v.* Lipscombe, 76 Va. 404, wherein it appeared that the terms of sale provided that if the purchaser, on examination, should not be satisfied with the title he need not take the property. It was held that if the purchaser, in good faith, was not satisfied with the title he would not be compelled to take the property, although the court of appeals pronounced the title good. And see Millingar *v.* Daly, 56 Pa. St. 245, holding that, where land is struck off to a bidder who does not know that a strip thereof has been acquired under condemnation proceedings, the purchaser may refuse to take the property.

Advice of counsel as to title.—A purchaser of land is not justified in refusing to accept a conveyance merely because of the opinion of counsel, given in good faith, that the title is not safe, if the opinion is erroneous and the record title is, in fact, perfect. Montgomery *v.* Pacific Coast Land Bureau, 94 Cal. 284, 29 Pac. 640, 28 Am. St. Rep. 122.

Encroachment.— The bidder on a lot "twenty-five feet, more or less, front and rear, by one hundred feet deep on each side," is not bound to consummate the purchase where a building encroaches on the lot, making it less than twenty-five feet wide at different points, and the owner of the building claims the encroachment by adverse possession. King *v.* Knapp, 66 Barb. (N. Y.) 225, 229.

Refusal of auctioneer to disclose owner.— A bidder may repudiate a purchase of goods if the auctioneer refuses to disclose the owner. Thomas *v.* Kerr, 3 Bush (Ky.) 619, 96 Am. Dec. 262.

60. Higgins *v.* Delaware, etc., R. Co., 60 N. Y. 553. See also Woodward *v.* Boston, 115 Mass. 81, holding that a stipulation, in an advertisement of an auction, that the building to be sold should be removed within a certain time from the day of sale is a condition, and, although the price be paid by the purchaser, if the building be not removed before the expiration of the time limited the sale is voidable at the option of the seller. But see McClaskey *v.* Albany, 64 Barb. (N. Y.) 310, holding that, although a purchaser of land at an auction sale fails to comply with the terms of the sale by paying the balance of the purchase-money within the time specified, and the seller thereupon declares the sale void, a specific performance of the contract may be decreed in favor of the purchaser where it appears that the execution of the contract by the seller is not embarrassed by any new relation contracted with other parties; that the buyer has made repairs and improvements upon the premises, and that the seller has received and accepted the deposit required to be paid on the day of the sale, and has executed and tendered a deed and demanded performance by the purchaser.

As to combinations to stifle bidding as ground for rescission see *supra*, IV, C, 6.

61. Failure of purchaser to comply with bid.— Donahue *v.* Parkman, 161 Mass. 412, 37

through because of the failure of the vendor to convey good title as agreed,[62] or without any fault of the purchaser,[63] the deposit may be recovered from the vendor. It has been held, however, that if a sale is abandoned by mutual consent and the purchaser forbids the auctioneer to pay over the deposit-money to the vendor, and thus prevents him from doing so, the vendor is not responsible for its return. The remedy of the purchaser in such case is against the auctioneer.[64]

F. Sale on Approved Security. A condition, in the terms of a sale, that the purchaser shall give a note with approved securities is complied with when he tenders a note duly executed, signed by good and solvent sureties, justly entitled to approval. The seller cannot arbitrarily reject such note.[65] In case of question as to the character of the note tendered, however, the purchaser is bound to prove either that the seller knew the note to be good, or had the means of conveniently ascertaining the fact.[66]

G. Set-Off Against Bid. A purchaser at auction may set off against the auctioneer, suing for the price, a debt due him by the owner of the goods.[67]

H. Remedies of Seller — 1. In General. Where personal or real property is sold at public auction, and the purchaser refuses to comply with his bid, the vendor may maintain an action against him for damages.[68]

N. E. 205, 42 Am. St. Rep. 415; Bullock *v.* Adams, 20 N. J. Eq. 367; Black *v.* Gesner, 3 Nova Scotia 157.

Fraud in sale.—Where a bid is obtained by the suppression of a material fact the seller cannot enforce the purchase, and the buyer is entitled to recover the amount of the deposit made in conformity with the terms of the sale. King *v.* Knapp, 59 N. Y. 462.

Payment not as deposit.— The conditions of a sale were that a certain amount be paid down, and the balance on the execution of a deed within a certain time. The purchaser paid the amount down, and was notified to close the sale, but, after several months, failed to do so, and the vendor then resold the land. It was held that the purchaser was entitled to recover the amount he had paid, less the expense that the vendor had been put to in making the resale, as the amount so paid was not a deposit. Poulson *v.* Ellis, 60 Pa. St. 134.

62. Failure of title.—Teaffe *v.* Simmons, 11 Allen (Mass.) 342; Cockcroft *v.* Muller, 71 N. Y. 367; Wetmore *v.* Bruce, 54 N. Y. Super. Ct. 149; Mahon *v.* Liscomb, 19 N. Y. Suppl. 224, 46 N. Y. St. 932.

Advice of counsel as to title.—A purchaser of land is not justified in demanding back a deposit paid by him on account of the purchase-money merely because of the opinion of counsel, given in good faith, that the title is not safe, if the opinion is erroneous and the record title is, in fact, perfect. Montgomery *v.* Pacific Coast Land Bureau, 94 Cal. 284, 29 Pac. 640, 28 Am. St. Rep. 122.

Right to interest.— On the failure of the vendor to convey a perfect title as agreed, the purchaser is entitled to interest on the deposit from the time of the demand for the deposit, and the refusal to pay. Cockcroft *v.* Muller, 71 N. Y. 367.

63. Purchaser without fault.— Bleeker *v.* Graham, 2 Edw. (N. Y.) 647.

64. Robinson *v.* Trofitter, 11 Allen (Mass.) 339.

As to liability of auctioneer for deposit see *infra*, VI, D, 2, a.

As to right of auctioneer to sue for deposit see *infra*, VI, C.

65. Guier *v.* Page, 4 Serg. & R. (Pa.) 1; Sweeney *v.* Vaughn, 94 Tenn. 534, 29 S. W. 903. See also Hope *v.* Alley, 9 Tex. 394, holding that, where the terms of sale were that the successful buyer should give a note with good security for the sum bid, the auctioneer, after knocking down the property, has no right to refuse to take the note, with the security offered, unless there is reasonable ground to believe that the security is not sufficient.

As to remedy of seller on failure of buyer to furnish security see *infra*, V, H, 1.

66. Mills *v.* Hunt, 20 Wend. (N. Y.) 431; Hicks *v.* Whitmore, 12 Wend. (N. Y.) 548.

67. Blum *v.* Torre, Riley (S. C.) 153; Coppin *v.* Craig, 2 Marsh. 501, 7 Taunt. 243, 17 Rev. Rep. 508, 2 E. C. L. 345.

68. Ansley *v.* Green, 82 Ga. 181, 7 S. E. 921.

As to specific performance of contract of sale see SPECIFIC PERFORMANCE.

Defenses.— In an action for not completing the purchase, the purchaser cannot set up as a defense that the sale was a sale by auction, and void on the ground of puffing, without pleading the fact. Icely *v.* Grew, 6 C. & P. 671, 25 E. C. L. 632. But see Millar *v.* Campbell, 3 A. K. Marsh. (Ky.) 526, holding that if, at an auction, a puffer is employed, by whom the property is run up to an unreasonable price, the fraud cannot be inquired into in an action for the sale-money. An action on the case or a bill in equity is the appropriate remedy.

Goods bargained and sold.— A seller of goods at auction may recover as for goods bargained and sold against the buyer who knows where they are kept, ready for convenient delivery, but who neglects to comply with the terms of the sale. Turner *v.* Langdon, 112 Mass. 265.

2. Resale. On the failure of a bidder to comply with his bid the owner may resell the property at the risk of such bidder on giving notice of intention to resell.[69] In such case the difference between the sum received at the resale and the first bid, together with the reasonable expenses of the resale, affords a proper criterion of damages,[70] though it is not binding on the jury.[71]

VI. RIGHTS AND LIABILITIES OF AUCTIONEER.

A. Right to Compensation — 1. In General. An auctioneer intrusted with the sale of an estate is entitled to his commissions, if he is the *causa causans* of a sale, even though, before the actual sale, the vendor withdrew the property from sale by him.[72] An auctioneer is not entitled to compensation, however,

Sale on credit.—Where goods are sold on a credit and the purchaser afterward refuses to take them, the owner may, before the expiration of the credit, maintain an action against the purchaser for a breach of the contract. Girard *v.* Taggart, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327. So, where goods are sold at auction on condition that the purchaser give in payment therefor an approved note, and the purchaser refuses to give the note on delivery of the goods, the auctioneer may reclaim the goods, or treat the sale as an absolute one without credit, and immediately sue for the price. Corlies *v.* Gardner, 2 Hall (N. Y.) 345. But, if the terms of sale of land be that the buyer shall, within a certain time, give his notes, with good indorsers, and, if he shall fail to do so, the land is to be resold on his account, the vendor cannot maintain an action for the breach of the contract until the deficit is ascertained by the resale. Webster *v.* Hoban, 7 Cranch (U. S.) 399, 3 L. ed. 384.

69. Notice of resale.— Green *v.* Ansley, 92 Ga. 647, 19 S. E. 53, 44 Am. St. Rep. 110, holding, however, that notice need not be given of the time and place of the resale.

The owner cannot bid in the property at a resale so as to charge the first purchaser with the difference in price. Banks *v.* Hyde, 15 La. 391.

Purchase by partner of auctioneer.—Where goods are sold at auction, but, not having been taken away by the purchaser, are afterward resold at a loss, the fact that they are purchased by a person who was the partner of the auctioneer in another business totally distinct from that of auctioneer is no ground of objection. Clarkson *v.* Noble, 2 U. C. Q. B. 361.

Sale under same conditions.—A purchaser at a sale can be held liable only for the deficiency in price caused by a second sale when the conditions of the second sale are the same, or are not more onerous than those of the first. Weast *v.* Derrick, 100 Pa. St. 509. See also Adams *v.* McMillan, 7 Port. (Ala.) 73, holding that, in order to charge a bidder with the deficiency in price, it must appear that the second sale was conducted fairly. And see Paul *v.* Shallcross, 2 Rawle (Pa.) 326, holding that, if property be sold on certain terms, one of which is that, on non-compliance with those terms, the property shall be resold at the risk and expense of the purchaser, the second sale must not be clogged with terms likely to lower the price.

70. Measure of damages.—*Alabama.*—Adams *v.* McMillan, 7 Port. (Ala.) 73.

Georgia.— Green *v.* Ansley, 92 Ga. 647, 19 S. E. 53, 44 Am. St. Rep. 110; Hicks *v.* Ayer, 5 Ga. 298.

Kentucky.—McBrayer *v.* Cohen, 92 Ky. 479, 13 Ky. L. Rep. 667, 18 S. W. 123.

Louisiana.—Stewart *v.* Paulding, 7 La. 506; Lalaurie *v.* Cahallen, 2 La. 401.

Maine.— Springer *v.* Berry, 47 Me. 330.

North Carolina.— Christmas *v.* Jenkins, 3 N. C. 594.

Pennsylvania.— Weast *v.* Derrick, 100 Pa. St. 509; Bowser *v.* Cessna, 62 Pa. St. 148; Tompkins *v.* Haas, 2 Pa. St. 74; Coffman *v.* Hampton, 2 Watts & S. (Pa.) 377, 37 Am. Dec. 511; Ashcom *v.* Smith, 2 Penr. & W. (Pa.) 211, 21 Am. Dec. 437; Girard *v.* Taggart, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327.

South Carolina.— Boinest *v.* Leignez, 2 Rich. (S. C.) 464; Leman *v.* Blackwood, Harp. (S. C.) 219; Campbell *v.* Ingraham, 1 Mill (S. C.) 293; Hall *v.* O'Hanlan, 2 Brev. (S. C.) 46.

See 5 Cent. Dig. tit. "Auctions and Auctioneers," § 33.

71. Question for jury.— Adams *v.* McMillan, 7 Port. (Ala.) 73; Coffman *v.* Hampton, 2 Watts & S. (Pa.) 377, 37 Am. Dec. 511; Girard *v.* Taggart, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327; Boinest *v.* Leignez, 2 Rich. (S. C.) 464.

72. Green *v.* Bartlett, 14 C. B. N. S. 681, 32 L. J. C. P. 261, 8 L. T. Rep. N. S. 503, 11 Wkly. Rep. 834, 108 E. C. L. 681. See also Clark *v.* Smythies, 2 F. & F. 83, holding that, in the absence of an express contract, auctioneers are entitled to a reasonable remuneration for sales by private contract effected through their instrumentality, even though, by the act or default of the vendor, the contract is rescinded.

Disbursements on private sale.— Though an auctioneer cannot recover commissions on property sold by the owner at private sale, he is entitled to disbursements. Girardey *v.* Stone, 24 La. Ann. 286.

Discount on disbursements.—An auctioneer employed under an agreement that he shall be paid expenses of printing advertisements of the sale cannot charge the ordinary rate if the printer has allowed him any discount

on a sale effected by him, if, by reason of his negligence, the sale becomes nugatory.[73]

2. STATUTORY REGULATIONS. A statute fixing the amount of an auctioneer's compensation for his services, in the absence of an agreement in writing,[74] at a certain per cent of the amount of the sales,[75] refers only to services as auctioneer. It does not prevent recovery for disbursements and expenses necessarily incurred for the successful conduct of a sale.[76]

B. Right to Lien. An auctioneer has a lien, on property which he is employed to sell. for all sums due to him for his commissions and charges of sale.[77]

C. Right to Maintain Action. In case of personal property, an auctioneer employed to sell may, ordinarily, maintain an action in his own name for the price,[78]

therefrom. Union Refining, etc., Co. *v.* Pentecost, 79 Pa. St. 491.

Part of sale beyond limits of license.— Where an auctioneer sold severally numerous lots of standing wood, and part of the wood was within the limits of a county where the auctioneer had no authority, and was, by law, prohibited to sell, he is entitled to recover compensation for selling those lots which were within the county where he was licensed and qualified to sell. Robinson *v.* Green, 3 Metc. (Mass.) 159.

Where a sale is adjourned the auctioneer is not entitled to fees for services on the day of adjournment. He must sell to earn his fees. Ward *v.* James, 8 Hun (N. Y.) 526.

73. Denew *v.* Daverell, 3 Camph. 451. But see Benner's Estate, 7 Phila. (Pa.) 333, holding that, if an auctioneer's sale is set aside and a second sale is ordered, the auctioneer is entitled to compensation for his services at both sales if the first sale was not set aside through any default of the auctioneer.

Bid not complied with.— If an auctioneer is employed to sell at a certain commission on so much as he shall sell, he is not entitled to a commission on a bid not complied with. Cochran *v.* Johnson, 2 McCord (S. C.) 21.

A trustee who acts as auctioneer in the sale of trust property is not entitled to charge commissions. Kirkman *v.* Booth, 11 Beav. 273, 13 Jur. 525, 18 L. J. Ch. 25. See also Matthison *v.* Clarke, 3 Drew 3, 18 Jur. 1020, 24 L. J. Ch. 202, 3 Wkly. Rep. 2, wherein it appeared that a mortgagee with power of sale was a member of a firm of auctioneers. The firm sold for him. It was held that they were not entitled to commissions.

74. Writing signed by auctioneer.— To bring a case within the exception, it is not essential that the written agreement should be signed by the auctioneer. Carpenter *v.* Le Count, 93 N. Y. 562.

75. Griffin *v.* Helmbold, 72 N. Y. 437.

76. Russell *v.* Miner, 25 Hun (N. Y.) 114; Russell *v.* Miner, 61 Barb. (N. Y.) 534, 5 Lans. (N. Y.) 537. *Compare* Leeds *v.* Bowen, 1 Rob. (N. Y.) 10, 2 Abb. Pr. N. S. (N. Y.) 43.

77. *Illinois.*— Elison *v.* Wulff, 26 Ill. App. 616.

Louisiana.— Dowler's Succession, 29 La. Ann. 437.

Massachusetts.— Thompson *v.* Kelly, 101 Mass. 291, 3 Am. Rep. 353.

Missouri.— Harlow *v.* Sparr, 15 Mo. 184. See also Lewis *v.* Mason, 94 Mo. 551, 5 S. W. 911, 8 S. W. 735.

New York.— See Hone *v.* Henriquez, 13 Wend. (N. Y.) 240, 27 Am. Dec. 204, holding that, where an assignment for the benefit of creditors is fraudulent, an auctioneer to whom the assignees have intrusted the effects to be sold has no lien upon the moneys realized from the sale, as against judgment creditors of the assignor, the auctioneer being himself a creditor, but having agreed to the assignment.

Pennsylvania.— Girard *v.* Taggart, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327.

South Carolina.— Blum *v.* Torre, 3 Hill (S. C.) 155.

England.— Woolfe *v.* Horne, 2 Q. B. D. 355, 46 L. J. Q. B. 534, 36 L. T. Rep. N. S. 705, 25 Wkly. Rep. 728; Williams *v.* Millington, 1 H. Bl. 81, 2 Rev. Rep. 724.

Canada.— Blackburn *v.* Macdonald, 6 U. C. C. P. 380.

See 5 Cent. Dig. tit. "Auctions and Auctioneers," § 46.

Property subject to lien.—Whatever is put into the hands of the auctioneer as passing with, and appurtenant to, the property sold, is subject to the lien. But maps left with him for the purpose of selling land thereby are not so subject. Blackburn *v.* Macdonald, 6 U. C. C. P. 380.

78. This doctrine stands upon the right of the auctioneer to receive, and his responsibility to his principal for, the price of the property sold, and his lien thereon for his commissions, which give him a special property in the goods intrusted to him for sale, and an interest in the proceeds.

Alabama.— Robinson *v.* Garth, 6 Ala. 204, 41 Am. Dec. 47.

Arkansas.— Beller *v.* Block, 19 Ark. 566.

Illinois.— Flanigan *v.* Crull, 53 Ill. 352; Elison *v.* Wulff, 26 Ill. App. 616.

Massachusetts.— Thompson *v.* Kelly, 101 Mass. 291, 3 Am. Rep. 353.

New York.— Minturn *v.* Main, 7 N. Y. 220; Nixon *v.* Zuricalday, 12 N. Y. App. Div. 287, 42 N. Y. Suppl. 86; Bogart *v.* O'Regan, 1 E. D. Smith (N. Y.) 590; Hulse *v.* Young, 16 Johns. (N. Y.) 1.

Pennsylvania.— See Girard *v.* Taggart, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327.

England.— Woolfe *v.* Horne, 2 Q. B. D. 355, 46 L. J. Q. B. 534, 36 L. T. Rep. N. S. 705, 25

or for the property itself,[79] even though the owner of the property be known. In case of real estate, however, an auctioneer is not, ordinarily, entitled to receive the price. But when the terms of his employment and of the authorized sale contemplate the payment of a deposit into his hands at the time of the auction, he may sue for the deposit in his own name, whenever an action for the deposit, separate from the other purchase-money, may become necessary.[80] An auctioneer may also sue in his own name for fees which the terms of sale require to be paid him by the purchaser;[81] but his right to recover will depend on the validity of the contract to purchase as between buyer and seller.[82]

D. Liabilities of Auctioneer — 1. To Seller — a. In General. As an auctioneer assumes upon himself an obligation to his employer to perform the services confided to him with ordinary care and skill, he is responsible for loss arising from gross negligence or ignorance.[83]

b. Disobedience of Instructions. If an auctioneer deviates from the instructions of his principal, he is liable in damages.[84] Thus, if he is directed not to

Wkly. Rep. 728; Robinson *v.* Rutter, 4 E. & B. 954, 1 Jur. N. S. 823, 24 L. J. Q. B. 250, 3 Wkly. Rep. 405, 82 E. C. L. 954; Williams *v.* Millington, 1 H. Bl. 81, 2 Rev. Rep. 724; Coppin *v.* Craig, 2 Marsh. 501, 7 Taunt. 243, 17 Rev. Rep. 508, 2 E. C. L. 345.

Canada.—Wakefield *v.* Gorrie, 5 U. C. Q. B. 159.

See 5 Cent. Dig. tit. "Auctions and Auctioneers," § 50.

79. Thompson *v.* Kelly, 101 Mass. 291, 3 Am. Rep. 353. See also Riddle *v.* Coburn, 8 Gray (Mass.) 241, wherein it appeared that an auctioneer, who had guaranteed his sales, sold and delivered a chattel upon condition that the title should not pass until payment of the price. Upon the purchaser's failing to perform the condition, the auctioneer agreed to take the chattel and settle with the seller after informing him of the facts. It was held that the auctioneer thereby acquired a perfect title, and could maintain trover against one claiming title by sale from such purchaser.

Replevin.—An auctioneer who sells and delivers goods on a condition which is not complied with may maintain replevin therefor. Tyler *v.* Freeman, 3 Cush. (Mass.) 261.

Trespass de bonis asportatis.—An auctioneer put into possession of fixtures attached to the freehold for the purpose of selling them, the purchaser being bound to detach and remove them, has not such a possession as will support trespass *de bonis asportatis* for their wrongful removal. Davis *v.* Danks, 3 Exch. 435, 18 L. J. Exch. 213.

80. In relation to such deposit the auctioneer stands in the same position as he does to the price of personal property sold and delivered by him. Thompson *v.* Kelly, 101 Mass. 291, 3 Am. Rep. 353.

I O U for deposit.— Where an auctioneer, without the vendor's consent, takes the purchaser's I O U for the deposit, an action will lie, at the suit of the auctioneer, against the purchaser for the amount of the I O U. Hodgens *v.* Keon, [1894] 2 Ir. R. 657.

81. Recovery of fees.— Johnson *v.* Buck, 35 N. J. L. 338, 10 Am. Rep. 243; Muller *v.* Maxwell, 2 Bosw. (N. Y.) 355; Bleecker *v.* Franklin, 2 E. D. Smith (N. Y.) 93.

82. Johnson *v.* Buck, 35 N. J. L. 338, 10 Am. Rep. 243.

83. Hicks *v.* Minturn, 19 Wend. (N. Y.) 550; Denew *v.* Daverell, 3 Campb. 451.

Deposit of proceeds in bank.—Where an auctioneer, with the assent of the seller, deposits the proceeds of the sale in a bank to his own credit, mingling them with his own funds and with the proceeds of sales for others, the seller becomes a general creditor of the auctioneer, with no preference over other creditors. Levy *v.* Cavanagh, 2 Bosw. (N. Y.) 100.

Failure to ascertain bidder.—An auctioneer accepted a bid, but did not call for the name of the bidder. The bidder was asked by the auctioneer to come to the desk, but did not do so. Later, the auctioneer put up the chattel again and sold it for a less sum. It was held that he was liable to the owner for the sum first bid. Townsend *v.* Van Tassel, 8 Daly (N. Y.) 261.

Proof of title.— In an action against an auctioneer to recover the price of property, a slave sold by the auctioneer, plaintiff must prove such a property in the slave as will entitle him to the proceeds of the sale. It is not sufficient to show merely that he delivered it to the auctioneer. Allen *v.* Brown, 5 Mo. 323.

Sale at ruinous sacrifice.—An action will lie against an auctioneer for selling goods at a ruinous sacrifice, if the jury find that, under the circumstances, he has acted negligently and in disregard of his duty. Cull *v.* Wakefield, 6 U. C. Q. B. O. S. 178.

Unavoidable accidents.—An auctioneer is bound only to take due care of property sent to him for sale, the same as he would of his own goods, and is not liable for unavoidable accidents. Maltby *v.* Christie, 1 Esp. 340.

84. Hazul *v.* Dunham, 1 Hall (N. Y.) 655; Wilkinson *v.* Campbell, 1 Bay (S. C.) 169; Jones *v.* Nanney, 13 Price 76; Mason *v.* Chamberlain, 1 Nova Scotia 5.

As to right of seller to fix minimum price see *supra*, IV, C, 7.

Subsequent insolvency of purchaser on credit.—Where auctioneers are authorized to sell on credit, and they do so, taking the notes of the purchasers, payable to themselves, the

sell goods below a certain price, he must put them up at such price, and cannot sell them if they will not bring it.[85]

c. Estoppel of Auctioneer to Assert Title. An auctioneer sued for the proceeds of goods sold by him cannot set up title in himself either as a defense to the action or in reduction of damages.[86]

2. To Buyer — a. In General. An auctioneer is bound by his personal warranty that title exists in his principal.[87] If he assumes the delivery of goods sold by him, he is liable for a failure to deliver them.[88] He is also responsible to the purchaser for money paid as a deposit, as required by the terms of the sale, if the vendor fails to complete the conveyance.[89]

b. Sale For Undisclosed Principal. An auctioneer is personally responsible as vendor unless, at the time of the sale, he discloses the name of his principal. His general employment as auctioneer is not *per se* notice that he acts as agent.[90]

principal, and not the auctioneer, must bear the loss in case of the failure of the makers of the notes before their maturity, unless the auctioneers have appropriated the notes to their own use. Townes *v.* Birchett, 12 Leigh (Va.) 173.

85. Hazul *v.* Dunham, 1 Hall (N. Y.) 655; Williams *v.* Poor, 3 Cranch C. C. (U. S.) 251, 29 Fed. Cas. No. 17,732.

86. Hutchinson *v.* Gordon, 2 Harr. (Del.) 179; Osgood *v.* Nichols, 5 Gray (Mass.) 420.

87. Personal warranty.— Dent *v.* McGrath, 3 Bush (Ky.) 174, holding, further, that, in an action against an auctioneer for damages resulting from his false warranty of the title of stolen property, which the purchaser has surrendered to the true owner, a judicial eviction is not necessary where the answer does not controvert the allegations as to want of title, and the owner's recaption.

Implied warranty.— Though the sale of goods by an auctioneer "as are" relieves him from any responsibility by way of warranty or for any defects in the condition of the thing sold, it, nevertheless, implies the existence of the thing sold in some condition, and does not protect him if the subject of the sale is wholly different from what it is represented to be. Ruben *v.* Lewis, 20 Misc. (N. Y.) 583, 46 N. Y. Suppl. 426. See also Somers *v.* O'Donohue, 9 U. C. C. P. 208, holding that, where an auctioneer sells a chattel as his own and delivers it to the purchaser, from whom it is taken by the rightful owner, the auctioneer is to be treated as impliedly warranting that he has a right to sell, and is, therefore, bound to compensate the purchaser for the loss.

Statute of frauds.—A verbal warranty of an auctioneer, where he alone was trusted, and expressly agreed, for himself, to warrant the title, is an original undertaking and not within the statute of frauds. Schell *v.* Stephens, 50 Mo. 375.

88. Failure to deliver.— Elison *v.* Wulff, 26 Ill. App. 616; Woolfe *v.* Horne, 2 Q. B. D. 355, 46 L. J. Q. B. 534, 36 L. T. Rep. N. S. 705, 25 Wkly. Rep. 728.

89. Return of deposit.— Teaffe *v.* Simmons, 11 Allen (Mass.) 342 (holding that, as to the deposit-money, the auctioneer is a stakeholder between the parties, and liable as such); Robinson *v.* Trofitter, 11 Allen (Mass.) 339; Cockeroft *v.* Muller, 71 N. Y. 367; Mahon *v.* Liscomb, 19 N. Y. Suppl. 224, 46 N. Y. St. 932; Gray *v.* Gutteridge, 3 C. & P. 40, 1 M. & Rob. 614, 14 E. C. L. 440. But see Ellison *v.* Kerr, 86 Ill. 427, wherein it appeared that, five months after the sale, the vendor gave the purchaser a contract acknowledging receipt of the deposit-money, and the purchaser, through whose acts the auctioneer had been induced to pay the deposit to the vendor, suffered two years to elapse after the sale before making demand for the deposit. It was held that the rule that the auctioneer is the stakeholder of both parties had ceased to apply, and that the purchaser could not recover the deposit.

As to liability of seller for deposit see *supra*, V, E.

Bill of interpleader.— If adverse claims arise as to the deposit-money received by an auctioneer, one party insisting upon its return and the other on its being paid over, the auctioneer may file a bill of interpleader. Bleeker *v.* Graham, 2 Edw. (N. Y.) 647.

90. *Illinois.*— Elison *v.* Wulff, 26 Ill. App. 616.

Kentucky.— Thomas *v.* Kerr, 3 Bush (Ky.) 619, 96 Am. Dec. 262.

Maryland.— Seemuller *v.* Fuchs, 64 Md. 217, 1 Atl. 120, 54 Am. Rep. 766.

Missouri.— Schell *v.* Stephens, 50 Mo. 375.

New York.— Baltzen *v.* Nicolay, 53 N. Y. 467; Bush *v.* Cole, 28 N. Y. 261, 84 Am. Dec. 343; Mills *v.* Hunt, 20 Wend. (N. Y.) 431 [*affirming* 17 Wend. (N. Y.) 333].

Texas.— Davie *v.* Lynch, 1 Tex. App. Civ. Cas. § 695.

England.— Jones *v.* Littledale, 6 A. & E. 486, 6 L. J. K. B. 169, 1 N. & P. 677, 33 E. C. L. 265; Franklyn *v.* Lamond, 4 C. B. 637, 11 Jur. 780, 16 L. J. C. P. 221, 56 E. C. L. 637; Hanson *v.* Roberdeau, Peake 163.

See 5 Cent. Dig. tit. "Auctions and Auctioneers," § 42.

Amount of recovery.—An auctioneer selling for an undisclosed principal is liable to the purchaser, not only for the deposit and the auctioneer's fees, with interest, but also for any difference between the actual value of the property and the price agreed to be paid. Bush *v.* Cole, 28 N. Y. 261, 84 Am. Dec. 343.

3. To Third Persons[91]**— a. In General.** An auctioneer who sells property for one who has no title and pays over to his principal the proceeds is liable to the real owner for the conversion, even though such auctioneer acts in good faith, and without knowledge of the defect of title.[92] Of course, an auctioneer is liable to the true owner for the proceeds of a sale if he sells with knowledge, or under circumstances which charge him with knowledge, that the property does not belong to his principal.[93]

b. Garnishment. An auctioneer selling goods by order of a sheriff, and receiving the money for them, is accountable only to the sheriff, and cannot be held as the trustee of those who may have claims on the sheriff for the proceeds.[94]

VII. Bonds and Actions Thereon.

A. Requisites and Validity of Bond. The bond must conform in its provisions to the ordinance or statute governing it.[95]

B. Liabilities on Bond. Since it is the duty of an auctioneer to pay over to his employer the proceeds of a sale made by him, sureties on his bond, which

91. As to liability for refusal to accept bid see *supra*, IV, C, 3.

92. *California.*— Swin *v.* Wilson, 90 Cal. 126, 27 Pac. 33, 25 Am. St. Rep. 110, 13 L. R. A. 605 [*overruling* Rogers *v.* Huie, 2 Cal. 571, 56 Am. Dec. 363]; Rogers *v.* Huie, 1 Cal. 429, 54 Am. Dec. 300.

Massachusetts.— Robinson *v.* Bird, 158 Mass. 357, 33 N. E. 391, 35 Am. St. Rep. 495; Hills *v.* Snell, 104 Mass. 173, 6 Am. Rep. 216; Coles *v.* Clark, 3 Cush. (Mass.) 399.

Michigan.— Kearney *v.* Clutton, 101 Mich. 106, 59 N. W. 419, 45 Am. St. Rep. 394.

Missouri.— Mohr *v.* Langan, 162 Mo. 474, 63 S. W. 409; Koch *v.* Branch, 44 Mo. 542, 100 Am. Dec. 324.

New York.— Hoffman *v.* Carow, 22 Wend. (N. Y.) 285 [*affirming* 20 Wend. (N. Y.) 21]; Moloughney *v.* Hegeman, 9 Abb. N. Cas. (N. Y.) 403; Chambess *v.* McCormick, 4 N. Y. Leg. Obs. 342.

Ohio.— Miller *v.* Laws, 6 Ohio Dec. (Reprint) 736, 7 Am. L. Rec. 606, 4 Cinc. L. Bul. 123.

Tennessee.— *Contra*, Frizzell *v.* Rundle, 88 Tenn. 396, 12 S. W. 918, 17 Am. St. Rep. 908, holding that an auctioneer who, in the regular course of his business, receives mortgaged chattels from the mortgagor and sells them for him on commission, and pays over the proceeds thereof, without notice, actual or constructive, of the mortgage, is not liable to the mortgagee as for a conversion of the goods. The registration of the mortgage in such case does not operate as constructive notice to the auctioneer.

England.— Hollins *v.* Fowler, L. R. 7 H. L. 757, 44 L. J. Q. B. 169, 33 L. T. Rep. N. S. 73; Cochrane *v.* Rymill, 40 L. T. Rep. N. S. 744, 27 Wkly. Rep. 776.

Canada.— Johnston *v.* Henderson, 28 Ont. 25.

See 5 Cent. Dig. tit. "Auctions and Auctioneers," § 43.

Executor de son tort.—An auctioneer who sells the assets of a deceased person is liable for the debts of the deceased as executor *de son tort* unless he can show that he acted under an executor who has proved the will. Nulty *v.* Fagan, 22 L. R. Ir. 604.

93. Higgins *v.* Lodge, 68 Md. 229, 11 Atl. 846, 6 Am. St. Rep. 437; Morrow Shoe Mfg. Co. *v.* New England Shoe Co., 57 Fed. 685, 18 U. S. App. 256, 6 C. C. A. 508, 24 L. R. A. 417; Hardacre *v.* Stewart, 5 Esp. 103.

Advances.—Where goods purchased through fraud are placed in the hands of an auctioneer for sale, and he, in good faith, advances money upon them, or incurs expenses in relation thereto, he acquires a title to the goods that cannot be impeached by the original vendor thereof. Higgins *v.* Lodge, 68 Md. 229, 11 Atl. 846, 6 Am. St. Rep. 437. See also Lewis *v.* Mason, 94 Mo. 551, 5 S. W. 911, 8 S. W. 735, holding that an auctioneer, who receives in good faith, and without the knowledge of any fraud, a consignment of goods to be sold on commission, and, on receiving part thereof, advances the consignor money upon account, is entitled to the possession of the goods as against an attaching creditor of the vendor of the consignor, and cannot be deprived of their possession, either by the consignor or a creditor of the consignor, until his advances, commissions, and charges are paid.

Void chattel mortgage.—An auctioneer, who, as agent of the mortgagee in a chattel mortgage void under the insolvent laws, sells the mortgaged property, under a power in the mortgage, after notice of the issuance of a warrant in insolvency against the mortgagor and demand of possession by the messenger, is guilty of a conversion of the property, and is liable to the assignee in insolvency for the value thereof. Milliken *v.* Hathaway, 148 Mass. 69, 19 N. E. 16, 1 L. R. A. 510.

94. Penniman *v.* Ruggles, 6 Mass. 166. See also Pratte *v.* Scott, 19 Mo. 625, holding that an auctioneer having in his possession a consignment for sale cannot be garnished by plaintiff in an execution suit against the owner of the goods.

See, generally, Garnishment.

95. Georgetown *v.* Baker, 2 Cranch C. C. (U. S.) 291, 10 Fed. Cas. No. 5,342, holding that a bond executed to a municipal corpora-

is conditioned that he will do whatsoever the law requires, are liable to his employer for the proceeds of a sale which he withholds.[96]

C. Action on Bond. A person who intrusts an auctioneer with the sale of goods, and has a claim against him for money arising on the sale, may apply for and direct a suit on the auctioneer's bond even though the ordinance requiring the bond did not authorize any person in particular to sue upon it.[97]

AUCUPIA VERBORUM SUNT JUDICE INDIGNA. A maxim meaning "Catchings at words are unworthy of a judge."[1]

AUDI ALTERAM PARTEM. A maxim meaning "No man should be condemned unheard."[2]

AUDIENCE COURT. A court belonging to the Archbishop of Canterbury, of equal authority with the court of arches, though inferior both in dignity and antiquity.[3]

AUDIT. To examine; to pass upon;[4] to hear and examine; to pass upon and adjust;[5] to examine and adjust an account;[6] to examine, settle, and adjust accounts — to verify the accuracy of the statement submitted to the auditing

tion instead of to the mayor, as required by ordinance, is void.

96. Raleigh *v.* Holloway, 10 N. C. 234. See also Tripp *v.* Barton, 13 R. I. 130, 131, holding that neglect of an auctioneer to pay over the proceeds of a sale by him constitutes a breach of his bond, conditioned merely that he shall "well and faithfully perform all the duties of said office during his continuance therein." But see Viadero *v.* Stacom, 14 Daly (N. Y.) 345, 12 N. Y. St. 114, holding that a bond, designed by the provisions of a statute as security against frauds and fraudulent practices committed upon purchasers at auction sales, does not embrace the fraud of an auctioneer in converting to his own use the proceeds of goods consigned to him for sale.

Discharge of sureties.— Where an auctioneer's license is void because not under the corporate seal, as required by ordinance, a surety on the bond, given before the issuance of the license, is not liable, though the auctioneer continued to act as such throughout the year. Georgetown *v.* Baker, 2 Cranch C. C. (U. S.) 291, 10 Fed. Cas. No. 5,342. But the neglect of a city treasurer to call on an auctioneer to render an account of his sales does not discharge the auctioneer's sureties from their liability. Charleston *v.* Paterson, 2 Bailey (S. C.) 165. So, a discharge in bankruptcy of an auctioneer does not discharge the sureties on his official bond. Jones *v.* Russell, 44 Ga. 460.

Duration of liability.— The liability of an auctioneer commissioned for one year, and of his sureties under a bond to perform, etc., "during the period he shall continue to act as auctioneer under the commission that may be granted him," continues while he acts as auctioneer, and does not expire in one year. Daly *v.* Com., 75 Pa. St. 331. But see Florance *v.* Richardson, 2 La. Ann. 663, 664, holding that where an auctioneer, who had received and advertised for sale goods, sells them after his term of office has expired and converts the proceeds to his own use, the sureties on his bond, who bound themselves "that he should perform his duty as an auctioneer to all persons who shall employ him as such, during his continuance in office," will not be liable for the amount so converted.

Private sale.— If goods are sent to an auctioneer with directions to sell them at public auction, and he sells them at private sale, without authority, and does not pay over the proceeds, his bond as auctioneer is liable. McMechen *v.* Baltimore, 3 Harr. & J. (Md.) 534.

97. McMechen *v.* Baltimore, 2 Harr. & J. (Md.) 41.

In Pennsylvania it has been held that the bond of an auctioneer is security for his private customers as well as for the payment of the duties to the state, and either may sue upon it. Davis *v.* Com., 3 Watts (Pa.) 297; Yard *v.* Lee, 3 Yeates (Pa.) 335, 4 Dall. (Pa.) 95, 1 L. ed. 756.

Defenses.— In an action on an auctioneer's bond a surety cannot object that the bond was invalid in that the principal had not taken out the license as required by statute. State *v.* Blohm, 26 La. Ann. 538.

Presumptions.— In an action on an auctioneer's bond, it will be presumed, in the absence of evidence to the contrary, that the bond and license were given the same day, the execution of the former preceding the granting of the latter. McMechen *v.* Baltimore, 2 Harr. & J. (Md.) 41.

1. Burrill L. Dict.
2. Broom Leg. Max.

Applied in Aldrick *v.* Kinney, 4 Conn. 380, 384, 386, 10 Am. Dec. 151; Cloud *v.* Pierce City, 86 Mo. 357, 366.

3. Wharton L. Lex.
4. Cobb County *v.* Adams, 68 Ga. 51, 53.
5. Matter of Murphy, 24 Hun (N. Y.) 592, 594. See also People *v.* Jefferson County, 35 N. Y. App. Div. 239, 242, 54 N. Y. Suppl. 782.
6. People *v.* Oneida County, 24 Hun (N. Y.) 413, 419.

The term is not applicable to demands arising from tort. Adams *v.* Modesto, 131 Cal. 501, 502, 63 Pac. 1083.

officer or body;[7] to hear, examine, adjust, pass upon, and settle an account, and then allow it;[8] to hear, and upon the hearing to adjust, or to allow, or to reject, or otherwise decide, according to the nature of the claim;[9] the examination and allowance of accounts.[10]

7. People *v.* Green, 5 Daly (N. Y.) 194, 200.
8. Morris *v.* People, 3 Den. (N. Y.) 381, 391.
9. Territory *v.* Grant, 3 Wyo. 241, 243, 21 Pac. 693. See also People *v.* Barnes, 114 N. Y. 317, 323, 20 N. E. 609, 21 N. E. 739, 22 N. Y. St. 164, 23 N. Y. St. 795, to the effect that "in its broader sense it includes its adjustment or allowance, disallowance or rejection."
10. People *v.* Green, 5 Daly (N. Y.) 194, 200.

AUDITA QUERELA

EDITED BY HENRY STEPHEN

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I. DEFINITION.

Audita querela[1] is a common-law writ,[2] issued upon the application of a judgment or execution debtor, designed to afford relief from the consequences of a judgment or an execution, upon the ground of some matter of defense or discharge arising subsequent to the rendition of the judgment or issue of the execution,[3] or for the relief, in like manner, of conusors in recognizances and statutes merchant and staple.[4] The term "audita querela" has also been applied

1. Literally, "the complaint having been heard," from which emphatic words used in the writ the latter takes its name. Abbott L. Dict.

2. It is a common-law writ (Radclyffe *v.* Barton, 161 Mass. 327, 37 N. E. 373; Garfield *v.* State University, 10 Vt. 536); and even where the proceeding is authorized and the forms prescribed by statute the rules of the common law determine the cases in which it is a suitable remedy (Radclyffe *v.* Barton, 161 Mass. 327, 37 N. E. 373; Lovejoy *v.* Webber, 10 Mass. 101; Johnson *v.* Plimpton, 30 Vt. 420; Poultney *v.* State Treasurer, 25 Vt. 168; Comstock *v.* Grout, 17 Vt. 512; Staniford *v.* Barry, 1 Aik. (Vt.) 321, 15 Am. Dec. 692) and the principles by which the suit is to be governed (Brackett *v.* Winslow, 17 Mass. 153; Johnson *v.* Plimpton, 30 Vt. 420).

It is said to have been first used in the tenth year of Edward III. Young *v.* Collet, T. Raym. 89 [*cited* in 2 Wms. Saund. 148, note 1].

3. *Georgia.*— Manning *v.* Phillips, 65 Ga. 548.

Kansas.— McMillan *v.* Baker, 20 Kan. 50.

Massachusetts.— Foss *v.* Witham, 9 Allen (Mass.) 572; Johnson *v.* Harvey, 4 Mass. 483.

Missouri.—Fischer *v.* Johnson, 74 Mo. App. 64.

New Hampshire.— Hadlock *v.* Clement, 12 N. H. 68.

New York.— Mallory *v.* Norton, 21 Barb. (N. Y.) 424; Wardell *v.* Eden, 2 Johns. Cas. (N. Y.) 258, 1 Johns. (N. Y.) 534 note.

Pennsylvania.—McLean *v.* Bindley, 114 Pa. St. 559.

South Carolina.— Longworth *v.* Screven, 2 Hill (S. C.) 298.

Vermont.— Scott *v.* Larkin, 13 Vt. 112; Sutton *v.* Tyrrell, 10 Vt. 87; Staniford *v.* Barry, 1 Aik. (Vt.) 321, 15 Am. Dec. 692.

England.— 3 Bl. Comm. 405; 2 Wms. Saund. 148, note 1.

It seems to have been invented lest there should be an oppressive defect of justice without any remedy. 3 Bl. Comm. 405.

4. Hadlock *v.* Clement, 12 N. H. 68; 2 Wms. Saund. 148, note 1.

These statutes are obsolete (Burrill L. Dict.) but for cases where the writ would lie see Portington's Case, 10 Coke 35*b*; Randal *v.* Wale, Cro. Jac. 59; Forrest *v.* Ballard, Cro. Eliz. 809; Huish *v.* Philips, Cro. Eliz. 754; Fulshaw *v.* Ascue, Cro. Eliz. 319; Ascue *v.* Fuljambe, Cro. Eliz. 233; Harrison *v.* Worley, Dyer 232*b*; Anonymous, Dyer 35*a*; 1 Bacon

by some well-recognized authorities to the whole action or proceeding upon the writ itself.[5]

II. NATURE AND PROPRIETY OF REMEDY.

A. Nature. The proceeding is a regular suit or action,[6] in which the parties may plead and take issue, either in law or in fact,[7] and a regular judgment must be pronounced.[8] While the complaint generally[9] sounds in tort,[10] the proceeding is in the nature of a bill in equity.[11]

B. Propriety — 1. In General. The purpose of the writ of audita querela is to relieve the party suing it out from the fraud, oppression, or other misconduct of the opposite party,[12] by avoiding the execution[13] or vacating the judgment[14] complained of. Injury, or danger of injury, seems to be essential to the maintenance of the action,[15] and whenever the party has had a legal opportunity to avail himself of the matters of defense set forth in his complaint, or the injury of which he complains is attributable to his own neglect, he is not entitled to relief

Abr. 510, 512, 515, 516; Fitzherbert Nat. Brev. (ed. 1793) 236, 238, 240.

5. Abbott L. Dict.

6. *New York.*— Brooks *v.* Hunt, 17 Johns. (N. Y.) 484, 18 Johns. (N. Y.) 5.

South Carolina.— Longworth *v.* Screven, 2 Hill (S. C.) 298, 27 Am. Dec. 381.

Vermont.— Stone *v.* Seaver, 5 Vt. 549.

United States.— Avery *v.* U. S., 12 Wall. (U. S.) 304, 20 L. ed. 405.

England.— Holmes *v.* Pemberton, 1 E. & E. 369, 5 Jur. N. S. 727, 28 L. J. Q. B. 172, 7 Wkly. Rep. 160, 102 E. C. L. 369; Giles *v.* Hutt, 5 D. & L. 387, 1 Exch. 701, 17 L. J. Exch. 121.

7. Edwards *v.* Lewis, 16 Ala. 813; Longworth *v.* Screven, 2 Hill (S. C.) 298, 27 Am. Dec. 381.

8. Longworth *v.* Screven, 2 Hill (S. C.) 298, 27 Am. Dec. 381.

9. It may sometimes be in the nature of an action *ex contractu*. Shrewsbury *v.* Stong, 10 Vt. 591.

10. Walter *v.* Foss, 67 Vt. 591, 32 Atl. 643; Little *v.* Cook, 1 Aik. (Vt.) 363, 15 Am. Dec. 698. But in Stone *v.* Chamberlain, 7 Gray (Mass.) 206, it was held that a writ of audita querela was improperly denominated an action of tort.

11. *Maine.*— Bryant *v.* Johnson, 24 Me. 304.

Massachusetts.— Lovejoy *v.* Webber, 10 Mass. 101.

New York.— Mallory *v.* Norton, 21 Barb. (N. Y.) 424; Waddington *v.* Vredenbergh, 2 Johns. Cas. (N. Y.) 227.

Vermont.— Stone *v.* Seaver, 5 Vt. 549.

England.— Leake *v.* Dawes, March N. Cas. 69; 2 Wms. Saund. 148, note 1; 3 Bl. Comm. 405. *Compare* Ognel *v.* Randol, Cro. Jac. 29, to the effect that it is a commission to the judges to examine the cause.

12. *Kansas.*— McMillan *v.* Baker, 20 Kan. 50.

Maine.— Bryant *v.* Johnson, 24 Me. 304.

Massachusetts.—Barker *v.* Walsh, 14 Allen (Mass.) 172; Lovejoy *v.* Webber, 10 Mass. 101.

New York.— Mallory *v.* Norton, 21 Barb. (N. Y.) 424.

Vermont.— Walter *v.* Foss, 67 Vt. 591, 32 Atl. 643; Kimball *v.* Randall, 56 Vt. 558; Sutton *v.* Tyrrell, 10 Vt. 87; Weeks *v.* Lawrence, 1 Vt. 433.

England.— 1 Bacon Abr. 510; 3 Bl. Comm. 405.

Misconduct complained of need not be intentional, and may be legal misconduct merely (Kimball *v.* Randall, 56 Vt. 558) or permissive, not actual misconduct (Comstock *v.* Grout, 17 Vt. 512).

13. After execution.— The action lies as well after the levy of an execution is begun as before. Lothrop *v.* Bennet, Kirby (Conn.) 185.

Before entry of judgment.—When audita querela is brought after judgment, but before it is entered up, the court will order it entered, so that *nul tiel record* cannot be pleaded. Weeks *v.* Lawrence, 1 Vt. 433; Lampiere *v.* Mereday, 1 Mod. 111; 1 Bacon Abr. 510.

14. Under modern practice the process sometimes acts directly on the judgment by setting it aside (Walter *v.* Foss, 67 Vt. 591, 32 Atl. 643; Kimball *v.* Randall, 56 Vt. 558; Poultney *v.* State Treasurer, 25 Vt. 168; Alexander *v.* Abbott, 21 Vt. 476; Weeks *v.* Lawrence, 1 Vt. 433; Anonymous, 12 Mod. 598; 1 Bacon Abr. 510), but ordinarily it acts only on the execution (Poultney *v.* State Treasurer, 25 Vt. 168; Alexander *v.* Abbott, 21 Vt. 476; Anonymous, 12 Mod. 598), and at common law it did not extend to the judgment (Thatcher *v.* Gammon, 12 Mass. 267; Sutton *v.* Tyrrell, 10 Vt. 87; Higden *v.* Whitechurch, 1 Mod. 224).

Where a judgment is absolutely void the writ is not necessary to set it aside. Essex Min. Co. *v.* Bullard, 43 Vt. 238.

15. Bryant *v.* Johnson, 24 Me. 304.

Technical omission.— The writ does not lie to set aside a judgment and execution simply because of a technical omission, by which the complainant has not been wronged or injured. Starkey *v.* Waite, 69 Vt. 193, 37 Atl. 292.

in this form.[16] The writ, moreover, bears solely upon the acts of the opposite party,[17] and cannot ordinarily be used to correct the errors[18] or misconduct[19] of the court, mistakes of the clerk,[20] or the erroneous taxation of costs.[21] Neither

16. *Massachusetts.*— Radclyffe *v.* Barton, 161 Mass. 327, 37 N. E. 373; Merritt *v.* Marshall, 100 Mass. 244; White *v.* Clapp, 8 Allen (Mass.) 283; Goodrich *v.* Willard, 11 Gray (Mass.) 380; Faxon *v.* Baxter, 11 Cush. (Mass.) 35; Flint *v.* Sheldon, 13 Mass. 443, 7 Am. Dec. 162; Thatcher *v.* Gammon, 12 Mass. 267; Lovejoy *v.* Webber, 10 Mass. 101.

New Hampshire.— Hadlock *v.* Clement, 12 N. H. 68.

Vermont.— Walter *v.* Foss, 67 Vt. 591, 32 Atl. 643; Johnson *v.* Roberts, 58 Vt. 599, 2 Atl. 482; Griswold *v.* Rutland, 23 Vt. 324; Barber *v.* Graves, 18 Vt. 290; Perry *v.* Ward, 18 Vt. 120; Comstock *v.* Grout, 17 Vt. 512; Betty *v.* Brown, 16 Vt. 669; Potter *v.* Hodges, 13 Vt. 239; Jenney *v.* Glynn, 12 Vt. 480; Barrett *v.* Vaughan, 6 Vt. 243; Foster *v.* Stearns, 3 Vt. 322; Mason *v.* Lawrence, 2 Vt. 560; Staniford *v.* Barry, 1 Aik. (Vt.) 321, 15 Am. Dec. 692.

United States.— Avery *v.* U. S., 12 Wall. (U. S.) 304, 20 L. ed. 405.

England.— Giles *v.* Hutt, 5 Dowl. & L. 387, 1 Exch. 701, 17 L. J. Exch. 121; Cooke *v.* Berry, 1 Wils. C. P. 98; Watson *v.* Sutton, 12 Mod. 583; Wicket *v.* Creamer, 1 Salk. 264; Anonymous, 1 Salk. 93; Peters *v.* White, 2 Show. 238; Young *v.* Collet, T. Raym. 89; Day *v.* Guilford, T. Raym. 19; Hanner *v.* Mase, Hob. 396; Fisher *v.* Banks, Cro. Eliz. 25; Anonymous, Dyer 332*a*.

Neglect of agent or co-defendant.—A party is chargeable with the knowledge or the negligence of his agent or co-defendant. Walter *v.* Foss, 67 Vt. 591, 32 Atl. 643; Finney *v.* Hill, 13 Vt. 255; Scott *v.* Larkin, 13 Vt. 112.

17. Kimball *v.* Randall, 56 Vt. 558.

18. **Writ of error, and not audita querela,** lies to review the decision of the court upon any question that it was its duty to decide (Walter *v.* Foss, 67 Vt. 591, 32 Atl. 643; Perry *v.* Morse, 57 Vt. 509; Abbott *v.* Dutton, 44 Vt. 546, 8 Am. Rep. 394; Lamson *v.* Bradley, 42 Vt. 165; Amidon *v.* Aiken, 28 Vt. 440; Alburgh Eleventh School Dist. *v.* Rood, 27 Vt. 214; Spaulding *v.* Swift, 18 Vt. 214; Spear *v.* Flint, 17 Vt. 497; Betty *v.* Brown, 16 Vt. 669; Chase *v.* Scott, 14 Vt. 77; Potter *v.* Hodges, 13 Vt. 239; Sutton *v.* Tyrrell, 10 Vt. 87; Dodge *v.* Hubbell, 1 Vt. 491; Weeks *v.* Lawrence, 1 Vt. 433; Little *v.* Cook, 1 Aik. (Vt.) 363, 15 Am. Dec. 698; Tuttle *v.* Burlington, Brayt. (Vt.) 27); and audita querela does not lie for errors of the court, even though remedy by writ of error has been taken away by statute (Perry *v.* Morse, 57 Vt. 509; Spear *v.* Flint, 17 Vt. 497; Dodge *v.* Hubbell, 1 Vt. 491). Writ of error, or motion, and not audita querela, is also the proper remedy for the unauthorized appearance of an attorney. Abbott *v.* Dutton, 44 Vt. 546. 8 Am. Rep. 394; Spaulding *v.* Swift, 18 Vt. 214; Sheldon *v.* Kelseys, Brayt. (Vt.) 26. See also Alleley *v.* Colley, Cro. Jac. 695, where it was held that writ of deceit against the attorney, and not audita querela, was the appropriate remedy for his unauthorized and collusive appearance.

In Vermont, however, the writ has been held to be a proper remedy for certain errors of the court, such as the improper denial of an appeal (Edwards *v.* Osgood, 33 Vt. 224; Tyler *v.* Lathrop, 5 Vt. 170 [*criticized* in Scott *v.* Darling, 66 Vt. 510, 29 Atl. 993; Bradish *v.* Redway, 35 Vt. 424, 426; Harriman *v.* Swift, 31 Vt. 385; Spear *v.* Flint, 17 Vt. 497, in which cases the court said: "That case has since been followed, but with reluctance, and, if the question were now an open one, probably a different rule would be adopted"]), provided the suit was appealable on its face (Scott *v.* Darling, 66 Vt. 510, 29 Atl. 993; Bradish *v.* Redway, 35 Vt. 424; Griswold *v.* Rutland, 23 Vt. 324. See also Harriman *v.* Swift, 31 Vt. 385), or the rendition of judgment when the court lacked jurisdiction, either of the subject-matter of the suit (Burlington, etc., R. Co. *v.* Brush, 57 Vt. 472; Glover *v.* Chase, 27 Vt. 533; Ball *v.* Sleeper, 23 Vt. 573; Hastings *v.* Webber, 2 Vt. 407. See also Perry *v.* Morse, 57 Vt. 509), or of the person of defendant, as where an infant or lunatic was not represented by guardian *ad litem* (Miller *v.* Potter, 54 Vt. 267; Starbird *v.* Moore, 21 Vt. 529; Lincoln *v.* Flint, 18 Vt. 247; Judd *v.* Downing, Brayt. (Vt.) 27. See also Perry *v.* Morse, 57 Vt. 509); but a recovery against an officer for failure to collect a judgment against an infant will not be set aside by audita querela while the judgment against the infant remains in force (Solace *v.* Downing, Brayt. (Vt.) 27), and the writ was held not to lie in Wrisley *v.* Kenyon, 28 Vt. 5 (where an infant was sued jointly with his father and natural guardian, who appeared and defended the suit); Chase *v.* Scott, 14 Vt. 77 (where the infant, being one of several defendants, did not appear, and no guardian *ad litem* was appointed, and judgment was rendered against all the defendants).

19. Titlemore *v.* Wainwright, 16 Vt. 173.

20. As where the clerk, in entering judgment, included excessive interest or damages. Edmondson *v.* King, 1 Overt. (Tenn.) 425; Perry *v.* Ward, 18 Vt. 120; Weeks *v.* Lawrence, 1 Vt. 433.

21. Goodrich *v.* Willard, 11 Gray (Mass.) 380; Rickard *v.* Fisk, 66 Vt. 675, 30 Atl. 93; Johnson *v.* Roberts, 58 Vt. 599, 2 Atl. 482; Clough *v.* Brown, 38 Vt. 179; Harriman *v.* Swift, 31 Vt. 385; Weeks *v.* Lawrence, 1 Vt. 433. *Contra*, Weed *v.* Nutting, Brayt. (Vt.) 28 [*criticized* in Dodge *v.* Hubbell, 1 Vt. 491, and *explained* in Johnson *v.* Roberts, 58 Vt. 599, 2 Atl. 482].

Even though procured by the fraud of the opposite party this is true. Goodrich *v.* Willard, 11 Gray (Mass.) 380; Clough *v.* Brown,

can purely equitable defenses, not cognizable at law, be set up by audita querela.[22] The writ is now less frequently resorted to than formerly, owing to the disposition of the courts to grant the same relief in a more summary manner;[23] but the remedy so substituted or other common-law remedies are merely concurrent with audita querela, and are not exclusive.[24]

2. **QUIA TIMET.** To maintain a writ of audita querela it is not necessary that

38 Vt. 179. *Compare* Rickard *v.* Fisk, 66 Vt. 675, 30 Atl. 93; Johnson *v.* Roberts, 58 Vt. 599, 2 Atl. 482.

22. Barker *v.* Walsh, 14 Allen (Mass.) 172; Schott *v.* McFarland, 1 Phila. (Pa.) 53, 7 Leg. Int. (Pa.) 58; Herrick *v.* Orange County Bank, 27 Vt. 584. But in England, under the Common Law Procedure Act, § 84, equitable defenses arising after the lapse of the time during which they could be pleaded might be set up by way of audita querela. 3 Bl. Comm. 405, note 3.

Execution enjoined.— Where an execution has been issued by a court of law, a writ of audita querela cannot be maintained to vacate the same, or suspend its operations, on the ground that it has been enjoined by the chancery court. The remedy is under the injunction. Porter *v.* Vaughn, 24 Vt. 211.

23. Substitutes for audita querela are as follows:

Alabama.— Petition, or motion, and supersedeas. Bruce *v.* Barnes, 20 Ala. 219; Dunlap *v.* Clements, 18 Ala. 778; Edwards *v.* Lewis, 16 Ala. 813.

Georgia.— Motion, or proceeding by illegality. Manning *v.* Phillips, 65 Ga. 548; Hill *v.* De Launay, 34 Ga. 427.

Illinois.— Motion. Harding *v.* Hawkins, 141 Ill. 572, 31 N. E. 307, 33 Am. St. Rep. 347; People *v.* Barnett, 91 Ill. 422.

Kansas.— Petition or motion. McMillan *v.* Baker, 20 Kan. 50.

Kentucky.— Motion. Chambers *v.* Neal, 13 B. Mon. (Ky.) 256.

Maryland.— Motion. Huston *v.* Ditto, 20 Md. 305; Job *v.* Walker, 3 Md. 129.

New York.— Motion. Clark *v.* Rowling, 3 N. Y. 216, 53 Am. Dec. 290; Wetmore *v.* Law, 34 Barb. (N. Y.) 515; Davis *v.* Sturtevant, 4 Duer (N. Y.) 148; Baker *v.* Judges Ulster C. Pl., 4 Johns. (N. Y.) 191; Wardell *v.* Eden, 1 Johns. (N. Y.) 534 note, 2 Johns. Cas. (N. Y.) 258.

North Carolina.— Notice and motion in nature of audita querela. McRae *v.* Davis, 58 N. C. 140.

Pennsylvania.— Motion. Harper *v.* Kean, 11 Serg. & R. (Pa.) 280; Share *v.* Becker, 8 Serg. & R. (Pa.) 239.

South Carolina.— Motion. Longworth *v.* Screven, 2 Hill (S. C.) 298, 27 Am. Dec. 381.

Tennessee.— Motion, certiorari and supersedeas, or bill in equity. Hardin *v.* Williams, 5 Heisk. (Tenn.) 385; Baldwin *v.* Merrill, 8 Humphr. (Tenn.) 132; Marsh *v.* Haywood, 6 Humphr. (Tenn.) 210; Rogers *v.* Ferrell, 10 Yerg. (Tenn.) 253; Barnes *v.* Robinson, 4 Yerg. (Tenn.) 185; Linebaugh *v.* Rinker, Peck (Tenn.) 362; Edmondson *v.* King, 1 Overt. (Tenn.) 425.

Texas.— Motion. Cook *v.* Sparks, 47 Tex. 28.

Vermont.— Motion. Porter *v.* Vaughn, 24 Vt. 211.

Virginia.— Motion. Steele *v.* Boyd, 6 Leigh (Va.) 547, 29 Am. Dec. 218; Smock *v.* Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780.

Wisconsin.— Motion. McDonald *v.* Falvey, 18 Wis. 571; Cooley *v.* Gregory, 16 Wis. 303; Spafford *v.* Janesville, 15 Wis. 474.

England.— Motion. Baker *v.* Ridgway, 2 Bing. 41, 9 Moore C. P. 114, 9 E. C. L. 472; Nathans *v.* Giles, 1 Marsh. 226, 5 Taunt. 558, 1 E. C. L. 286; Lister *v.* Mundell, 1 B. & P. 427; Sutton *v.* Bishop, 4 Burr. 2283; Wharton *v.* Richardson, 2 Str. 1075; Ludlow *v.* Lennard, 2 Ld. Raym. 1295; Anonymous, 1 Salk. 93; Wicket *v.* Creamer, Holt 272, 1 Ld. Raym. 439, 12 Mod. 240, 1 Salk. 264; 3 Bl. Comm. 405.

See 5 Cent. Dig. tit. "Audita Querela," § 1.

24. *Georgia.*— Manning *v.* Phillips, 65 Ga. 548.

Maine.— Folan *v.* Folan, 59 Me. 566.

Massachusetts.— Brackett *v.* Winslow, 17 Mass. 153; Lovejoy *v.* Webber, 10 Mass. 101.

Tennessee.— White *v.* Harris, 5 Humphr. (Tenn.) 420.

Vermont.— Harmon *v.* Martin, 52 Vt. 255; Edwards *v.* Osgood, 33 Vt. 224; Porter *v.* Vaughn, 24 Vt. 211; Alexander *v.* Abbott, 21 Vt. 476; Comstock *v.* Grout, 17 Vt. 512; Stanley *v.* McClure, 17 Vt. 253.

If the facts are not clear, or the case presents any difficulty, the court may either order an issue, for trial by jury, in which event the same mode of trial as in audita querela should prevail (Bruce *v.* Barnes, 20 Ala. 219; Harding *v.* Hawkins, 141 Ill. 572, 31 N. E. 307, 33 Am. St. Rep. 347; Longworth *v.* Screven, 2 Hill (S. C.) 298, 27 Am. Dec. 381; Smock *v.* Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780; McDonald *v.* Falvey, 18 Wis. 571), or deny the motion and put the party to his audita querela (Brooks *v.* Hunt, 17 Johns. (N. Y.) 484, 18 Johns. (N. Y.) 5; Wardell *v.* Eden, 1 Johns. (N. Y.) 534 note, 2 Johns. Cas. (N. Y.) 258; Symons *v.* Blake, 2 C. M. & R. 416, 4 Dowl. P. C. 263, 1 Gale 182; Baker *v.* Ridgway, 2 Bing. 41, 9 Moore C. P. 114, 9 E. C. L. 472; Hewes *v.* Mott, 2 Marsh. 37, 192, 6 Taunt. 329, 1 E. C. L. 638; Nathans *v.* Giles, 1 Marsh. 226, 5 Taunt. 558, 1 E. C. L. 286; Mitford *v.* Cordwell, 2 Str. 1198; Wharton *v.* Richardson, 2 Str. 1075; Wicket *v.* Creamer, Holt 272, 1 Ld. Raym. 439, 12 Mod. 240, 1 Salk. 264).

Although the court has refused summary relief moved for on the same grounds audita querela has been held to lie. Schott *v.* McFarland, 1 Phila. (Pa.) 53, 7 Leg. Int. (Pa.) 58.

the party suing it out should be actually in execution, or that an execution should have actually issued;[25] and after suing out a writ plaintiff is justified in pursuing it until he knows that he is no danger from the execution, although the execution was not in the officer's hands at the time the writ issued.[26]

3. To Set Aside Execution — a. When Issue, Levy, or Return Irregular or Void.[27] Audita querela lies to set aside an execution which is irregular in some particular or void,[28] which was irregularly issued,[29] under which an irregular levy was made,[30] or upon which the officer made a false return.[31]

b. When Judgment Released, Satisfied, or Otherwise Discharged. The writ of audita querela has also long been recognized as the proper remedy to avoid an execution which has been sued out after the judgment has been released,[32]

25. Glover *v.* Chase, 27 Vt. 533; Phelps *v.* Slade, 13 Vt. 195; Stone *v.* Seaver, 5 Vt. 549. *Contra,* Fitzherbert Nat. Brev. (ed. 1793) 239.

A purchaser of lands subject to a judgment cannot have an audita querela quia timet, but only after execution has issued. So a purchaser of part of the lands cannot have it until after execution against him, although execution has already issued against the residue of the lands of the original debtor. Waddington *v.* Vredenbergh, 2 Johns. Cas. (N. Y.) 227, 3 Johns. Cas. (N. Y.) 495.

26. Phelps *v.* Slade, 13 Vt. 195.

27. When improperly issued on a statute or recognizance.— At common law, the writ was often used to avoid an execution improperly issued on a statute merchant, statute staple, or recognizance. For cases where the use of the writ was proper see Ashhurnham *v.* St. John, Cro. Jac. 85; Dean *v.* Hinde, Cro. Eliz. 797; Humphrey *v.* Harneage, Cro. Eliz. 756; Anonymous, Dyer 332*a*; Pullen *v.* Purbeck, 12 Mod. 355; 1 Bacon Abr. 515, 516; Fitzherbert Nat. Brev. (ed. 1793) 236. For cases where audita querela did not lie to avoid execution on a statute see 1 Bacon Abr. 513; Beston *v.* Robinson, Cro. Jac. 218.

28. Stone *v.* Chamberlain, 7 Gray (Mass.) 206 (date of judgment erroneously stated, whereby the officer was required to collect more interest than was due); Fairbanks *v.* Devereaux, 48 Vt. 550 (where an alias execution purported to be for the whole amount of the judgment, when a portion thereof had been collected on the first execution, even though the amount satisfied on the original execution was indorsed on the alias), Hovey *v.* Niles, 26 Vt. 541 (where the execution was made returnable at an earlier day than prescribed by statute); Sawyer *v.* Vilas, 19 Vt. 43; Stanley *v.* McClure, 17 Vt. 253 (in both which cases the execution was wrongfully issued against the body of the debtor, instead of against his property only); Gray *v.* Parker, 16 Vt. 652 (where, in a suit abated because there were no such persons as plaintiffs, an execution for costs was issued against plaintiffs); Wilson *v.* Fleming, 16 Vt. 649, 42 Am. Dec. 531 (where the execution misdescribed the judgment as to amount).

A justice's execution, which is renewed by erasing the date and inserting a new date, after it has been delivered to an officer for collection but before service is made and within its life, is not void, and cannot be set aside by audita querela. Sawyer *v.* Doane, 19 Vt. 598.

29. Dingman *v.* Myers, 13 Gray (Mass.) 1 (where issued against a non-resident, not personally served, without the creditor first filing the bond required by statute); Skillings *v.* Coolidge, 14 Mass. 43 (where issued contrary to the manifest intent of the referees on a judgment of the court upon an award by referees); Johnson *v.* Harvey, 4 Mass. 483; Hicks *v.* Murphy, Walk. (Miss.) 66 (where issued by the clerk against an administrator without an award of the court or revival by scire facias, after the lapse of a year and a day from the rendition of judgment against the intestate in his lifetime); Porter *v.* Vaughn, 24 Vt. 211.

Mistake no defense.— That an execution irregularly issued by the mistake of the clerk or attorney is no defense to the audita querela. Phelps *v.* Slade, 13 Vt. 195.

30. Hurlbut *v.* Mayo, 1 D. Chipm. (Vt.) 387. See also Com. *v.* Whitney, 10 Pick. (Mass.) 434, holding that where judgment was recovered and execution issued thereon before plaintiff's death, and defendant was committed on the execution after plaintiff's death, audita querela was the proper proceeding to try the question as to whether or not the prisoner was entitled to his discharge as a matter of right.

Where a levy on land is void the writ does not lie. Bryant *v.* Johnson, 24 Me. 304.

31. Hopkins *v.* Hayward, 34 Vt. 474, where the creditor fraudulently procured the officer to make a false return of the appraisal of the real estate levied on, and thereby set off too much of the debtor's property, on the basis of the actual appraisal, to cover the amount which he returned as satisfied on the execution.

32. Bryant *v.* Johnson, 24 Me. 304; Gordonier *v.* Billings, 77 Pa. St. 498; Flower *v.* Elgar, Cro. Car. 214 (holding that the writ lies against a plaintiff on his release of a judgment, although he has taken execution by elegit, and assigned it over); Child *v.* Durrant, Cro. Jac. 337 (where plaintiff released after judgment, and defendant subsequently brought error, upon which judgment was affirmed and additional costs incurred, whereupon defendant was taken in execution for the whole, and was relieved, on audita querela, as to the damages and first costs, but not as to the second costs); Hyde *v.* Morley, Cro. Eliz. 40; 3 Bl. Comm. 405.

paid,[33] satisfied on a prior execution,[34] discharged by the satisfaction of another judgment, when there have been separate recoveries for the same cause of action,[35] or against joint and several obligors[36] or joint trespassers,[37] where the debtor, after judgment, has obtained a discharge in bankruptcy,[38] where the debt was attached in the debtor's hands by a judgment creditor of plaintiff,[39] or where any other matter has occurred which operated as a discharge of the judgment.[40]

A release procured by fraud is of no avail. Anonymous, Dyer 339*a*.

33. Bryant *v.* Johnson, 24 Me. 304; Gordonier *v.* Billings, 77 Pa. St. 498; Baugh *v.* Killingworth, 4 Mod. 13; Ognel *v.* Randol, Cro. Jac. 29; Reynolds' Case, Cro. Eliz. 44; 3 Bl. Comm. 405.

Tender.— There would seem to be no doubt that the tender of the amount due upon an execution, and a refusal to receive it, may entitle the debtor to relief by audita querela, when the tender is kept good and properly pleaded. Perry *v.* Ward, 20 Vt. 92. But it was held in Keen *v.* Vaughan, 48 Pa. St. 477, that where a petition for the writ averred an agreement to accept a certain sum in compromise of a larger judgment, and an actual receipt of the greater part, with a tender of the balance, it was not error to refuse the writ, as to discharge the judgment the agreement must be fully executed.

Where a bond was executed in payment of a judgment and execution afterward issued, it was held, on demurrer to an audita querela brought to vacate the execution, that the bond was insufficient to avoid the judgment. Lutterford *v.* Le Mayre, Cro. Jac. 579.

34. Luddington *v.* Peck, 2 Conn. 700; Lothrop *v.* Bennet, Kirby (Conn.) 185; Parker *v.* Jones, 58 N. C. 276, 75 Am. Dec. 441; McRae *v.* Davis, 58 N. C. 140.

Satisfaction by co-defendant.— Where one of two judgment debtors satisfies the execution, and the other is taken in execution upon an alias issued to compel contribution, he will be relieved by audita querela. Brackett *v.* Winslow, 17 Mass. 153. *Compare* Waddington *v.* Vredenbergh, 2 Johns. Cas. (N. Y.) 227.

Payment by purchaser for release of attachment.—Where a purchaser of land under attachment pays to the attaching creditor, after judgment and execution, a certain sum for the release of the attachment, under an agreement that the creditor need not apply such sum toward satisfaction of the judgment, this does not inure to the benefit of the debtor, and he cannot obtain his discharge from prison on that account after there has been a partial satisfaction of the judgment on an alias execution, and he has been committed on a pluries taken out for the balance. Kimball *v.* Parker, 7 Metc. (Mass.) 63.

35. Bowne *v.* Joy, 9 Johns. (N. Y.) 221, holding that when two suits are brought upon the same cause of action, and proceed, *pari passu*, to judgment and execution, a satisfaction of either may be shown in discharge of the other.

36. Pullen *v.* Purbeck, 12 Mod. 355; Foster *v.* Jackson, Hob. 71; Crawley *v.* Lidgeat, Cro. Jac. 338.

37. Coke *v.* Iennor, Hob. 90.

38. *Connecticut.*— Pettit *v.* Seaman, 2 Root (Conn.) 178.

New York.— Baker *v.* Judges Ulster C. Pl., 4 Johns. (N. Y.) 191.

Pennsylvania.— Gordonier *v.* Billings, 77 Pa. St. 498; Williams *v.* Butcher, 1 Wkly. Notes Cas. (Pa.) 304.

Vermont.— Comstock *v.* Grout, 17 Vt. 512.

England.— Calcraft *v.* Swann, 2 Barnes Notes Cas. 204.

See 5 Cent. Dig. tit. "Audita Querela," § 8.

The creditor cannot evade the effect of the discharge by continuing the suit from time to time, until the debtor has been discharged, and then taking judgment. Paddleford *v.* Bancroft, 22 Vt. 529. But see White *v.* Clapp, 8 Allen (Mass.) 283; Faxon *v.* Baxter, 11 Cush. (Mass.) 35, which hold that if the debtor neglected to take the necessary steps in court to postpone the action because of pending proceedings in insolvency, and subsequently a discharge was granted after judgment had been rendered, he could not be relieved by audita querela.

Where a debtor, imprisoned under an execution, was admitted to the liberties of the prison, and subsequently obtained a discharge in bankruptcy, and the creditor refused to discharge him from prison, or consent to his going at large, it was held that the debtor could not maintain audita querela against the creditor to procure his release; but that the debtor and his sureties must take the responsibility of deciding whether or not the discharge was effectual. Gould *v.* Mathewson, 18 Vt. 65.

39. Gridley *v.* Harraden, 14 Mass. 497; Daly *v.* Derringer, 1 Phila. (Pa.) 324, 9 Leg. Int. (Pa.) 46 (where the debt was impounded by plaintiff's creditor by trustee process).

40. As where the sheriff recovered against a hondsman for prisoner's escape, when his sole right to recover arose from liability to the creditor, whose right of recovery was afterward barred by limitation (Hall *v.* Fitch, 1 Root (Conn.) 151); where action was brought on a foreign judgment, pending an appeal, and the judgment was afterward reversed (Merchants' Ins. Co. *v.* De Wolf, 33 Pa. St. 45, 75 Am. Dec. 577); where judgment was recovered against bail, and the judgment against his principal was afterward satisfied (1 Bacon Abr. 513); where the execution debtor was enlarged by the consent of the creditor, and afterward taken in execution on the same judgment (Linacres' Case, 2 Leon. 96; Linacers' Case, 1 Leon. 230; 1 Bacon Abr. 513 [*citing* Rolle Abr. 307]); where two are in execution, and one is suffered to escape, and a recovery is had

4. To Vacate Judgment. A judgment may be vacated by writ of audita querela when defendant had no opportunity to defend the suit because not served with process,[41] or when, though he had due notice of the suit, he was prevented from making his defense by plaintiff's fraud.[42]

against the sheriff therefor (Foster *v.* Jackson, Hob. 71; Alford *v.* Tatnel, 2 Mod. 49); where, after judgment in trespass against a soldier for forcibly taking property, an act was passed pardoning all acts of hostility and discharging the offenders from all actions and executions on that account (Benson *v.* Idle, 2 Mod. 37); where, after judgment obtained by an administrator, the administration was repealed (Turner *v.* Davies, 1 Mod. 62, 2 Saund. 137); where a recovery in debt was had against a jailer upon an escape, and the original judgment was afterward reversed (Appesley *v.* Ive, Cro. Jac. 645); or where a stranger purchased and paid for a judgment (Malyns *v.* Hawkins, Cro. Eliz. 634).

The writ will not lie where a corporation had an election of remedies against a defaulting shareholder, and proceeded to take judgment, and after judgment declared his shares to be forfeited, since the corporation having elected to take judgment, the declaration of forfeiture was invalid and did not operate in discharge of the judgment (Giles *v.* Hutt, 3 Exch. 18, 18 L. J. Exch. 53, 5 R. & Can. Cas. 505); or where an execution debtor is temporarily enlarged by consent of the creditor, under an agreement that he should settle the debt within a specified time, and he fails so to do and is taken into custody again (Little *v.* Newburyport Bank, 14 Mass. 443). Nor can the writ be maintained by one of two execution debtors, after the escape of the other, before recovery against the sheriff for the escape (Blumfield's Case, 5 Coke 86*b*; 1 Bacon Abr. 513. But see Bloomfield *v.* Roswick, Cro. Eliz. 555, 573), and the death of one of two in execution is no discharge to the other (Blumfield's Case, 5 Coke 86*b*).

41. *Florida.*— Barrow *v.* Bailey, 5 Fla. 9.
Maine.— Folan *v.* Folan, 59 Me. 566; Bryant *v.* Johnson, 24 Me. 304.
Massachusetts.— Foss *v.* Witham, 9 Allen (Mass.) 572.
Vermont.— Staniford *v.* Barry, 1 Aik. (Vt.) 321, 15 Am. Dec. 692.
United States.— Landes *v.* Brant, 10 How. (U. S.) 348, 13 L. ed. 449.
England.— Lampton *v.* Collingwood, 1 Ld. Raym. 27, 3 Ld. Raym. 327; Fisher *v.* Banks, Cro. Eliz. 25; 3 Bl. Comm. 405.

Judgment against a defendant who was without the state at the time suit was brought will be vacated by audita querela when defendant had no notice of the suit, and continued absent until after the return-day (Sawyer *v.* Cross, 65 Vt. 158, 26 Atl. 528), or when plaintiff failed to give the security by recognizance required by statute, conditioned that he would refund such sum as might be recovered against him on writ of review (Folan *v.* Folan, 59 Me. 566; Dingman *v.* Myers, 13 Gray (Mass.) 1; Hill *v.* Warren, 54 Vt. 73; Harmon *v.* Martin, 52 Vt. 255; Folsom *v.* Conner, 49 Vt. 4; Eastman *v.* Waterman, 26 Vt. 494; Kidder *v.* Hadley, 25 Vt. 544; Whitney *v.* Silver, 22 Vt. 634; Alexander *v.* Abbott, 21 Vt. 476), even though execution has been returned satisfied (Folan *v.* Folan, 59 Me. 566), or though recognizance for review was given, but for double the amount of the damages only, instead of double the amount of the judgment and costs (Hill *v.* Warren, 54 Vt. 73).

Judgment by default against a non-resident defendant, not served with process, will be vacated by audita querela if the case was not continued for notice to defendant, as required by statute. Hawley *v.* Mead, 52 Vt. 343; Rollins *v.* Clement, 49 Vt. 98.

If the return does not show notice to a resident defendant who was out of the state at time suit was brought, the record must show on its face that the plaintiff proved notice, or proceedings must be had agreeably to Vt. Comp. Stat. §§ 58, 59, or the judgment will be vacated by audita querela. Kidder *v.* Hadley, 25 Vt. 544; Marvin *v.* Wilkins, 1 Aik. (Vt.) 107.

Where plaintiff procures a deputized person to make a return that he served a writ on defendant, when in fact defendant received no notice whatever of the suit, a judgment taken by default will be declared null on an audita querela, even though no execution has issued on the judgment. Stone *v.* Seaver, 5 Vt. 549.

Service on part of defendants.— In an action against three trustees, service was had on an agent of two of the trustees, who were non-residents, but the resident trustee was not personally served and no judgment was taken against him. It was held that audita querela did not lie to set aside the judgment against the others. Hamilton *v.* Wilder, 31 Vt. 695.

Omission of name of justice signing writ from copy served on defendant does not defeat the effect of the service as notice, and hence a default judgment thereon cannot be avoided by audita querela. Collins *v.* Merriam, 31 Vt. 622.

When the officer's return shows personal service the writ cannot be maintained to set aside, for want of notice, a judgment by default, the return being conclusive between the parties. Witherell *v.* Goss, 26 Vt. 748; Hawks *v.* Baldwin, Brayt. (Vt.) 85.

42. Lovejoy *v.* Webber, 10 Mass. 101 (where the debtor, after service of the original writ, and before its return, satisfied the creditor's demand, and the creditor nevertheless prosecuted the action to judgment by default); Walter *v.* Foss, 67 Vt. 591, 32 Atl. 643; Kimball *v.* Randall, 56 Vt. 558;

III. ISSUE OF WRIT AND ITS EFFECT.

A. Issue — 1. From What Court. The writ issues from a court of law only,[43] and from that one which rendered the judgment or issued the execution complained of;[44] since, in such court, there remains the record of the judgment on which the writ is designed to operate.[45]

2. Time of Making Application. Since the party injured may neither know of a judgment or execution in the former proceeding or the manner of procuring the same until some time after the rendition of the judgment or the issue of the execution, it has been held that he is not limited to a specific time within which he must sue out his writ.[46]

3. Parties — a. In General. An audita querela, being a judicial writ, must be between the parties to the former proceeding and their legal representatives only.[47]

b. Plaintiff. With respect to the parties plaintiff in audita querela it is held that the person suing out the writ must be one injured in the former proceeding,[48]

Weeks *v.* Lawrence, 1 Vt. 433; Eddy *v.* Cochran, 1 Aik. (Vt.) 359; Staniford *v.* Barry, 1 Aik. (Vt.) 321, 15 Am. Dec. 692; Stamp *v.* Parker, Cro. Jac. 646; 1 Bacon Abr. 510.

Where plaintiff obtains judgment by default in a suit discontinued, either by acts of the parties or by operation of law for irregularity, the writ will lie. Perkins *v.* Cooper, 28 Vt. 729; Paddleford *v.* Bancroft, 22 Vt. 529; Hinman *v.* Swift, 18 Vt. 315; Pike *v.* Hill, 15 Vt. 183; Crawford *v.* Cheney, 12 Vt. 567; Phelps *v.* Birge, 11 Vt. 161. But in Aldrich *v.* Bonett, 33 Vt. 202, the doctrine of Paddleford *v.* Bancroft, 22 Vt. 529, was limited to a case where the discontinuance was irregularly had for the purpose of depriving the opposite party of a defense he would have enjoyed if judgment had been entered at the proper time.

43. Garfield *v.* State University, 10 Vt. 536. But see Gleason *v.* Peck, 12 Vt. 56, 36 Am. Dec. 329; Peters *v.* White, 2 Show. 238.

44. Manning *v.* Phillips, 65 Ga. 548; Coffin *v.* Ewer, 5 Metc. (Mass.) 228; Parker *v.* Jones, 58 N. C. 276, 75 Am. Dec. 441; McRae *v.* Davis, 58 N. C. 140; Ross *v.* Shurtleff, 55 Vt. 177; Shumway *v.* Sargeant, 27 Vt. 440; Poultney *v.* State Treasurer, 25 Vt. 168; Warner *v.* Crane, 16 Vt. 79; Gleason *v.* Peck, 12 Vt. 56, 36 Am. Dec. 329.

An original jurisdiction of all civil actions given by statute to one court does not confer upon it power to grant a writ of audita querela to affect a judgment or execution of another court. Ross *v.* Shurtleff, 55 Vt. 177; Warner *v.* Crane, 16 Vt. 79.

45. Warner *v.* Crane, 16 Vt. 79.

An extent issued, for the collection of taxes, by the state treasurer is not reviewable under an audita querela. Poultney *v.* State Treasurer, 25 Vt. 168. So, in Georgia, an execution issued by the comptroller-general of the state and not from a court is not the subject of relief under the proceeding by illegality. Manning *v.* Phillips, 65 Ga. 548.

46. Stone *v.* Seaver, 5 Vt. 549, holding that, where a statute of limitations does not name a writ of audita querela, the statute cannot with propriety be extended without doing violence to the spirit of the law permitting the remedy.

47. Herrick *v.* Orange County Bank, 27 Vt. 584; Gleason *v.* Peck, 12 Vt. 56, 36 Am. Dec. 329.

Misjoinder of parties.—Although authorized by statute, audita querela is governed by the common law as to misjoinder of parties. Johnson *v.* Plimpton, 30 Vt. 420. As to demurrer for misjoinder or non-joinder see *infra*, VI, B.

A judgment creditor, who had nothing to do with the enforcement of the judgment against the debtor by its assignee, and who has received nothing thereunder, is not a proper party to an audita querela to recover the amount paid under the judgment. Radclyffe *v.* Barton, 161 Mass. 327, 37 N. E. 373.

An officer who permits an execution debtor to escape, and afterward rearrests and imprisons him on the same execution, is not a proper party defendant to an audita querela brought to recover damages for false imprisonment. Coffin *v.* Ewer, 5 Metc. (Mass.) 228.

Husband and wife.— A husband is properly joined with his wife where the proceeding complained of was occasioned by a *feme sole*, and the audita querela is brought after the marriage. 1 Bacon Abr. 511.

Subsequently attaching creditors.—A subsequently attaching creditor may not use the name of his debtor to prosecute an audita querela to affect a judgment or levy of a prior attaching creditor, even though the subsequent creditor is authorized by statute, if he wishes to contest the validity of the debt or claim on which a prior attachment is based, to appear and defend the suit. Essex Min. Co. *v.* Bullard, 43 Vt. 238.

48. 2 Wms. Saund. 148, note 1 [*citing* Blakeston *v.* Martyn, W. Jones 90].

Trustee process.— A trustee is so far a party to a judgment rendered in trustee process that he may seek redress by audita

and a defendant therein.[49] Where there was more than one defendant in the original proceeding and a joint judgment rendered affecting all of them, the writ must be sued out in the name of all,[50] unless the judgment complained of is admitted to be good as to some, in which case it has been held that the writ may be brought in the name of the defendant for whose benefit the proceeding is instituted;[51] or, unless the object is to obtain relief against an execution affecting only one defendant.[52]

c. Defendant. All persons benefited by the judgment or execution complained of, if parties thereto, or the legal representatives of such persons, should be made parties defendant to an audita querela.[53]

4. Motion. A writ of audita querela can be awarded only in open court upon motion or petition,[54] setting forth the grounds of relief with such certainty as would be good on demurrer,[55] and this should, in some cases, be supported by an affidavit as to the truth of the facts set forth.[56]

5. Security For Costs. Plaintiff must give security for costs in those cases where such security would be required in ordinary actions[57] and the security must

querela. Wilson *v.* Fleming, 16 Vt. 649, 42 Am. Dec. 531.

A purchaser of lands aliened subsequently to a judgment or recognizance and extended under an elegit may relieve himself by audita querela. Jackson *v.* U. S. Bank, 5 Cranch C. C. (U. S.) 1, 13 Fed. Cas. No. 7,131; Wilson *v.* Watson, Pet. C. C. (U. S.) 269, 30 Fed. Cas. No. 17,847.

An outlaw cannot sue out an audita querela. Higden *v.* Whitechurch, 1 Mod. 224; Griffith *v.* Middleton, Cro. Jac. 425.

49. Aldridge *v.* Buller, 5 Dowl. P. C. 733, 1 Jur. 385, 6 L. J. Exch. 151, M. & H. 94, 2 M. & W. 412, holding that the remedy is not one available to a plaintiff.

A defendant to a set-off, although plaintiff in the former proceeding, is entitled to sue out the writ. Walter *v.* Foss, 67 Vt. 591, 32 Atl. 643; Sisco *v.* Parkhurst, 23 Vt. 537; Gray *v.* Parker, 16 Vt. 652; Jenney *v.* Glynn, 12 Vt. 480; Sheldon *v.* Kelseys, Brayt. (Vt.) 26.

50. Melton *v.* Howard, 7 How. (Miss.) 103; Godfrey *v.* Downer, 47 Vt. 599; Herrick *v.* Orange County Bank, 27 Vt. 584; Whitney *v.* Silver, 22 Vt. 634; Starbird *v.* Moore, 21 Vt. 529; Titlemore *v.* Wainwright, 16 Vt. 173; Corbett *v.* Barnes, Cro. Car. 443, W. Jones 378.

Where judgment is obtained against two, which is fraudulent as to one, both must join notwithstanding one of them was party to the fraud. Titlemore *v.* Wainwright, 16 Vt. 173.

Where there was a proper severance, the joinder is not necessary. Melton *v.* Howard, 7 How. (Miss.) 103.

If two bring an audita querela, and the outlawry of one is pleaded, the other shall have summons and severance. Worsley *v.* Charnock, Cro. Eliz. 448.

51. Chase *v.* Scott, 14 Vt. 77.

52. Starbird *v.* Moore, 21 Vt. 529.

53. Gleason *v.* Peck, 12 Vt. 56, 36 Am. Dec. 329; 1 Bacon Abr. 511.

A sovereign power is not a proper party defendant to an audita querela. Com. *v.* Berger, 8 Phila. (Pa.) 237 [*citing* 1 Bacon Abr. 511, 1 Comyns Dig. 785, 3 Viner Abr. 345]; Avery *v.* U. S., 12 Wall. (U. S.) 304, 20 L. ed. 405; Peters *v.* White, 2 Show. 238.

54. Waddington *v.* Vredenbergh, 2 Johns. Cas. (N. Y.) 227; Newhart *v.* Wolfe, 102 Pa. St. 561; Keen *v.* Vaughan, 48 Pa. St. 477; Pearie *v.* Kerr, 7 Dowl. & L. 231, 4 Exch. 82, 18 L. J. Exch. 448; Cowley *v.* Lydeot, 2 Bulst. 97; Torrey *v.* Adey, 1 Bulst. 140; Peters *v.* White, 2 Show. 238. But it has been said that the injured party is entitled to the writ as a matter of right and without petition or motion. Folan *v.* Folan, 59 Me. 566; Lovejoy *v.* Webber, 10 Mass. 101; Wardell *v.* Eden, Col. Cas. (N. Y.) 137, Col. & C. Cas. (N. Y.) 137; Nathans *v.* Giles, 1 Marsh. 226, 5 Taunt. 558, 1 E. C. L. 286.

Under Reg. Gen. Hil. 16 Vict. no writ of audita querela might be allowed, unless by rule of court or order of a judge. Holmes *v.* Pemberton, 1 E. & E. 369, 5 Jur. N. S. 727, 28 L. J. Q. B. 172, 7 Wkly. Rep. 160, 102 E. C. L. 369.

Notice of application should be given the other side. Troop *v.* Ricardo, 33 Beav. 122, 9 Jur. N. S. 887, 8 L. T. Rep. N. S. 757, 11 Wkly. Rep. 1014.

An appeal lies from a refusal to allow the application. Newhart *v.* Wolfe, 102 Pa. St. 561; Keen *v.* Vaughan, 48 Pa. St. 477.

55. Schott *v.* McFarland, 1 Phila. (Pa.) 53, 7 Leg. Int. (Pa.) 58. See also Job *v.* Walker, 3 Md. 129.

56. Job *v.* Walker, 3 Md. 129; Burns *v.* St. Albans First Nat. Bank, 45 Vt. 269; Hinman *v.* Swift, 18 Vt. 315; Pearie *v.* Kerr, 7 Dowl. & L. 231, 4 Exch. 82, 18 L. J. Exch. 448.

Who may make affidavit.— It is not necessary that the affidavit be made by the person applying for the writ. Job *v.* Walker, 3 Md. 129; Hinman *v.* Swift, 18 Vt. 315.

57. Sisco *v.* Hurlburt, 17 Vt. 118; Holmes *v.* Pemberton, 1 E. & E. 369, 5 Jur. N. S. 727, 28 L. J. Q. B. 172, 7 Wkly. Rep. 160, 102 E. C. L. 369. But see Brown *v.* Stacy, 9 Vt. 118, to the effect that a recognizance for costs is not necessary unless required by statute.

be of such a nature as to secure redelivery of the body or estate where either of them have been taken in execution,[58] and payment of intervening damages.[59]

B. Effect.[60] The issue of the writ does not of itself operate as a supersedeas, which may be granted or not, according to the requirements of justice.[61]

IV. FORM, REQUISITES, AND NATURE OF WRIT, AND PROCESS THEREON.

A. Form and Requisites. The writ should, after setting out the matter of complaint, require the parties to be called before the court in order that, upon a hearing, justice may be administered.[62]

B. Nature. The writ is sometimes regarded as judicial,[63] and sometimes original.[64]

C. Process. Process may be either in the form of a scire facias or a venire facias,[65] and must be served upon all who are named as defendants.[66]

As to security for costs in general see COSTS.

58. Sisco *v.* Hurlburt, 17 Vt. 118.

A statute expressly requiring a recognizance must be strictly complied with or the suit may be dismissed. Sisco *v.* Hurlburt, 17 Vt. 118; Hiecock *v.* Hiecock, 1 D. Chipm. (Vt.) 133.

Where the party is not in execution there is no need of bail. Turner *v.* Davies, 2 Wms. Saund. 148, note 1 [*citing* Corbet *v.* Barnes, Cro. Car. 443, W. Jones 378].

59. State Treasurer *v.* Wells, 27 Vt. 276; Sisco *v.* Hurlburt, 17 Vt. 118.

60. Effect as waiver of right to writ of error see APPEAL AND ERROR, 2 Cyc. 659, note 29.

61. Brooks *v.* Hunt, 17 Johns. (N. Y.) 484, 18 Johns. (N. Y.) 5; Waddington *v.* Vredenbergh, 2 Johns. Cas. (N. Y.) 227; Emery *v.* Pattou, 9 Phila. (Pa.) 125, 30 Leg. Int. (Pa.) 92; Giles *v.* Hutt, 5 Dowl. & L. 115, 1 Exch. 59, 16 L. J. Exch. 258; Wall *v.* Dukes, 12 Mod. 105; Langston *v.* Grant, 1 Salk. 92.

Omission of statutory requirement.— A writ of audita querela will not be permitted to operate as a supersedeas, if a material condition required in a statutory recognizance be omitted. State Treasurer *v.* Wells, 27 Vt. 276.

Prerequisites to operation as supersedeas. — Under the Vermont statute of 1809 (Vt. Rev. Laws, § 1657), an audita querela cannot operate as a supersedeas until sworn to, and having a judge's certificate that it ought so to operate, or until legal service has been had. Clark *v.* National Hydraulic Co., 12 Vt. 435.

Proof of the facts upon which writ is grounded must be made in court before a supersedeas is granted. Wall *v.* Dukes, 12 Mod. 105; Langston *v.* Grant, 1 Salk. 92.

62. For forms of writ see Vt. Rev. Laws, § 5417, No. 9; Turner *v.* Davies, 2 Saund. 137; Lampton *v.* Collingwood, 1 Ld. Raym. 27, 3 Ld. Raym. 327.

Annexation of an affidavit supporting the motion is not requisite, nor need the affidavit become part of the process. Hinman *v.* Swift, 18 Vt. 315.

A sufficient entry of the recognizance taken must appear on the writ in Vermont. Sisco *v.* Hurlburt, 17 Vt. 118. The minute is sufficient, where neither the body nor the property has been taken in execution when it is in these words: "Recognized to the defendant, in the sum of forty dollars, to insure costs of prosecution, in due form of law." Foster *v.* Carpenter, 11 Vt. 589.

63. Poultney *v.* State Treasurer, 25 Vt. 168; Warner *v.* Crane, 16 Vt. 79; Gleason *v.* Peck, 12 Vt. 56, 36 Am. Dec. 329.

An audita querela is in the nature of mesne process, to bring defendant to answer. Vaughan *v.* Lloyd, Vent. 7.

64. Williams *v.* Roberts, 14 Jur. 399, 19 L. J. Exch. 269, 1 L. M. & P. 381 [*citing* Reg. Brev. pp. 114, 149, 219].

65. Waddington *v.* Vredenbergh, 2 Johns. Cas. (N. Y.) 227.

Scire facias is proper where the writ is founded upon a record, or the party is in custody. Clerk *v.* Moor, 1 Salk. 92; Anonymous, 1 Salk. 92.

Venire facias is proper where the audita querela is grounded on matter of fact, or the party is not in custody or where he sues *quia timet*. Waddington *v.* Vredenbergh, 2 Johns. Cas. (N. Y.) 227; Clerk *v.* Moor, 1 Salk. 92; Anonymous, 1 Salk. 92.

In Vermont, under statute, the writ may issue either as a summons or attachment. Sisco *v.* Hurlburt, 17 Vt. 118.

66. Com. *v.* Berger, 8 Phila. (Pa.) 237; Clark *v.* Freeman, 5 Vt. 122.

As to effect of non-service see *infra*, VI, D, 1.

As to service of process in general see PROCESS.

Necessity of personal service.—Where an audita querela is regarded as an original and not a judicial writ, personal service cannot be dispensed with. Williams *v.* Roberts, 14 Jur. 399, 19 L. J. Exch. 269, 1 L. M. & P. 381. As to whether the writ is original or judicial see *supra*, IV, B.

Service on a corporation is effected in the same manner as any other writ. Clark *v.* National Hydraulic Co., 12 Vt. 435; Clark *v.* Freeman, 5 Vt. 122.

V. APPEARANCE.

Defendant in audita querela must, of course, enter an appearance as in other cases.[67]

VI. PLEADINGS.

A. Declaration — 1. In General. The declaration should either set out the whole record of the recovery in the former proceeding, or recite it generally.[68] A good cause of action should be stated,[69] and the grounds of defense to the judgment or execution complained of set forth,[70] with an averment that such grounds existed at the time, or before, the writ was sued out.[71] Moreover, although the writ may comprehend several causes for avoidance of the proceeding complained of, the declaration should comprehend but one cause, or, if it alleges several, plaintiff must rely upon one only, or the declaration will be bad for duplicity.[72]

2. Particular Averments — a. Fraud and Deceit. An allegation of fraud and deceit seems to be necessary.[73]

b. Ground of Objection. The ground of objection to the proceeding attacked must be specifically averred.[74]

67. Edwards *v.* Lewis, 16 Ala. 813; Com. *v.* Berger, 8 Phila. (Pa.) 237.

Judgment by default for want of appearance is not proper, but plaintiff may enter a common appearance for defendant, who may then be ruled to plead as in other cases. Com. *v.* Berger, 8 Phila. (Pa.) 237. In the English practice the remedy for non-appearance of the defendant was by distress infinite. Com. *v.* Berger, 8 Phila. (Pa.) 237 [*citing* Clerk *v.* Moor, 1 Salk. 92].

68. For forms of declaration see Staniford *v.* Barry, 1 Aik. (Vt.) 321, 15 Am. Dec. 692; Lampton *v.* Collingwood, 1 Ld. Raym. 27, 3 Ld. Raym. 327; Turner *v.* Davies, 2 Saund. 137.

69. King *v.* Jeffrey, 77 Me. 106; Schott *v.* McFarland, 1 Phila. (Pa.) 53, 7 Leg. Int. (Pa.) 58; Alburgh Eleventh School Dist. *v.* Rood, 27 Vt. 214; Perry *v.* Ward, 18 Vt. 120, 20 Vt. 92; Spear *v.* Flint, 17 Vt. 497; Finney *v.* Hill, 13 Vt. 255; Potter *v.* Hodges, 13 Vt. 239; Jenney *v.* Glynn, 12 Vt. 480; Sheldon *v.* Kelseys, Brayt. (Vt.) 26; Blomfield *v.* Roswick, Cro. Eliz. 555; Puttenham *v.* Puttenham, Dyer 297*a*.

Sufficient declarations.— In an audita querela to avoid an execution for payment of the judgment, a surmise that the entire sum has been paid is sufficient. It is not necessary to surmise any writing to evidence the payment. Ognel *v.* Randol, Cro. Jac. 29. A complaint in audita querela by one in close jail need not allege that the jailer refused to release him, as the jailer has no discretion in the matter, and is bound to keep him until he is discharged by the creditor or by operation of law. Comstock *v.* Grout, 17 Vt. 512. Where a declaration in covenant in an action before a justice of the peace shows that it concerns the title to land, and by statute a justice has no jurisdiction to entertain such an action, a writ of audita querela, brought to set aside a judgment rendered by default, setting out the declaration *in hæc verba*, was, on demurrer, held sufficient, although it contained no express or formal averment that the action in which the judgment was rendered concerned the title to land. Hastings *v.* Webber, 2 Vt. 407.

70. Edwards *v.* Lewis, 16 Ala. 813; Oakes *v.* Eden School Dist. No. 9, 33 Vt. 155; Stone *v.* Seaver, 5 Vt. 549.

The grounds averred must not be such as plaintiff might have pleaded as a defense to the former proceeding. Flint *v.* Sheldon, 13 Mass. 443, 7 Am. Dec. 162; Lovejoy *v.* Webber, 10 Mass. 101.

A good defense to the original action need not be averred. Eddy *v.* Cochran, 1 Aik. (Vt.) 359.

71. Alford *v.* Tatnell, 1 Mod. 170.

72. Forrest *v.* Ballard, Cro. Eliz. 809; Puttenham *v.* Puttenham, Dyer 297*a*.

73. Lovejoy *v.* Webber, 10 Mass. 101; Walter *v.* Foss, 67 Vt. 591, 32 Atl. 643.

Sufficient averments.—An averment that complainant, believing that the original suit would not be entered in court, did not attend to defend it, and that thereupon defendant fraudulently procured judgment by default, was held, after verdict in the audita querela, equivalent to an allegation that complainant absented himself from the trial under the expectation and confidence that the suit was to be discontinued, and that defendant, knowing that he acted upon that confidence, procured judgment by default. Perkins *v.* Cooper, 28 Vt. 729. So fraud and deceit are sufficiently averred where the declaration alleges that defendant caused a return to be made on the writ in the original suit that a copy was left with complainant when defendant knew no such copy was left and that complainant had no knowledge of the suit, and that judgment by default was taken after such return. Stone *v.* Seaver, 5 Vt. 549.

74. Oakes *v.* Eden School Dist. No. 9, 33 Vt. 155, holding that, in the absence of such

c. Tender. Where a tender of the sum due defendant upon the execution complained of is alleged as a ground of relief, it is not sufficient to allege the bare fact of tender, but a readiness to pay must appear affirmatively by the declaration.[75]

d. Prayer For Relief. Specific or general relief for the act complained of should be prayed or indicated in the declaration.[76]

3. Amendments. A declaration in an audita querela may in a proper case be amended.[77]

B. Demurrer. A demurrer is proper where the matter alleged as the cause of complaint might have been pleaded in bar of the original action,[78] where plaintiff's remedy is not by audita querela, but by some other form of proceeding,[79] where there is a want of necessary parties,[80] or where the declaration fails generally to show a good cause of action.[81]

C. Motion to Dismiss. Defendant may move to dismiss the action where plaintiff procures too late an amendment to his writ,[82] when the court has no jurisdiction to entertain the writ,[83] when no security for costs is taken,[84] when process is not served on all the defendants,[85] or where there is an improper joinder of plaintiffs.[86]

D. Answer or Plea — 1. In Abatement. A plea in abatement, or motion to that effect, is proper where the writ is not served upon all the defendants,[87] or where proper security is not taken.[88]

2. In Bar. Defendant may plead in bar,[89] and several matters may be pleaded.[90]

an averment, plaintiff can introduce no evidence as to the objection.

75. Perry *v.* Ward, 20 Vt. 92; Jenney *v.* Glynn, 12 Vt. 480.

76. Clough *v.* Brown, 38 Vt. 179. See also Stone *v.* Seaver, 5 Vt. 549.

Sufficient claim for damages.—In an audita querela to vacate a judgment on which execution has issued and been satisfied, an allegation in these words: "By all which the said complainant, as he says, is greatly injured and aggrieved, and has suffered damage the sum of one hundred dollars," is a sufficient claim for damages; and complainant under such allegation may recover the amount collected from him by virtue of the execution. Alexander *v.* Abbott, 21 Vt. 476.

A declaration deficient only in matter alleged in aggravation of damages is sufficient. Hyott *v.* Hoxton, Cro. Car. 153.

77. Stone *v.* Chamberlain, 7 Gray (Mass.) 206, holding where the writ was described in the declaration as "an action of tort" that an amendment was proper.

78. Lovejoy *v.* Webber, 10 Mass. 101.

79. Goodrich *v.* Willard, 11 Gray (Mass.) 380; Lovejoy *v.* Webber, 10 Mass. 101; Hadlock *v.* Clement, 12 N. H. 68; Herrick *v.* Orange County Bank, 27 Vt. 584; Witherell *v.* Goss, 26 Vt. 748; Porter *v.* Vaughan, 24 Vt. 211; Griswold *v.* Rutland, 23 Vt. 324.

Where object is to set aside judgment of justice of peace.—Where the declaration in an action before a justice of the peace clearly shows the jurisdiction of the justice, the action is not appealable on its face, and under the Vermont statutes a demurrer to a declaration in audita querela should be sustained on the ground that it is not a proper remedy. Scott *v.* Darling, 66 Vt. 510, 29 Atl. 993. See also Perry *v.* Morse, 57 Vt. 509.

80. Melton *v.* Howard, 7 How. (Miss.) 103; Herrick *v.* Orange County Bank, 27 Vt. 584.

81. King *v.* Jeffrey, 77 Me. 106; Hadlock *v.* Clement, 12 N. H. 68; Alburgh Eleventh School Dist. *v.* Rood, 27 Vt. 214; Perry *v.* Ward, 18 Vt. 120, 20 Vt. 92.

82. Burns *v.* St. Albans First Nat. Bank, 45 Vt. 259.

83. Poultney *v.* State Treasurer, 25 Vt. 168.

84. Sisco *v.* Hurlburt, 17 Vt. 118.

Motion to dismiss for non-compliance with statutory requirement as to recognizance should be overruled, where it appears that the non-compliance was the fault of the judge who allowed the writ and not that of plaintiff. Kidder *v.* Hadley, 25 Vt. 544.

85. Clark *v.* Freeman, 5 Vt. 122.

86. Worsley *v.* Charnook, Cro. Eliz. 473.

87. Clark *v.* National Hydraulic Co., 12 Vt. 435; Clark *v.* Freeman, 5 Vt. 122.

88. Hiecock *v.* Hiecock, 1 D. Chipm. (Vt.) 133.

89. Edwards *v.* Lewis, 16 Ala. 813; Stone *v.* Seaver, 5 Vt. 549.

For form of plea see Turner *v.* Davies, 2 Saund. 137.

A prior judgment in audita querela on the same cause of action may be pleaded in estoppel. Mussey *v.* White, 58 Vt. 45, 3 Atl. 319; Sisco *v.* Parkhurst, 23 Vt. 537.

The outlawry of plaintiff may be pleaded in disability. Griffith *v.* Middleton, Cro. Jac. 425.

Where a special plea is insufficient a demurrer to the plea is proper. Godfrey *v.* Downer, 47 Vt. 599; Hinman *v.* Swift, 18 Vt. 315; Phelps *v.* Birge, 11 Vt. 161.

90. Giles *v.* Hutt, 5 Dowl. & L. 387, 1 Exch. 701, 17 L. J. Exch. 121.

No one plea, however, may be double,[91] nor must any special plea amount to the general issue.[92]

VII. TRIAL.

A. Mode of. Where an issue of fact is presented, either party may demand trial by jury unless it can be tried by the record, or the parties may agree to submit the issues of fact to the court alone for trial.[93]

B. Evidence — 1. In General. The regular rules of evidence are applicable. Accordingly where witnesses are introduced to sustain the issue by either party, the other may cross-examine such witnesses.[94]

2. Presumptions and Burden of Proof. Plaintiff must, where the record of the former proceedings is produced, prove their irregularity, the presumption being that all things were rightly done.[95]

3. Admissibility and Sufficiency — a. In General. Under the general issue, evidence may be given of a former judgment in audita querela on the same cause of action.[96] Pleadings in the action in which the judgment complained of was rendered are admissible to prove that the issues in the audita querela were involved in the former proceeding.[97] Plaintiff must confine his proof to the grounds for avoiding the judgment or execution complained of alleged in his declaration.[98]

b. Parol Evidence. Parol evidence is admissible to show that the proceedings and judgment complained of are invalid and ineffectual against plaintiff, notwithstanding the record is sufficient on its face, the whole object of the audita being to question, invalidate, and annul the record.[99]

C. Instructions. The jury must be duly instructed as to the burden of proof, but where a particular instruction is requested an instruction substantially complying with the request and expressed in such terms as not to mislead the jury is sufficient.[1]

D. Discontinuance and Nonsuit. Where there are two or more plaintiffs either of them may release or discharge the suit without the concurrence of the other.[2]

VIII. JUDGMENT, COSTS, AND REVIEW.

A. Judgment — 1. In General. If plaintiff is successful, the judgment may

91. Spaulding *v.* Swift, 18 Vt. 214, holding that a plea is not double because it alleges that the former writ was legally served upon plaintiff in the audita querela, and that he appeared and answered to the suit by attorney.

92. Hollingworth *v.* Ascough, Cro. Eliz. 532.

The general issue is "not guilty." Little *v.* Cook, 1 Aik. (Vt.) 363, 15 Am. Dec. 698. But see Shrewsbury *v.* Stong, 10 Vt. 591, 592, where it was said: "It is true, that the plea in these cases is, usually, not guilty; but this is rather a matter of convenience and choice, than the result of any established principle of pleading. The practice has sometimes been different, as by traversing some decisive fact in the complaint, or by a general and express denial of all the facts alleged."

93. Bruce *v.* Barnes, 20 Ala. 219.

94. Bruce *v.* Barnes, 20 Ala. 219.

95. Underwood *v.* Hart, 23 Vt. 120.

96. Mussey *v.* White, 58 Vt. 45, 3 Atl. 319.

Declarations or admissions of the attorney of plaintiff in the former proceeding, not made for the purpose of the trial in such proceeding or to obviate the necessity of proving his case, are not admissible for plaintiff in the audita querela since such admissions or declarations are not binding upon the client. Underwood *v.* Hart, 23 Vt. 120.

The answer of plaintiff when defendant in the former proceeding is competent evidence as a deliberate admission made by him. Radclyffe *v.* Barton, 161 Mass. 327, 37 N. E. 373.

97. Radclyffe *v.* Barton, 161 Mass. 327, 37 N. E. 373.

98. Oakes *v.* Eden School Dist. No. 9, 33 Vt. 155; Underwood *v.* Hart, 23 Vt. 120.

99. Hill *v.* Warren, 54 Vt. 73; Folsom *v.* Conner, 49 Vt. 4; Paddleford *v.* Bancroft, 22 Vt. 529. See, *contra*, Eastman *v.* Waterman, 26 Vt. 494 [*citing* Pike *v.* Hill, 15 Vt. 183].

A defect in the record cannot be supplied by evidence *aliunde*. Hawley *v.* Mead, 52 Vt. 343.

As to admissibility of parol evidence to impeach records of courts in general see Evidence.

1. Underwood *v.* Hart, 23 Vt. 120.

2. Braynard *v.* Burpee, 27 Vt. 616. A judgment debtor may, where his name has been improperly used by a subsequently attaching creditor for the purpose of prosecuting an audita querela to vacate a judgment or levy of a prior attaching creditor, enter a nonsuit with costs against the party suing out the writ. Essex Mln. Co. *v.* Bullard, 43 Vt. 238.

be simply that the judgment or execution, or both, be vacated,[3] or for damages also, as the case may require.[4] When defendant is successful, there is simply a "judgment for the defendant," and the court cannot order further proceedings in the former action.[5]

2. Effect of. The judgment is conclusive only as between the parties and their privies,[6] but is not conclusive as to matters not directly involved in the decision.[7]

3. Proceedings After Judgment. Defendant cannot move in arrest of judgment, although he may move for a new trial;[8] and a verdict will not be set aside, on motion, for insufficiency of the complaint.[9]

B. Costs. Costs are recovered by the successful party.[10]

C. Review. The proceedings under the writ may be reviewed by appeal,[11] or writ of error.[12]

3. Foss *v.* Witham, 9 Allen (Mass.) 572; Benwood Iron-Works Co. *v.* Tappan, 56 Miss. 659.

A verdict may be vacated under such circumstances as would authorize the vacation of a judgment. Benwood Iron-Works Co. *v.* Tappan, 56 Miss. 659.

A judgment against several must be vacated as to all. Starbird *v.* Moore, 21 Vt. 529.

When an execution is vacated, plaintiff may recover an amount collected on execution. Alexander *v.* Abbott, 21 Vt. 476; Anonymous, 12 Mod. 598.

When the record in the former proceeding shows there was no pleading on an audita querela brought to set the judgment aside, and the only record of the proceedings on the audita querela is, "Judgment that the plea of defendant is insufficient and that the plaintiff take no costs," a subsequent judgment rendered is erroneous and void because the original judgment was never reversed. Catlin *v.* Jewell, Brayt. (Vt.) 28.

Audita querela may affect former judgment.—Where, after a judgment for damages and costs, plaintiff released to defendant who then brought error, the judgment being affirmed with additional costs, and defendant taken in execution for the whole, an audita querela was sued out and a judgment therein that plaintiff in the audita should be relieved as to the damages and first costs, but not as to costs incurred after the release, was sustained. Child *v.* Durrant, Cro. Jac. 337. But see Thatcher *v.* Gammon, 12 Mass. 267; Higden *v.* Whitechurch, 1 Mod. 224, which hold that an audita querela cannot affect in any way the former judgment.

4. Foss *v.* Witham, 9 Allen (Mass.) 572; Brackett *v.* Winslow, 17 Mass. 153; Miller *v.* Potter, 54 Vt. 267; Hill *v.* Warren, 54 Vt. 73; Alexander *v.* Abbott, 21 Vt. 476; Finney *v.* Hill, 13 Vt. 255; Sutton *v.* Tyrrell, 10 Vt. 87; Stone *v.* Seaver, 5 Vt. 549; Weeks *v.* Lawrence, 1 Vt. 433; Little *v.* Cook, 1 Aik. (Vt.) 363, 15 Am. Dec. 698; Anonymous, 12 Mod. 598; Lampton *v.* Collingwood, 1 Ld. Raym. 27, 3 Ld. Raym. 327. *Contra*, Gascoigne *v.* Whalley, Dyer 193*b*.

5. Foss *v.* Witham, 9 Allen (Mass.) 572. But see Anonymous, Vent. 264, where it was held that when an audita querela is brought *quia timet*, and defendant is successful, he shall pursue execution on the first judgment; but that when defendant is successful in audita querela brought by one in execution, he shall pursue execution on the judgment in audita querela.

In Vermont, statutory damages may be awarded, when an audita querela is brought for delay. Perry *v.* Ward, 18 Vt. 120.

A judgment non obstante veredicto is erroneous. French *v.* Steele, 14 Vt. 479.

6. Stevens *v.* Curtiss, 3 Conn. 260.

Judgment a bar to an action of debt on judgment vacated. Bush *v.* Mason, Smith (N. H.) 117.

A judgment for defendant does not preclude plaintiff from suing for relief in equity. Williams *v.* Roberts, 8 Hare 315, 32 Eng. Ch. 315.

Judgment as affecting running of statute of limitations.—Where an execution and levy were vacated upon audita querela for irregularity, the execution having been returned as satisfied, it was held that the statute of limitations did not begin to run on the judgment until the time the execution and levy were vacated. Fairbanks *v.* Devereaux, 58 Vt. 359, 3 Atl. 500.

7. Baker *v.* Tompson, 151 Mass. 390, 24 N. E. 399.

8. Nathans *v.* Giles, 1 Marsh. 226, 5 Taunt. 558, 1 E. C. L. 286.

9. Sessions *v.* Gilbert, Brayt. (Vt.) 28.

10. Hill *v.* Warren, 54 Vt. 73; Holmes *v.* Pemberton, 1 E. & E. 369, 5 Jur. N. S. 727, 28 L. J. Q. B. 172, 7 Wkly. Rep. 160, 102 E. C. L. 369. *Contra*, Gascoigne *v.* Whalley, Dyer 193*b*.

Where nonsuit is entered by plaintiff, defendant is entitled to costs. Essex Mfg. Co. *v.* Bullard, 43 Vt. 238. But in an audita querela brought by a town to vacate a judgment or process in favor of several, defendants, upon nonsuit, are entitled to costs only as for a single party. Shrewsbury *v.* Stong, 10 Vt. 591.

11. Fitch *v.* Scovel, 1 Root (Conn.) 56; White *v.* Clapp, 8 Allen (Mass.) 283.

12. Brooks *v.* Hunt, 17 Johns. (N. Y.) 484, 18 Johns. (N. Y.) 5; Gordonier *v.* Billings, 77 Pa. St. 498; Nathans *v.* Giles, 1 Marsh. 226, 5 Taunt. 558, 1 E. C. L. 286.

Error from state to federal court.—Where

IX. LIABILITY ON BOND OR RECOGNIZANCE.

A. In General. No recovery can be had on plaintiff's bond or recognizance for costs when the court in which the audita querela was brought had no jurisdiction;[13] where, however, the court had jurisdiction a breach of condition of the bond creates a liability in accordance with the condition.[14] The liability of the principal is personal where the basis of the audita querela is personal, and in such case an executor or administrator of a decedent principal is not liable.[15]

B. Action. Debt lies on a recognizance taken on the issue of an audita querela, even though the recognizance is not returned into court,[16] the record of recognizance being conclusive evidence in an action thereon that it was entered with the consent of defendant.[17]

AUDITOR. A person appointed to settle and adjust accounts, and state or certify the result;[1] an officer whose duty is to examine and verify the accounts of persons intrusted with the receipt and disbursement of public moneys;[2] an officer, either at law or in equity, assigned to state the items of debt and credit between parties, and exhibit the balance.[3] (Auditor: Appointment and Proceedings — In General, see REFERENCES; In Chancery, see EQUITY. Of County, see COUNTIES. Of State, see STATES. Of Treasury, see UNITED STATES. See also APPEAL AND ERROR.)

AUGMENTATION. The act of increasing or making larger by addition, expansion, or dilation; the act of adding to or enlarging; the state or condition of being made larger.[4]

AUSTRALIAN BALLOT LAWS. See ELECTIONS.

AUTER DROIT. See AUTRE DROIT.

the proper jurisdictional facts exist error will lie from a state court to the supreme court of the United States. Brooks *v.* Hunt, 17 Johns. (N. Y.) 484, 18 Johns. (N. Y.) 5.

13. State Treasurer *v.* Wells, 27 Vt. 276.

14. Hubbell *v.* Dodge, 4 Vt. 56.

A recognizance conditioned for the payment of all intervening damages and costs, taken in a case where no levy was made on the body or estate of the debtor, does not create a liability for the amount of the debt and costs. State Treasurer *v.* Wells, 27 Vt. 276. See also Perry *v.* Ward, 20 Vt. 92.

15. Connecticut, etc., R. Co. *v.* Bliss, 24 Vt. 411.

16. Anonymous, Brayt. (Vt.) 214.

17. Beech *v.* Rich, 13 Vt. 595.

Parol evidence is not admissible to contradict a minute of recognizance signed by the judge and appended to the writ of audita. Hinman *v.* Swift, 18 Vt. 315.

1. State *v.* Hastings, 10 Wis. 525, 530 [*citing* Bouvier L. Dict.; Burrill L. Dict.]. See also State *v.* Brown, 10 Oreg. 215, 222 [*quoting* Burrill L. Dict.].

2. State *v.* Hastings, 10 Wis. 525, 530 [*citing* Bouvier L. Dict.; Burrill L. Dict.], wherein the court said: "As used in our constitution it signifies an officer whose business is to examine and certify accounts and claims against the state, and to keep an account between the state and its treasurer. Since the ratification of that instrument such has been the commonly accepted and uniform legislative interpretation of the word." See also State *v.* Brown, 10 Oreg. 215, 223 [*quoting* Abbott L. Dict.; Burrill L. Dict.].

"Originally it meant an officer of the king, whose duty it was, at stated periods of the year, to examine the accounts of inferior officers and certify to their correctness (Blount's Dictionary of 1681; Cotgrove's Dictionary of 1632; Rastall's Termes de la Ley; Defoe's English Dictionary of 1732), and was afterwards used to designate those officers of the Court of Exchequer whose duty, according to Coke, was to take the accounts of the receivers of the king's revenue and 'audit and perfect them,' without, however, putting in any changes, their office being only to audit the accounts — that is, ascertain their correctness (4 Coke's Inst. 107)." People *v.* Green, 5 Daly (N. Y.) 194, 200.

Synonym of "controller." — "In the constitution and statutes of the states of this Union, the words 'auditor' and 'controller' are synonymous." State *v.* Doron, 5 Nev. 399, 413.

3. Whitwell *v.* Willard, 1 Metc. (Mass.) 216, 218 [*quoted* in Fisk *v.* Gray, 100 Mass. 191, 193]. See also Field *v.* Holland, 6 Cranch (U. S.) 8, 21, 3 L. ed. 136, where it is said that "auditors" is a "term which designates agents or officers of the court, who examine and digest accounts for the decision of the court."

Used for "master." — "The term 'auditor' is often used to designate an officer whose duties are properly those of a 'master,' and not of an 'auditor' under the statute." Blain *v.* Patterson, 48 N. H. 151, 152 [*citing* Price *v.* Dearborn, 34 N. H. 481].

4. Vejar *v.* Mound City Land, etc., Assoc., 97 Cal. 659, 663, 32 Pac. 713 [*quoting* Century Dict.].

AUTER VIE. See AUTRE VIE.

AUTHENTIC. Vested with all due formalities and legally attested.[5]

AUTHENTIC ACT. An act which has been executed before a notary public or other officer authorized to execute such functions, in presence of two witnesses, free, male, and aged at least of fourteen years, or of three witnesses, if the party be blind.[6] (See, generally, CHATTEL MORTGAGES; DEEDS; MORTGAGES.)

AUTHENTICATE. To render authentic; to give authority to by the proof, attestation, or formalities required by law, or sufficient to entitle to credit;[7] to give verity;[8] to prove authentic.[9]

AUTHENTICATED. Attested.[10]

AUTHENTICATION. A proper or legal attestation; acts done with the view of causing an instrument to be known and identified;[11] the act or mode of giving legal authority to a statute, record, or other written instrument, or a certified copy thereof, so as to render it legally admissible in evidence;[12] that which is certified concerning any document by the proper certifying officer or officers.[13] (Authentication: In General, see ACKNOWLEDGMENTS. Of Certificate of Acknowledgment, see ACKNOWLEDGMENTS. Of Deeds, see ACKNOWLEDGMENTS. Of Documents For Use as Evidence — Generally, see EVIDENCE; Presumptions on Appeal, see APPEAL AND ERROR. Of Foreign Affidavits, see AFFIDAVITS. Of Record — For Purpose of Review, see APPEAL AND ERROR; CRIMINAL LAW; For Use as Evidence, see EVIDENCE.)

AUTHOR. One, who, by his own intellectual labor, applied to the materials of his composition, produces an arrangement or compilation new in itself.[14] (Author: Rights in Literary Property, see LITERARY PROPERTY. Rights Under Copyright Acts, see COPYRIGHT.)

AUTHORITIES. Citations of, or references to, statutes, adjudged cases, and the opinions of text-writers, made on the argument of causes or questions before a court, as grounds of the points or propositions contended for.[15] (Authorities: Citations in Briefs, see APPEAL AND ERROR; CRIMINAL LAW.)

AUTHORITY. Power delegated by a principal to his agent or attorney.[16] (Authority: Of Agent,[17] see FACTORS AND BROKERS; PRINCIPAL AND AGENT. Of Ambassadors and Consuls, see AMBASSADORS AND CONSULS. Of Arbitrators, see ARBITRATION AND AWARD. Of Army or Navy Officers, see ARMY AND NAVY. Of Assignee, see ASSIGNMENTS FOR BENEFIT OF CREDITORS. Of Attorney, see ATTORNEY AND CLIENT. Of Attorney-General, see ATTORNEY-GENERAL. Of Bank Officers, see BANKS AND BANKING. Of Clerks of Court, see CLERKS OF COURT. Of Corporate Officers, see CORPORATIONS. Of Judges, see JUDGES. Of Justices of the Peace, see JUSTICES OF THE PEACE. Of Municipal Officers, see OFFICERS. Of Partners, see PARTNERSHIP. Of Pilots, see PILOTS. Of Poor-Law Officers, see POOR PERSONS. Of Prosecuting Attorneys, see PROSECUTING ATTORNEYS. Of Receivers,[18] see RECEIVERS. Of Sheriffs and Constables, see SHERIFFS AND CONSTABLES. Of Ship's Master, see SHIPPING. Of State Officers, see STATES. Of Trustee, see TRUSTS. Of Umpire of Arbitrators, see ARBITRATION AND AWARD. Of United States Officers, see UNITED STATES; UNITED STATES COMMISSIONERS; UNITED STATES MARSHALS. See also POWERS.)

5. Downing *v.* Brown, 3 Colo. 571, 591 [*quoting* Webster Dict.].

6. Merrick Rev. Civ. Code La. (1900), art. 2234.

7. Webster Dict. [*quoted* in *In re* Fowler, 18 Blatchf. (U. S.) 430, 4 Fed. 303, 310].

8. Hartley *v.* Ferrell, 9 Fla. 374, 380.

9. Worcester Dict. [*quoted* in *In re* Fowler, 18 Blatchf. (U. S.) 430, 4 Fed. 303, 310].

10. *In re* Weir, 14 Ont. 389, 394.

11. Bouvier L. Dict. [*quoted* in *In re* Fowler, 18 Blatchf. (U. S.) 430, 4 Fed. 303, 310].

12. Burrill L. Dict. [*quoted* in *In re* Fowler, 18 Blatchf. (U. S.) 430, 4 Fed. 303, 310]. See Mayfield *v.* Sears, 133 Ind. 86, 32 N. E. 816.

13. Ordway *v.* Conroe, 4 Wis. 45, 50.

14. Atwill *v.* Ferrett, 2 Blatchf. (U. S.) 39, 46, 2 Fed. Cas. No. 640.

15. Burrill L. Dict.

16. Burrill L. Dict.

17. **Authority of agent of accident insurance company, how shown,** see ACCIDENT INSURANCE, 1 Cyc. 238.

Authority to alter instrument see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 52 *et seq.*

18. **Authority of receiver to appeal, necessity for,** see APPEAL AND ERROR, 2 Cyc. 641, note 23.

AUTOMATIC. Self-acting, or the elimination of human agency or volition, which results in the saving of labor and increased certainty and uniformity of operation.[19] (Automatic: Machines, see PATENTS.)

AUTOPSY. The dissection of a dead body for the purpose of inquiring into the cause of death.[20] (Autopsy:[21] Liability For Illegal, see DEAD BODIES. To Determine Cause of Death, see CORONERS.)

AUTRE or AUTER DROIT. Another or another's right.[22]

AUTREFOIS ACQUIT. Literally, "formerly acquitted." A plea made by a defendant indicted for a crime or misdemeanor, that he has formerly been tried, and acquitted of the same offense.[23] (See, generally, CRIMINAL LAW.)

AUTREFOIS ATTAINT. Literally, "formerly attainted." A plea of former attainder in bar to an indictment, whether for the same or any other felony.[24]

AUTREFOIS CONVICT. Literally, "formerly convicted." A plea made by a defendant indicted for a crime or misdemeanor, that he has formerly been tried, and convicted of the same offense.[25] (See, generally, CRIMINAL LAW.)

AUTRE or AUTER VIE. Another or another's life.[26]

AVAILABLE MEANS. Anything which can be readily converted into money, but not necessarily or primarily money itself.[27]

AVAILS. Proceeds of property sold after deducting expenses.[28]

AVAL. The guarantor of a bill of exchange.[29]

AVER. To allege or assert;[30] to express the truth of a declaration unequivocally.[31]

AVERAGE. Medium; mean.[32] (Average: General, see ADMIRALTY; MARINE INSURANCE; SHIPPING. Particular, see MARINE INSURANCE.)

A VERBIS LEGIS NON EST RECEDENDUM. A maxim meaning "From the words of the law there must be no departure."[33]

AVERMENT. A direct and positive allegation of a fact, made in a manner capable of being traversed;[34] a positive statement of facts in opposition to argument or inference.[35] In old pleading, a VERIFICATION,[36] *q. v.* (Averment: Office of, in Action or Prosecution For Defamation, see LIBEL AND SLANDER.)

AVIZANDUM. In Scotch practice, advisement or deliberation.[37]

AVOCATION. Primarily, "a calling away; a diversion;" when used in the plural form, however, it means "vocation; occupation; usual employment."[38] (Avocation: License For, see LICENSES. Prohibition of, on Sunday, see SUNDAY.)

AVOID. To render void; to evade or escape.[39]

AVOIDANCE. The introduction of new or special matter, which, admitting the premises of the opposite party, avoids or repels his conclusions.[40] (Avoidance: Actions For, see CANCELLATION OF INSTRUMENTS. Of Accord, see ACCORD AND SATISFACTION. Of Contracts — In General, see CONTRACTS; Of Enlistment,

19. Tripp Giant Leveler Co. *v.* Rogers, 61 Fed. 289, 290.

20. Mass. Pub. Stat. (1882), p. 1288.

21. **Autopsy, report of, in lieu of physician's certificate,** in accident insurance, see ACCIDENT INSURANCE, 1 Cyc. 277.

Autopsy, admissibility in evidence of facts developed at, see ACCIDENT INSURANCE, 1 Cyc. 292.

22. Burrill L. Dict.

23. Mass. Pub. Stat. (1882), p. 1288 [*citing* Bouvier L. Dict.].

24. 4 Bl. Comm. 336.

25. Mass. Pub. Stat. (1882), p. 1288 [*citing* Bouvier L. Dict.].

26. Burrill L. Dict.

27. Brigham *v.* Tillinghast, 13 N. Y. 215, 219.

"Available capital" is a synonymous term. McFadden *v.* Leeka, 48 Ohio St. 513, 528, 28 N. E. 874.

28. McCay *v.* Lamar, 20 Blatchf. (U. S.) 474, 12 Fed. 367, 371.

29. Randolph Com. Paper, § 4.

30. Abbott L. Dict.

31. Hirschfelder *v.* State, 19 Ala. 534, 539 [*citing* Crabb Eng. Syn.].

32. Hersh *v.* Northern Cent. R. Co., 74 Pa. St. 181, 190.

33. Burrill L. Dict.

34. Laughlin *v.* Flood, 3 Munf. (Va.) 255, 262, where it is said that "it excludes the idea of an affirmation, to be made out by inference and induction only."

35. Prigmore *v.* Thompson, Minor (Ala.) 420.

36. Burrill L. Dict.

37. Burrill L. Dict.

38. Webster Int. Dict. [*quoted* in Ross *v.* State, 9 Ind. App. 35, 36 N. E. 167].

39. Burrill L. Dict.

40. Mahaiwe Bank *v.* Douglass, 31 Conn. 170, 177 [*quoting* Bouvier L. Dict.].

see Army and Navy; Of Infants, see Infants; Of Insane Persons, see Insane Persons. Of Release — In General, see Release; Of Claim Against Assigned Estate, see Assignments For Benefit of Creditors. Pleading Matter in, see Pleading.)

AVOIRDUPOIS. A weight of which a pound contains sixteen ounces; its proportion to a pound troy being as seventeen to fourteen. It is the weight of larger and coarser commodities.[41]

AVOW. To acknowledge and justify an act done; to make an avowry.[42]

AVOWEE. See Advowee.

AVOWRY or ADVOWRY. The setting forth, as in a declaration, the nature and merits of defendant's case, showing that the distress taken by him was lawful, which must be done with such sufficient certainty as will entitle him to a retorno habendo.[43] (See, generally, Animals; Replevin.)

AVULSION. See Navigable Waters; Waters.

AWARD. To adjudge; to give or assign by sentence or judicial determination.[44] (See, generally, Arbitration and Award.)

AWAY-GOING CROP. A crop sown during the last year of tenancy, but not ripe until after its expiration.[45] (See, generally, Landlord and Tenant.)

AWNING. A rooflike cover, usually of canvas, extended over or before any place as a shelter from the sun, rain, or wind;[46] a movable, rooflike covering of canvas or other cloth, spread over any place, or in front of a window, door, etc., as a protection from the sun's rays.[47] (Awning: Liability For Injuries From, see Municipal Corporations; Negligence. Regulations Concerning, see Municipal Corporations.)

AYLE, AIEL, or AILE. A writ which lay for an heir to recover the possession of lands on the seizin of his grandfather.[48]

AYUNTAMIENTO. In Spanish-American law, a municipal council[49] having charge of the political and financial government of the municipality.[50]

B. See A.

BACK. To indorse.[51]

BACK-BOND. In Scotch law and conveyancing, an instrument equivalent to a declaration of trust in English conveyancing, a deed which, in conjunction with an absolute disposition, constitutes a trust.[52]

BACKGAMMON. A game played with dice and thirty pieces, called men, upon a board or table, peculiarly marked.[53]

BACKWARDATION. The premium paid by a seller of stock for the privilege of postponing his delivery of such stock from and to a specified date.[54]

BAD. In pleading, materially defective.[55]

BADGE. A mark, sign, or token; an indication; a distinctive mark.[56] (Badge: Of Fraud, see Fraudulent Conveyances. Unlawful Wearing of, see False Personation.)

BAGGAGE. See Carriers; Shipping.

41. Mass. Pub. Stat. (1882), p. 1288.
42. Black L. Dict.
43. Brown *v.* Bissett, 21 N. J. L. 267, 274 [*quoting* Bacon Abr. tit. Replevin (K)]; Hill *v.* Stocking, 6 Hill (N. Y.) 277, 284 [*quoting* Woodfall Landlord & Ten. 592]. See also Hill *v.* Miller, 5 Serg. & R. (Pa.) 355, 357.

"An 'avowry' as distinguished from a 'cognisance,' imports a taking in one's own right: a 'cognisance' imports a justification under the authority of another." Brown *v.* Bissett, 21 N. J. L. 46, 49.

44. Starkey *v.* Minneapolis, 19 Minn. 203; Johnson *v.* Ball, 1 Yerg. (Tenn.) 290, 292, 24 Am. Dec. 451.
45. Burrill L. Dict.
46. Webster Int. Dict. [*quoted* in State *v.* Clarke, 69 Conn. 371, 373, 37 Atl. 975, 61 Am. St. Rep. 45, 39 L. R. A. 670].
47. Century Dict. [*quoted* in State *v.* Clarke, 69 Conn. 371, 373, 37 Atl. 975, 61 Am. St. Rep. 45, 39 L. R. A. 670].
48. Burrill L. Dict.
49. Castillero *v.* U. S., 2 Black (U. S.) 17, 194, 17 L. ed. 360; Strother *v.* Lucas, 12 Pet. (U. S.) 410, 442 note, 9 L. ed. 1137.
50. Holliman *v.* Peebles, 1 Tex. 673, 696.
51. Abbott L. Dict.
52. Burrill L. Dict.
53. American Encyc. [*quoted* in Wetmore *v.* State, 55 Ala. 198, 199].
54. Dos Passos Stock-Brokers 270, note 1.
55. Anderson L. Dict.
56. Burrill L. Dict.